



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[REDACTED]
Ted L.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2022003623

Hearing No. 570-2020-01267X

Agency No. ARHQOSA19JAN00285

DECISION

Following its June 21, 2022, final order, the Agency filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination, by default judgment, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Commission VACATES the Agency's final order, and REMANDS this matter for further processing in accordance with the Order herein.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an auditor at the Agency's U.S. Army Audit Agency located in El Paso, Texas. On February 11, 2019, he received a Notice of Proposed Removal from his first-line supervisor, S1. On March 21, 2019, Complainant notified the Agency that he would resign his position in two-weeks. On March 28, 2019, management called Complainant into a meeting to serve him with the decision to remove him.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

Upon arriving at the meeting, he submitted his notice of immediate resignation. His official personnel documents show that Complainant was separated by resignation.

On April 8, 2019, Complainant filed a formal complaint alleging the Agency subjected him to discrimination based on his race (African American), color (black), sex (male), age (over 40), disability (mental), and in reprisal (prior EEO activity) when:

- a. On February 11, 2019, he received a notice of proposed removal from his position;
- b. On January 14, 2019, S1 granted him sick leave but then reported him as AWOL;
- c. On January 10, 2019, he informed S1 that he had a mental disability and provided documentation and she then “wrote him up;” and
- d. On January 4, 2019, he contacted his acting supervisor, S2, and informed her that he had been arrested and requested leave; however, S1 charged him as AWOL.

On April 27, 2019, Complainant filed an appeal with the Merit Systems Protection Board (MSPB) alleging that he was forced to resign. According to the Agency, during the initial teleconference with the MSPB AJ, the MSPB AJ asked if Complainant was contesting the fact that his resignation was voluntary, and Complainant indicated that he was. The Agency noted that the affirmative defense of discrimination asserted in Complainant’s MSPB appeal was based on the same incidents and allegations that were set forth in his EEO complaint.

According to the Agency, because it intended to file a motion to have the MSPB case dismissed for lack of jurisdiction, it, in accordance with the Commission’s Management Directive, held Complainant’s EEO case in abeyance until a determination on jurisdiction in the MSPB case was made. On August 6, 2019, the MSPB AJ dismissed Complainant’s appeal for lack of jurisdiction, after finding that Complainant had not shown that his resignation was involuntary. [Complainant] v. Dep’t of the Army, DA-0752-19-0308-I-1 (Aug. 6, 2019).

On August 13, 2019, Agency officials began processing Complainant’s EEO complaint. Specifically, they issued a Notice of Partial Acceptance, as well as submitting a request for an investigation to the EEO Director at Headquarters. In October 2019, when an investigator had still not been assigned, it was discovered that the original request had not been received; therefore, the request was resubmitted on October 15, 2019. Complainant was asked if he was willing to extend the formal complaint/investigation process for 90 days. He agreed to do so and signed a 90-day extension on October 15, 2019. Agency officials continued inquiring about the appointment of an investigator, and one was assigned and began investigating the case on March 12, 2020. On March 24, 2020, Complainant submitted a request for a hearing before an EEOC Administrative Judge (AJ). The investigator completed the investigation on May 12, 2020.

On March 17, 2021, the AJ issued an Order to Show Cause, requiring that the Agency submit good cause for why it should not be sanctioned for its untimely investigation. On July 20, 2021, the AJ found that the Agency did not provide good cause for its delay.

The AJ stated that:

the Agency did not accept Complainant's claims for investigation until August 14, 2019, and did not request an EEO investigator until October 15, 2019, at the earliest. The EEO investigator did not begin her investigation until March 2, 2020, well past the Agency's deadline to investigate Complainant's claims. (emails from EEO Investigator to relevant witnesses requesting completion of affidavits, and emails from EEO Investigator to Agency's EEO office requesting documentation of Complainant's claims). In addition, it appears no witnesses provided affidavits until March 12, 2020. Finally, the Agency did not complete its investigation until May 3, 2020.

Using May 3, 2020, as an end date, the AJ found that the Agency was at least 210 days late in completing its investigation into Complainant's claims, which he found was an excessively long period of time. The AJ stated that "[m]ore importantly, the Agency did not even begin its investigation into Complainant's claims until 148 days after its 180-day deadline to do so." The AJ noted that the Agency, as cause for its delay, argued that its EEO office did not handle many complaints and the process for EEO investigations involving different sub-components of its organization was exceedingly complex, creating delays. The AJ noted that the Commission has found such reasons do not constitute good cause for failing to comply with its regulations. The AJ found that, "Given the delay in this case and prior Commission case law, default judgment is the appropriate sanction to remedy the prejudice to Complainant's case and deter the Agency from future non-compliance. I find no lesser sanction serves the purpose of preventing similar abuse of process in the future."

Regarding Complainant's proposed removal (claim (a)) the AJ found that this matter merged with his ultimate removal, depriving the Commission of jurisdiction, at this time, of any claim related to Complainant's removal. According to the AJ, "[t]here is no dispute that the Agency proposed Complainant's removal on February 21, 2019, relating to several charges, including being AWOL, misusing his government travel card, and failure to follow written orders," and that, "[o]n March 28, 2019, the Agency was in the process of issuing a decision sustaining Complainant's proposed removal when he submitted his immediate resignation." Because Complainant filed an appeal with the MSPB on this matter, which was subsequently dismissed for lack of jurisdiction, the AJ concluded that the Commission had no jurisdiction to hear claim (a) and Complainant's allegation of an involuntary resignation, until the Agency processed Complainant's non-mixed complaint of discrimination pertaining to his removal.²

Because the AJ found that the Commission had no jurisdiction over Complainant's removal claim, he indicated that he was precluded from reaching a determination on the merits of Complainant's

² The AJ cited our decision in Brandee B. v. Dep't of Agriculture, EEOC Appeal No. 2019000663 (Oct. 10, 2019) for the proposition that when the MSPB finds that it does not have jurisdiction over a matter, the plain language of the regulation places the onus on the agency to recommence processing of the mixed case complaint as a non-mixed case.

removal and awarding him relief, such as reinstatement. The Agency, according to the AJ, must investigate Complainant's involuntary resignation claim and issue a Report of Investigation relating to that claim. The AJ noted that upon completion of the Agency's investigation, Complainant would be entitled to either request a final decision or a hearing before an EEOC Administrative Judge.

Regarding Complainant's remaining claims, (b) - (d), the AJ found that he did not establish a prima facie case of discrimination, because he never introduced any evidence demonstrating that the Agency's actions were motivated by discrimination, or that discrimination could otherwise be inferred. Consequently, the AJ limited Complainant's remedial relief to compensatory damages, attorney's fees, a posting notice, consideration of discipline, and training. The parties were given the opportunity to submit briefs on the issue of compensatory damages.

Complainant sought \$200,000.00 in nonpecuniary damages. In support of his claim, Complainant presented a lengthy affidavit, detailing the alleged harassment he endured at the Agency, and two supporting affidavits from C1 (a friend) and C2 (his sponsor in a twelve-step recovery program). The AJ found that Complainant's evidence focused in large part on claim (a) and other unrelated matters, but not on the "anguish and depression" he felt after receiving the alleged AWOL notices. The AJ did find that C1 and C2's statements corroborated that Complainant felt distress as a result of the relevant Agency actions. In considering the severity, duration, and extent to which the Agency directly caused Complainant's harm, the AJ found that Complainant was entitled to an award of \$8,000.00 in nonpecuniary, compensatory damages. The AJ also ordered at least 8 hours of training to personnel in the Agency's EEO office regarding the processing and timetables/deadlines of EEO complaints in general; and the posting of a notice about the discrimination finding in this case.

On appeal, the Agency argues that, in rendering the Decision and Order, the AJ made erroneous findings of material fact and conclusions of law. According to the Agency, the AJ erred in finding that its investigation of Complainant's claims was 210-days late. The Agency maintained that it was only 19 days late when you factored into the calculations that the complaint was held in abeyance while his appeal was pending before the MSPB, and the 90-day extension provided by Complainant. The Agency next argues that a default judgment was too harsh of a sanction given the facts of this case. Finally, the Agency maintained that an award of \$8,000.00 in compensatory damage exceeds make-whole relief, where Complainant failed to establish prima facie cases, and had a preexisting condition that could flare up anytime he was under any type of life stressor.

Complainant requests that the AJ's decision be upheld.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

EEOC Regulation 29 CFR § 1614.302(c)(2)(ii) provides that:

Where the agency or the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, the agency shall hold the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him or her to bring the allegation of discrimination to the attention of the MSPB. During this period of time, all time limitations for processing or filing under this part will be tolled.

With regard to the Agency's first contention, however, we find that it has misinterpreted our regulations. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 4 § II.B (Aug. 5, 2015) provides that "[b]ecause the MSPB does not have jurisdiction to hear non-appealable matters, complaints . . . containing those matters should be processed by the agency under the 1614 process and not mixed with matters that are appealable to the MSPB through amendment, consolidation or held in abeyance." (emphasis added). Therefore, the Agency should have held claim (a), a matter that was appealable to the MSPB, in abeyance while proceeding to investigate claims (b) – (d), which were not appealable to the MSPB.

Our regulations require agency action in a timely manner at many points in the EEO process. See Tammy S. v. Dep't of Def., EEOC Appeal No. 0120084008 (June 6, 2014). Compliance with these timeframes is not optional. As the Commission stated in Royal v. Department of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009), "the Commission has the inherent power to protect its administrative process from abuse by either party and must [e]nsure that agencies, as well as complainants, abide by its regulations." Because of the length of time it can take to process a federal sector EEO complaint, any delays in complying with the time frames in the regulations can impact the outcome of a complainant's claims. Id

After a review of the record, although we find that the Agency failed to timely investigate the complaint as required by our regulations, it did not act in a manner to warrant the sanction of a default judgment.

See, e.g., Thomas B. v. Department of the Army, EEOC Appeal No. 2021004023 (September 13, 2023) (no default judgment when agency investigation was approximately three months late, and the agency decision was approximately two years late); Bruce B. v. Dep't of Justice, EEOC Appeal No. 2021004818 (Mar. 7, 2022) (the Commission found that an AJ abused her discretion by issuing default judgment after the agency's 304-day delay in issuing its Report of Investigation); Cassie L. v. Dep't of Veterans Affairs, EEOC Appeal No. 2020001340 (Sep. 13, 2021) (no default judgment where the Agency did not complete the investigation of two amendments to the complaint until approximately six months after the regulatory time limit) Melissa H. v. Dep't of Homeland Security, EEOC Appeal No. 2021000696 (Nov. 10, 2021) (the Commission found that a default judgment was not an appropriate sanction to address, among other things, the agency's delay in issuing the Report of Investigation); Josefina L. v. Soc. Sec. Admin., 0120142023 (July 19, 2016), req. for recon. denied, EEOC Request No. 0520170108 (Feb. 9, 2017) (finding that the Agency's 571-day delay in issuing the decision did not warrant sanctions, as complainant did not show she was prejudiced by the delay).

Upon review, we find that Complainant has not shown he was prejudiced by the delay in the investigation, and we find no evidence the Agency's delay in this case was attributed to contumacious conduct or bad faith. As such, under the specific circumstances present, we do not find the Agency's delay warrants the severe sanction of granting default judgement.³ While we will not impose a sanction in the present case, we do find the Agency's failure to abide by the regulations reflects negatively on the Agency's support for the integrity of the EEO process. We take administrative notice that this Agency has previously failed to comply with regulatory time frames. As a result, we will notify Federal Sector Programs (FSP) which monitors the federal agencies' EEO programs of the Agency's failure to comply with the regulations regarding the timely issuance of final agency decisions. FSP may raise this information in scheduled technical assistance visits with the Agency.

Thus, we shall remand the entire complaint to the Agency to request a hearing be held. We do not address the merits of any claim in this decision. We note that claim (a), which has merged into a claim of constructive discharge, should be processed in the administrative EEO process along with claims (b)-(d) since the MSPB has denied jurisdiction over the matter.

CONCLUSION

The Agency's final order is VACATED and we REMAND the complaint to the Agency for further processing pursuant to the Order herein.

³ A default judgment is the most severe sanction that can be meted out to an Agency, and as such, should be reserved only for the most egregious acts of non-compliance. Owen L. v. Office of Personnel Mgmt., EEOC Appeal No. 2020000990 (July 15, 2021).

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit of the Washington Field Office within 15 days of the date this decision is issued. The Agency shall provide written notification to the Compliance Officer at the address set forth herein that the complaint file has been transmitted to said Hearings Unit. Thereafter, the EEOC Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency or filed your appeal with the Commission.

If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant’s Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

September 20, 2023
Date