

SANCTIONS IN THE EEOC ADMINISTRATIVE PROCESS

Eve G. Friedli
Administrative Judge
EEOC Miami District Office

John P. Mahoney, Esq.
Partner
Tully Rinckey, PLLC

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Concepts Pertinent to Non-Compliance Issues Set Forth In EEOC's Caselaw

- Untimely Investigations
- Undue Delay
- Failing to Obey an Order
(Ignoring Discovery Requests; Failing to Submit Pre-Hearing Statements or Attend a Scheduled Conference)
- Failing to Submit a Complete Hearings Record to EEOC's Office of Federal Operations ("OFO")

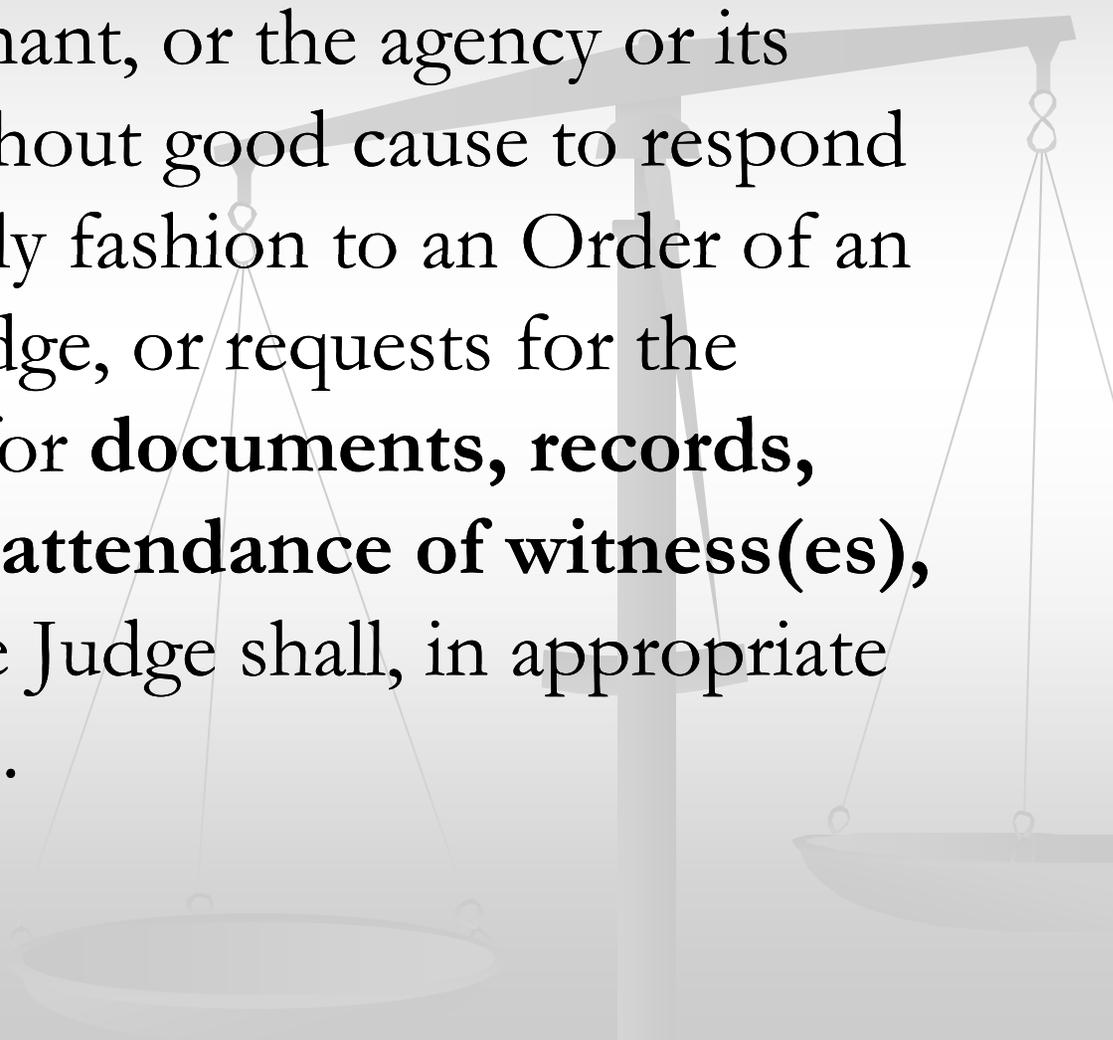


What Can Leave Either Party Vulnerable?

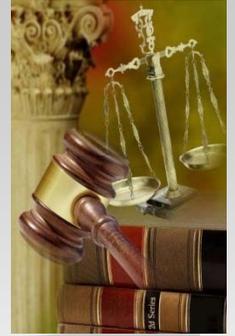


29 C.F.R. 1614.109(f)(3)

When the complainant, or the agency or its employees fail without good cause to respond fully and in a timely fashion to an Order of an Administrative Judge, or requests for the investigative file, for **documents, records, affidavits, or the attendance of witness(es)**, the Administrative Judge shall, in appropriate circumstances



29 C.F.R. 1614.109(f)(3)



- (i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
- (ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
- (iii) Exclude other evidence offered by the party failing to produce the requested information or witness;
- (iv) **Issue a decision fully or partially in favor of the opposing party; or**
- (v) Take such other actions as appropriate.

EEOC's Standard Acknowledgement and Order Provides Notice to the Parties that . . .

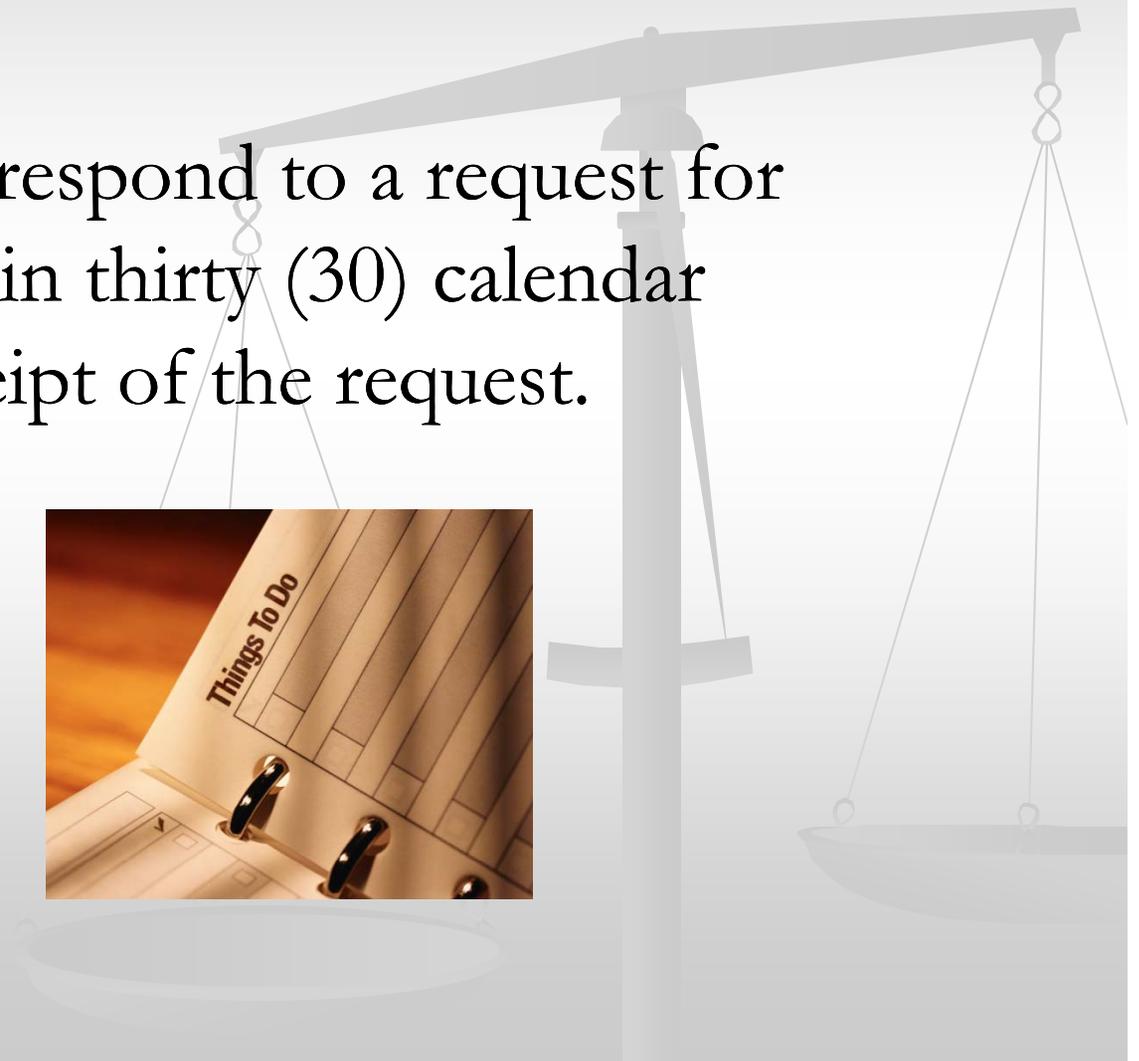
Sanctions may be issued pursuant to
29 C.F.R. § 1614.109(f)(3).

Sanctions may be issued for the failure to
follow the A&O or other Orders of an AJ.



EEOC Standard Acknowledgement and Order

A party **must** respond to a request for discovery within thirty (30) calendar days from receipt of the request.



EEOC Standard Acknowledgement and Order



Failure to follow this Order or other orders of the Administrative Judge may result in sanctions pursuant to 29 C.F.R. § 1614.109(f)(3). The Administrative Judge may, where appropriate:

- (A) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
- (B) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
- (C) Exclude other evidence offered by the party failing to produce the requested information or witness;
- (D) **Issue a decision fully or partially in favor of the opposing party;** or
- (E) Take such other actions as appropriate.

EEOC Management Directive 110 ("EEO-MD-110")

EEO-MD-110, Chap. 7, Sect. III (D).

This section contains language pertaining to the AJ's authority to sanction parties that fail to comply with Orders. Part of that language **tracks the language that is contained within the EEOC's standard A&O.**

Other language refers to the AJ's ability to sanction a party that is not **prepared** for a conference.

Precedent for Monetary Sanctions

- EEOC decisions grant attorney fees as a sanction against agencies for failing to obey an Order when a Complainant is represented by an attorney.
- As a sanction for agencies not providing the complete hearings record for review, EEOC decisions have ordered agencies to provide notice to a CP of his entitlement to retain an attorney for which the agency must pay attorney fees and costs.

Interim Sanctions: Award of Attorney's Fees for Discovery

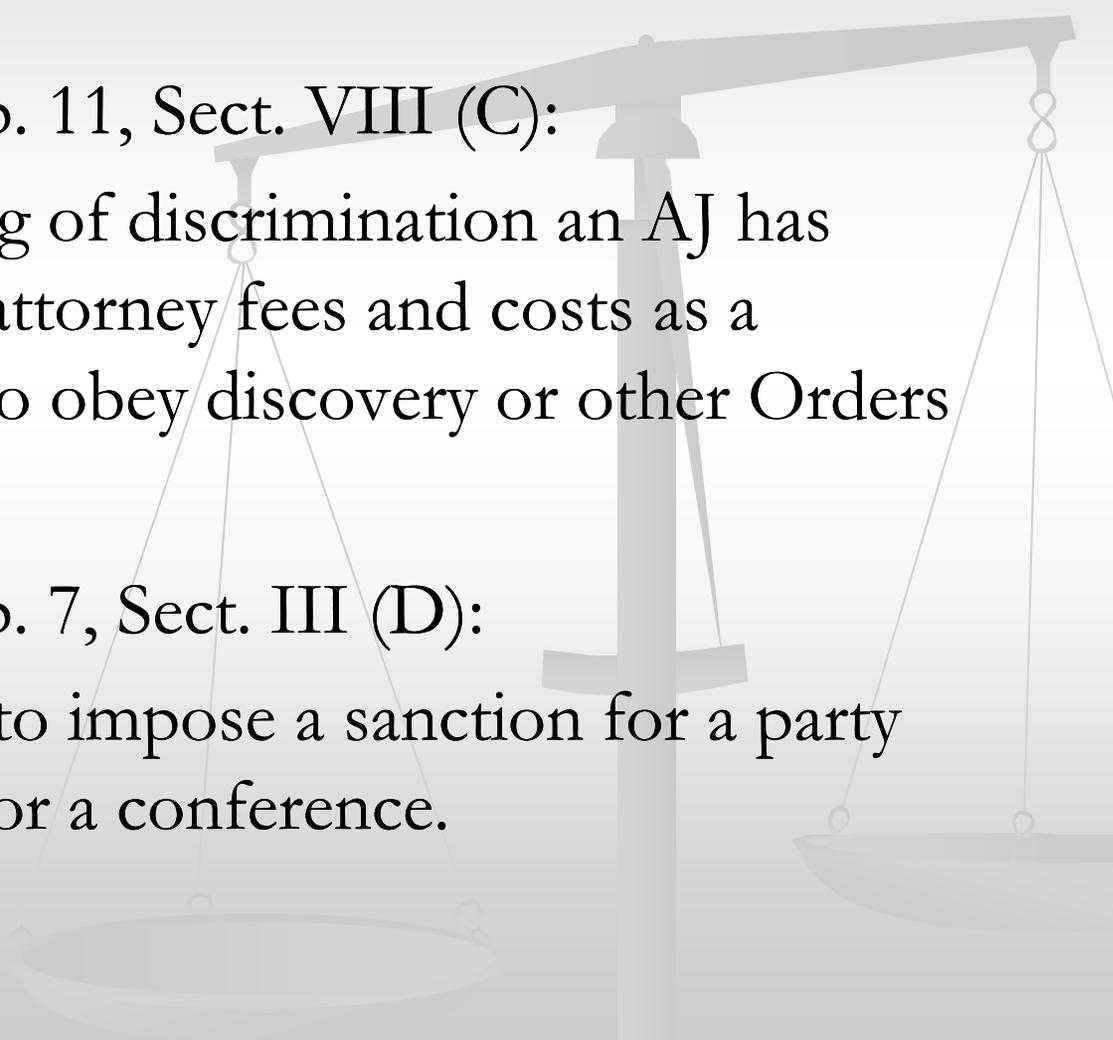
EEO-MD-110, Chap. 7, Sect. IV (F):

- The Administrative Judge may require “the agency to bear the costs for the complainant to obtain depositions or any other discovery because the agency has failed to complete its investigation timely . . . or has failed to investigate the allegations adequately.”

EEO-MD-110, Chap. 7, Sect. V (A)(1):

- “Sanctions under § 1614.109(f) may be evidentiary, monetary, or both. . . . Monetary sanctions include attorneys fees and the costs of discovery.”

Interim Sanctions: Award of Attorney's Fees for Discovery

- EEO-MD-110, Chap. 11, Sect. VIII (C):
Even absent a finding of discrimination an AJ has authority to impose attorney fees and costs as a sanction for refusal to obey discovery or other Orders
 - EEO-MD-110, Chap. 7, Sect. III (D):
An AJ has authority to impose a sanction for a party not being prepared for a conference.
- 

Interim Sanctions: Award of Attorney's Fees for Discovery

Waller v. Dep't of Transportation, EEOC Appeal No. 0720030069 (May 25, 2007), req. for recon. denied, EEOC Request No. 0520070689 (Feb. 26, 2009).

- OFO upheld the AJ's Order, which awarded, in part, fees and costs to a Complainant that were incurred in the preparation of the Complainant's Motion for Sanctions.
- AJs may award attorney's fees and costs as a sanction against federal agencies for the violation of an AJ's Order.
- “[A]warding attorney’s fees and costs as a sanction ensures the integrity and efficiency of the administrative process. No party has the opportunity to pick and choose which order by an Administrative Judge it deems worthy of compliance.”

Interim Sanctions: Award of Attorney's Fees for Discovery

How much can a sanction of attorney's fees to conduct discovery cost?

- Approximately **\$10,300** during a supplemental investigation (20 hours x \$515/hr Laffey rate)
- Approximately **\$12,875** for requesting and responding to discovery (25 hours x \$515/hr Laffey rate)
- Approximately **\$143,600** for 20 depositions (10 per side) (12 hours per deposition x \$515/hr Laffey rate + \$1,000 transcript fee)
- Total: **\$166,775**

Interim Sanctions: Award of Attorney's Fees & Costs for Delay

Mirabal v. Dep't of the Army, EEOC Appeal No. 0720120007 (November 9, 2012).

A Video Tele-Conference (“VTC”) hearing was scheduled and the agency had responsibility to ensure that the VTC connections were in proper working condition and to ensure that an IT person was immediately available in case of any technical difficulties.



Mirabal v. Army

- Day 1 - The VTC connection was lost early and the hearing started 51 minutes late. Later that same day, the connection was lost again and the agency acknowledged that it could not reestablish the video feed because there were no IT personnel available.
- Day 2 - Further VTC problems led to the adjournment of the hearing at 2:15 p.m. and the hearing was reconvened the following month.
- Day 3 - Continued VTC connection problems occurred when the VTC hearing reconvened. The agency had not pre-tested the system.

Mirabal v. Army

- The Administrative Judge ordered the agency to pay \$776.70 for the Complainant's travel costs from Honduras to a hearing site in Virginia.
- The Administrative Judge ordered the agency to pay \$3,330.88 in attorney fees for the additional time incurred because of the delays at the VTC hearing.

Mirabal v. Army

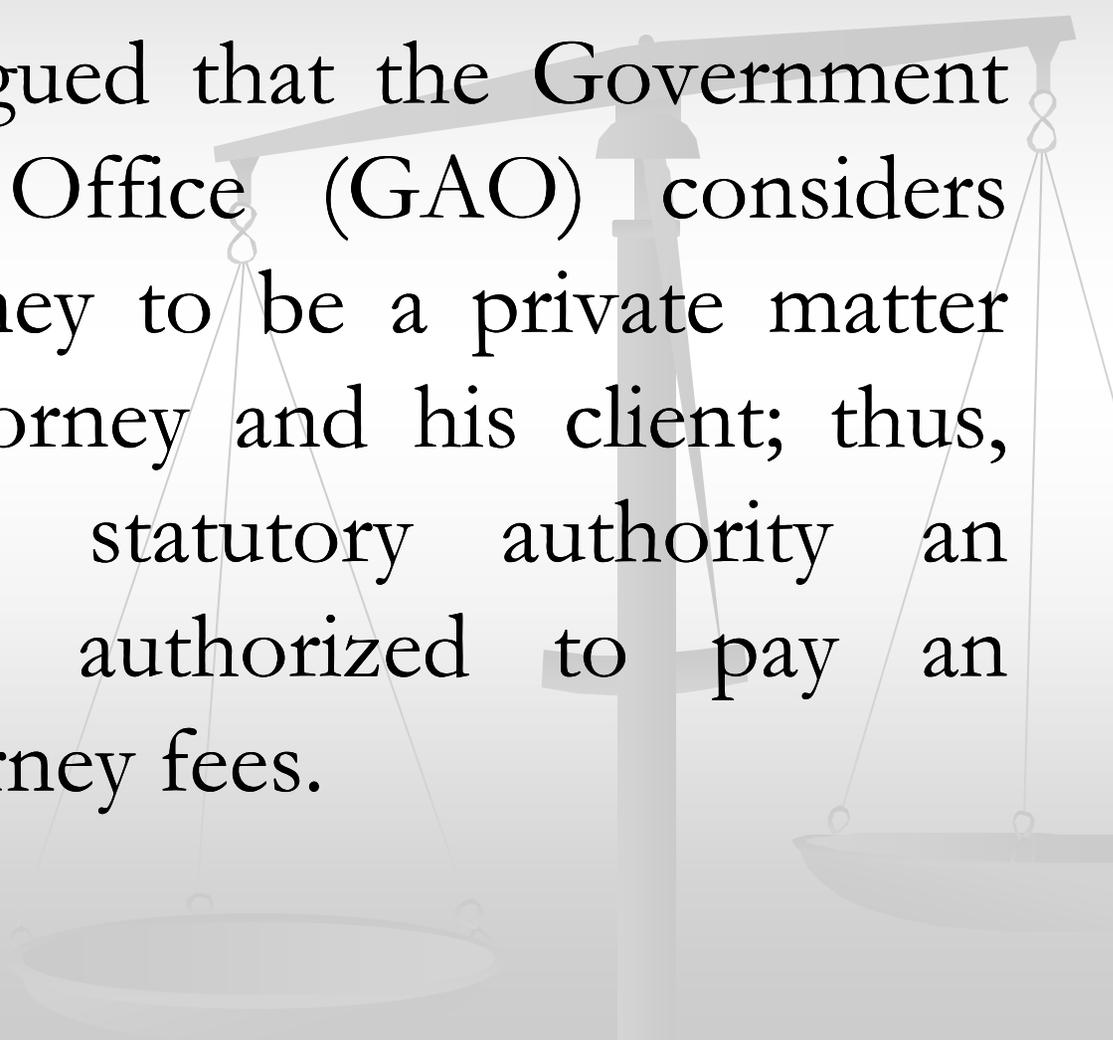
- The agency agreed to pay the \$776.70 in travel costs, but appealed the order which granted \$3,330.88 in attorney fees.
- The agency cited to the Department of Justice's Office of Legal Counsel Memorandum regarding the doctrine of sovereign immunity and argued that AJs are precluded from imposing monetary sanctions for the violation of an Order.

Mirabal v. Army

- The Agency argued that having to pay attorney fees as a sanction placed its senior officials in jeopardy of violating the Antideficiency Act. According to the agency, if they paid monetary sanctions without legal authority to do so they could be disciplined or subjected to criminal liability.
- The Agency argued that the use of appropriated funds for unauthorized or prohibited purposes for which zero funds are available would violate the Purpose Statute.

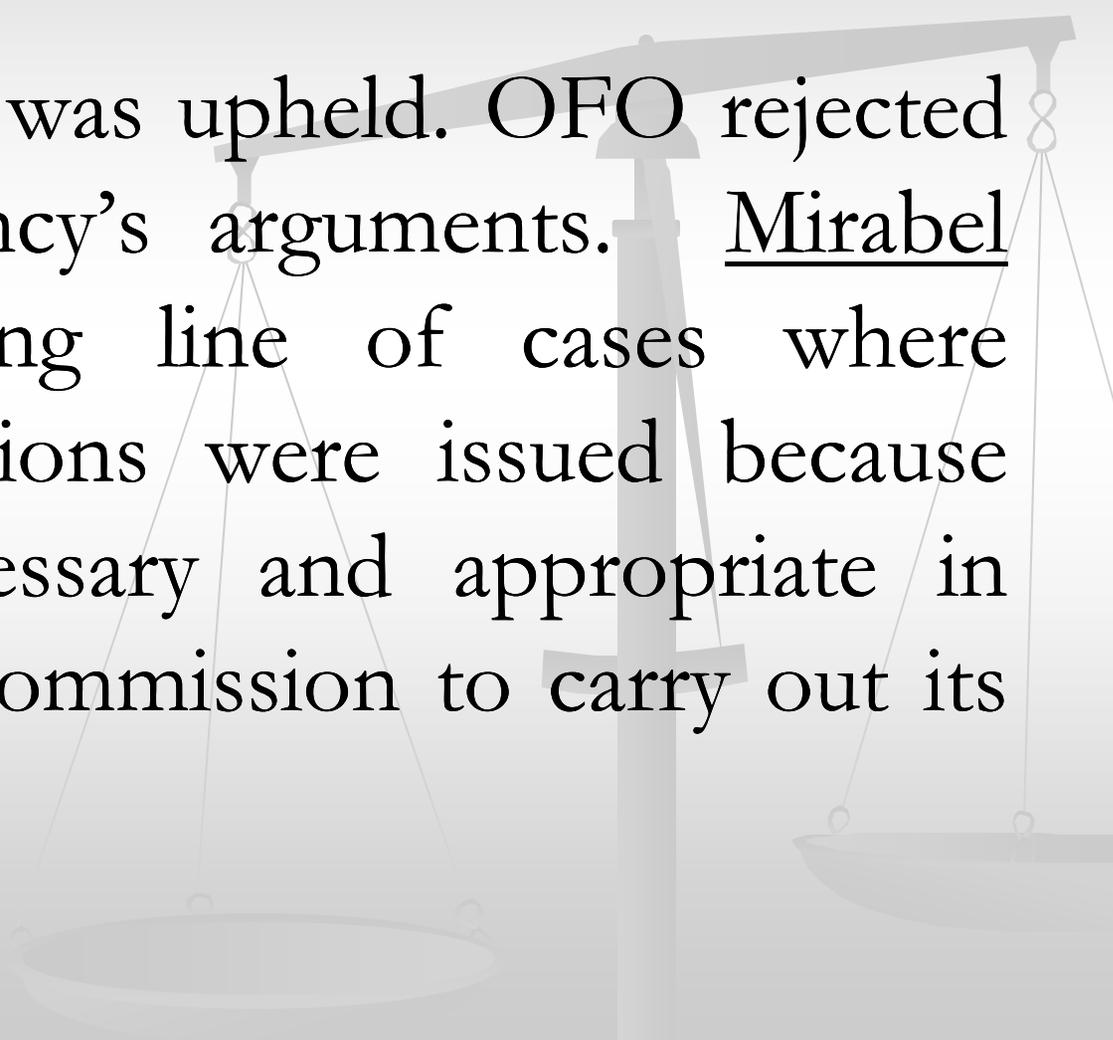
Mirabal v. Army

The Agency argued that the Government Accountability Office (GAO) considers hiring an attorney to be a private matter between an attorney and his client; thus, absent express statutory authority an agency is not authorized to pay an employee's attorney fees.



Mirabal v. Army

The AJ's Order was upheld. OFO rejected all of the agency's arguments. Mirabel cited to a long line of cases where monetary sanctions were issued because they were necessary and appropriate in order for the Commission to carry out its responsibilities.

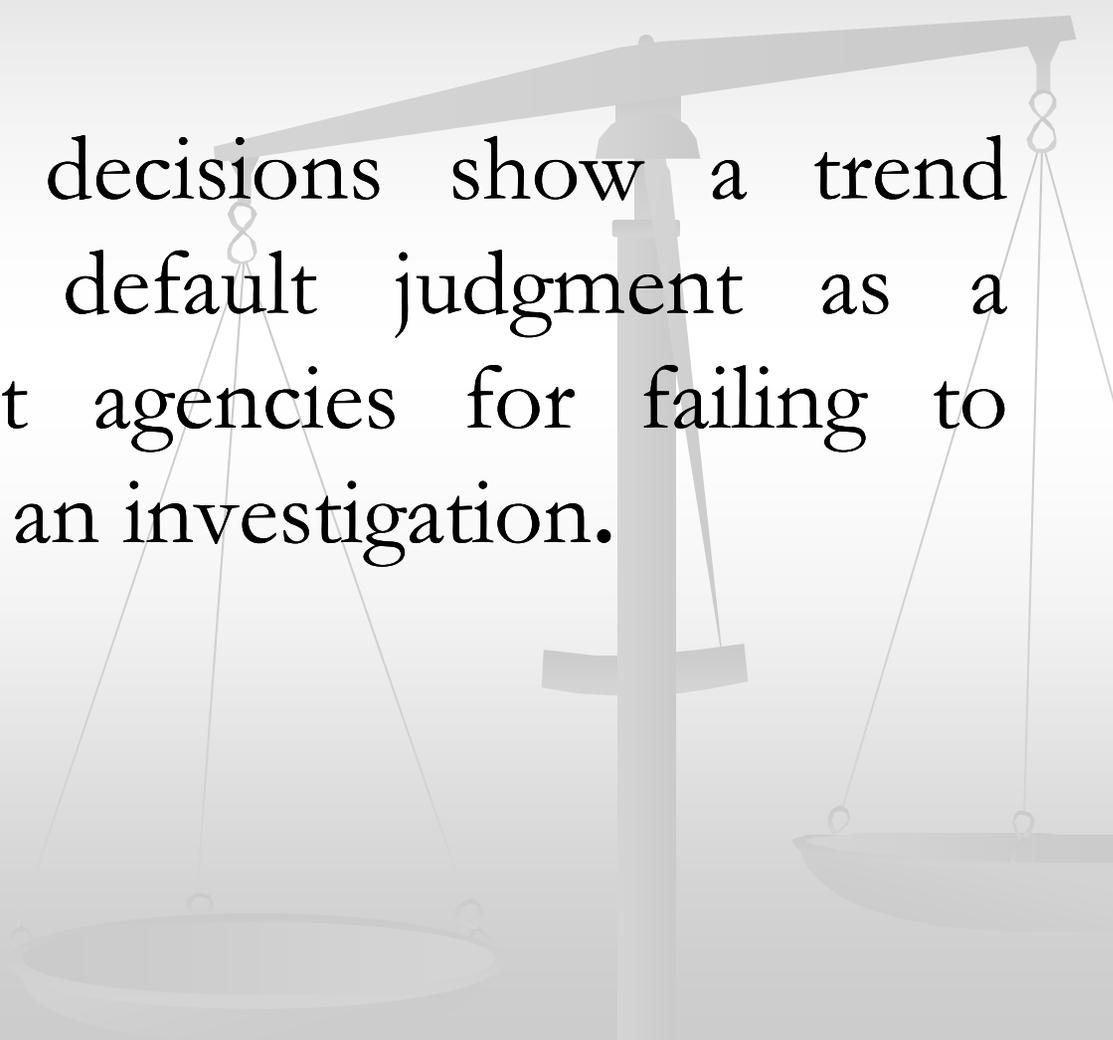


The Power to Sanction

- The Commission's authority to issue sanctions was granted, through statute, through the power to issue rules and regulations it deems necessary to enforce the prohibition of employment discrimination. Sanctions (including monetary ones) are a necessary and appropriate remedy which effectuates the policies of the Commission. **The Commission has delegated to the Administrative Judges the power to issue sanctions and “broad authority” to conduct hearings.** See Waller v. Dep't of Transportation, EEOC Appeal No. 0720030069 (May 25, 2007), req. for recon. denied, EEOC Request No. 0520070689 (Feb. 26, 2009).
- OFO also cites to: 29 C.F.R. 1614.109(f)(3); EEO-MD-110, Chapters 7 and 11; and 42 U.S.C. 2000e-16(c).

The Trend Toward Default Judgment

Recent EEOC decisions show a trend toward issuing default judgment as a sanction against agencies for failing to timely complete an investigation.



Royal v. VA, EEOC Request No. 0520080052 (September 25, 2009).

- The Commission denied the Agency's request for reconsideration and affirmed the issuance of a default judgment in favor of the CP. CP was awarded, in part, retroactive promotion to the position of Nurse Manager, back pay and benefits.
- The case was remanded to determine whether the CP was entitled to compensatory damages because the AJ had only provided the CP with an inadequate 15 days to provide any evidence on compensatory damages. The agency was not barred from submitting rebuttal evidence to a CP's claim for compensatory damages.

Royal v. VA

- This case rejected multiple arguments made by the Agency. 
- The default judgment was upheld due to the Agency's failure to conduct an investigation within 180 days. 

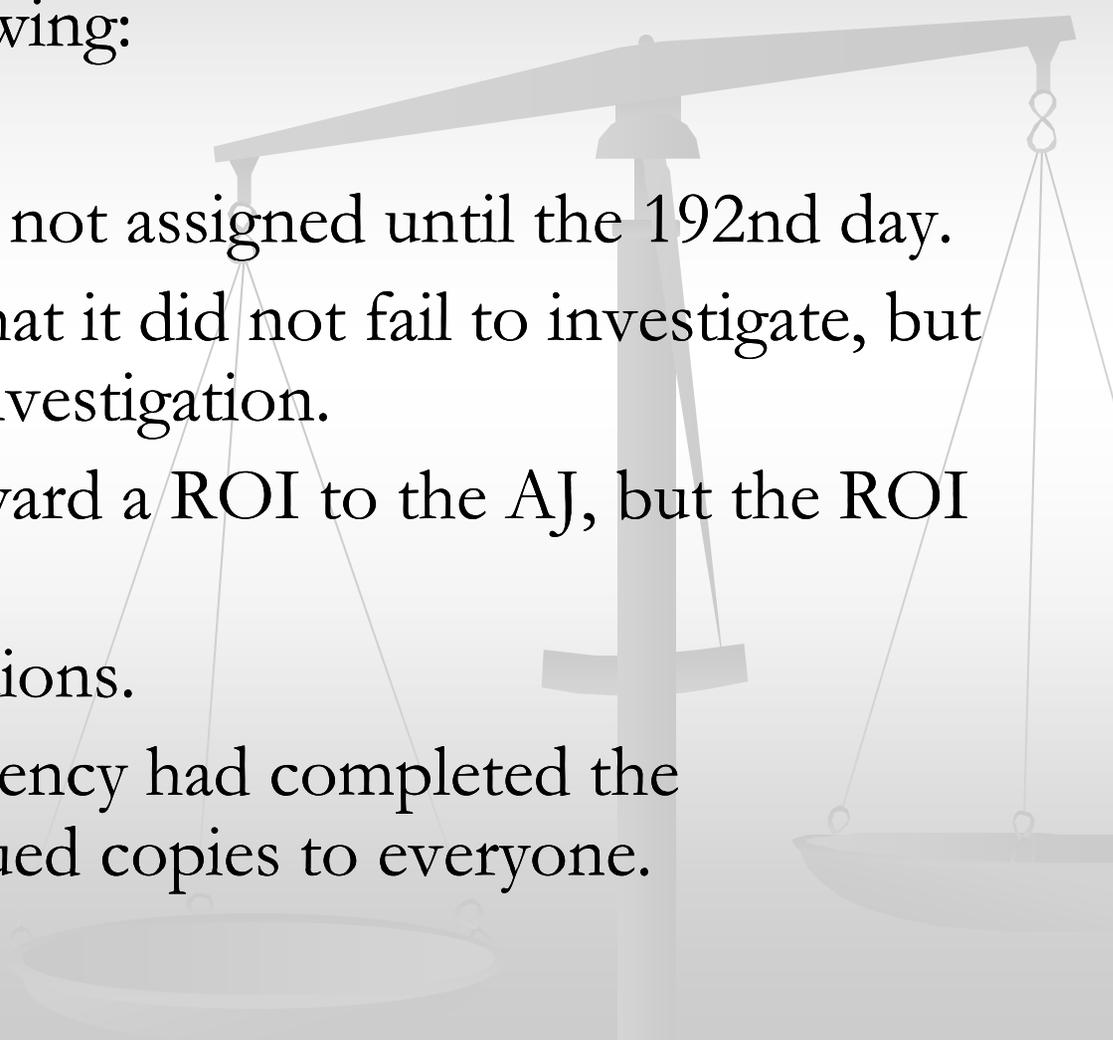
Royal v. VA

Agency arguments included:

- The AJ and the CP currently have a completed ROI.
- The delay was only a little over two months from the date that it should have been completed (62 days).
- The Agency was suffering from a lack of resources.
- The Agency was not intentionally trying to prejudice the CP.
- There is no prejudice to the CP.
- CP has a history of abusing the EEO process.
- The sanction imposed on the Agency is disproportionate to any harm caused by the delay.

Royal v. VA

Facts showed the following:

- The investigator was not assigned until the 192nd day.
 - The Agency stated that it did not fail to investigate, but merely delayed the investigation.
 - The Agency did forward a ROI to the AJ, but the ROI was incomplete.
 - The CP sought sanctions.
 - One day later the Agency had completed the investigation and issued copies to everyone.
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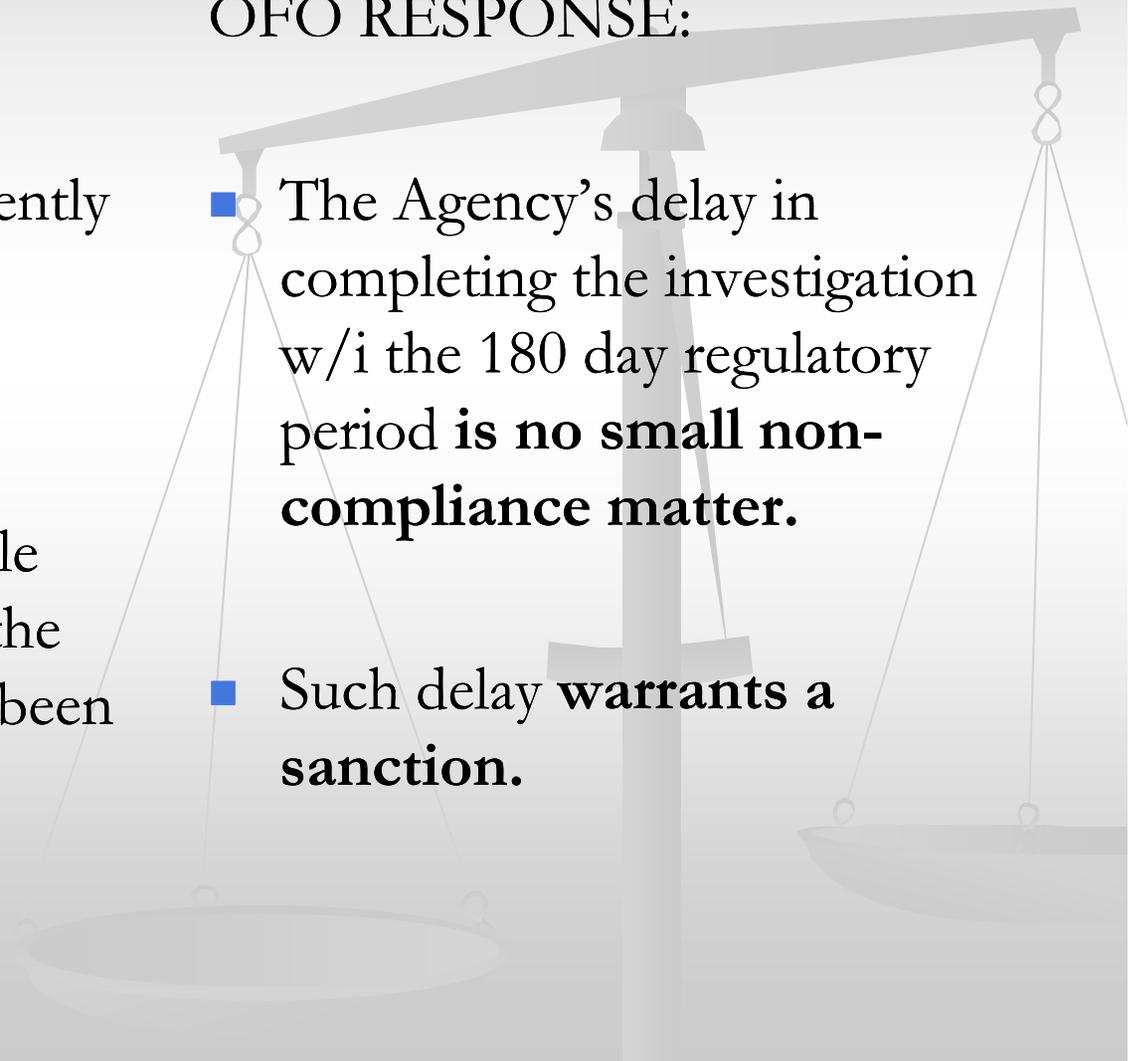
Royal v. VA

REJECTED DEFENSES:

- The AJ and the CP currently have a complete ROI.
- The delay was only a little over two months from the date that it should have been completed (62 days).

OFO RESPONSE:

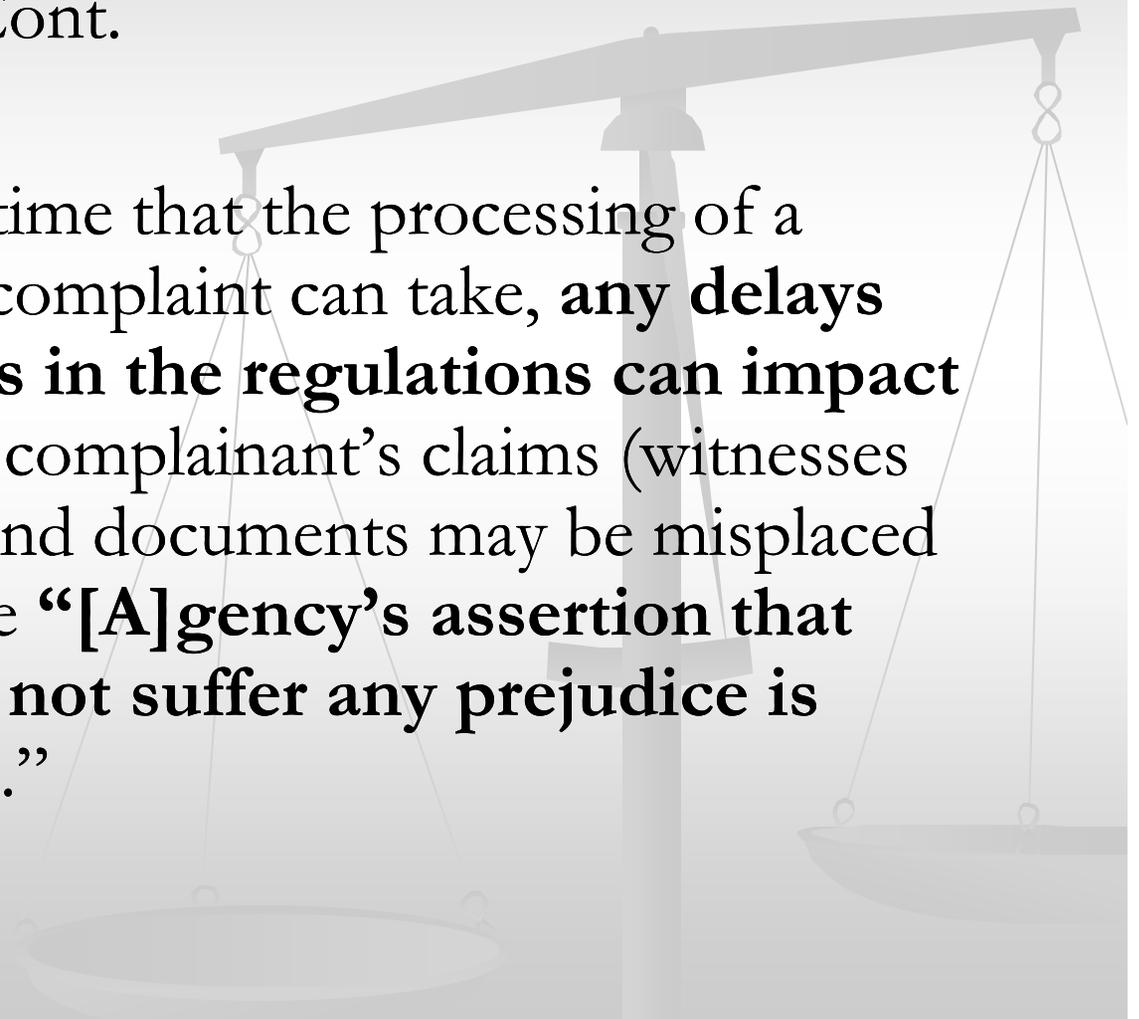
- The Agency's delay in completing the investigation w/i the 180 day regulatory period **is no small non-compliance matter.**
- Such delay **warrants a sanction.**



Royal v. VA

OFO's RESPONSE Cont.

- Given the length of time that the processing of a federal sector EEO complaint can take, **any delays past the timeframes in the regulations can impact the outcome** of the complainant's claims (witnesses may retire or leave, and documents may be misplaced or destroyed) and the “[A]gency’s assertion that [C]omplainant did not suffer any prejudice is speculative, at best.”



Royal v. VA

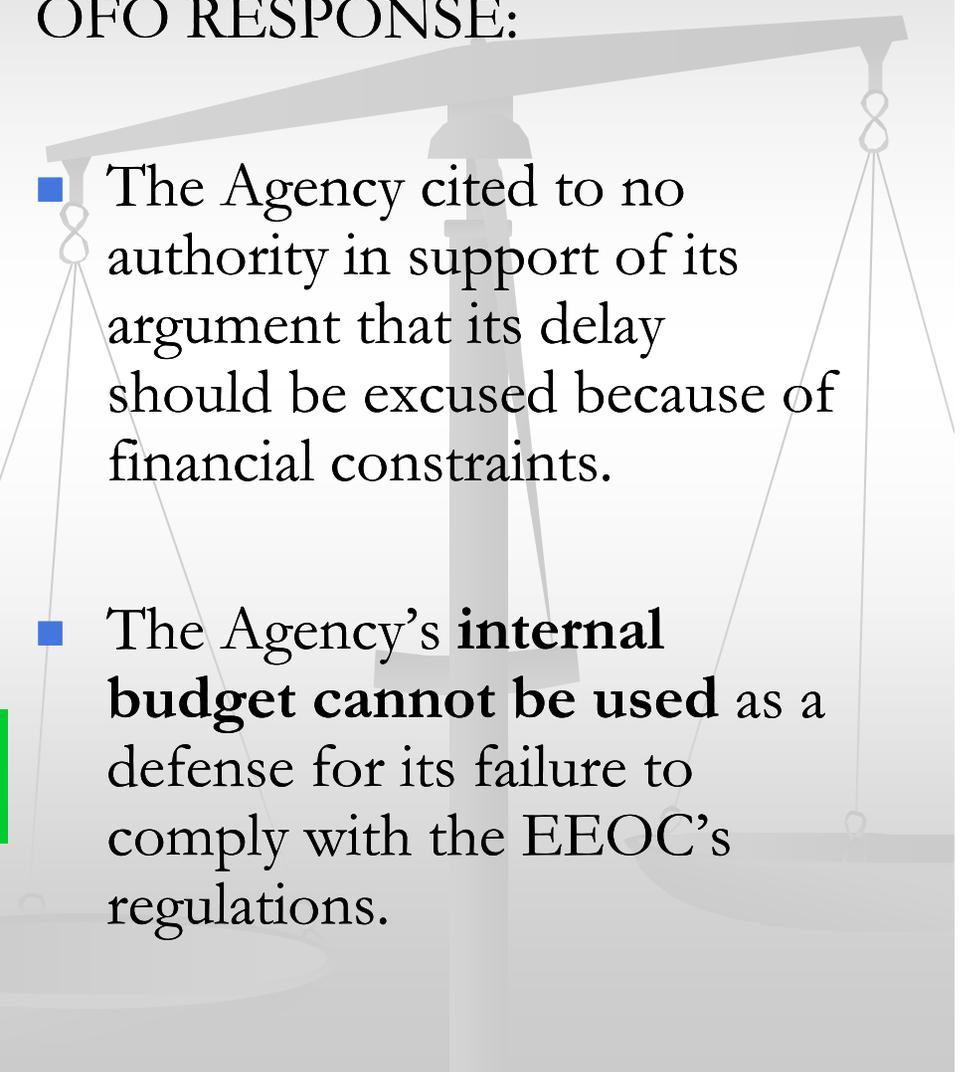
REJECTED DEFENSE:

- The Agency was suffering from a lack of resources.



OFO RESPONSE:

- The Agency cited to no authority in support of its argument that its delay should be excused because of financial constraints.
- The Agency's **internal budget cannot be used** as a defense for its failure to comply with the EEOC's regulations.



Royal v. VA

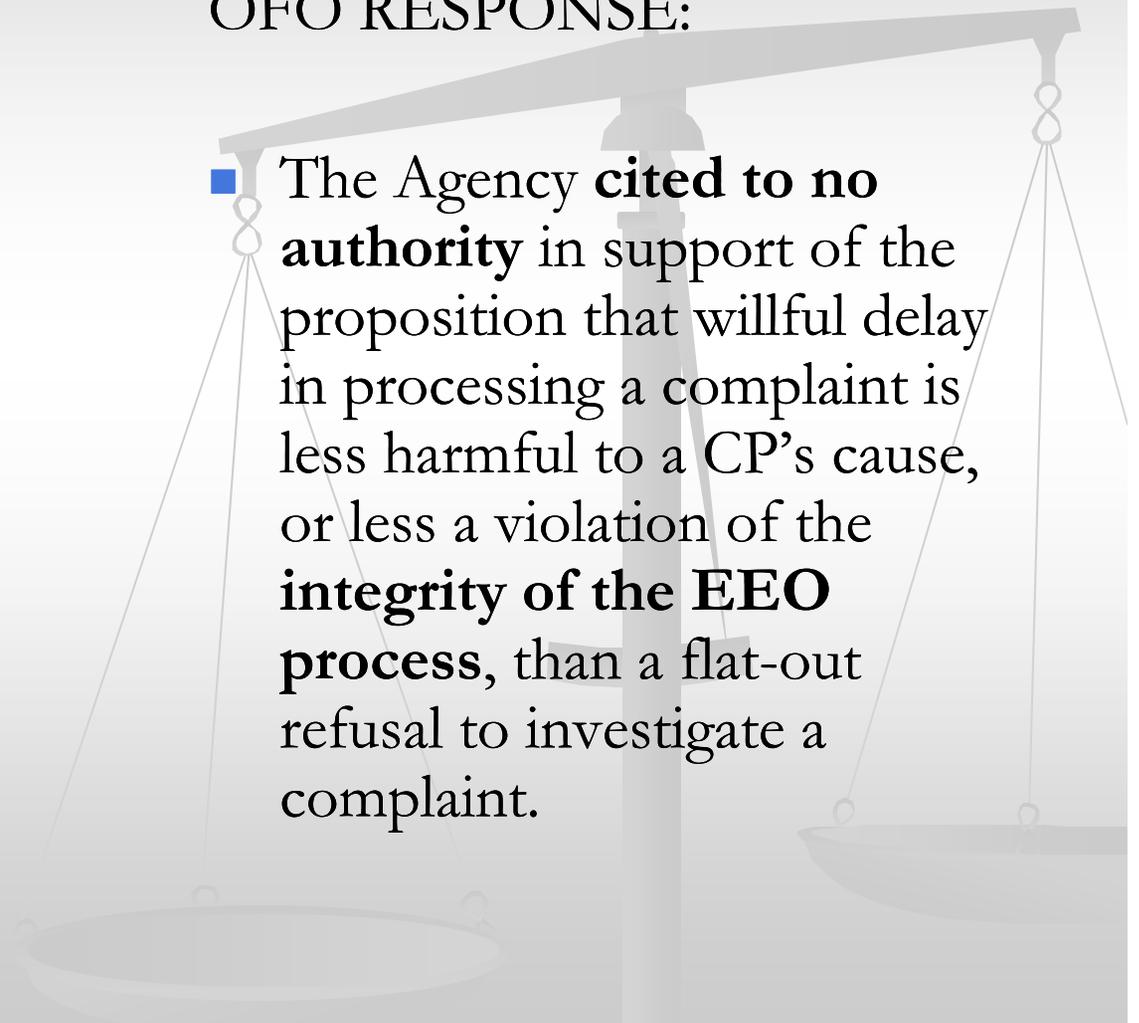
REJECTED DEFENSE:

- The Agency was not intentionally trying to prejudice the CP.



OFO RESPONSE:

- The Agency **cited to no authority** in support of the proposition that willful delay in processing a complaint is less harmful to a CP's cause, or less a violation of the **integrity of the EEO process**, than a flat-out refusal to investigate a complaint.



Royal v. VA



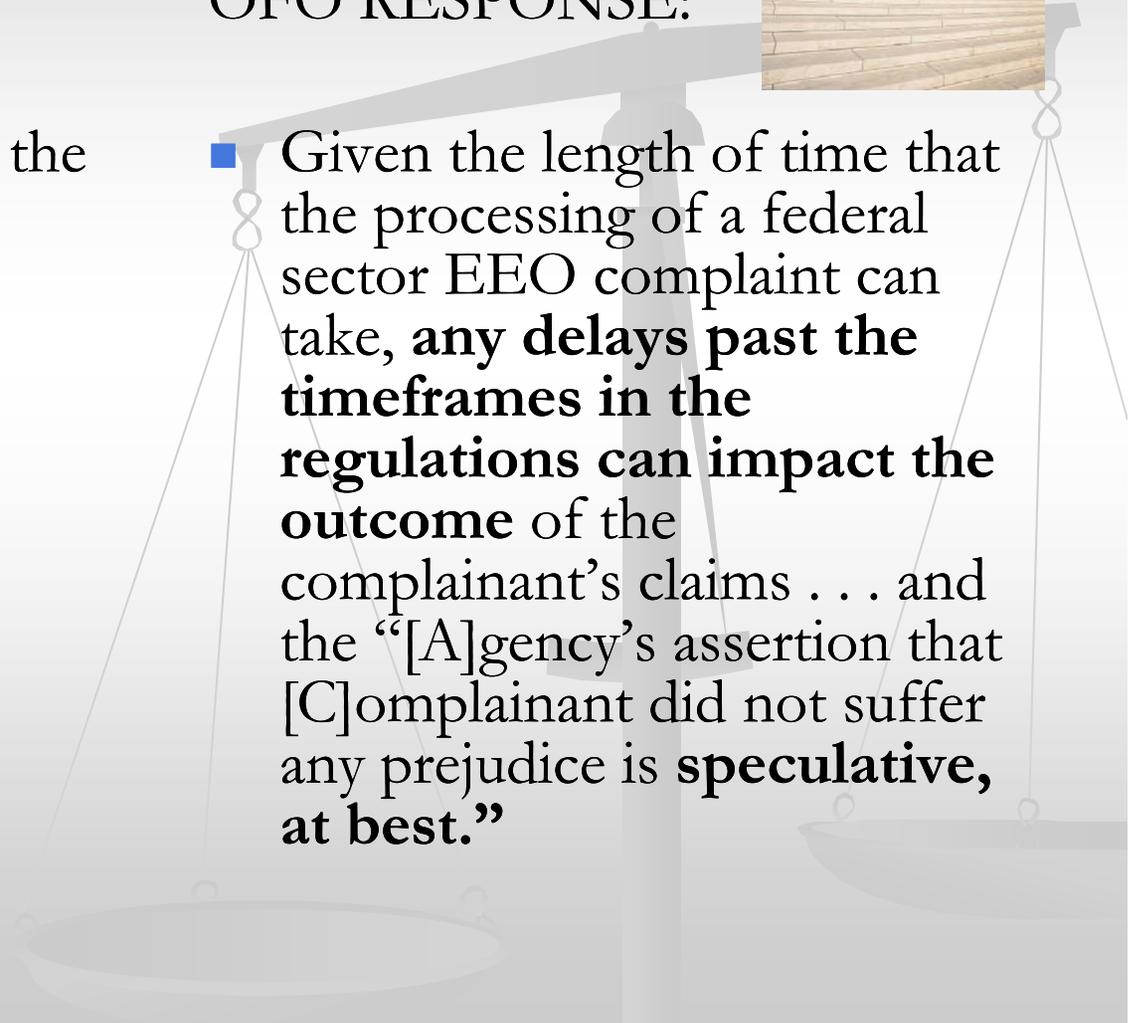
REJECTED DEFENSE:

- There is no prejudice to the CP.



OFO RESPONSE:

- Given the length of time that the processing of a federal sector EEO complaint can take, **any delays past the timeframes in the regulations can impact the outcome** of the complainant's claims . . . and the "[A]gency's assertion that [C]omplainant did not suffer any prejudice is **speculative, at best.**"



Royal v. VA

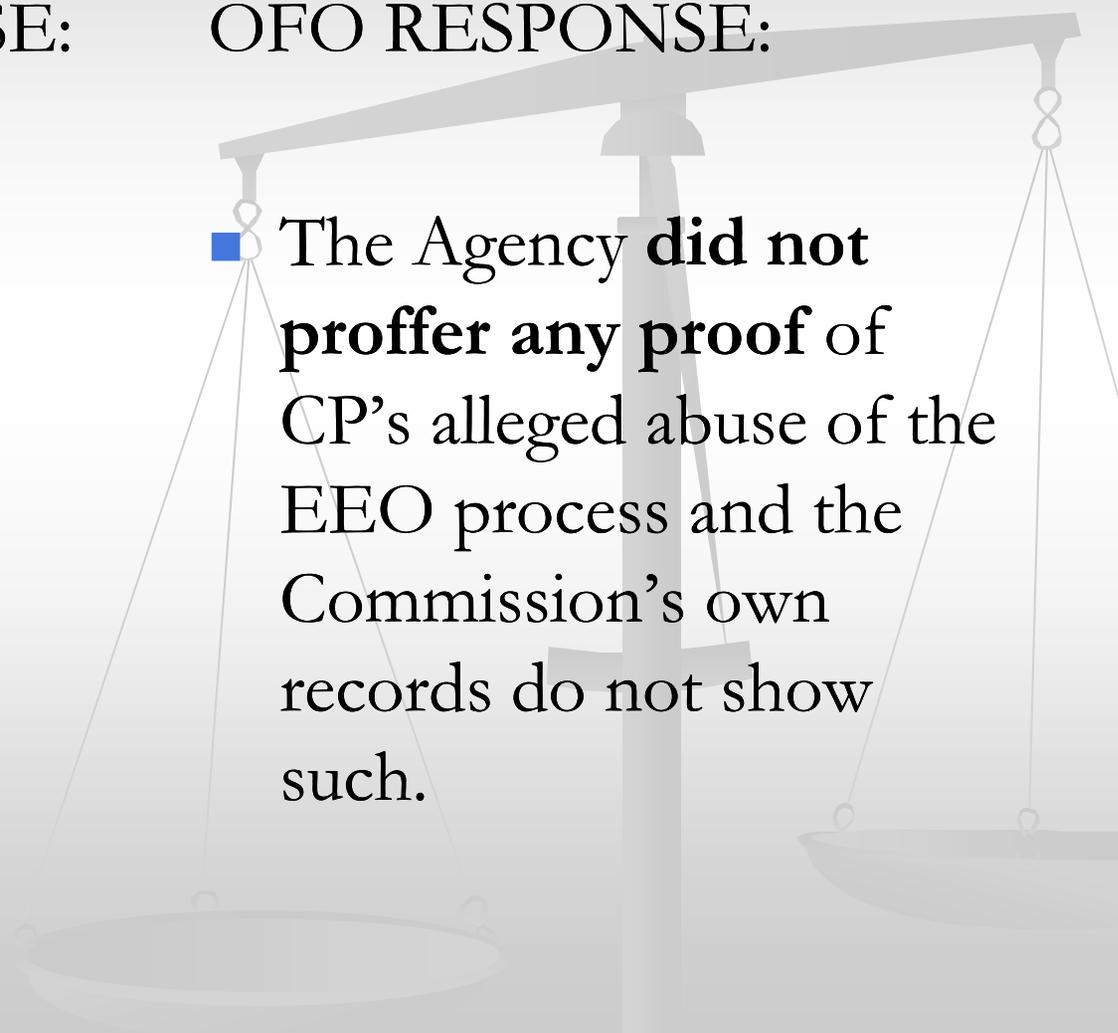
REJECTED DEFENSE:

- CP has a history of abusing the EEO process.



OFO RESPONSE:

- The Agency **did not proffer any proof** of CP's alleged abuse of the EEO process and the Commission's own records do not show such.



Royal v. VA

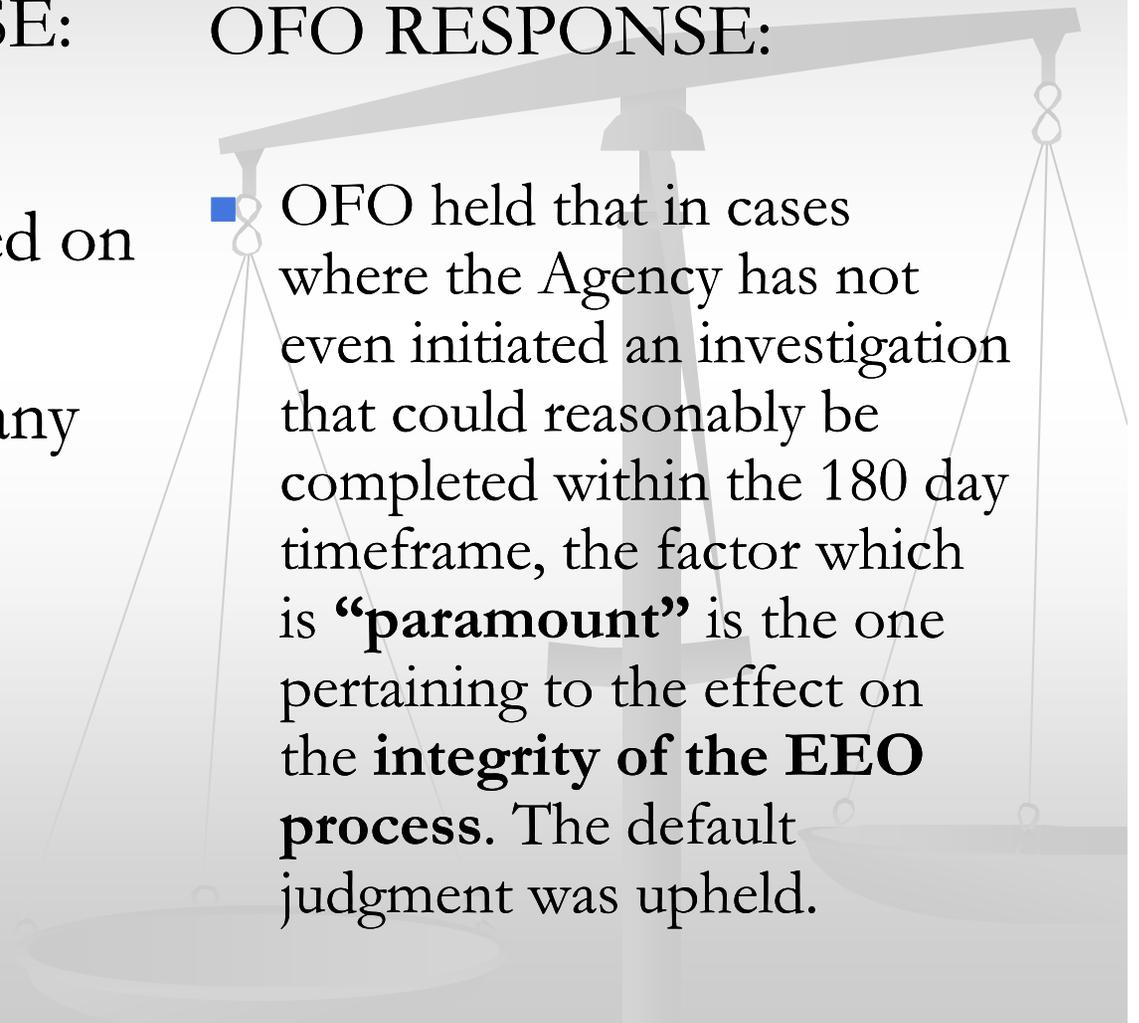
REJECTED DEFENSE:

- The sanction imposed on the Agency is disproportionate to any harm caused by the delay.



OFO RESPONSE:

- OFO held that in cases where the Agency has not even initiated an investigation that could reasonably be completed within the 180 day timeframe, the factor which is “**paramount**” is the one pertaining to the effect on the **integrity of the EEO process**. The default judgment was upheld.



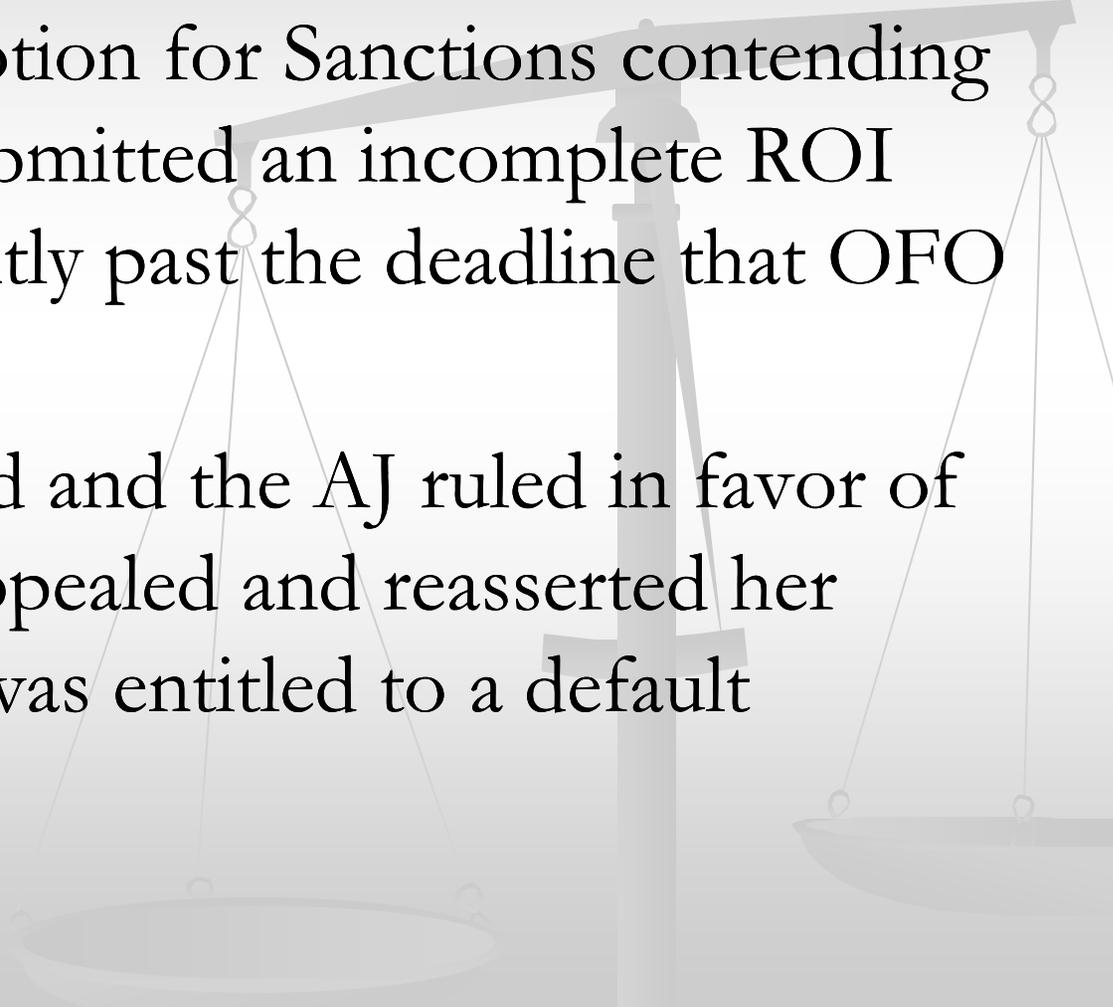
Royal v. VA

OFO RESPONSE explained:

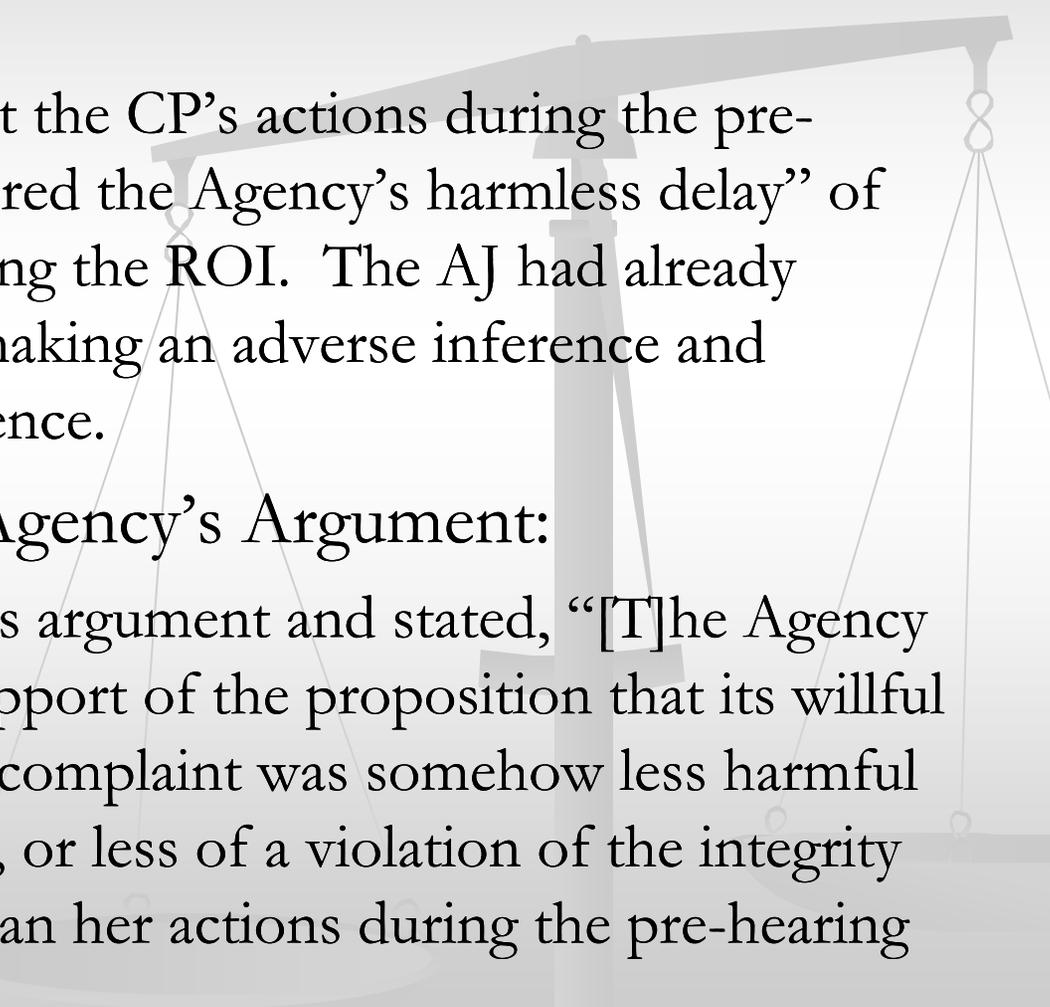
- **Factors** pertinent to tailoring a sanction, or determining whether a sanction is warranted, **include:**
- (a) the extent and nature of the non-compliance, including the justification presented by the non-complying party;
- (b) the prejudicial effect of the non-compliance on the opposing party;
- (c) the consequences resulting from the delay in justice, if any; and
- **(d) the effect on the integrity of the EEO process.**



Montes-Rodriguez v. USDA, EEOC Appeal No. 0120080282 (Jan. 12, 2012), req. for recon. denied, EEOC Request No. 0520120295 (Dec. 20, 2012).

- The CP filed a Motion for Sanctions contending the agency had submitted an incomplete ROI that was significantly past the deadline that OFO had ordered.
 - A hearing was held and the AJ ruled in favor of the agency. CP appealed and reasserted her position that she was entitled to a default judgment.
- 

Montes-Rodriguez v. USDA



The Agency's Argument:

- The agency claimed that the CP's actions during the pre-hearing process "tempered the Agency's harmless delay" of completing and providing the ROI. The AJ had already sanctioned the CP by making an adverse inference and precluding certain evidence.

OFO's Response to the Agency's Argument:

- The EEOC rejected this argument and stated, "[T]he Agency cited no authority in support of the proposition that its willful delay in processing the complaint was somehow less harmful to Complainant's cause, or less of a violation of the integrity of the EEO process, than her actions during the pre-hearing process."

Montes-Rodriguez v. USDA

Facts supporting the issuance of sanctions:

- The Agency did not initiate the investigation until 202 days after the EEOC's decision became final even though it was supposed to complete the investigation within 150 days.
- The Agency provided the ROI 299 days after the EEOC's decision became final.
- Although the agency had two opportunities to explain its delay, the EEOC found that it “never provided documentation or an explanation specifically addressing its delay.”

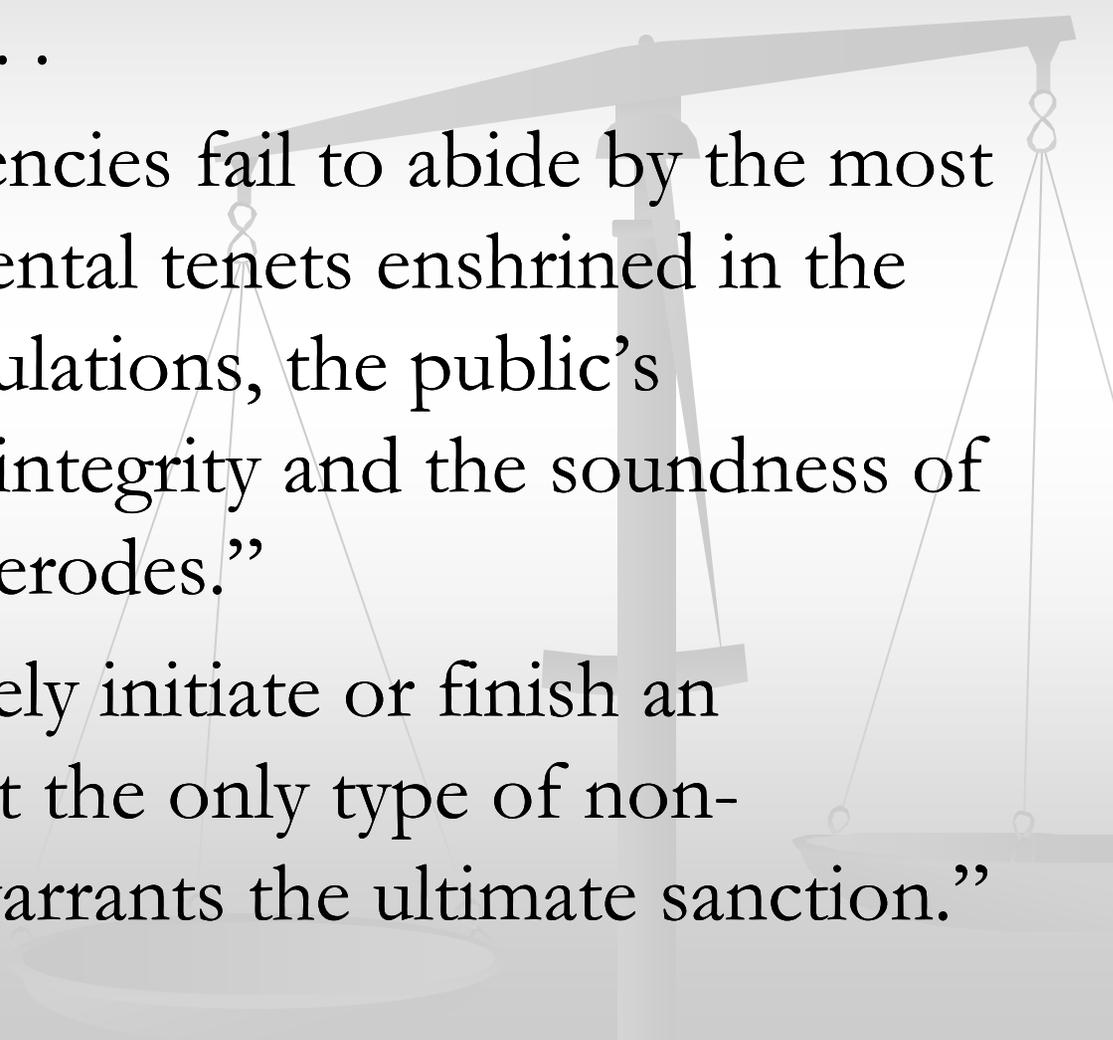
Montes-Rodriguez v. USDA

- The Commission ruled that the AJ erred in denying the CP's Motion for Sanctions when the agency failed to comply with OFO's Order to complete an investigation within 150 days.
- The Commission issued default judgment as a sanction against the agency for its failure to comply.
- The CP did not establish a prima facie case of discrimination, thus, reinstatement and back pay were not appropriate. However, the Commission stated this did not prevent her from being awarded other remedies and remanded the case to the Hearings Unit for a determination on compensatory damages and attorney's fees.

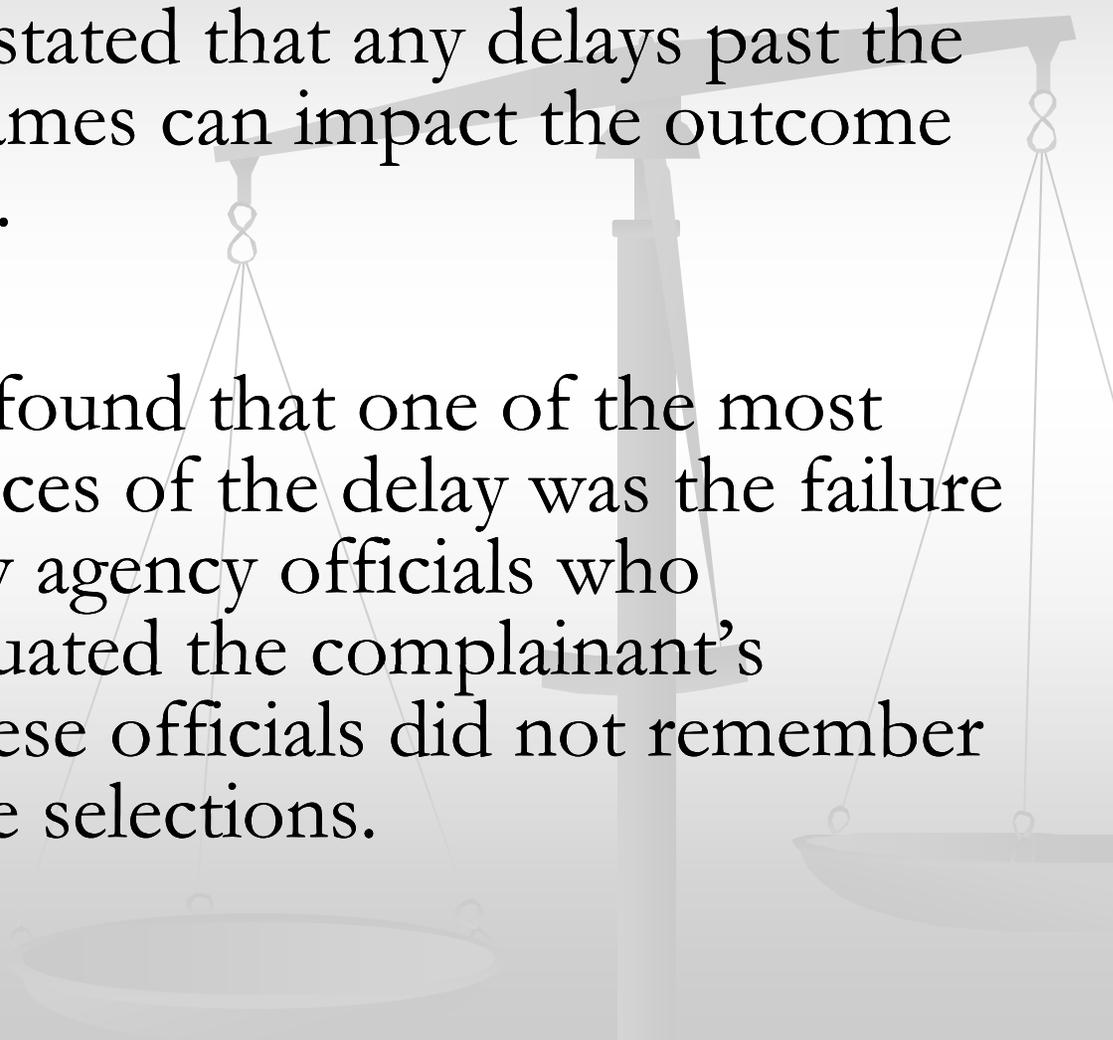
Adkins v. FDIC, EEOC Appeal No. 0720080052 (Jan. 13, 2012).

- The Commission affirmed the issuance of default judgment against the agency as a sanction when the agency had the ROI in its possession for over two years, but did not timely respond to the AJ's Order to produce the complaint file and provided the CP a copy 862 days late.
- The Commission applied Royal to note that denying an opposing party access to the investigative file is no less harmful and no less a violation of the integrity of the EEO process than a refusal to investigate.

Adkins v. FDIC

- OFO explained. . . .
 - “When federal agencies fail to abide by the most basic and fundamental tenets enshrined in the Commission’s regulations, the public’s confidence in the integrity and the soundness of the EEO process erodes.”
 - “[A] failure to timely initiate or finish an investigation is not the only type of non-compliance that warrants the ultimate sanction.”
- 

Adkins v. FDIC

- The Commission stated that any delays past the regulatory time frames can impact the outcome of the CP's claims.
 - The Commission found that one of the most serious consequences of the delay was the failure to timely interview agency officials who reviewed and evaluated the complainant's applications, as these officials did not remember the specifics of the selections.
- 

Adkins v. FDIC

- For an investigation to be “complete,” the agency must first provide a copy of the ROI to the CP.
- Part of the delay was caused when the agency attempted to unilaterally convert the EEO complaint into a “mixed-case complaint” and the agency issued a mixed-case FAD prior to the AJ’s determination of jurisdiction over the complaint. However, an agency cannot unilaterally deny an AJ’s inherent power to determine his or her own jurisdiction once a CP has requested an EEOC hearing.

Adkins v. FDIC

- An AJ has the authority to issue sanctions, including payment of attorney's fees and costs. A CP does not have to prevail on the merits in order for the AJ to issue sanctions.
- A CP may also be entitled to reasonable attorney's fees incurred in connection **with an appeal** to the extent that such fees pertain to the scope of attorney's fees awarded as a sanction.

Adkins v. FDIC

- Although OFO did not address the question of whether attorney's fees may be awarded as a sanction in a complaint alleging only a violation of the ADEA, it clarified that the AJ did not abuse his discretion in ordering the Agency to pay attorney's fees as a sanction in a proceeding alleging, in part, a Title VII violation.

Agency's Worse Case Scenario – Potential Default Judgment

Damage Control:

- Settle?  Litigate? 
- Argue no prima facie case?
- Argue no inference of discrimination.
- Argue damages. 



Damages in a Default Judgment:

- An AJ needs to decide if there is “**evidence that satisfies the court**” which establishes the CP’s **right to relief**.
- Ask: was the CP able to establish of the elements of a prima facie case?

For example, in Montes-Rodriguez, the CP did not submit any evidence that established an inference of discrimination.

- As an example, in a non-selection case the AJ would need to find the CP is at least minimally qualified for the position at issue before retroactive promotion could be ordered.

In Royal, the CP had scored the second highest after interviews were conducted.

What if there is no ROI whatsoever?

The AJ could:

Take limited testimony from the CP; or

obtain a copy of:

the informal complaint, the EEO Counselor's Report, and the Agency's letter accepting the complaint for investigation and defining the claims.



To determine relief:

The AJ may hold a hearing on damages only.

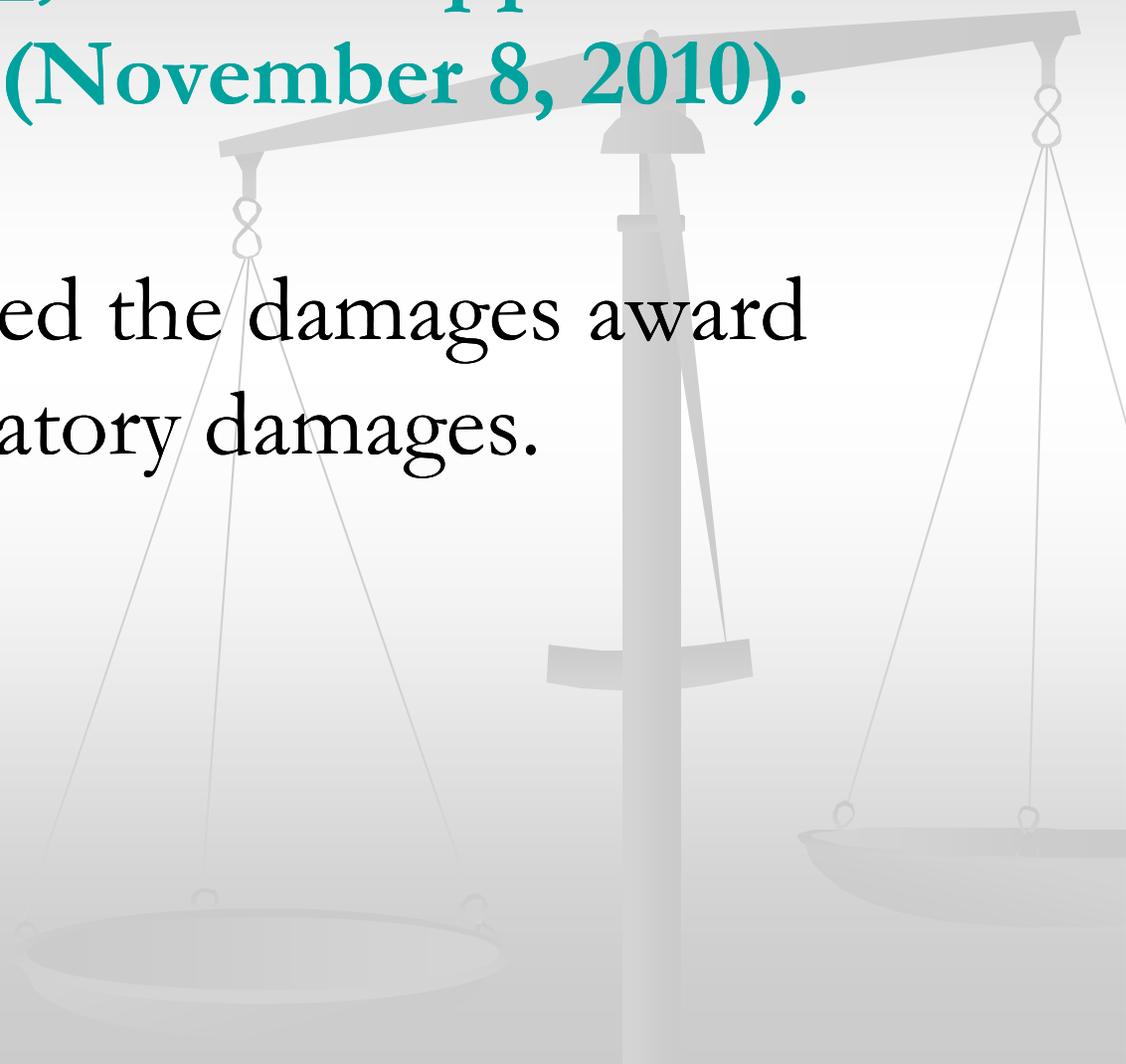
In Royal, OFO determined that the AJ's Order which only provided the CP with **15 days** to provide any evidence on compensatory damages was an **inadequate amount to time** for the CP to submit medical information. Thus, the case was remanded so the CP would be provided with an opportunity to establish her compensatory damages.

A default judgment does not bar an agency from submitting **rebuttal evidence** to a CP's claim for compensatory damages.



**Suit v. USDA, EEOC Appeal No.
0120082737 (November 8, 2010).**

OFO modified the damages award
for compensatory damages.



Suit v. USDA

- AJ dismissed the CP's constructive discharge claim, but **entered default judgment** finding hostile environment, **citing to 29 C.F.R. 1614.109(f)(3)**. Part of the awarded relief included costs and \$5,000 in non-pecuniary compensatory damages for the hostile environment.
- The CP appealed asserting that the **AJ did not provide him with an opportunity to present his damages**. CP sought further sanctions against the Agency and \$300,000 for mental anguish.

Suit v. USDA

- OFO affirmed the default judgment; affirmed the AJ's dismissal of the CP's constructive discharge claim for his failure to adequately delineate the claim; and affirmed the non-monetary relief as sufficient, explaining that punitive damages are not available to federal employees.
- OFO also vacated the final order with regard to the amount of compensatory damages awarded and remanded the case to the AJ to examine the CP's entitlement to compensatory damages. **In the remedy stage, the CP must be provided the opportunity to offer his evidence pertaining to remedies.**



Cox v. SSA, EEOC Appeal No. 0720050055 (December 24, 2009).

The default judgment was entered based upon the AJ's finding that the Agency failed to:

- **adequately develop** the factual record prior to hearing;
- respond to the CP's initial request for admissions and subsequent written **discovery** requests;
- comply with the AJ's Order to **produce 30 witnesses** for depositions (within a week); and
- **timely respond to the AJ's Order to Show Cause** why a default judgment should not be entered against the Agency.

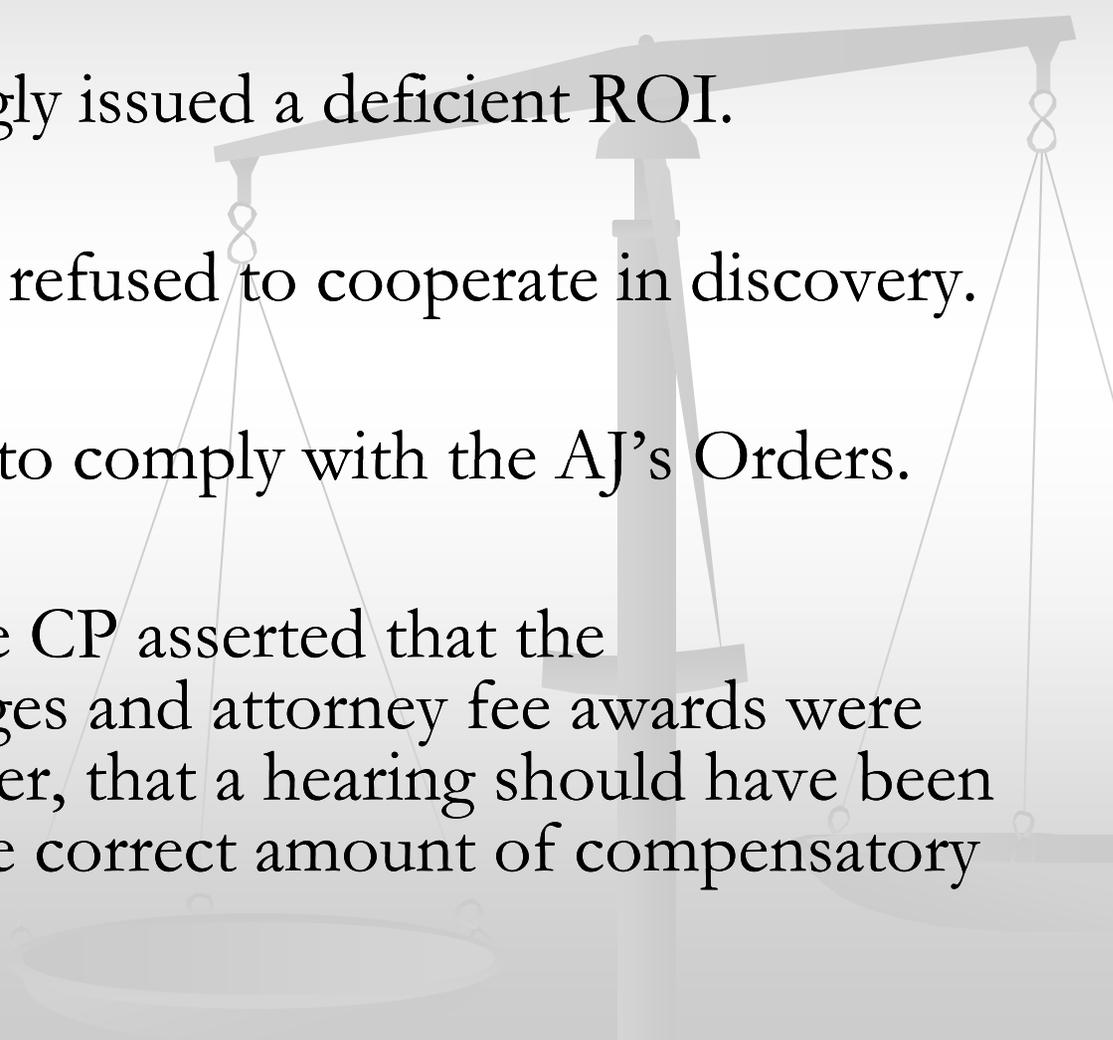
Cox v. SSA

The Agency lost with the below arguments:

- Although the ROI may have been inadequate from which to render a decision, the **hearing process is designed to be an extension of the investigation** and may be used to perfect the record through discovery.
- It attempted to cooperate with the CP and never willfully refused to do so.
- A default judgment was an **excessive sanction**.
- An award for compensatory damages and attorney's fees is **inappropriate given that there was no finding that the CP had actually been discriminated against**.

Cox v. SSA

The CP contended that:

- The Agency knowingly issued a deficient ROI.
 - The Agency willfully refused to cooperate in discovery.
 - The Agency refused to comply with the AJ's Orders.
 - In a cross-appeal, the CP asserted that the compensatory damages and attorney fee awards were inadequate and further, that a hearing should have been held to determine the correct amount of compensatory damages.
- 

Cox v. SSA

X OFO rejected the CP's contention that it was necessary to hold a hearing on the matter.

A hearing on compensatory damages and attorney's fees was not held because the parties had **previously briefed** the AJ on these issues. Instead, OFO upheld the compensatory damages award of \$60,000.

Language Reminding Agencies of Their Obligations



OFO Language

- “The purpose of discovery is to **perfect the record** in the hearing process, but it is **not a substitute** for an appropriate investigation.”
- “**Contracting out** the investigation **does not relieve** an agency of its responsibility.”



OFO Language

- “An agency **cannot create the good cause**” to extend the time frame “to complete discovery **through inaction** at the outset of the discovery period.”
- “The agency, by its inaction, **may not unduly delay the progress an AJ** may wish to make when moving a case toward a hearing. The parties need to abide by the time frames set out in an AJ’s Acknowledgment and Order.”

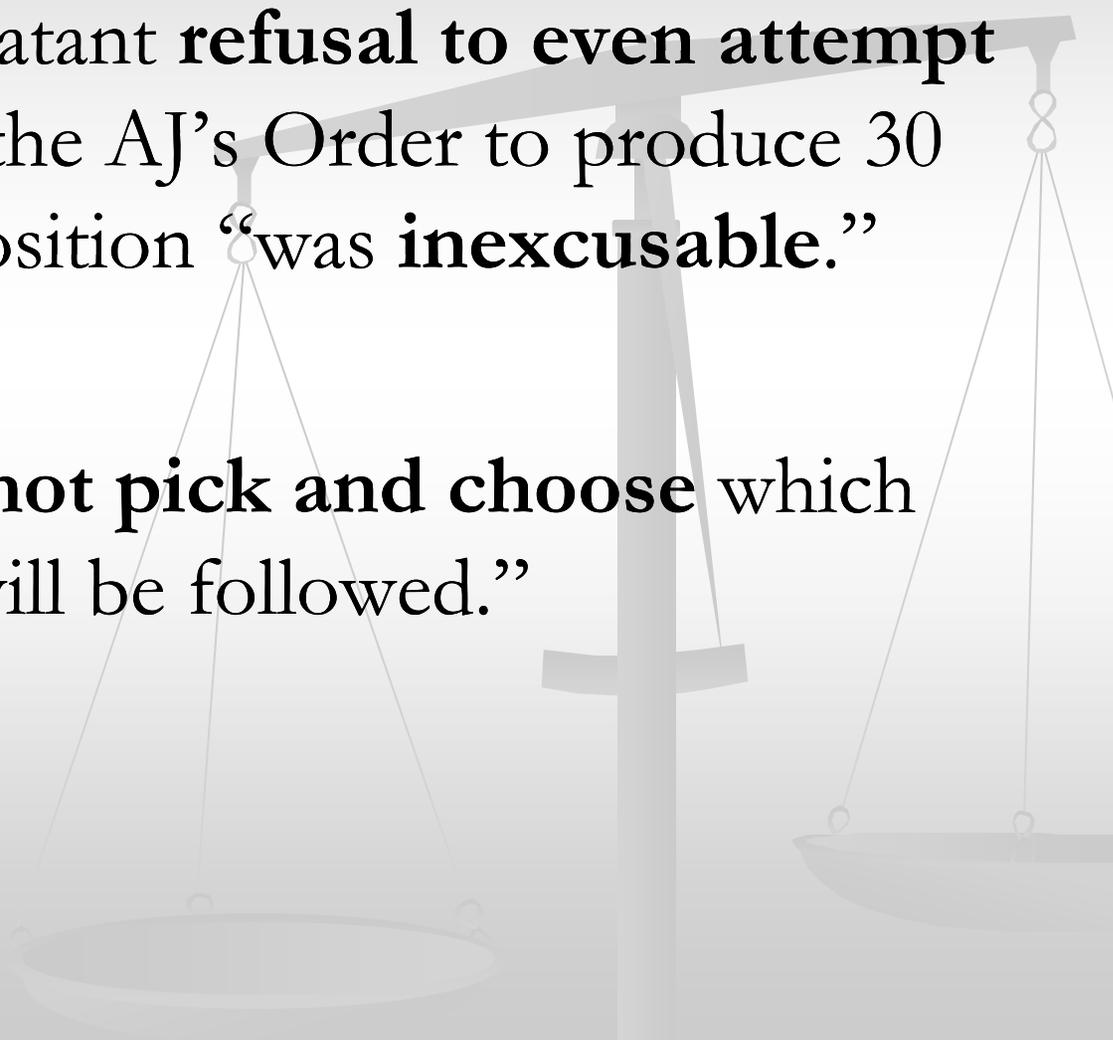


OFO Language

“An agency which treats the deadlines in the hearings process, and the requirement to produce an adequately developed ROI, as optional, based on when its staffing and resources may allow it [to] comply, has a **negative effect on the outcome not only of the immediate case, but also of any other cases under its jurisdiction, as well as those under the jurisdiction of an AJ.** The Commission must insure that agencies, as well as complainants, abide by its regulations and the Orders of its AJs.”



OFO Language



- “[T]he Agency’s blatant **refusal to even attempt to comply**” with the AJ’s Order to produce 30 witnesses for deposition “was **inexcusable.**”
- “An agency **may not pick and choose** which Orders of an AJ will be followed.”

OFO Language

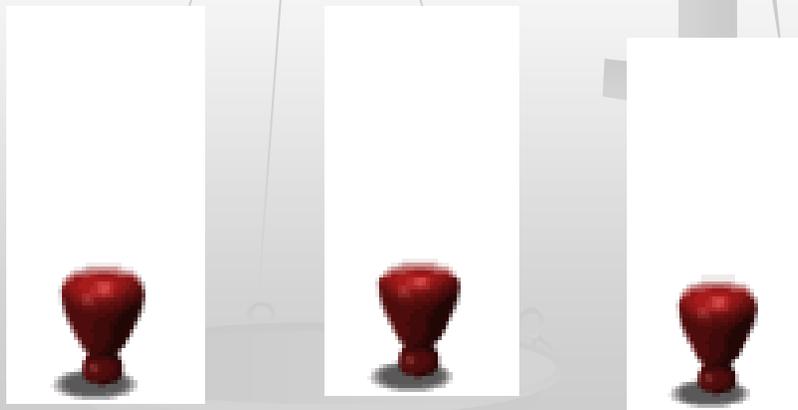
- “Under our decision in Royal v. Department of Veterans Affairs, EEOC Request No. 0520080052 (September 25, 2009), we found that the **fourth factor** in appropriately tailoring a sanction . . . **should not be underestimated.**”

WHAT IS THE FOURTH FACTOR?



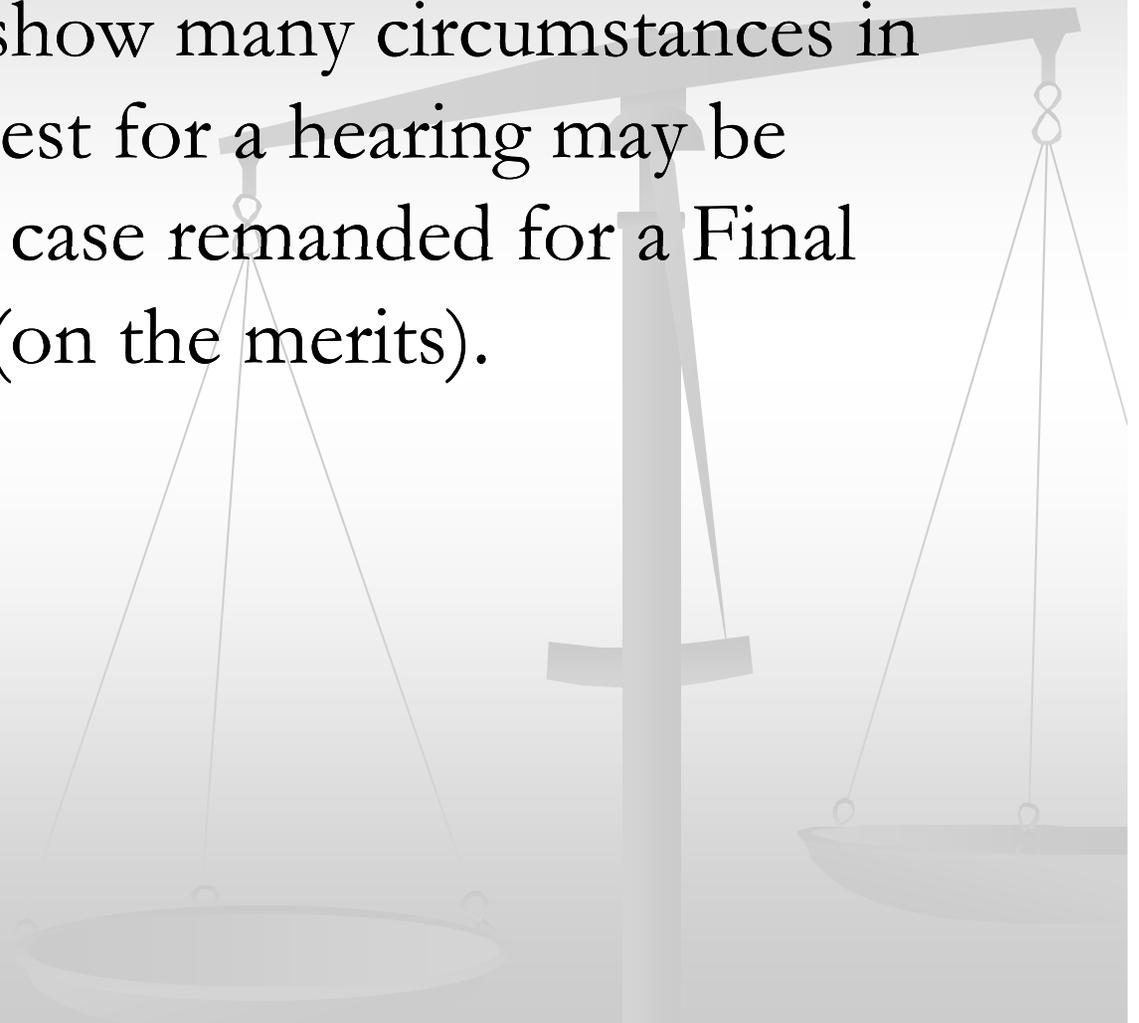
OFO Language

**The effect on the
integrity of the EEO process**



Dismissing a CP's Request for a Hearing

EEOC decisions show many circumstances in which a CP's request for a hearing may be dismissed and the case remanded for a Final Agency Decision (on the merits).

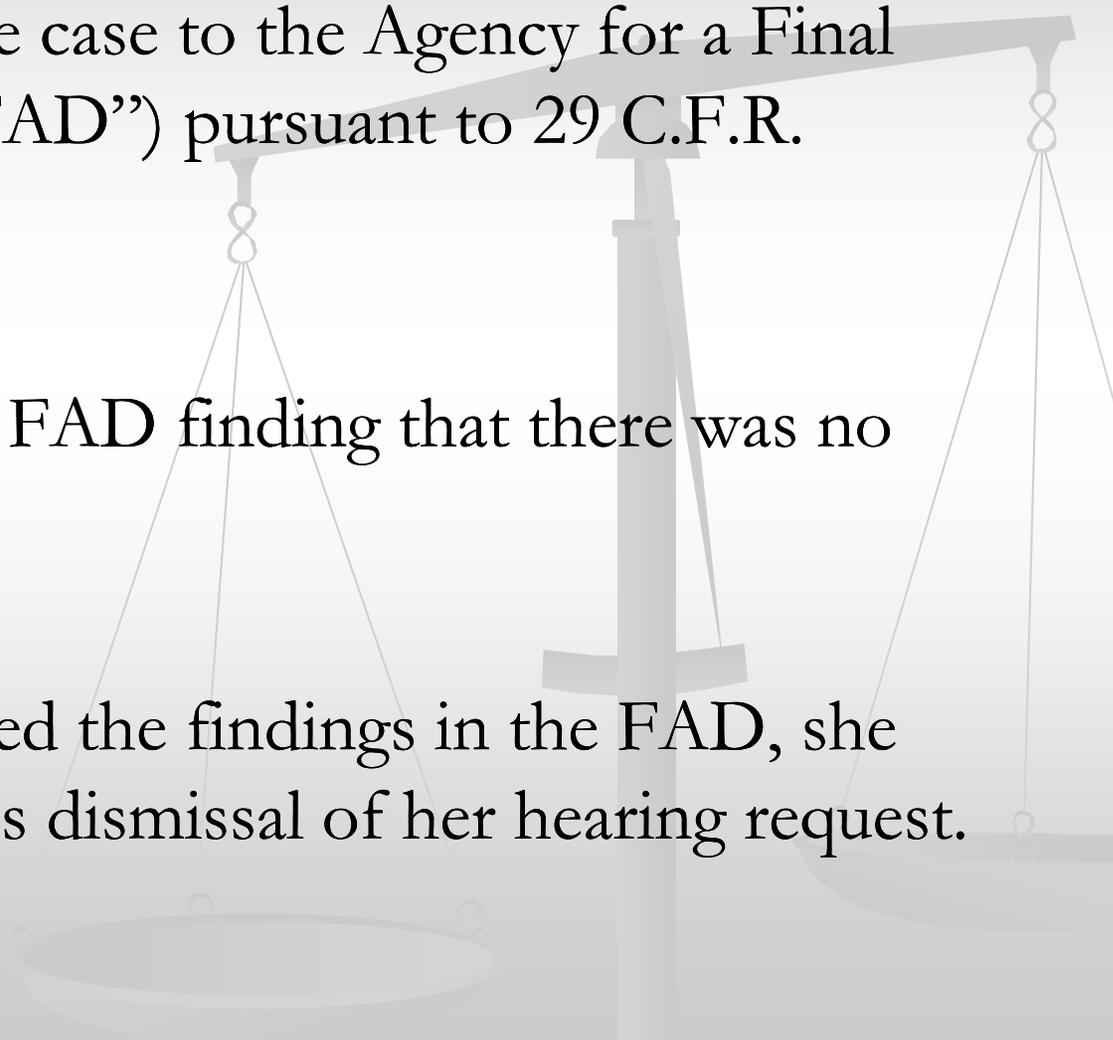


The AJ's Dismissal of the CP's Hearing Request Was Upheld

Council v. VA, EEOC Appeal No. 0120080321
(April 9, 2010).

OFO affirms the AJ's dismissal of CP's request for a hearing as a sanction for the failure to prosecute her case when she failed to timely submit her Pre-Hearing Statement or otherwise proceed with her complaint.

Council v. VA

- The AJ remanded the case to the Agency for a Final Agency Decision (“FAD”) pursuant to 29 C.F.R. 1614.110(b).
 - The Agency issued a FAD finding that there was no discrimination.
 - When the CP appealed the findings in the FAD, she also appealed the AJ’s dismissal of her hearing request.
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Council v. VA

- The CP missed the initial deadline to submit her Pre-Hearing Statement.
- The AJ subsequently granted a request for an extension of time, but this deadline was also missed.
- The Pre-Hearing Conference was previously scheduled for the next day, but a Pre-Hearing Statement was also not submitted by the scheduled date of the Pre-Hearing Conference.
- The AJ dismissed the CP's request for a hearing and noted that the CP also did not provide a reason warranting an extension of time to submit her Pre-Hearing Statement.



Council v. VA



CP argued:

- The sanction was too harsh; and
- that the AJ erred in dismissing her hearing request without first issuing a show cause order or generally providing her with an opportunity to explain why she did not submit a timely Pre-Hearing Statement.

OFO upheld the dismissal:

- The **Acknowledgement and Order** advised the parties that failure to follow Orders may result in sanctions pursuant to **29 C.F.R. 1614.109(f)(3)**.
- CP failed to submit the Pre-Hearing Statement by the 2nd deadline and failed to provide a reason for an extension to submit it by the Pre-Hearing Conference the next day.

The AJ's Dismissal of the CP's Hearing Request Was Upheld

Sonnier v. Dep't of Commerce, EEOC Appeal No. 0120111953 (Nov. 2, 2012).

The EEOC affirmed the decision of an AJ to sanction the complainant by dismissing her hearing request where the CP repeatedly violated the AJ's Orders not to contact agency officials other than the agency's designated attorney regarding her EEO complaint. After receiving these orders from the AJ, the CP contacted the Secretary of the agency (a non-designated representative). The CP also announced her unavailability without a prior request for an extension and "unreasonably characterized a typographical error" in one of the agency's discovery requests as "a means of avoiding discovery."

The AJ's Dismissal of the CP's Hearing Request Was Upheld

Mack v. SSA, EEOC Appeal No. 0120121298 (May 8, 2013).

The EEOC affirmed the AJ's decision to sanction the CP by dismissing his request for a hearing when he failed to provide complete discovery answers even though he was ordered to do so. CP had also failed to respond to the agency's motion to compel and motion to dismiss, and failed to attend a teleconference scheduled by the AJ. While the CP and his attorney claimed they required reasonable accommodations during the EEOC process, they did not make this claim until later in the proceedings, did not submit any additional information to support this claim, and did not indicate what accommodation he needed or how it was related to the hearing process.

The AJ's Dismissal of the CP's Hearing Request Was Upheld

Beavers v. Dep't of the Interior, EEOC Appeal No. 0120110701 (September 6, 2012).

The EEOC affirmed the AJ's dismissal of the CP's hearing request as a sanction for her conduct in inappropriately obtaining and utilizing personal identifying information of other employees in her case. The case was remanded to the agency to issue a Final Agency Decision on the merits and reversed the agency's FAD which **failed to provide any analysis** and merely agreed with the AJ's dismissal of the hearing request.

The AJ's Dismissal of the CP's Hearing Request Was Upheld

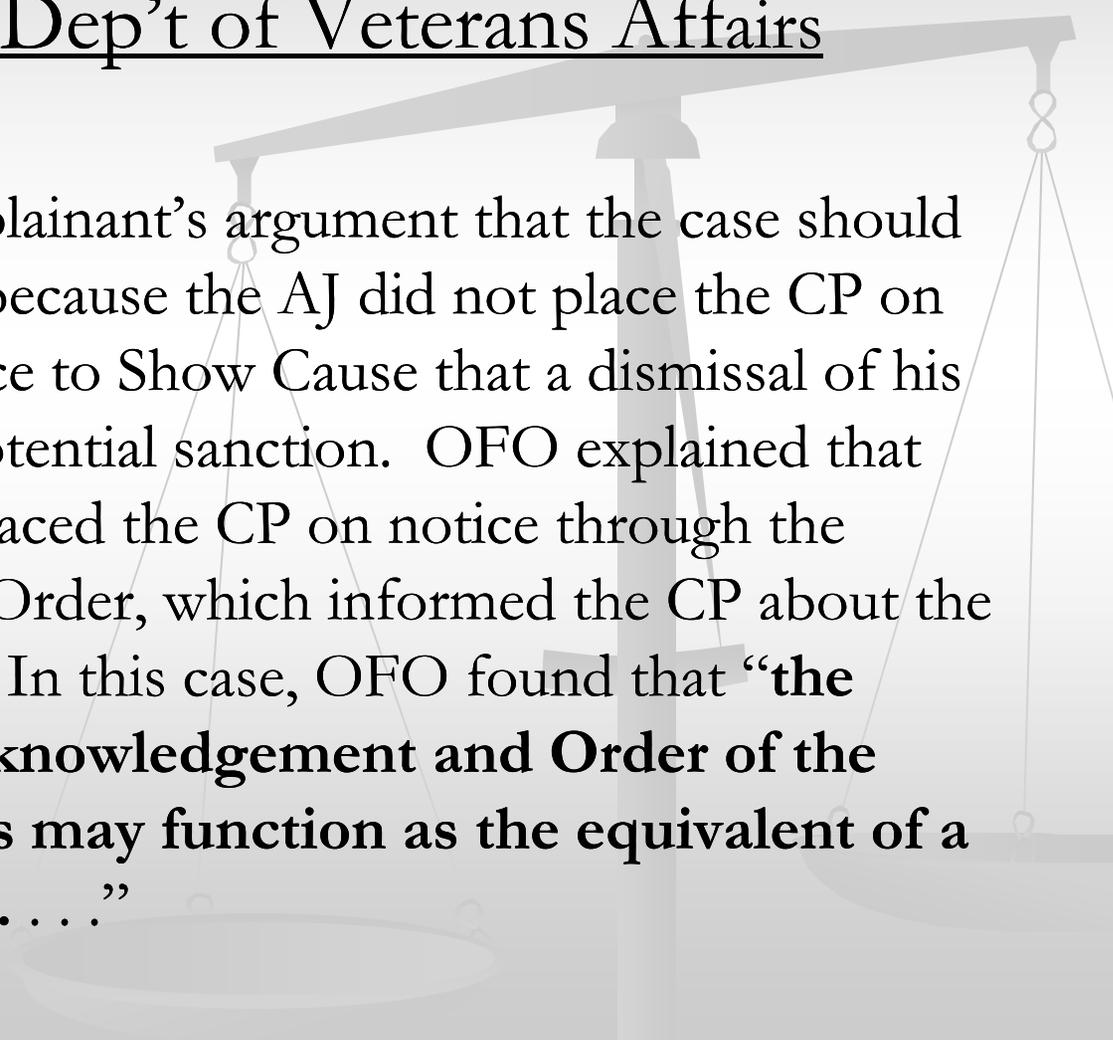
Campbell v. Dep't of Veterans Affairs, EEOC Appeal No. 0120112704 (October 21, 2011); req. for recon. denied, EEOC Request No. 0520120169 (May 30, 2012).

The EEOC affirmed the AJ's dismissal of the CP's hearing request as a sanction for his failure to respond to the Agency's written discovery requests. In this case the agency filed a motion to compel. Subsequently, the agency filed a motion to dismiss, or, in the alternative for sanctions. The CP did not respond to either motion.

The AJ's Dismissal of the CP's Hearing Request Was Upheld

Campbell v. Dep't of Veterans Affairs

OFO rejected the Complainant's argument that the case should be remanded to the AJ because the AJ did not place the CP on notice by issuing a Notice to Show Cause that a dismissal of his hearing request was a potential sanction. OFO explained that the AJ had previously placed the CP on notice through the Acknowledgement and Order, which informed the CP about the possibility of sanctions. In this case, OFO found that **“the notice given in the Acknowledgement and Order of the possibility of sanctions may function as the equivalent of a Notice to Show Cause. . . .”**



When a CP's Request for a Hearing is Dismissed, the Agency Must Issue a Decision on the Merits.

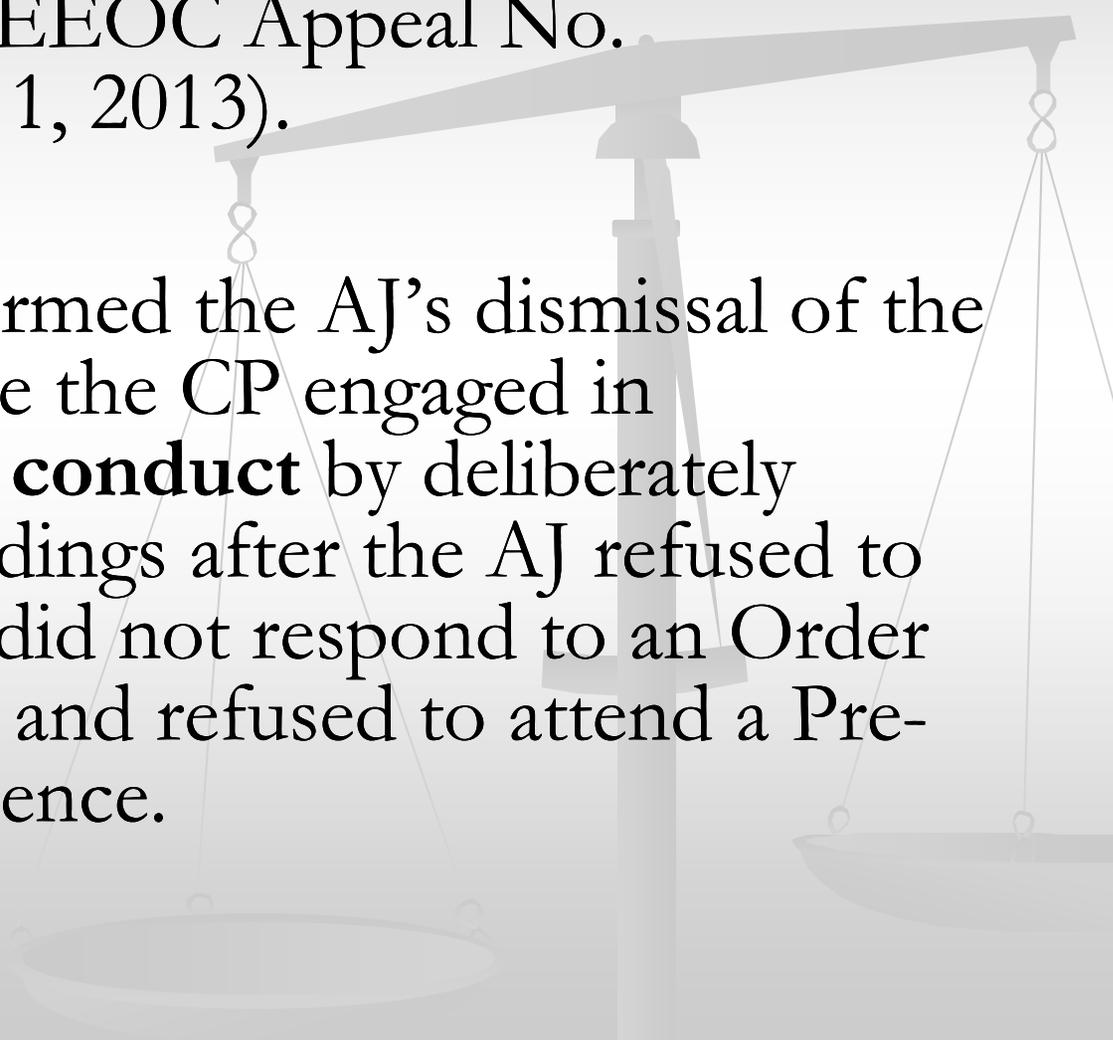
Alcindor v. Dep't of Transportation, EEOC
Appeal No. 0120130557 (May 3, 2013).

The hearing request was properly dismissed, but it was error by the agency not to issue a Final Agency **Decision on the merits** based upon the existing record given that the agency had conducted a full investigation on the complaint.

The AJ's Dismissal of the Complaint in its Entirety Was Upheld.

Muller v. USDA, EEOC Appeal No.
0120101015 (Feb. 1, 2013).

The EEOC affirmed the AJ's dismissal of the complaint where the CP engaged in **contumacious conduct** by deliberately delaying proceedings after the AJ refused to recuse himself, did not respond to an Order to Show Cause, and refused to attend a Pre-Hearing Conference.



The AJ's Dismissal of the Complaint in its Entirety Was Upheld.

Schoenrogge v. Dep't of Justice, EEOC Appeal No. 0120130893 (May 20, 2013).

The EEOC affirmed the AJ's dismissal of the complaint where the CP repeatedly failed to comply with discovery orders and also engaged in the "serious abuse of the process." **Contumacious conduct** included: numerous inappropriate voice messages left for the AJ and the Agency, requiring the intervention of the local police. Messages were left for the AJ by the CP wherein the CP spoke at length regarding **substantive matters** regarding his complaint and made **lewd and vulgar** statements about agency officials. The AJ was advised that the agency had received about 50 minutes worth of similar messages from the CP. Federal Protective Services ("FPS") had received about 100 calls from the CP.

The AJ's Dismissal of the Complaint in its Entirety Was Not Upheld.

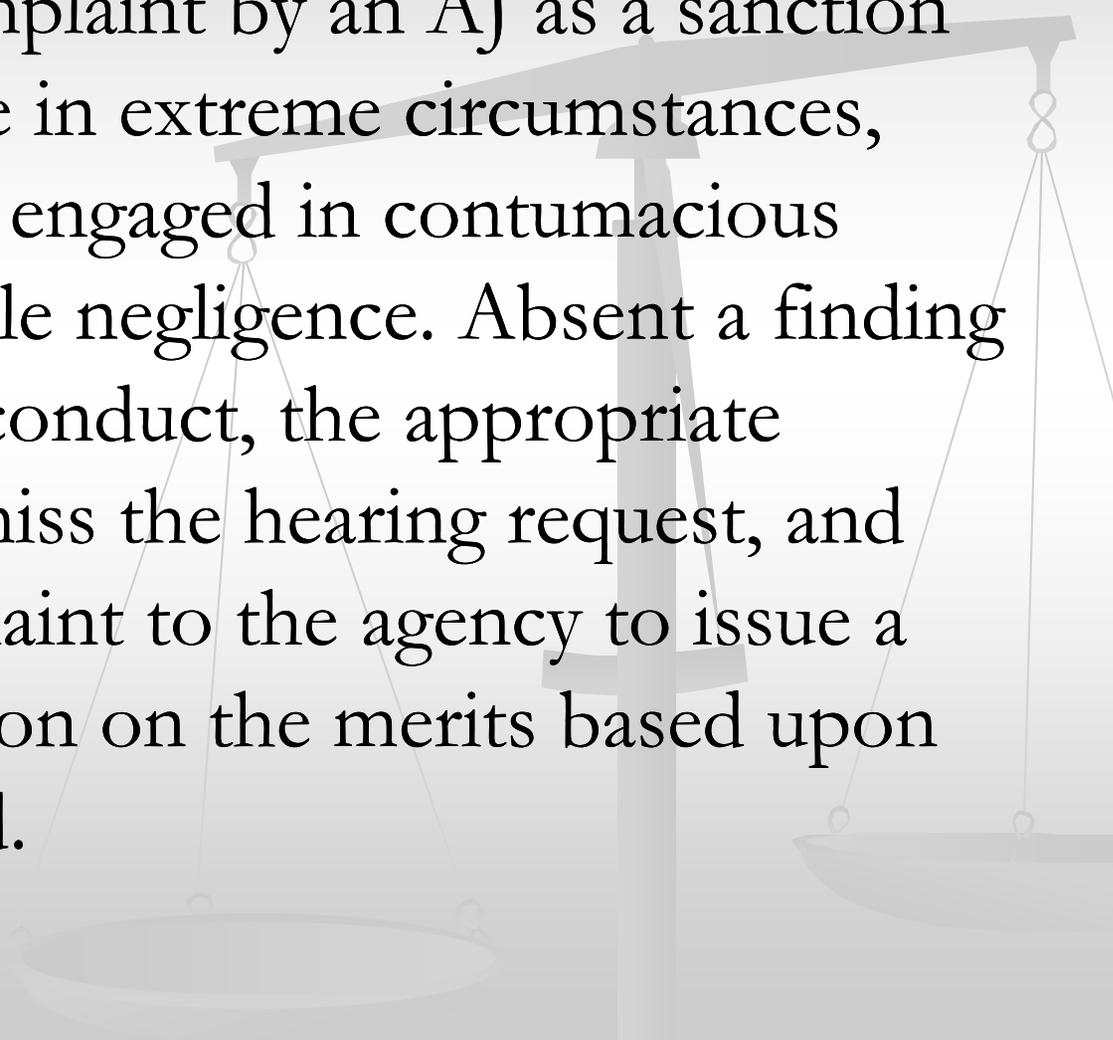
Worley v. Dep't of Veterans Affairs, EEOC Appeal No. 0120113908 (Jan. 30, 2012).

The AJ's dismissed the entire complaint on the grounds that the CP had failed to prosecute her claims when she did not respond adequately to the AJ's Orders and the agency's discovery requests and/or settlement inquiries. The Agency issued a Final Agency Decision adopting the AJ's dismissal.

OFO reversed the agency's FAD and remanded the complaint for a FAD on the merits.

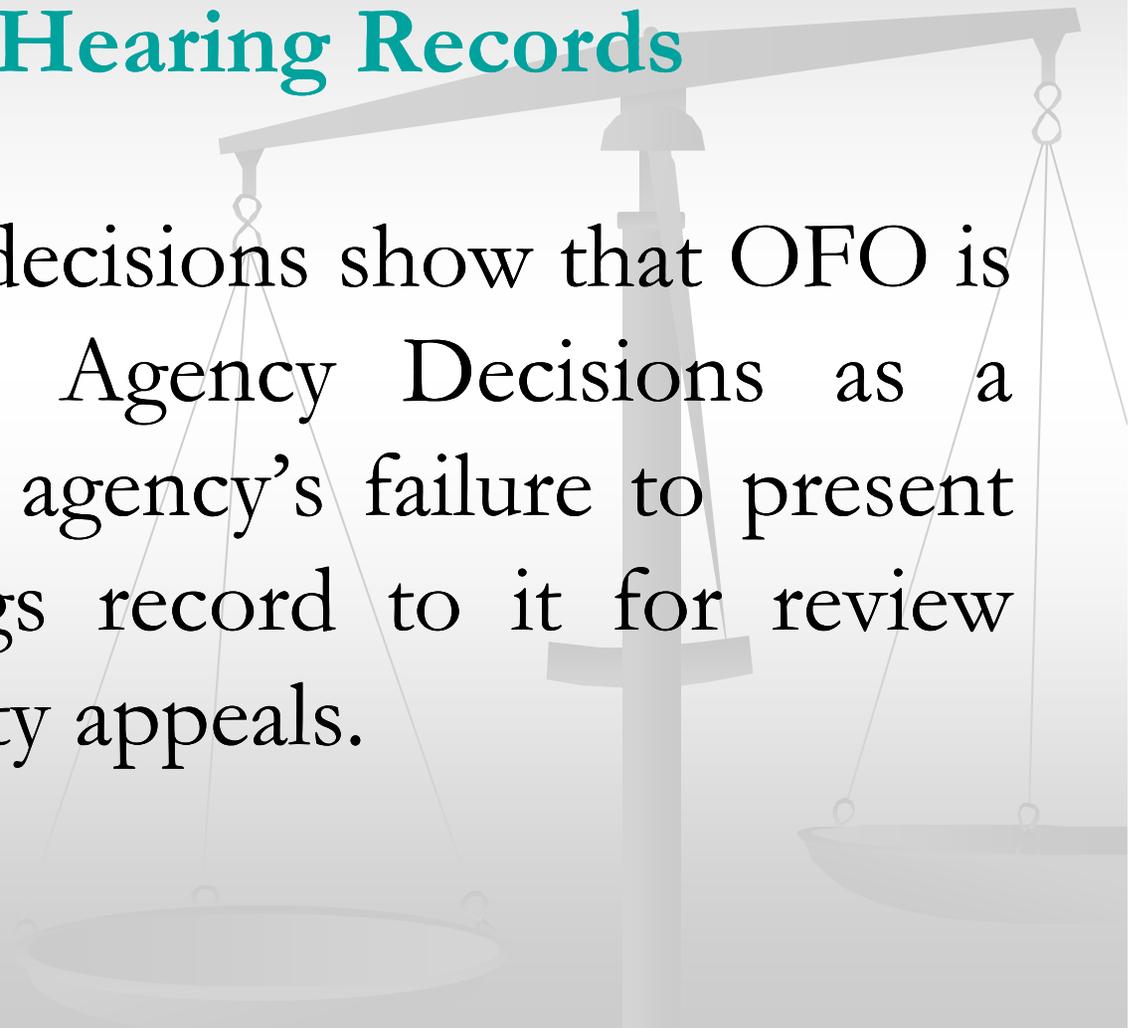
Contumacious Conduct

Dismissal of a complaint by an AJ as a sanction is only appropriate in extreme circumstances, where the CP had engaged in contumacious conduct, not simple negligence. Absent a finding of contumacious conduct, the appropriate sanction is to dismiss the hearing request, and remand the complaint to the agency to issue a final agency decision on the merits based upon the existing record.



The Trend Towards Reversing FADs When Agencies Fail to Preserve and Provide Hearing Records

Recent EEOC decisions show that OFO is reversing Final Agency Decisions as a sanction for an agency's failure to present the full hearings record to it for review when either party appeals.



Sanctions Issued Against the Agency After a Hearing

Klimek v. Dep't of Agriculture, EEOC Appeal
No. 0720120026 (April 30, 2013).

The Agency appealed an AJ's finding of discrimination and OFO requested the Agency to provide the complete record for review. The Agency made two submissions, but neither submission contained the documents generated during the hearing process or the hearing transcript.

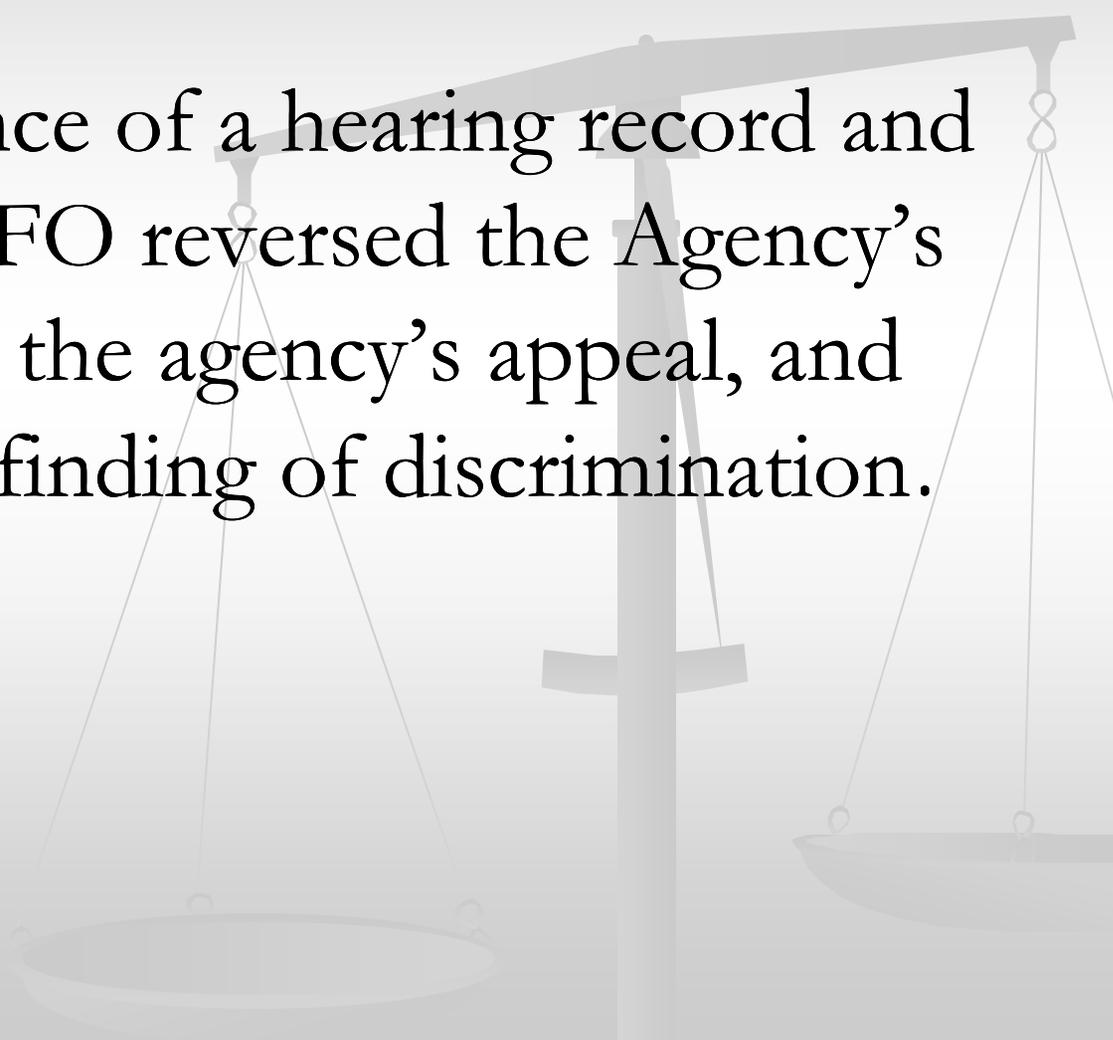
OFO issued a Notice to Show Cause Why Sanctions Should Not Be Imposed. The Agency failed to submit the documents or to show good cause for not doing so.

Klimek v. Dep't of Agriculture

- OFO found that sanctions were warranted.
- Sanctions serve a “dual purpose”: (1) to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future; and (2) to be corrective and provide equitable remedies to the opposing party.
- EEO-MD-110, Chapter 9, IV (F): Agencies should develop internal procedures that will ensure the prompt submission of the complaint files upon notice of an appeal.

Klimek v. Dep't of Agriculture

Given the absence of a hearing record and as a sanction, OFO reversed the Agency's FAD, dismissed the agency's appeal, and upheld the AJ's finding of discrimination.

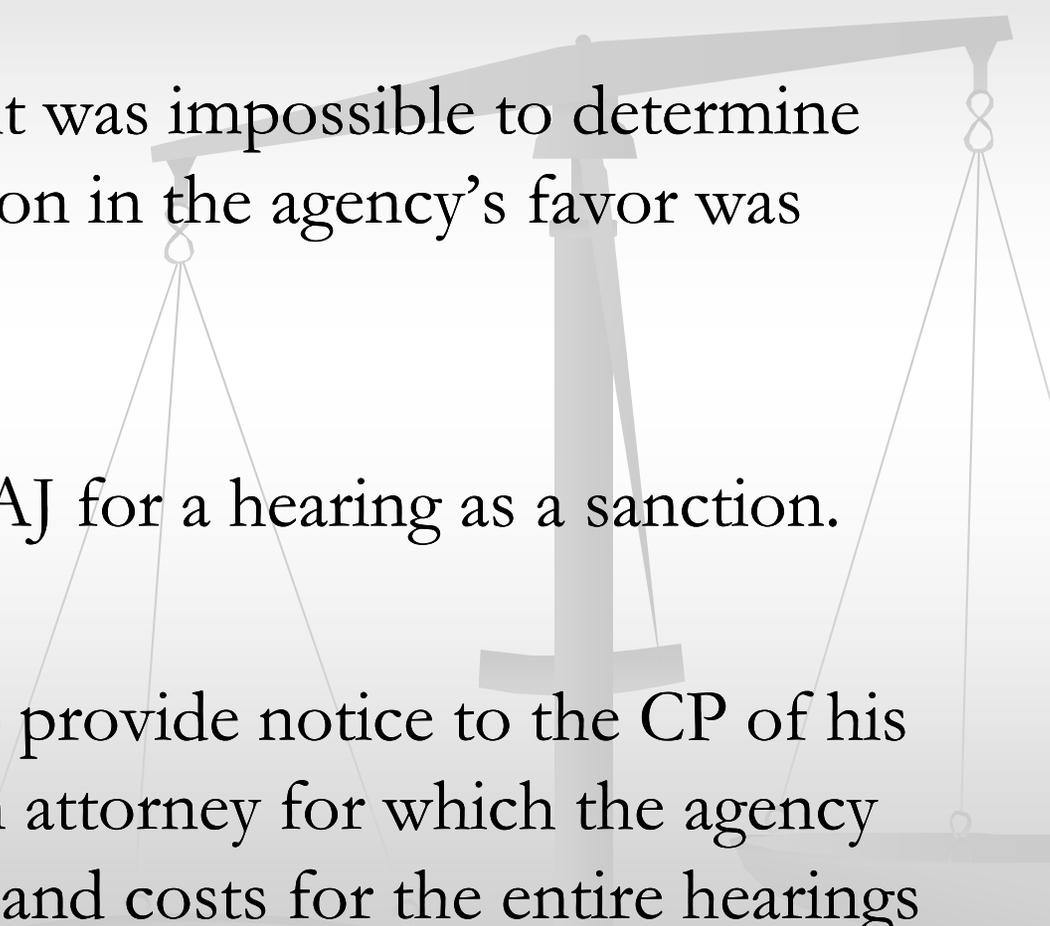


Sanctions Issued Against the Agency After a Hearing

Chattopadhyay v. Dep't of Health and Human Services (National Institutes of Health), EEOC Appeal No. 0120081177 (September 28, 2012), req. for recon. denied, EEOC Request No. 0520130097 (April 2, 2013).

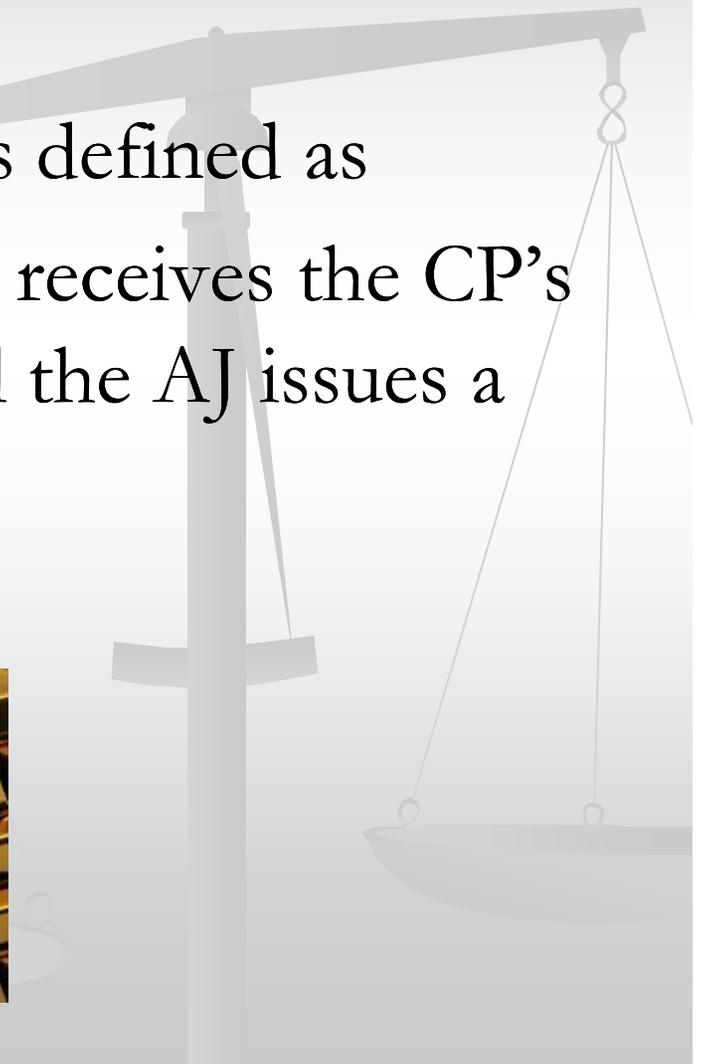
After a hearing the AJ ruled in favor of the agency and the CP appealed. The agency failed to submit a complete record for review and did not respond to OFO's Notice to Show Cause. Missing: hearing transcripts, AJ Orders, motions, & part of the complaint file.

Chattopadhyay v. Health and Human Services (National Institutes of Health)

- OFO determined that it was impossible to determine whether the AJ's decision in the agency's favor was appropriately issued.
 - Case remanded to the AJ for a hearing as a sanction.
 - Agency also ordered to provide notice to the CP of his entitlement to retain an attorney for which the agency must pay attorney fees and costs for the entire hearings process, irrespective of the outcome of the case.
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Chattopadhyay v. Health and Human Services (National Institutes of Health)

The entire hearings process was defined as commencing as soon as the AJ receives the CP's file and does not conclude until the AJ issues a decision on the complaint.



By the Way...Did You Know?

OFO may issue a Notice to the head of any federal agency to Show Cause and may request the head or a representative to appear before the Commission with adequate evidence of compliance or with compelling reasons for non-compliance.

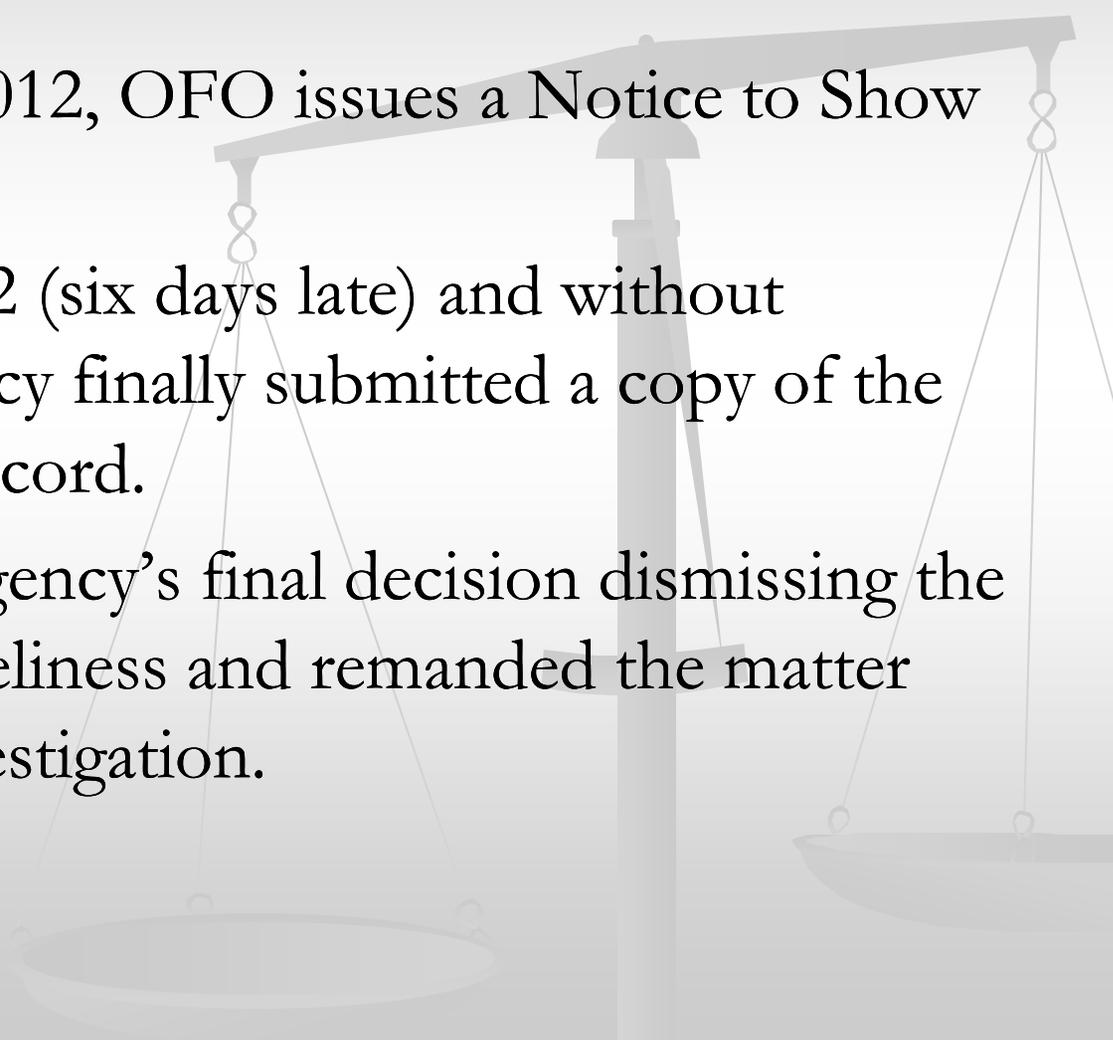
29 C.F.R 1614.503(e)

Sanctions Issued Against the Agency After a Dismissal by the Agency

Barker v. Dep't of Health and Human Services
(Indian Health Service), EEOC Appeal No.
0120110385 (October 15, 2012).

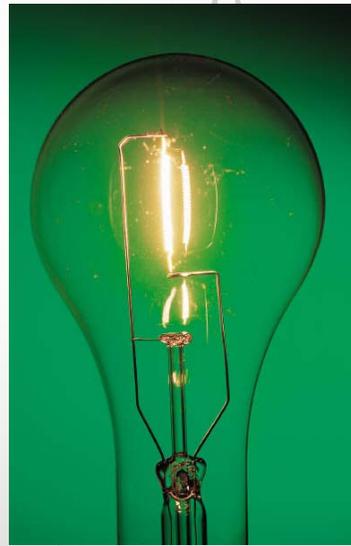
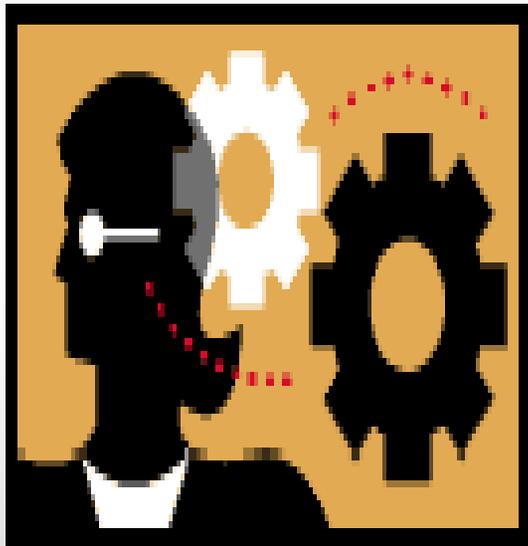
CP appeals a decision. On Nov. 8, 2010, OFO notified the agency that it had 30 days to provide the “complaint file.” The Agency was placed on notice that failure to comply could result in an adverse inference. By subsequent written communication, OFO again requested the complaint file and warned the agency that failure to comply could result in the issuance of sanctions.

Barker v. Dep't of Health and Human Services (Indian Health Service)

- On September 10, 2012, OFO issues a Notice to Show Cause.
 - On October 11, 2012 (six days late) and without explanation the agency finally submitted a copy of the 82 page complaint record.
 - OFO reversed the agency's final decision dismissing the complaint for untimeliness and remanded the matter for an expedited investigation.
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Practical Tips

What to do . . .



Offensive Moves

- Having a Default Judgment Entered Against the Agency and/or Obtaining Attorney Fees and Costs



- Having a CP's Request for a Hearing Dismissed or in Limited Circumstances, Having the CP's Complaint Dismissed in its Entirety

A “delayed” investigation can still result in a default judgment.

- After a formal discrimination complaint has been filed the Agency should assign the case to be investigated as soon as possible.
- The Agency should have **already trained** its managers not to “stonewall” an EEO investigator. Document any CP that refuses to cooperate during an investigation. Equally important, maintain and timely submit the complaint file and hearings record.





- The investigation should be completed within **180 days** after the formal discrimination complaint has been filed;
- or where a complaint was amended, within the **earlier of 180 days** after the last amendment to the complaint or **360 days** after the filing of the original complaint;
- within the time period contained in an Order from the Office of Federal Operations on appeal from a dismissal; or
- within in any period of extension provided for in Section 1614.108(e) of the Code of Federal Regulations. (Section 1614.108(e) allows for the CP and the Agency to voluntarily extend the time period, by written agreement, for not more than an additional **90 days**.)



Even if the CP waits for the investigation to be concluded and does not request a hearing until he receives a ROI, the AJ may still issue an Order to Show Cause pertaining to the untimely investigation. If there is delay, seek a 90 day written extension from the CP.

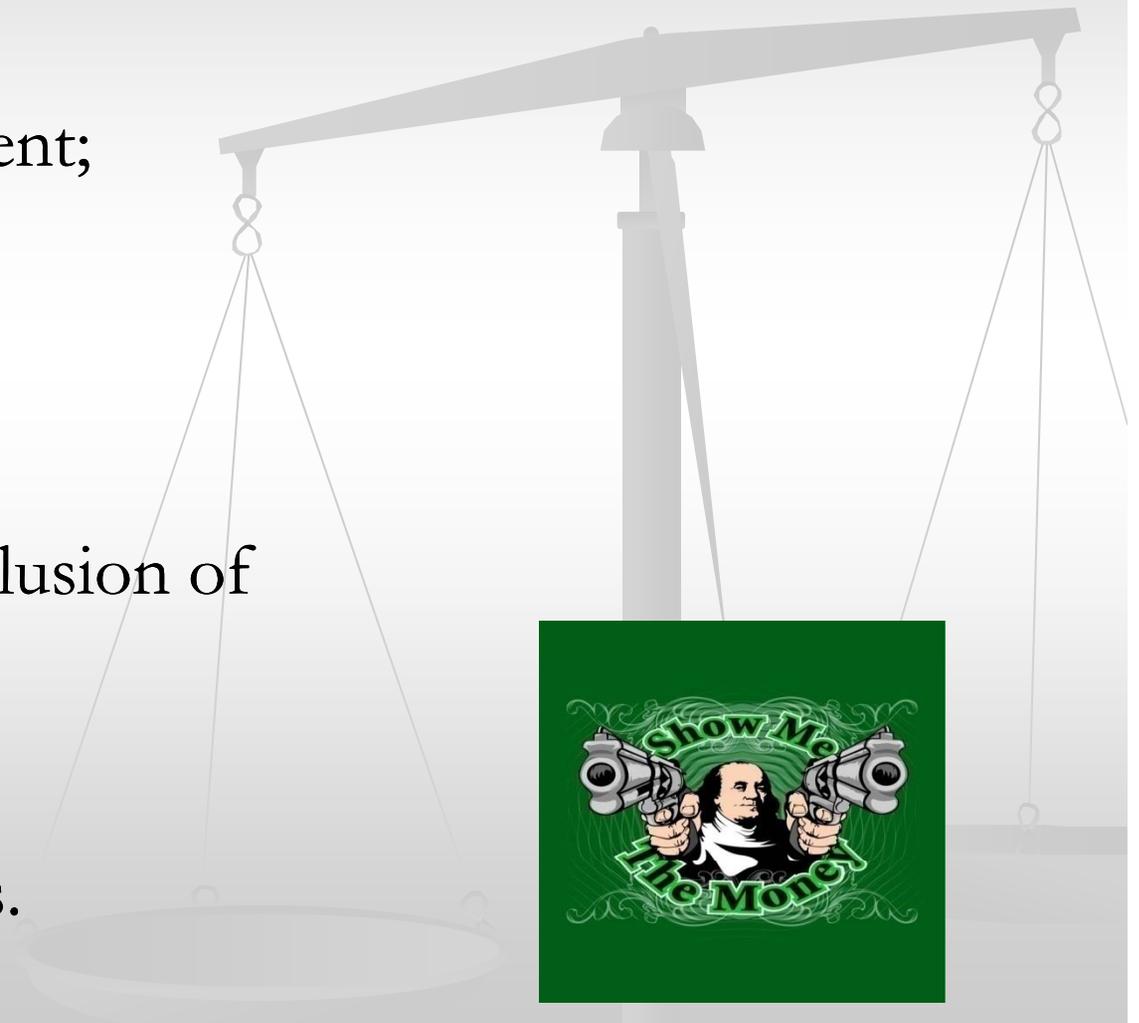
- When an Order for a ROI is received, submit what the Agency has even if it is not complete and even if the agency plans to contest jurisdiction; otherwise, the Agency will be in violation of the Order. When a hearing request is received, submit what the Agency has even if it is not complete and even if the agency plans to contest jurisdiction; otherwise, the Agency will be in violation of the CFR.

- If part of the delay was attributable to the CP, then the Agency should set forth **specifically** how the CP contributed to the delay and the attempts made by the Agency to comply with the timeframes. Do damage control if the agency was still untimely when accounting for any delay by the CP.



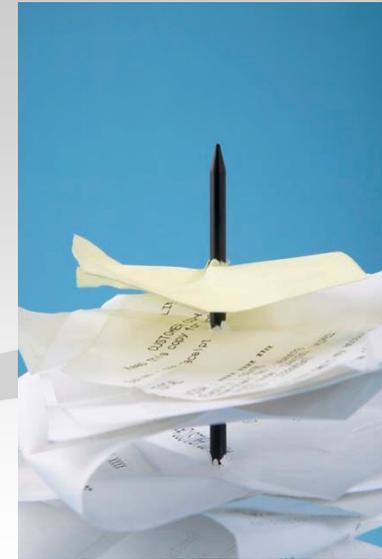
CPs should be monitoring an Agency's timeliness. If an Agency is untimely, the CP should consider:

- seeking a default judgment;
- monetary sanctions;
- adverse inferences/preclusion of evidence; and/or
- attorney's fees and costs.



Even a CP without an attorney may seek his costs, but the CP should be prepared to **attach receipts**.

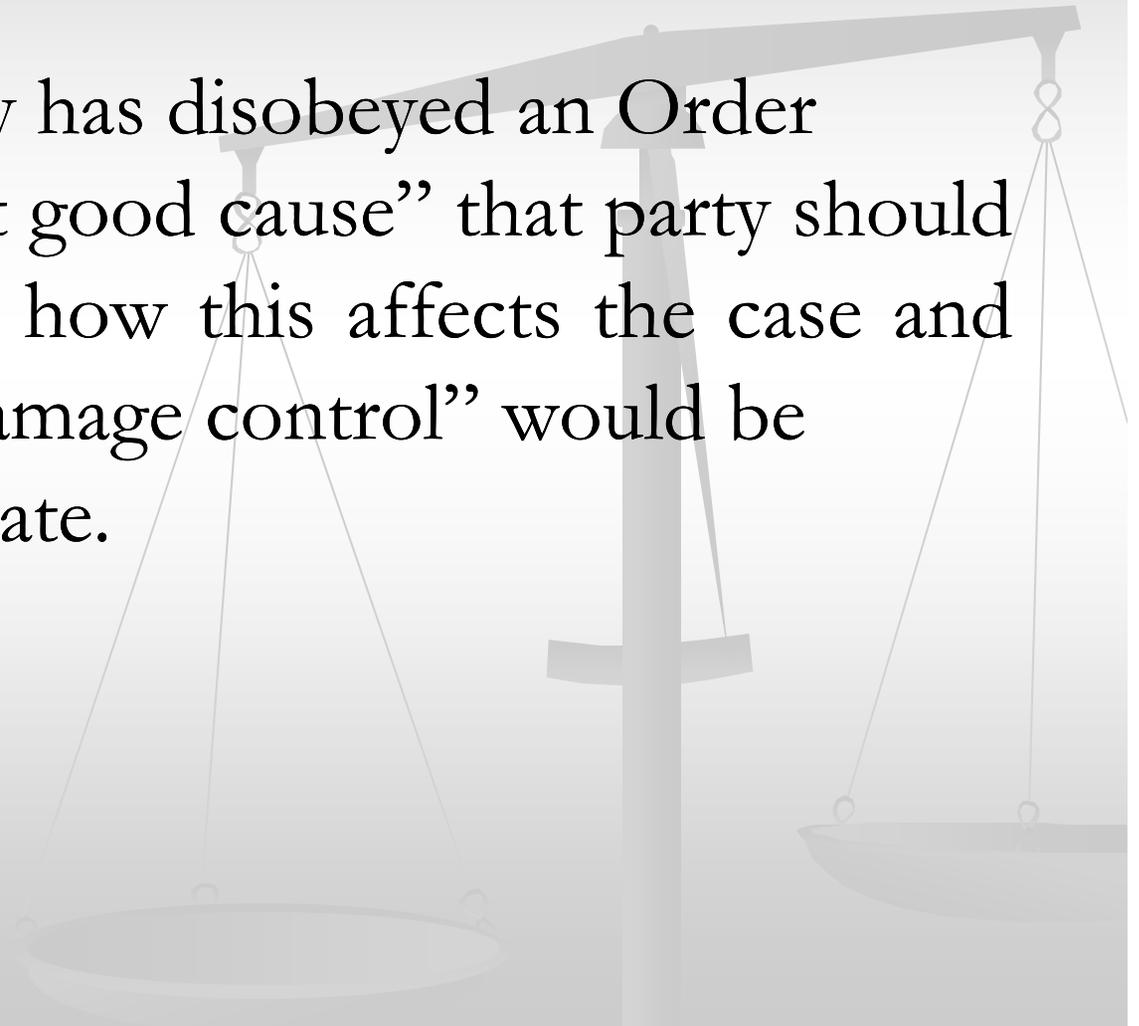
If a default judgment is granted, the CP should request an **opportunity to either testify or present documentation** of his damages.



Damage Control

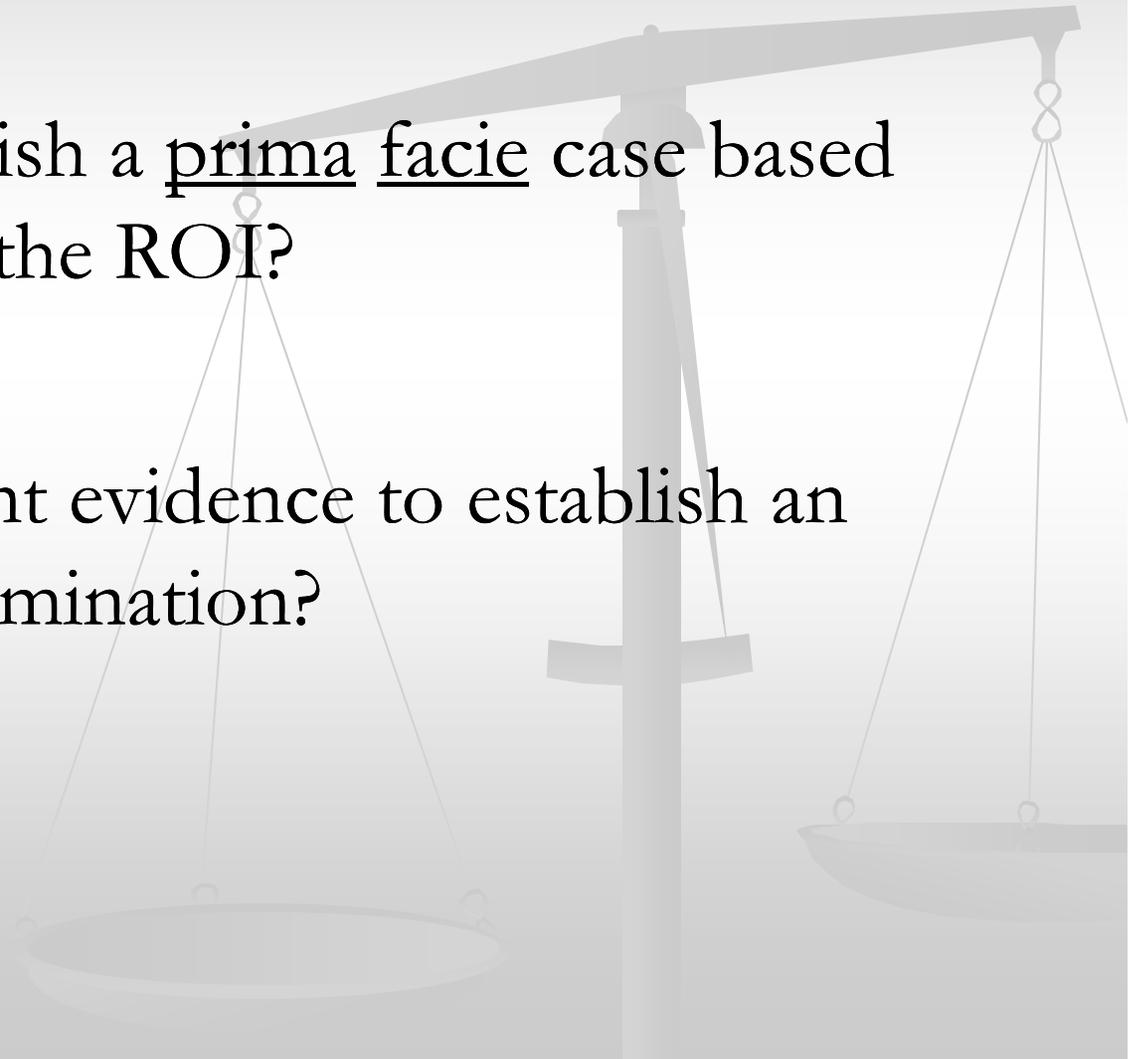


If a party has disobeyed an Order “without good cause” that party should consider how this affects the case and what “damage control” would be appropriate.



Damage Control

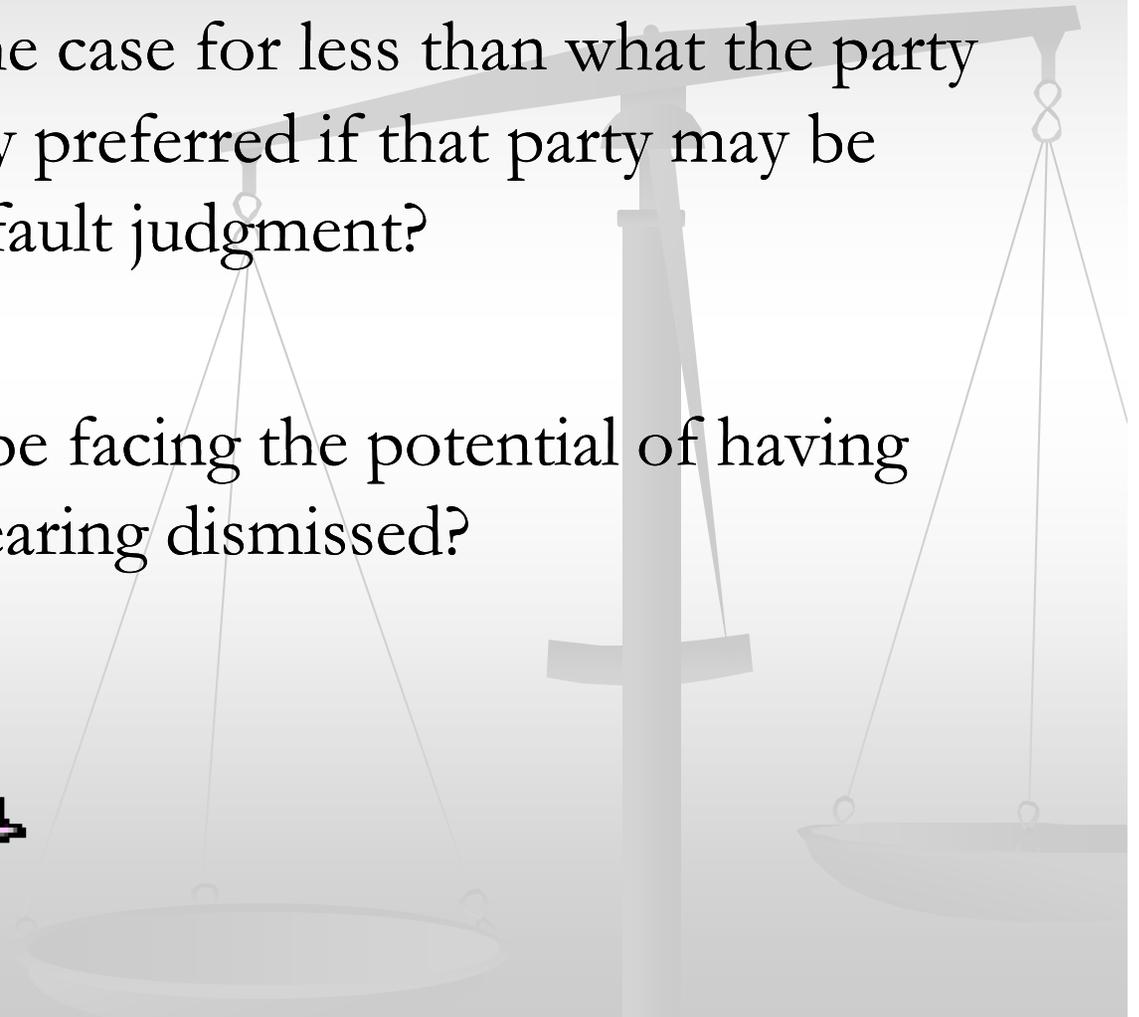
- Can the CP establish a prima facie case based upon evidence in the ROI?
- Can the CP present evidence to establish an inference of discrimination?



Damage Control

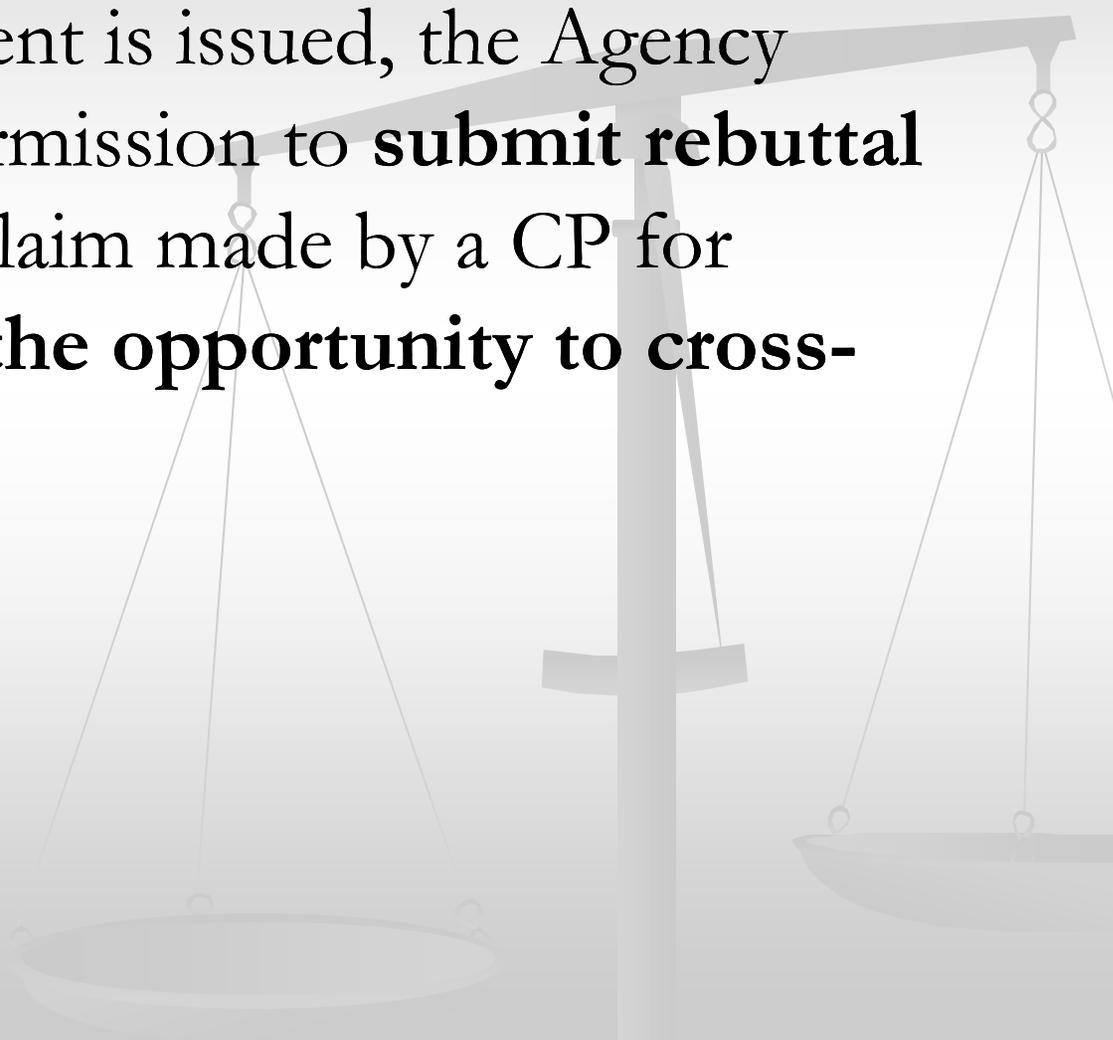
Is it worth settling the case for less than what the party would have originally preferred if that party may be facing a potential default judgment?

Or if that party may be facing the potential of having their request for a hearing dismissed?



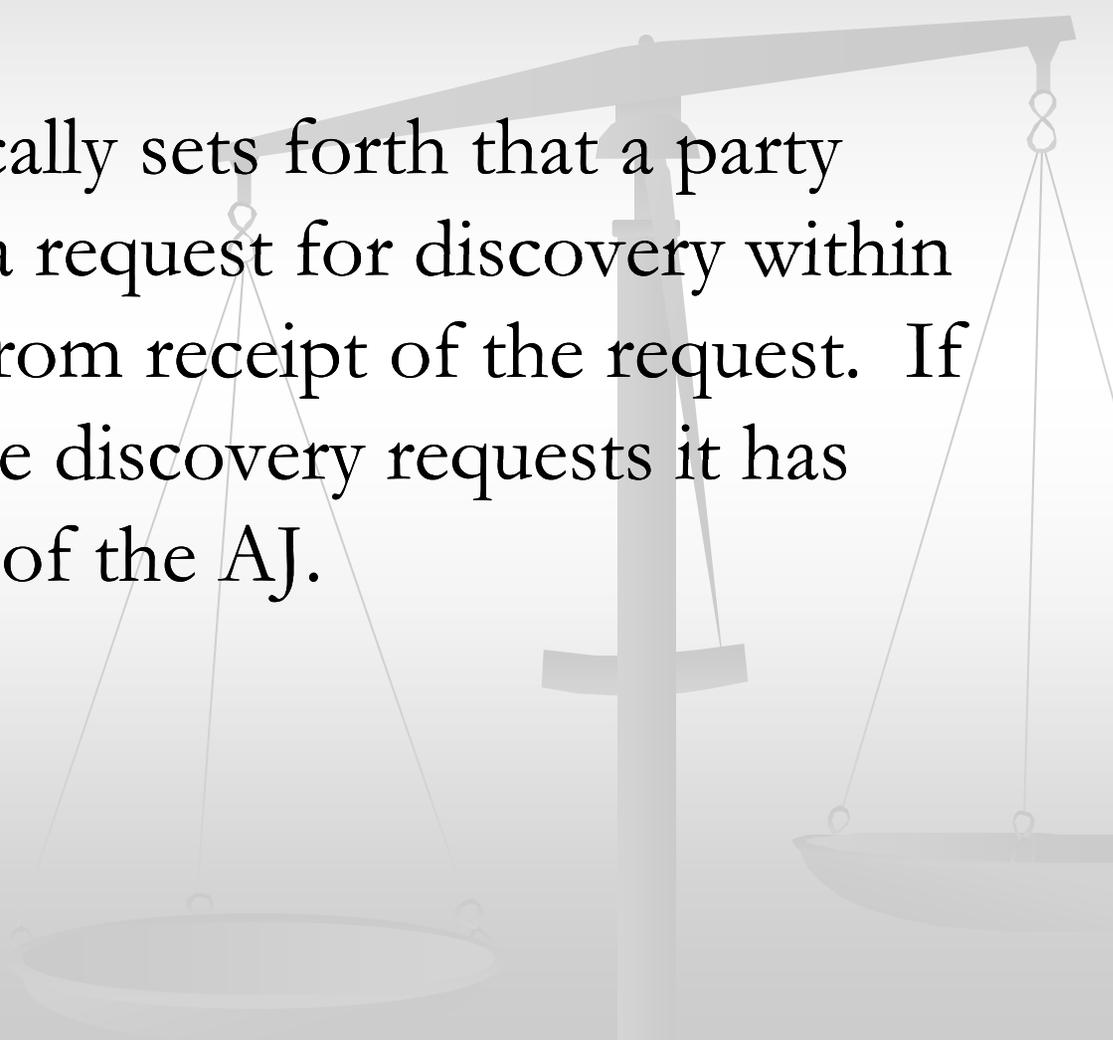
Damage Control

If a default judgment is issued, the Agency should request permission to **submit rebuttal evidence** to any claim made by a CP for damages **and/or the opportunity to cross-examine** the CP.



Vulnerabilities: ROIs, Discovery Violations, and Missed Deadlines. Remember the A&O.

The A&O specifically sets forth that a party **must** respond to a request for discovery within 30 calendar days from receipt of the request. If a party **ignores** the discovery requests it has violated an Order of the AJ.

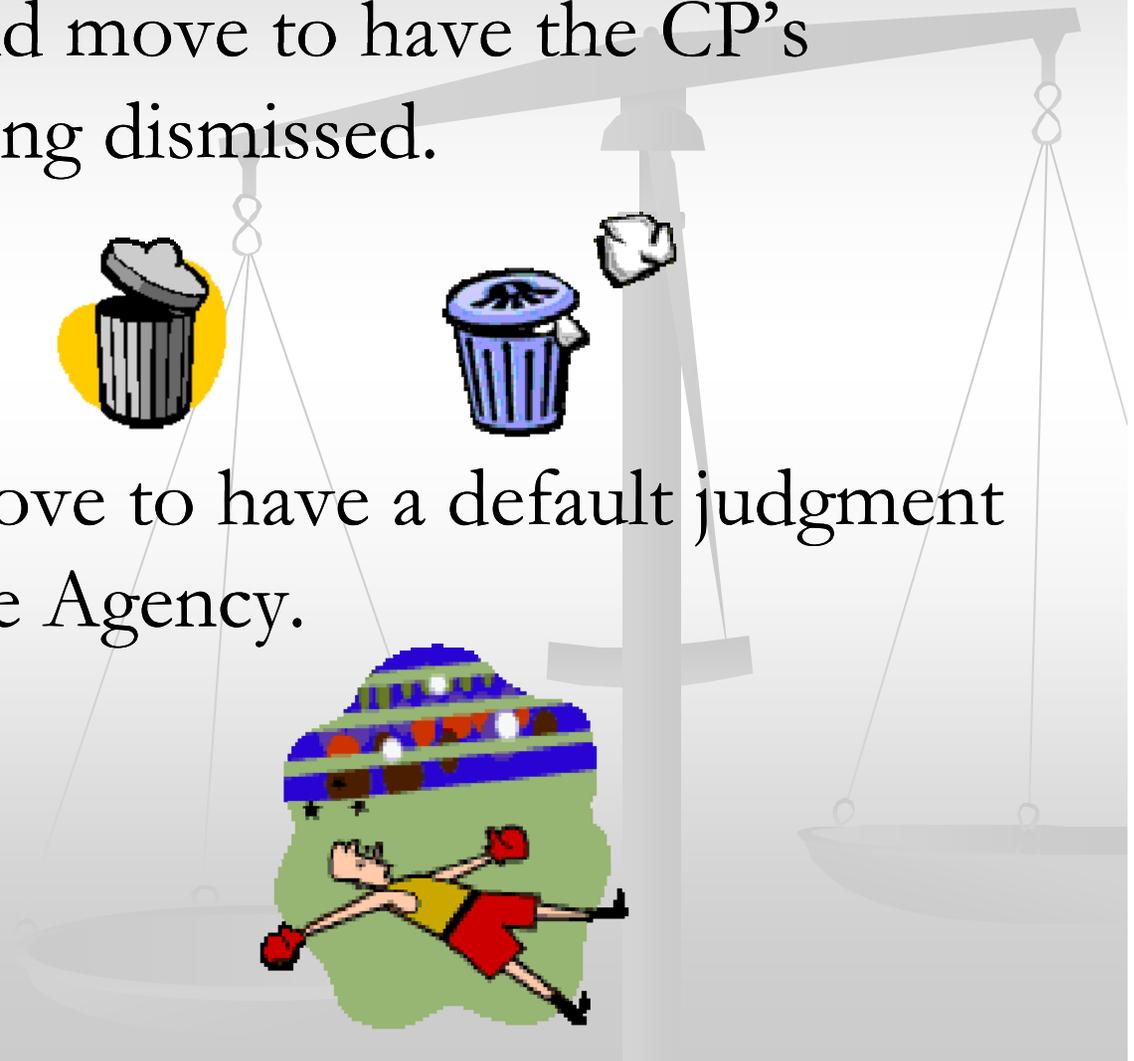
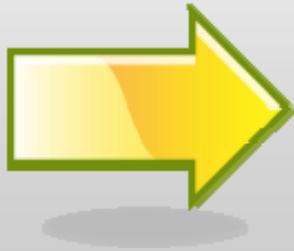


If a discovery request has been ignored, the appropriate Motion for Sanctions should be filed.

- The Agency should move to have the CP's request for a hearing dismissed.

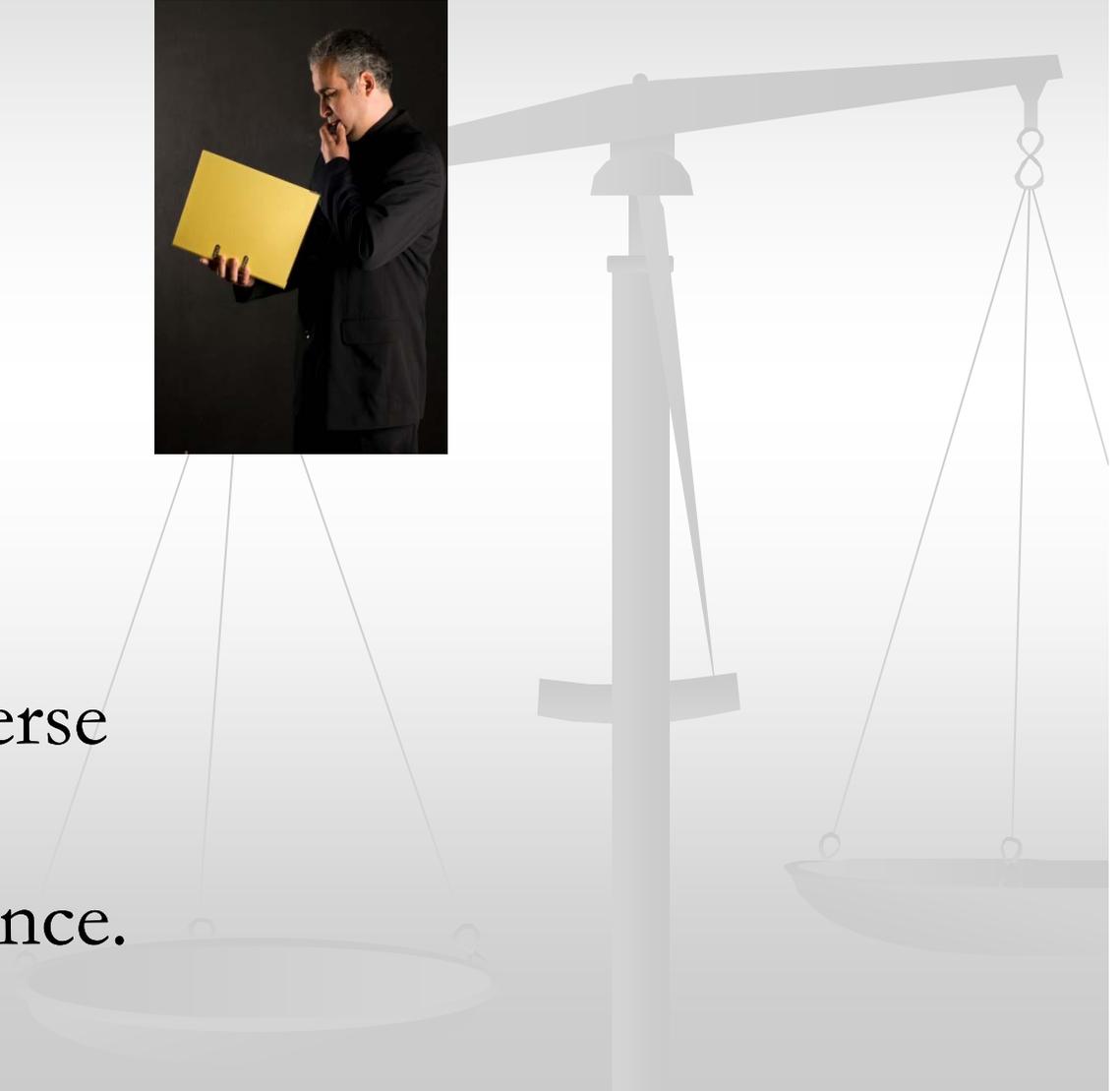


- The CP should move to have a default judgment entered against the Agency.



If requests for admissions have been ignored, alternative options include:

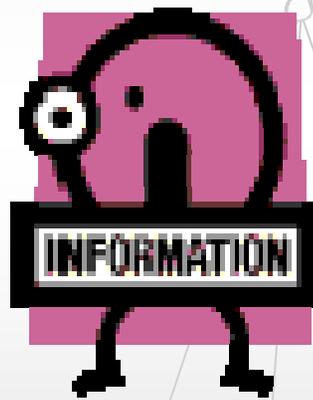
- filing a motion to compel;
- requesting the admissions be deemed admitted; and/or
- requesting an adverse inference and the exclusion of evidence.



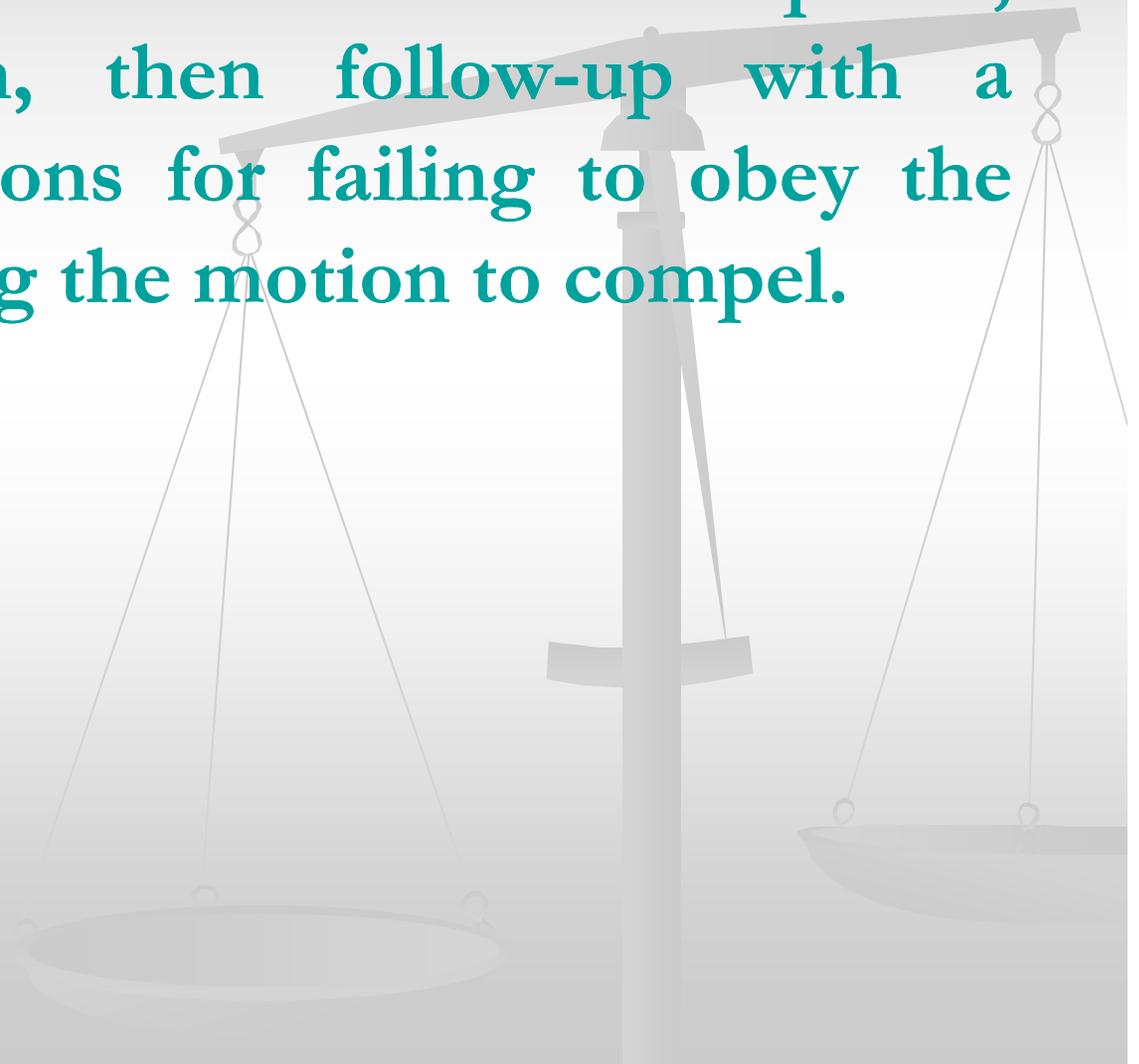
When filing a motion to compel, the moving party should argue that the non-responsive party did not lodge any objections to discovery within the required timeframes, therefore, the right to object has been waived.



If a motion to compel is granted and the right to lodge objections waived, then the party is under
Order to answer all requests without objection.

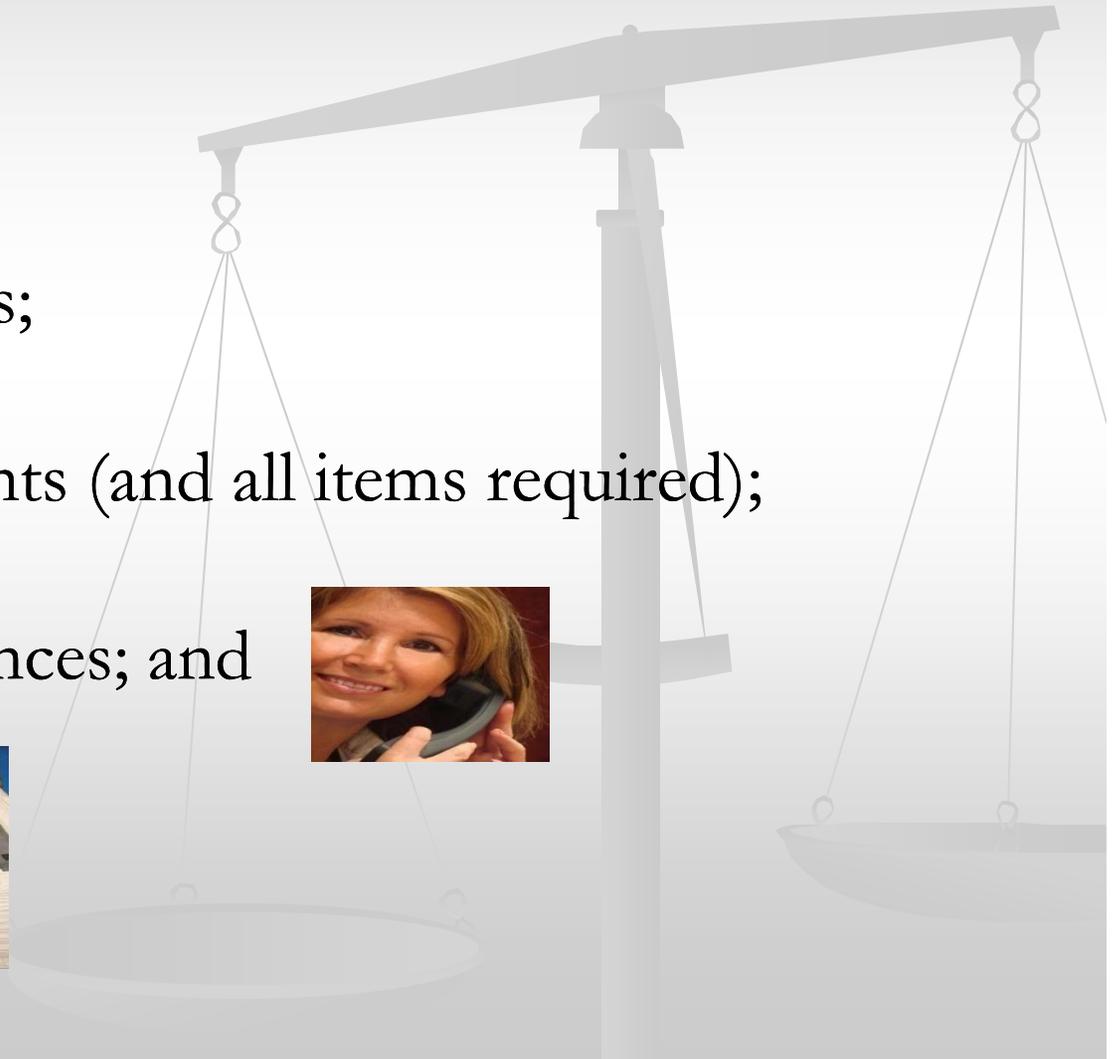


If the party does not answer all requests, without objection, then follow-up with a Motion for Sanctions for failing to obey the AJ's Order granting the motion to compel.



Calendar/Calculate all due deadlines from the A&O, Scheduling Order, Etc.

- Last day to serve discovery/respond to discovery;
- Depositions
- Proposed witness lists;
- Pre-Hearing Statements (and all items required);
- Pre-Hearing Conferences; and
- Hearings.



If a Motion for Sanctions has been filed or an Order to Show Cause has been issued, then the party should attempt to show **good cause** for the failure to obey the Order, instead of submitting something that is non-responsive, such as, arguing the merits of the case.
Consider damage control.



