

contains information that is relevant to the adjudication of Agency No. 2015-26311-FWHA-06, the Agency was unable to produce any ROI for the latter case because it had not conducted a separate investigation for the instant case. Instead, the Agency merely consolidated 2015-26311-FWHA-06 with the earlier case, a closed case in which a Final Agency Decision FAD had been issued and no appeal had been filed, and said that the ROI for that case was sufficient. The ROI for that case, however, contains no investigation into the final weeks of Complainant's employment, nor the circumstances of her alleged constructive discharge.

During the Initial Conference, Complainant's Representative informed the Agency and me [REDACTED],

[REDACTED].

Based on the parties' representations during the Initial Conference, I informed the parties that failure to investigate a case may subject the Agency to sanctions, up to and including default judgment. I provided Complainant until April 1, 2016 to file a Motion for Default Judgment, laying out the procedural history of this case. I provided the Agency until April 14, 2016 to respond.²

On March 31, 2016, the Agency filed a Motion for Leave to Allow Agency 21 Calendar Days to Supplement ROI, admitting that the Agency failed to conduct an investigation into Complainant's constructive discharge claim raised in the second complaint, and requesting three weeks to supplement the record through an expedited investigation into that claim.

On April 7, 2016, Complainant filed her Motion for Sanctions and Objection to Agency Motion for Extension of Time to Investigate, arguing that the Agency was well aware that additional investigation was required for the new complaint, and the Agency's failure to investigate the constructive discharge complaint warrants sanctions in the form of default judgment. The same day, Complainant filed a separate Motion to Initiate Discovery, arguing that the need to develop the factual record in this case is urgent in light of Complainant's failing health.

On April 9, 2016, Complainant filed her Supplement to Motion for Sanctions, providing additional documentation in support of her Motion.

On April 19, 2016 the Agency filed its Response to Complainant's Motions for Sanctions

² Because Complainant was late in filing his Motion, I granted the Agency an extension to file its response.

and to Initiate Discovery, arguing that it should not be subjected to sanctions because the nine claims that make up the hostile work environment case form the bulk of the factual record for this case. The Agency further argued that the complex procedural history of this case should excuse the Agency's mistake in believing a new investigation was not warranted, and that Complainant failed to assert that the ROI was lacking at the time the ROI for the closed case was provided, instead merely contesting the consolidation and electing a hearing. The Agency contends that its first notice of any deficiency in the investigation came at the March 18, 2016 Initial Conference, and that because it promptly offered to conduct a supplemental investigation, it should not be subjected to sanctions.

With respect to Complainant's Motion to Initiate Discovery, the Agency offered no opposition to the Motion.

Standard for Default Judgment

EEOC Regulations at 29 C.F.R. § 1614.109(f)(3)(i)-(v) set forth several sanctions available to an Administrative Judge ("AJ") when either party fails, without good cause, to respond fully and in a timely fashion to an order of an AJ. Sanctions are also provided in order to effectuate the Commission's inherent power to protect its administrative process from abuse by either party. *See, e.g., DaCosta v. Dep't of Educ.*, EEOC Appeal No. 01995992 (February 25, 2000); *Card v. United States Postal Serv.*, EEOC Request No. 05950568 (October 25, 1996); *Buren v. United States Postal Serv.*, EEOC Request No. 05850299 (November 18, 1988). The Commission has exercised its inherent authority to enforce its Part 1614 Regulations by ordering sanctions in response to various violations.³

EEOC Regulations specifically provide for default judgment as a sanction. *See* 29 C.F.R. § 1614.109(f)(3)(iv). With regard to when default judgment is appropriate as a sanction, the U.S. Court of Appeals for the District of Columbia Circuit has held that courts should consider factors

³ *See, e.g., DaCosta*, EEOC Appeal No. 01995992 (February 25, 2000) (imposing a sanction of a decision partially in favor of Complainant where Agency failed to timely assign the matter to an independent investigator); *Epstein v. Dep't of Health and Human Serv.*, EEOC Request No. 05970671 (July 2, 1998) (upholding an award of attorney's fees and costs incurred in establishing a breach of a settlement agreement where the agency's attorney misrepresented her authority to enter into a specific agreement); *Terrell v. Dep't of Health and Human Servs.*, EEOC Request No. 04950018 (November 7, 1996) (awarding attorney's fees and costs for filing a petition for enforcement following the agency's failure to comply with the Commission's order to conduct a supplemental investigation within 90 days); *Stull v. Dep't of Justice*, EEOC Appeal No. 01942827 (June 15, 1995) (upholding an award of attorney's fees and costs incurred in an attempt to have an adverse inference drawn where the agency failed to comply with an AJ's order to produce documents).

such as the effect of the offending party's dilatory or contumacious conduct on the adjudicator's docket, whether the conduct has prejudiced the other party, or "whether deterrence is necessary to protect the integrity of the [adjudicative process]." *Bonds v. Dist. of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1997) citing *Bristol Petroleum Corp. v. Harris*, 901 F.2d 165, 167 (D.C. Cir. 1990); see also *Shea v. Donohoe Constr. Co., Inc.*, 795 F.2d 1071 (D.C. Cir. 1986). A showing that the non-complying party acted in bad faith is not prerequisite to the issuance of sanctions. See *Cornell v. Dep't of Veterans Affairs*, EEOC Appeal No. 01974476 (Nov. 24, 1998).

Analysis

In her Motion, Complainant provides a full accounting of the procedural history of the closed hostile work environment case and the instant case. Complainant contends that roughly six weeks after she filed her August 2013 hostile work environment complaint with the Agency's EEO Office, the Agency served Complainant with a notice of proposed removal. Complainant contends that she involuntarily retired on October 31, 2013 in order to avoid removal. Complainant first challenged this alleged constructive discharge at the Merit Systems Protection Board (MSPB), which rejected the claim for failure to exhaust administrative remedies. The MSPB reasoned that because Complainant had made allegations of whistleblower retaliation in addition to discrimination and constructive discharge, she needed to first exhaust her administrative remedies with the Office of Special Counsel (OSC). Complainant filed her complaint with OSC on November 12, 2013, alleging in part that "after [she] filed [an] EEOC complaint with the agency on March 28, 2013," she was constructively discharged because of discrimination, and involuntarily retired. On January 15, 2014, OSC closed Complainant's case, and informed her of her right to seek corrective action at the MSPB. Complainant exercised her right, returning to MSPB to challenge the alleged constructive discharge.

On August 21, 2014, an MSPB administrative judge dismissed Complainant's case on jurisdictional grounds, thereby leaving her claims of discrimination unaddressed. The full Board upheld the dismissal. On February 19, 2015, Complainant appealed the final decision of the MSPB to the EEOC Office of Federal Operations, which, on April 1, 2015, issued a decision finding that because the MSPB failed to assert jurisdiction over Complainant's constructive discharge claim, the claim should no longer be considered a "mixed case." The decision referred the case to the Agency for further processing. On May 8, 2015, Complainant's counsel

contacted the Agency to initiate EEO counseling, and on June 19, 2015, Complainant filed her formal complaint of constructive discharge. Rather than conduct an investigation on the new claim, however, the Agency elected to consolidate the case with the closed, hostile work environment case, substituting the ROI for that case for an investigation in the instant case.

The Agency does not dispute these basic facts, rather, it argues that because the procedural history was confusing, the Agency did not have knowledge of the deficiency in the investigation and therefore should not be subjected to sanctions. The Agency's arguments are unavailing.

The record is clear that the Agency had full knowledge and understanding of the complex procedural history in this case. The same attorney represented the Agency before the MSPB and the EEOC Office of Federal Operations. *See* Complainant's Motion for Sanctions and Objection Agency Motion for Extension of Time to Investigate, Exhibits 8, 9, 10, and 12. The Agency Representative was copied on Complainant's Formal Complaint of Discrimination. *See Id.*, Exhibit 11. Moreover, the Agency's EEO Office was clearly on notice of the new complaint and the fact that the new complaint raised issues not addressed in the prior, closed case. Specifically, when informed by email of the Agency's intent to consolidate the new complaint with the prior, closed case, Complainant's Representative objected. In an email dated August 14, 2015, Complainant's Representative said, "You state 'please be aware that a FAD was issued and your client appealed to the MSPB.' The appeal to the MSPB related to an issue NOT addressed in the FAD. The appeal to the MSPB related to a claim NOT raised previously; therefore, these two cases should not be consolidated." *Id.* at Exhibit 14. In response to Complainant's objection to the consolidation of this case with a closed case that did not address the issue raised in the instant case, substituting the ROI from the prior case for an investigation in this case, the Agency merely responded, "Please be advised that you have the right to raise this matter with the Administrative Judge." *Id.*

The prejudice caused by the Agency's failure to conduct an investigation of the instant complaint is significant. The Agency has been on notice of Complainant's failing health since before the time of her first complaint, which alleged a hostile work environment based on her disability, cancer. The Agency's Motion to conduct a supplemental investigation at this juncture would put the Complainant in a position of having to respond to discovery requests and potentially a deposition while she is in hospice care. *See Id.* at 4. If Agency had fulfilled its

obligation to conduct a timely investigation in accordance with EEOC regulations at 29 C.F.R. 1614.108, by now the investigation would be complete and the case would by now be ripe for adjudication.

Moreover, no lesser sanction will make Complainant whole in light of the Agency's failure to investigate her complaint of constructive discharge and the unfortunate circumstances of Complainant's health. Whether through an expedited investigation or through discovery, Complainant would be prejudiced by having to respond to requests for discovery, interviews, or depositions while in hospice care. Moreover, at this juncture, any delay in this adjudication decreases the chance Complainant will live to see the outcome of this case. In sum, the Agency's failure to investigate the complaint, failure to correct its mistake when the mistake was brought to its attention by Complainant's Representative, and its error in "consolidating" the instant claim with a closed case in lieu of conducting an investigation, have resulted in severe prejudice to Complainant for which the only appropriate remedy is default judgment.

Conclusion

Based on the foregoing, Complainant's request for default judgment is **GRANTED**, and I hereby **enter default judgment against the Agency** pursuant to 29 C.F.R. § 1614.109(f)(3)(iv); EEO MD-110, Chap. 6 (XII)(4) and Chap. 7 (III)(D)(10)(d). Complainant is hereby **ORDERED** to provide evidence to support a *prima facie* showing of discrimination, and to submit a preliminary statement regarding relief no later than May 10, 2016. The Agency may respond no later than May 17, 2016. Based on the entry of default judgment, no order shall issue on the remaining outstanding motions.

For the Commission:

It is so ORDERED.

[REDACTED]

[REDACTED]
Administrative Judge
[REDACTED] ([REDACTED])
[REDACTED]

[REDACTED]
[REDACTED]

Darrin W. Gibbons, Esq.
[REDACTED]

[REDACTED]
[REDACTED]