



was necessary because the Agency's discovery responses are woefully inadequate. The Agency responded to interrogatories and requests for production of documents with general references to between hundreds and more than twelve hundred pages of the Agency's document production without explaining or differentiating any of its references to the discovery production. The Agency failed to give adequate (in fact only cursory) answers to more than twenty interrogatories and ten Requests for Production of Documents (RFP) which went to the heart of Complainant's case, such as in paraphrase:

Describe with specificity what facts the Agency relies on if it disputes any part of Complainant's testimony describing sexual harassment by ██████████ and Complainant's reports of sexual harassment to her supervisor, ██████████ (Interrogatory Nos. 1 and 2)

Identify and describe each complaint by phone, in-person, hard copy or electronic communication to any management official or Human Resources staff member concerning inappropriate conduct of a sexual nature by ██████████, including but not limited to complaints by Complainant. Describe the Agency's actions including any reports of the investigation or discipline of ██████████ for inappropriate conduct of a sexual nature concerning any employee to any EEO Office staff member or Agency official. (Interrogatory Nos. 4 and 5).

Describe when the Agency was notified of Complainant's sexual harassment complaint and the Agency's response. Describe any investigations and their results that any Agency official conducted into Complainant's complaints of sexual harassment including any discipline investigation. (Interrogatory Nos. 10-12)

Describe any written or verbal contact in the workplace between ██████████ and Complainant after Complainant notified ██████████ of the sexual harassment. Explain why ██████████ was not transferred to another location and instead allowed to return to his former work station after Complainant reported sexual harassment. (Interrogatory Nos. 15 and 16)

Under what circumstances may a member of the public be prohibited from entering the area of the facility where Complainant works. Why did the Agency not instruct building security to prohibit ██████████ from entering Complainant's work area after ██████████ retired? Why did the Agency not instruct Agency employees that they were not permitted to bring ██████████ into Complainant's work area after ██████████ retired? What policy, procedure or regulation did the Agency rely upon when it did not instruct building security and/or employees to not allow ██████████ into Complainant's work area after he retired? (Interrogatory Nos. 18-21)

Produce: All documents related to an investigation into Complainant's sexual harassment complaint by the Agency's EEO office, Human Resources, the Inspector General or any other component of the Agency. All documents regarding any fact-finding investigation, discipline investigation or any other

investigation concerning-██████ sexually harassing or behaving inappropriately with any other employee or non-employee. (RFP Nos. 4 and 5)

Produce: All documents that demonstrate the sexual harassment described by Complainant did not occur. All documents that demonstrate the Agency timely responded to Complainant's sexual harassment complaint. All documents that demonstrate the Agency took appropriate remedial action in response to Complainant's sexual harassment complaint. All documents that demonstrate Complainant was separated from ██████ after she reported sexual harassment. (RFP Nos. 10-13)

As noted, the Agency's responses were cursory, non-responsive and referred to hundreds and even more than a thousand pages of generally non-responsive document production. The Agency's actions denied Complainant the basic discovery she needed to prosecute her case. The First Discovery Order granted the Compel Motion with respect to more than 20 interrogatories and more than ten RFPs. The Compel Motion was denied only regarding RFP No. 9 and the beginning of the relevant time period was reduced two years from 2007 to 2009. The Agency was ordered to produce a privilege log and, pursuant to Fed. R. Civ. P. 33(b)(3), was ordered to sign its interrogatory answers under oath. The Agency was directed with respect to compelled interrogatories and RFPs, that the Agency may refer to specific pages that are responsive, provide a narrative response or provide both. However, the Agency was warned that if it cited document or ROI pages that were not responsive to the specific interrogatory or RFP being responded to, the Agency would be subject to sanctions. Subject to a protective order, all of the Agency's Privacy Act objections were overruled. First Discovery Order.

The Agency's attorney, James Simpson, did not initially receive a copy of the First or Second Discovery Orders since it was faxed to an Agency fax number other than 202-619-2922. However, on November 12, 2015, Complainant's counsel sent copies of the First and Second Discovery Orders to Simpson via email. February 3, 2016 Affidavits of Josh Bowers, Katherine Adkinson Dave and Christopher Byrd.

On October 22, 2015, a hot water pipe burst directly over Simpson's desk and destroyed all the paper files in his cases including the above-captioned case. October 22, 2015 William A. Biglow Letter. The First Discovery Order granted the Compel Motion compelling responses to interrogatories and RFPs largely by reference to the Compel Motion and for reasons set forth therein. Thus, reference to the Compel Motion was necessary to understand and comply with the First Discovery Order. However, Complainant served the Agency with electronic and paper copies of the Compel Motion on July 31, 2015. Thus, by November 12, 2015, the Agency had everything it needed to comply with the First Discovery Order. Nonetheless, the Agency made no effort to comply with the First Discovery Order.

From mid-November 2015 through the end of 2015, Simpson was out on medical leave from a previously undiagnosed medical condition that impacted his ability to work. Opposition, p. 2. On January 19, 2016, Simpson returned to work full-time. Opposition, pp. 3-4. On February 3, 2016, the Administrative Judge emailed the parties with a complete copy of the First and Second Discovery Orders. The Agency still failed to make any effort to comply with the

First Discovery Order. In the January 21, 2016 Opposition, the Agency promised that it would fully comply with the First Discovery Order no later than mid-March 2016. Opposition, p. 2. However, the undersigned has never accepted the Agency's proposed schedule for compliance and the Agency has never explained why it could not have complied with the First Discovery Order within 15 days of Simpson's return to work full-time on January 19, 2016.

During the last week of February 2016, Simpson's computer crashed causing him to lose access to his electronic version of the Compel Motion. However, on March 4, 2016, Complainant's counsel emailed Simpson a copy of the Compel Motion and sent him a disk containing the master file, including the Compel Motion, and, on March 7, 2016, the undersigned emailed all counsel an electronic copy of the Compel Motion.

In the First Discovery Order, the Agency was given 15 days to comply with the orders compelling discovery once Complainant sent the Agency an electronic version of Complainant's discovery requests and the Agency's responses, including the document production. Complainant provided Simpson the required electronic version on November 12, 2015. She provided another disk containing the same information on February 2, 2016. Bowers Aff.; Dave Aff.; Byrd Aff. The First Discovery Order set forth the possible sanctions for failure to comply with it:

Failure to comply in full with this Order may result in sanctions in accordance with 29 C.F.R. § 1614.109(f)(3) up to and including (a) subjecting the Agency to adverse inference findings in favor of the Complainant; (b) considering the issues to which the requested information pertains to be favorable to the Complainant; (c) excluding other evidence offered by the Agency; (d) permitting the Complainant to obtain summary disposition in her favor on some or all the issues without a hearing; and (e) taking other action deemed appropriate including an award of attorney's fees. The Agency is hereby notified that it must show cause for any failure to comply with this Order by the due date for complying with it.

The Agency has had the First Discovery Order and all documents necessary to comply fully with it far more than 15 days even taking into account Simpson's medical leave. The Agency was never given more than 15 days to comply once it received the First Discovery Order, Complainant's discovery requests and the Agency's responses, including the document production. Simpson already had an electronic copy of the Compel Motion. By November 13, 2015, he had electronic copies of the First Discovery Order and the Agency's discovery responses and production. Simpson went out on medical leave in mid-November and did not return full-time until January 19, 2016. However, he has failed to make any effort to comply with the First Discovery Order since then. He had the opportunity to comply from January 19, 2016 to the last week in February when his computer crashed but failed to do so. Further, he has still not complied. He has not complied even though additional electronic copies of the Compel Motion were sent him on March 4 and 7, 2016. Thus, he had ample time to comply with the First Discovery Order but has failed to do so. Moreover, the Agency has supplied no reason for why someone else could not have filled in to comply with the First Discovery Order in

Simpson's absence. It has done so in at least one other of Simpson's cases. Further, it is important to note that the First Discovery Order required that the Agency "show cause for any failure to comply with this Order by the due date for complying with it."<sup>1</sup>

Royal v. DVA, EEOC Request No. 0520080052 (Sept. 25, 2009)(failure to complete investigation with 180 days), in particular, is instructive. In that case, the Commission set forth the factors for tailoring a sanction or determining whether a sanction is warranted and include: (a) the extent and nature of the non-compliance, including the justification presented by the non-complying party; (b) the prejudicial effect of the non-compliance on the opposing party; (c) the consequences resulting from the delay in justice, if any; and (d) the effect on the integrity of the EEO process. Where the agency has not even initiated an investigation that could reasonably be completed within the 180 day timeframe [pursuant to 29 C.F.R. §§ 1614.108(e) and (f)], the factor which is "paramount" is the one pertaining to the effect on the integrity of the EEO process. Royal, EEOC Appeal No. 0520080052, \*6 (September 25, 2009) (default judgment entered for failure to complete investigation within 180 days). Similarly, waiting since November for the Agency to comply with a 15 day discovery order has a major undermining effect on the integrity of the EEO process. The Agency does not get to pick and choose which orders it wants to comply with. Further, the Agency's non-compliance has had a major prejudicial effect on the opposing party. The hearing in this case is scheduled for the middle of next month and Complainant has been deprived of even the most basic information which narrative responses to highly relevant interrogatories would supply. Complainant would be going to trial in this case without pinning down the Agency as to what it knew about the case and essentially would be going to hearing blind. Moreover, it denied Complainant the opportunity to reduce the cost and length of the hearing by eliminating factual disputes before the trial.

The Commission's regulations afford broad authority to Administrative Judges to control the conduct of hearings. See 29 C.F.R. §1614.109, et seq.; Equal Employment Opportunity Management Directive for 29 C.F.R. § 1614 MD-110, Ch. 7, See Section III (D) (Nov. 9, 1999). To that end, an Administrative Judge has inherent powers to conduct a hearing and to issue appropriate sanctions, including a default judgment. See Id.; Matheny v. Justice, EEOC Request No. 05A30373 (April 21, 2005); Rountree v. Treasury, EEOC Appeal No. 07A00015 (July 13, 2001); Royal v. DVA, EEOC Request No. 0520080052 (Sept. 25, 2009). Additionally, MD-110 provides authority to Administrative Judges to impose sanctions for failure to follow orders. See EEO-MD-110, Chapter 7, Section III (Feb. 24, 2011). In general, the Commission has held that sanctions, while corrective, also act to prevent similar misconduct in the future and must be tailored to each situation, applying the least severe sanction necessary to respond to the party's failure to show good cause for its actions, as well as to equitably remedy the opposing party. Royal, EEOC Appeal No. 0520080052, (citing Gray v. DOD, EEOC Appeal No. 07A50030 (March 1, 2007)); Rountree v. Treasury, supra; and Hale v. Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000).

In this case, the Agency has had all the information it needed to comply with the First Discovery Order since November 12, 2015 and it has failed and refused to do so. While Simpson was out on medical leave, the Agency could have had another attorney comply with the

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<sup>1</sup> Just today for the first time, the Agency sent an email stating it was now working to comply with the First Discovery Order. This is too little too late.

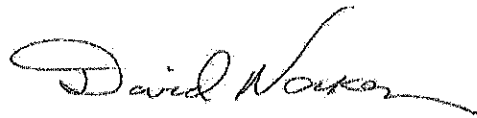
First Discovery Order but it failed to do so even though it has had other attorneys fill in for Simpson in other cases. The Agency also failed to request additional time to comply with the First Discovery Order. Once Simpson returned from medical leave, he could have complied with the First Discovery Order but failed to do so. The Agency had no explanation or excuse for failing to do so. Having to wait since November 2015 for the Agency to comply with a 15 day discovery order undermines the integrity and the EEO process. The Agency cannot be allowed to ignore discovery orders and to comply at a time and in a manner of its own choosing. The failure to comply has also prejudiced Complainant's case. Since the Agency's failure to comply with the First Discovery Order covers nearly every aspect of the case, adverse inferences would be ineffective except to be the equivalent of a default judgment. Thus, the only appropriate tailored remedy for the Agency's failure to comply is a default judgment.

Therefore, based on the foregoing, no sanction less than a Default Judgment would remedy the violation of the First Discovery Order in this case. Accordingly, the Motion is hereby granted and a Default Judgment ENTERED in favor of Complainant on all issues and bases in her complaint. Although a Default Judgment has been entered in these cases, Complainant must still make a showing of discrimination by the preponderance of the evidence for the Administrative Judge to issue a decision on the merits in her favor.<sup>2</sup> Fed R. Civ. P. 55(d) on Default Judgments is used as a guide in this regard:

(d) Judgment Against the United States. A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

Fed. R. Civ. P. 55(d). See also Royal, EEOC Appeal No. 0520080052 at \*8 (following Fed. R. Civ. P. 55(d) and requiring that complainant establish a prima facie case in order to obtain relief). In order to demonstrate Complainant is entitled to relief, she must offer evidence to establish a prima facie case on her claims subject to the default judgment. The undersigned will review Complainant's recent Prehearing Statement and its references to the record to determine whether Complainant's evidence is sufficient to establish a prima facie case on her claims. Since a default judgment has been entered, the Agency may not file a response regarding the merits of the Complainant's case.

It is so ORDERED.



For The Commission:

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David Norken  
Administrative Judge

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<sup>2</sup> Regardless of whether Complainant can establish a prima facie case, she may still be entitled to compensatory damages, attorney fees and a posting. See Montes-Rodriguez v. Agriculture, EEOC Appeal No. 0120120295, \*8 (January 12, 2012) (awarding compensatory damages and attorney's fees after default judgment even though complainant could not establish a prima facie case), request for reconsideration denied, EEOC Review No. 0520120295 (December 20, 2012).