



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

██████████
Irvin M.,¹
Complainant,

v.

Kevin McAleenan,
Acting Secretary,
Department of Homeland Security
(Federal Emergency Management Agency),
Agency.

Appeal No. 0120170498

Hearing No. 551-2012-00206X

Agency No. HS-FEMA-21641-2012

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's October 18, 2016, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the Agency should be sanctioned for conducting the investigation and issuing a final decision in an untimely manner, and if so, what is the appropriate sanction that should be imposed against the Agency.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Program Specialist/Disasters Operations Division Director, GS-15, at the Agency's facility in Bothell, Washington. On March 13, 2012, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him on the bases of race (Caucasian), color (white), sex (male), age (born in 1967), and in reprisal for prior protected EEO activity when on December 1, 2011, he learned that management did not select him for a Deputy Regional Administrator position, advertised under Vacancy Announcement Number (VAN) MG-2011-91197-LDC-507824-D.

The Investigation

The Agency began investigating Complainant's complaint on September 7, 2012. On or about September 10, 2012, Complainant requested a hearing before an EEOC Administrative Judge (AJ). On September 11, 2012, the AJ ordered the Agency to submit the complaint file within 15 days.

The AJ

On September 11, 2012, Complainant filed a Motion for Default Judgment and Sanctions with the AJ on the grounds that the Agency had not timely investigated his complaint. On November 13, 2012, the Agency moved to dismiss Complainant's complaint on the basis it was initiated by untimely EEO Counselor contact. On December 17, 2012, the AJ denied Complainant's Motion for Default Judgment and Sanctions as well as the Agency's Motion to Dismiss. On January 7, 2013, Complainant submitted a Motion for Reconsideration to the AJ, and on January 28, 2013, the Agency submitted a Motion to Compel Complainant to cooperate in discovery. On February 22, 2016, the AJ denied Complainant's Motion for Reconsideration but granted the Agency's Motion to Compel. In March 2016, Complainant withdrew his hearing request. On March 22, 2016, the AJ remanded Complainant's complaint to the Agency to issue a final decision in accordance with 29 C.F.R. § 1614.110(b).

On October 18, 2016, the Agency issued a final decision on Complainant's complaint. The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Agency should be sanctioned for not conducting the investigation or issuing a final decision in a timely manner. Complainant also contends that the Agency should be sanctioned for conducting an inadequate investigation. Specifically, Complainant maintains that the investigation failed to obtain a statement by the selecting official, did not produce complete application packages, and failed to investigate evidence of retaliation.

Regarding the merits of his complaint, Complainant maintains that the final decision or investigation did not identify why he was not selected for the final round of interviews for the position, although most applicants selected for the final round of interviews had no Agency experience. Complainant also maintains that the selectee for the position had never been a supervisor and did not have experience managing multiple facets of the Agency, whereas Complainant had far more leadership and experience with other federal agencies and at top levels. Additionally, Complainant contends that the Regional Administrator (RA) committed “perjury” in this case when he stated that he was unaware of Complainant’s previous activity, which is contradicted by RA’s assertion in Complainant’s subsequent EEO complaint that he learned of Complainant’s EEO participation in July 2010.

In its reply, the Agency contends that the AJ properly denied Complainant’s request for sanctions because he refused to cooperate with the investigation. The Agency also maintains that Complainant’s request for sanctions because of the late final decision should be denied because the untimely final decision did not result in any prejudice to Complainant.

ANALYSIS AND FINDINGS

Untimely Investigation

In this case, Complainant filed his EEO complaint in March 13, 2012. EEOC regulation 29 C.F.R. § 1614.108(e) provides that the Agency shall complete its investigation within 180 days of the date of the filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to § 1614.107. September 9, 2012, which was a Sunday, was the 180th day after March 13, 2012. Complainant requested a hearing with an AJ on or about September 10, 2012. The Agency did not complete the investigation until November 8, 2012.

The AJ found that the Agency demonstrated good cause for its delay in investigating the complaint because Complainant made his cooperation with the EEO investigator conditional upon the investigator providing him with the Investigative Plan, a statement of work, and documentation granting the investigator permission to perform the investigation. The record confirms that Complainant made his cooperation with the investigation dependent on the aforementioned terms. Under these circumstances, we find that the AJ did not abuse his discretion when he denied Complainant’s request for sanctions because of an untimely investigation.

Untimely Final Agency Decision

On March 22, 2016, the AJ ordered the Agency to issue a final decision in accordance with EEOC regulation 29 C.F.R. § 1614.110. This regulation provides that agencies must issue a final decision within 60 days. The Agency did not issue its final decision until October 18, 2016, or 210 days after March 22, 2016. The Agency has provided no explanation or justification for its tardiness. Thus, we find that the Agency issued its final decision in an untimely manner.

Sanctions

Regarding Complainant's request for sanctions for the untimely final decision, the procedures contained in the Commission's regulations are no more or no less than the necessary means to eliminate unlawful employment discrimination in Federal employment. Mach v. Dep't of Defense, EEOC Appeal No. 0120080658 (Nov. 30, 2010). As such, the Commission has exercised its inherent authority to enforce its 29 C.F.R. Part 1614 regulations by ordering sanctions in response to various types of violations. See Complainant v. Dep't of Energy, EEOC Appeal No. 0120113823 (Nov. 17, 2015) (sanction warranted where agency failed to submit hearing transcripts on appeal); Complainant v. Dep't of the Air Force, EEOC Appeal No. 0120110789 (Sept. 24, 2013) (sanction appropriate where agency failed to provide copy of hearing record, including hearing transcripts).

Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Several factors are considered in "tailoring" a sanction and determining if a particular sanction is warranted: 1) the extent and nature of the non-compliance, and the justification presented by the non-complying party; 2) the prejudicial effect of the non-compliance on the opposing party; 3) the consequences resulting from the delay in justice; and 4) the effect on the integrity of the EEO process. Gray v. Dep't of Defense, EEOC Appeal No. 07A50030 (Mar. 1, 2007).

In this case, the Agency issued the final decision 150 days late, or more than three times longer than allowed by the regulations. The Commission notes that our regulations require agency action in a timely manner at many points in the EEO process. 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. Dep't 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 insure that agencies, as well as complainants, abide by its regulations." Although the Agency was served with Complainant's request for sanctions because of its untimely final decision, the Agency has provided no explanation for its delay. Instead, the Agency merely maintains that its tardiness resulted in no prejudice to Complainant because a timely final decision would have resulted in the same legal conclusion. However, 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 or undermine the integrity of the EEO process. *Id.* Therefore, we find that the Agency's significant delay in this case warrants the severe sanction of granting default judgment in favor of Complainant. Moreover, default judgment should impress upon the Agency its need to henceforth issue final decisions in a timely manner.

See Glynda S. v. Dep't of Justice, EEOC Appeal No. 0120133361 (Feb. 23, 2016)(Commission determined default judgment in favor of Complainant was warranted as sanction against Agency that issued FAD 371 days late); Truman B. v. Dep't of the Army, EEOC Appeal No. 0120140418 (Apr. 10, 2017) (Commission determined default judgment in favor of Complainant was warranted as a sanction against Agency that issued FAD 110 days late, and did not complete investigation within 180 days).

Remedy Following Default Judgment

After deciding to issue a default judgment for a complainant, the Commission must determine if there is evidence that establishes the complainant's right to relief. One way to show a right to personal relief is to establish the elements of a prima facie case. See Royal, EEOC Request No. 0520080052; see also Matheny v. Dep't of Justice, EEOC Request No. 05A30373.

To prevail on Complainant's disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). In order to establish a prima facie case, a complainant generally must demonstrate that: (1) he is a member of a protected class, (2) he was subjected to adverse treatment, and (3) he was treated differently than otherwise similarly situated employees outside of her protected class. Walker v. U.S. Postal Sery., EEOC Appeal No. 01A14419 (Mar. 13, 2003); Ornelas v. Dep't of Justice, EEOC Appeal No. 01995301 (Sept. 26, 2002).

In this case, Complainant is a male who applied for and was deemed qualified for the Deputy Regional Administrator position. Complainant was not selected for the position, but a female applicant was selected. As such, we find that Complainant established a prima facie case of sex discrimination, and there is sufficient evidence to support a conclusion, by default judgment, that Complainant is entitled to relief for his complaint. See Complainant v. Pension Benefit Guaranty Corporation, EEOC Appeal No. 0720130001 (Oct. 9, 2014).²

Finally, to the extent that Complainant requests that the Agency should also be sanctioned for conducting an inadequate investigation, we decline to address this assertion because no further remedies would be available if Complainant were to prevail on this additional request.

² We decline to review whether there is a prima facie case of discrimination on the bases of age, race, color, or reprisal because no further relief would be available to Complainant by establishing such a case.

CONCLUSION

Accordingly, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final decision and issue default judgment in favor of Complainant. Further, we order relief for Complainant regarding his nonselection. We REMAND the complaint for further proceedings consistent with this decision and the Orders of the Commission set forth below.

ORDER

To the extent that it has not already done so, the Agency, within one hundred and twenty (120) calendar days from the date this decision is issued, shall undertake the following actions:

1. The Agency shall offer Complainant placement into the Deputy Regional Administrator position at issue in this case, or a subsequently equivalent position, retroactive to the date of the appointment of the selectee into the position. The Agency shall grant Complainant fifteen (15) days to determine whether to accept the position. Should Complainant reject the job offer, Complainant's entitlement to back pay shall terminate as of the date of rejection.
2. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant, pursuant to 29 C.F.R. § 1614.501. The back-pay award shall reflect all career ladder promotions to which an employee in Complainant's position who performed in a fully successful manner was entitled. The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within ninety (90) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled, "Implementation of the Commission's Decision.
3. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
4. The Agency will conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford her an

opportunity to establish a causal relationship between her termination and pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages and will provide all relevant information requested by the Agency. The Agency will issue a final decision on the issue of compensatory damages. 29 C.F.R. § 1614.110. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein.

5. The Agency shall provide at least two (2) hours of in-person training to all EEO officials involved in processing complaints regarding their case processing responsibilities, with a special emphasis on the importance of abiding by regulatory mandates and time limits.
6. The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision."

POSTING ORDER (G0617)

The Agency is ordered to post at its Bothell, Washington facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

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.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party’s timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant’s request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency’s request must be submitted in digital format via the EEOC’s Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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

April 25, 2019

Date