



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, DC 20507

Margaret E. Rand  
Complainant,

v.

John W. Snow,  
Secretary,  
Department of the Treasury,  
Agency.

Appeal No. 01A52116  
Hearing No. 100-2004-00129X  
Agency Nos. TD 02-2339T, TD 03-2054T, TD 04-2241T

DECISION

JURISDICTION

On January 24, 2005, complainant filed an appeal from the agency's December 20, 2004 final order concerning her equal employment opportunity (EEO) complaints 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.*, the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 *et seq.*, and the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d) *et seq.* The appeal is deemed timely and is accepted pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission VACATES the agency's final order.

ISSUE

The issue presented on appeal is whether the Administrative Judge abused his discretion in determining to hear this case by telephone.

BACKGROUND

At the commencement of the events giving rise to this appeal, complainant worked as a Program Analyst, GS-343-13, in the agency's Office of Strategic Planning, and Evaluation in Washington, D.C. Complainant filed a total of three EEO complaints, subsequently consolidated for hearing, alleging discrimination as follows:

- (1) Was complainant discriminated against or subjected to a hostile work environment on the basis of her race (White), sex (female), or age (date of birth)

1/30/1943) when, while detailed to the Office of the Assistant Secretary for Management and Budget (OASMB) during the period November 2001 to May 2002:

(a) the agency gave complainant work details and assignments that were demeaning; (b) various agency personnel berated complainant's work performance; (c) on or about April 29, 2002, the agency abruptly terminated complainant's detail to OASMB; and (d) in or about the summer of 2002, the agency permanently reassigned complainant to another department in the agency;

(2) Was complainant discriminated against or subjected to a hostile work environment on the basis of her race (White), sex (female), or age (date of birth 1/30/1943) when, during the Fall 2000 to August 2002 time period, the agency failed or refused to conduct a desk audit of complainant's GS-13 position to determine whether the position would be reclassified at the GS-14 grade level, or if a desk audit was conducted, to release the results of the desk audit;

(3) Was complainant discriminated against on the basis of her sex (female) when she performed substantially equal work as that of certain co-workers of the opposite sex, for which complainant received GS-13 pay and her co-workers received GS-14 pay; and

(4) Was complainant discriminated against on the basis of race (White), age (date of birth 1/30/1943), or reprisal for protected EEO activity when, in or about November 2003, she was suspended for three days and received a performance evaluation for the October 1, 2002 to September 30, 2003, rating period that did not accurately reflect her actual performance.

At the conclusion of the investigation of her complaints, complainant was provided with copies of the reports of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing, and her case was assigned to an AJ in EEOC's Washington, D.C. Field Office. Subsequently, on account of the allocation of judicial resources, her case was reassigned to an AJ in EEOC's San Antonio, Texas District Office, who consolidated her three complaints for hearing.

Thereafter, in a Supplemental Acknowledgement and Order (SAO) dated June 9, 2004, the AJ advised the parties of his intention to conduct the hearing by telephone. In a June 28, 2004 status report submitted pursuant to the SAO, however, complainant objected to a telephonic hearing. Complainant stated, in relevant part:

There is no authority for such a telephonic hearing in 42 U.S.C. §2000e-16; 29 C.F.R. part 1614 or Equal Employment Opportunity Commission MD 110.

In fact, any Office of Federal Operations review of an Administrative Judge's decision is deferential based on the Administrative Judge's credibility determinations. See Equal Employment Opportunity Commission MD 110 at VI. B. 2. (page 9-16). Complainant submits credibility determinations of witnesses cannot be made by a telephonic hearing.

In its status report, submitted June 25, 2004, the agency was silent with regard to the telephonic hearing.

By Order dated June 29, 2004, the AJ denied complainant's objection to the telephonic hearing. On July 2, 2004, complainant filed a motion for reconsideration of her objection. The AJ denied complainant's motion for reconsideration on the same date.

On motion of the parties, the hearing was rescheduled for October 25, 2004, on which date it was conducted by telephone. The parties and the court reporter were present at an agency facility in Washington, D.C., while the AJ appeared from his chambers in San Antonio, Texas. Complainant called herself and two other witnesses. The agency did not call any witnesses.

On November 1, 2004, the AJ issued a bench decision, also by telephone. The AJ noted that because the agency had proffered legitimate, non-discriminatory explanations for its actions, he would forgo the *prima facie* case analysis, and rule upon whether complainant had established that the agency's explanations for its actions were pretext for discrimination. With regard to Issues 1, 2, and 4, the AJ then found that complainant had not established pretext. With regard to Issue 3, an Equal Pay Act claim raised *sua sponte*, the AJ found that complainant had not established that she was performing work that was substantially similar to that performed by male comparators while being paid at a lower rate.

#### FINAL AGENCY ACTION

The agency issued a final order on December 20, 2004 fully implementing the AJ's decision.

#### CONTENTIONS ON APPEAL

On appeal, complainant argues that, based upon the evidence of record, she is entitled to judgment in her favor as to all issues or, in the alternative, a new, in-person hearing before an AJ located in Washington, D.C. Complainant notes her continuing objection to a telephonic hearing, again arguing against the ability of the AJ to render credibility determinations in a telephonic hearing. Complainant argues that the AJ could not always hear the witnesses' testimony. Complainant noted that the AJ had made credibility judgments about her based on her "voice demeanor." Complainant argued, *inter alia*, that the AJ had failed to properly credit unrebutted evidence of age discrimination proffered by one of her witnesses, and that the AJ had no basis for finding the aforementioned witness not credible.

On appeal, the agency argues, *inter alia*, that the decision to hold a telephonic hearing is a matter within the AJ's discretion, and that complainant has not shown that the AJ abused his discretion by doing so in the instant case. The agency further argues that the difficulties with the telephone transmission did not have an adverse effect on complainant, noting that the AJ advised the parties when he had difficulty hearing the witnesses, and that the agency provided alternate equipment to alleviate the problem. The agency also argues that the AJ's decision on the merits of the case is supported by substantial evidence of record.

### ANALYSIS AND FINDINGS

The issue before the Commission in this appeal is whether the Administrative Judge properly conducted the hearing in this case by telephone. The Commission has addressed this matter today in the case of *Louthen v. United States Postal Service*, EEOC Appeal No. 01A44521.<sup>1</sup> After reviewing at length the history and development of the administrative hearing, the Commission concluded:

... Considering the special weight given to an AJ's demeanor-based credibility determinations, however, the Commission is persuaded that the AJ should be afforded the maximum opportunity to observe the demeanor of a witness. To that end, the Commission finds that, with the limited exceptions set forth below, the conduct of an entire hearing by telephone is not appropriate and should not occur.

The Commission recognizes that in exigent circumstances it may be necessary to take the testimony of a witness, or to conduct an entire hearing, telephonically. For instance, the parties or witnesses to an action may be at far-flung locations and travel is impractical for reasons other than mere inconvenience or expense to the parties, *e.g.*, a civilian witness has been deployed on military reserve duty. Witnesses who are not Federal employees or who have left Federal service and cannot be compelled to appear in person may nonetheless be willing to testify telephonically. Taking testimony by telephone may be an appropriate reasonable accommodation where a witness or party has a disability that prevents him or her from participating in a hearing in person. This is not an

---

<sup>1</sup> In *Louthen*, the Commission has promulgated its policy regarding the taking of telephonic testimony in the future by setting forth explicit standards and obligations on its Administrative Judges and the parties. *Louthen* requires either a finding of exigent circumstances or a joint and voluntary request by the parties with their informed consent. When assessing prior instances of telephonic testimony, the Commission will determine whether an abuse of discretion has occurred by considering the totality of the circumstances. In particular, the Commission will consider factors such as whether there were exigent circumstances, whether a party objected to the taking of telephonic testimony, whether the credibility of any witness testifying telephonically is at issue, and the importance of the testimony given telephonically. Further, where telephonic testimony was improperly taken, the Commission will scrutinize the evidence of record to determine whether the error was harmless. *Sotomayor v. Department of the Army*, EEOC Appeal No. 01A33440.

exhaustive list of the limited circumstances in which a telephonic hearing or telephonic testimony may be warranted.

A telephonic hearing or testimony is permissible when the AJ determines that such exigent circumstances require it and the AJ documents these circumstances in the record. If exigent circumstances are not present, a telephonic hearing (or telephonic testimony) may be conducted only if the parties submit a joint request to the AJ. In such a case, prior to the date of the hearing, the AJ must obtain a statement of consent from both parties to the telephonic hearing or testimony, reflecting that the parties have been informed of the limitations of taking testimony telephonically. Further, the AJ must be satisfied that it is unlikely that the credibility of any witness testifying telephonically will be at issue. The parties' joint request as well as the AJ's ruling on them must be documented in the record.

*Louthen*, EEOC Appeal No. 01A44521 (footnotes omitted).

Here, the record contains no evidence of the type of exigent circumstances that *Louthen* requires. The parties and the witnesses were all present in one location, and there is no evidence to suggest that the AJ was unable to travel to preside over the hearing. Neither was participation in a telephonic hearing voluntary on complainant's part. Indeed, complainant voiced her objection to a telephonic hearing at the outset, and has continued to object throughout these proceedings.<sup>2</sup> Moreover, the record reflects that the outcome of the case, at least in part, was impacted by the AJ's credibility determinations. Under the circumstances, the Commission is persuaded that the AJ abused his discretion. Cf. *Sotomayor v. Department of the Army*, EEOC Appeal No. 01A43440.

#### CONCLUSION

In view of the foregoing, it is the decision of the Equal Employment Opportunity Commission to VACATE the final agency action. The case is REMANDED for an in-person hearing.

#### ORDER

Within fifteen (15) calendar days of the date on which this decision becomes final, the agency shall submit to the Hearings Unit of the EEOC Washington Field Office the request for a hearing, to be held in person before a newly assigned AJ. The agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. The agency shall provide written notification to the

---

<sup>2</sup> The fact that a party has objected to telephonic testimony, while instructive, is not dispositive of error. See *Louthen*, EEOC Appeal No. 01A44521.

Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall 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 (K0501)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. 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 (M0701)

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 or

**within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. 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 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 (R0900)

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 (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your

time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:



Stephen Llewellyn  
Acting Executive Officer  
Executive Secretariat

5/17/06  
Date