



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

[REDACTED]
Hayden K.,¹
Complainant,

v.

James N. Mattis,
Secretary,
Department of Defense
(Department of Defense Education Activity),
Agency.

Appeal No. 0120151347

Hearing No. 480-2013-00069X

Agency No. PE-FY12-065

DECISION

On February 27, 2015, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's February 5, 2015, final action concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. § 2000e *et seq.* Our review is *de novo*. For the following reasons, the Commission MODIFIES the Agency's final action.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Teacher at the Agency's CT Joy Elementary School at a Naval station in Chinhae, South Korea. Complainant was hired on September 3, 2010, and had a two-year probationary period.

On May 24, 2012, Complainant filed an EEO complaint wherein he claimed that the Agency discriminated against him on the bases of his race (Caucasian), sex (male), and in reprisal for his prior protected EEO activity under Title VII when he was terminated from his position on March 23, 2012, during his probationary period.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The AJ held a hearing by video conference on November 12-13, 2014, and issued a decision on December 9, 2014.

The AJ found that no discrimination occurred. The AJ stated that the CT Joy School is a school with only four to five teachers and 20 to 27 students. The AJ noted that Complainant also served as the faculty representative charged with raising concerns with the school Principal. According to the AJ, the Principal (African-American female) began serving in her position at the school in August 2011, and had fourteen years of experience with the Agency. The AJ stated that the Superintendent of the Korea School District (African-American male) was based in Seoul and had no direct working relationship with Complainant. The Principal was the official who decided to terminate Complainant. The AJ noted that the Principal discussed her decision with the Superintendent and the Agency's labor-management officials. The AJ stated that the decision to terminate was based on Complainant's consistent inability to keep students on task and maintain effective classroom discipline and management.

The AJ stated that the Principal cited several incidents in support of her decision. The AJ stated that the Principal testified that during room observations she conducted of Complainant's classrooms, students were off task; two students were disruptive without consequences; and students were unaware of what they should be doing. The Principal stated that she observed on one occasion in December 2011 that Complainant was still preparing for class when class should have started, thus not fulfilling the bell-to-bell instruction policy. The Principal stated that in September 2011, Complainant breached confidentiality when he released confidential information on an employee. The Principal testified that on October 4, 2011, she learned that Complainant did not leave emergency lesson plans. The AJ stated that on December 9, 2011, a fire extinguisher was discharged in the classroom by two of Complainant's students. The AJ noted that the Principal criticized Complainant concerning the incident, blaming it on his inadequate management and supervision of his students. Complainant denied the Principal's statement that he had not reviewed safety precautions in the classroom. Complainant stated that the fire extinguisher was installed within easy reach of the students in the doorway with no enclosure. Complainant asserted that he removed the students from the classroom and the two students involved were suspended.

The Principal cited four dates where she informed Complainant that his classroom door was not locked at the end of the school day. The AJ noted that on November 2, 2011, the Principal had a conference with Complainant concerning his failure to obtain approval for a Christmas program. The Principal testified that Complainant had not sought approval for a program that was not part of the regular curriculum and it involved students from other classrooms over which he had no authority. The AJ noted that the Principal also relied in part on her March 6, 2012, unannounced classroom observation. The Principal testified that she observed ineffective discipline arising

from student interruptions, ineffective teaching to two ESL students, and an inability to assess progress of all students.

The Principal stated that when she discussed Complainant's performance with him, he was confrontational and demonstrated resistance to constructive feedback and recommendations. The Principal asserted that she counseled Complainant for his inability to differentiate instructional techniques and strategies, the importance of having quality emergency lesson plans, to improve his teaching methods to engage all students in the learning process, about students being off task and not understanding lessons and him not checking for learning. According to the Principal, she counseled Complainant for students not following instructions, for lack of routines, and that student accountability became a safety and security issue.

The Principal asserted that in November 2011, she met with Complainant as a follow-up to his poor performance during a walkthrough evaluation. The Principal stated that in December 2011, she had a conference with Complainant regarding classroom management where she shared concerns from other staff about the behavior of his students. According to the Principal, Complainant had been counseled that bell-to-bell teaching was expected. The Principal asserted that Complainant was counseled on three occasions that the agenda-standards-objectives should be posted prior to the start of instruction. The Principal stated that in December 2011, Complainant received a second notice that his classroom was unsecured. Additionally, in December 2011, the Principal noted that she had a conference with Complainant after the fire extinguisher incident. In February 2012, the Principal rejected Complainant's request for a transfer based on his performance.

The Principal maintained that she treated all employees fairly and equitably. The Principal explained that Complainant as a probationary employee required several formal observations unlike two teachers on professional growth plans. According to the Principal, a Caucasian served as a substitute teacher during the school year when Complainant was terminated. The Principal acknowledged that the only disciplinary action Complainant received was a verbal warning in January 2012. The Principal admitted that other teachers did not post their standards but that Complainant was the only teacher who was repeatedly not ready for class. The Principal acknowledged that she did not adhere to past practice by failing to issue Complainant a mid-year rating. The Principal asserted that Complainant was informed, counseled and had the opportunity to request assistance for areas where he needed support.

The Principal stated that the other teachers had emergency lesson plans, that the other teachers did not spend large amounts of time with one or two students while the rest of the class worked on something else, and that one of the teachers was not interrupted often by students. The Principal asserted that she did not remember one of these teachers having multiple outbursts during staff meetings. The Principal acknowledged that this teacher left students working unsupervised in the staff kitchen but said she counseled the teacher. The Principal asserted that the same notification regarding security was sent to the two other teachers who left their classroom doors unlocked.

The AJ stated that Complainant testified that the Principal observed him on numerous occasions in 2011 and 2012, and did not criticize his performance or ever tell him that his performance was deficient. The AJ noted that one of Complainant's students was the Principal's son and that Complainant had informed the Principal that her son was not using his time wisely. Complainant testified that the Principal advised him that it was not a beneficial practice of his students to use the teacher's manual to check the score. Complainant testified that he and the Principal had philosophical differences in teaching methods. According to Complainant, he encouraged students to motivate themselves but the Principal regarded this approach as a weakness and ineffective. The AJ noted that in one or two instances, Complainant presented seminars on differentiation teaching. This method of teaching relates to instructing different students or a group of students within different achievement levels. The AJ stated that Complainant also developed clear student expectation rules and issued newsletters to parents.

With regard to the Principal's statement concerning bell-to-bell instruction, Complainant stated that while he accessed the necessary materials, he wrote the daily question on the board, or while students answered the daily question, he would review their homework and notes from parents, but that he did not waste instructional time. According to Complainant, another teacher was observed not being ready for class and frequently wasting up to twenty minutes getting ready for a lesson. Complainant further stated that his October formal observation was conducted in the upper grades math class which was not his primary assignment, a class that he took over for the teacher who resigned.

Complainant argued that the Principal targeted him for termination early in the year and then sought opportunities to misconstrue situations and events to justify her decision. Complainant stated that instead of valuing his classroom management approach, the Principal passed judgment on him when one student was off task. Complainant maintained that the Principal refused to accept his intervention techniques because they were not aggressive enough and he did not humiliate students publicly. Complainant asserted that when he took over the math class of the teacher who resigned, the Principal took over his class for a few months. According to Complainant, she yelled at the students when frustrated and had an aggressive management approach. Complainant claimed that his classroom management style was evaluated by many past administrators as appropriate and effective. Complainant asserted his philosophy of instruction was based on students having different needs and him meeting those needs. Complainant stated that his lesson plans outlined how he used flexible skill groups to differentiate learning. Complainant noted that at one unannounced visit by the Principal, she witnessed what she interpreted as inconsistent classroom management, but rather what it reflected was the effectiveness of his differentiation. Complainant explained that each student had target behaviors. As an example, Complainant stated that the Principal witnessed a student shout out answers and receive leniency because for that student, Complainant was targeting being engaged and on task so he was willing to overlook the shouting since he was making progress toward other goals.

Complainant asserted that he encouraged a positive learning environment and that students had autonomy over their learning and the freedom to ask for support when needed. Complainant

claimed that others in his work unit had a similar approach and did not receive similar negative reaction or any discipline. With regard to the Principal's accusation that he did not actively engage all students in the learning process, Complainant stated that he observed two other teachers spend large amounts of time with one or two students while the rest of the class worked in small groups, but they were not reprimanded. Complainant added that the two other teachers did not have a sightline of their students when working with other students.

Complainant stated that the Principal accused him of allowing constant interruptions during instructional time, but that his wife observed on multiple occasions students interrupting another teacher and she was not reprimanded. Complainant claimed that the Principal said he was confrontational but a teacher who had multiple outbursts during staff meetings was not reprimanded. According to Complainant, he was reprimanded and was the only teacher investigated regarding leaving his classroom door unlocked, but that two other teachers also left their door unlocked.

Complainant stated that the Principal inquired about whole group instruction and he responded that he did not believe it would provide the differentiation needed by students in a four-grade span in one hour. Complainant stated that he created a table for students to work together when needed and they often helped each other on the computers. Complainant maintained that he made an effort to check the learning of each student every day. Complainant contended that the Caucasian teacher who resigned was harassed by the Principal and left after one week. Complainant noted that when he discussed his feeling of harassment with the two Korean teachers, they reported their interactions with the Principal were entirely different. According to Complainant, after he was terminated, there were no Caucasian staff members. Complainant stated that at the Christmas performance, the Principal recognized the contributions of Korean staff members but not him, even though he directed at least half of the program.

Complainant asserted as to his formal observation on October 19, 2011, it was brought to the attention of the Superintendent that he had been observed in the upper grades math class rather than his primary assignment. Complainant maintained that the Superintendent agreed that he should have been evaluated based on his primary assignment. According to Complainant, the Principal used documentation from the upper grades math class as grounds for his termination and omitted documentation for his primary assignment in the second grade classroom.

One witness at the hearing was the Command Ombudsman (African-American female). The Ombudsman testified that the Principal made inappropriate comments to her about Complainant very early in her tenure at the school. According to the Ombudsman, the Principal mentioned after the sudden resignation of a teacher (Caucasian) the second week of school that it was one down, two to go, with one of the two being Complainant. The Ombudsman stated she asked the Principal why she said that and the Principal replied she did not trust Complainant but that it sounded like he had questioned her authority. The Ombudsman testified that she did not believe the Principal would follow through because everyone in the community thought Complainant was a pretty good teacher. The Ombudsman further testified that she believed Complainant was discriminated against when he was terminated but she could not say for sure it was racism. As

for the other individual who the Principal wanted to get rid of, the Ombudsman stated that this was a Korean national who was serving as the Principal's secretary. According to the Ombudsman, the Principal asserted that she wanted to replace her secretary because he had a doctorate and could be teaching instead of being a secretary and he was not a good secretary.

Another witness at the hearing was a parent (Caucasian male) of one of Complainant's second grade students. He testified that Complainant was regarded in the community as the best teacher at the school. He stated that his son no longer looked forward to going to school after Complainant was terminated and that he left the Naval base in order to get away from the school's discriminatory nature. The parent testified that he was also a youth sports coach to kids including the Principal's son. The parent recalled the Principal came once to practice and offered cake to two African-American coaches but not to him. He stated that on another occasion African-American coaches were invited by the Principal to a dinner but he was excluded. He further stated that in another instance some African-American friends heard the Principal say you dance pretty good for a white girl. The parent testified that at an additional social gathering, the Principal invited only high ranking officials along with African-American enlisted military members.

The Principal had been transferred from her prior position as an Assistant Principal at an Agency school in Germany. Another witness (Caucasian male) had been a teacher at that school as well as the faculty representative. This witness testified that the Principal harassed him for two years and mistreated him based on his race and sex. The teacher testified that after a parent at the school adopted an African-American child, the Principal said that white people should not be allowed to adopt black children. The teacher maintained that the Principal had conflicts with nearly every Caucasian woman within weeks of her arrival. The teacher stated that when the Principal yelled at the Caucasian art teacher, an African-American student told the art teacher not to take it personally because she hates white people, everybody knows that. According to the teacher, African-American students who were sent to the Principal's office were given candy and sent back to class with no official response while non-African-American students were treated harshly and often given detention, Saturday school assignments and work details. The teacher speculated in his affidavit that the Principal hates Caucasians, and especially Caucasian females, due to her first marriage and the manner in which it ended. The teacher further speculated that the Principal uses her positions to release all of her anger and frustration at her first husband on any Caucasian target she can find.

The District President of the teacher's association (Asian female) testified that the Principal discriminated against Complainant. This witness stated that she read all correspondence between Complainant and the Principal and there was one oral reprimand, but nothing substantial enough to justify termination. The witness further testified that the Principal treated the other staff equally so it was clear she targeted Complainant. The witness asserted that she informed the Superintendent that the Principal was not listening to Complainant and had a set agenda that she was pushing through without listening to reason. According to the District President, on March 8, 2012, she and Complainant met with the Superintendent concerning Complainant's problems with the Principal. The District President testified that the Superintendent suggested they discuss

the situation with the Principal so she could explain why Complainant was at risk. The District President stated that a meeting was set up and the Principal terminated Complainant at the beginning of the meeting.

The Superintendent testified that Complainant's termination was based on classroom performance and observations made by the Principal, and was not disciplinary. The Superintendent testified that Complainant was counseled many times by the Principal on his performance, but failed to improve sufficiently. The Superintendent stated that after Complainant was terminated, the faculty consisted of two Asians and one African-American. According to the Superintendent, all educators new to the Agency were placed at a provisional level for a two-year period. The Superintendent stated that educators were rated on five critical professional performance elements, for which the rating was "meets" or "does not meet." These performance elements were mastering content and curriculum; presenting organized instruction; managing for effective learning; monitoring and assessing student achievement; and promoting diversity and equity. The Superintendent explained that the final rating system summarized annual performance as either acceptable or unacceptable.

One of the other teachers (Asian female) stated that prior to working with small groups of students, she planned a lesson for the rest of the class. She testified that she had emergency lesson plans as of October 2011. The teacher denied being interrupted multiple times by students but recalled having a student who usually arrived late and she sometimes had to stop the lesson to accommodate him. The teacher testified that the Principal did not reprimand her concerning this matter. The teacher denied having outbursts at staff meetings but said she was assertive in expressing her opinions in an orderly way. According to the teacher, she was not aware of the Principal targeting Complainant for issues occurring in other classrooms, but acknowledged that the non-Caucasian staff members were left alone. The teacher testified that the Principal instructed her to lock her classroom doors and that the Principal addressed the situation with her concerning her students being unsupervised in the kitchen.

Another teacher (Asian female) testified that she kept her class actively engaged in differentiated centers, independent work, and small group structured settings. She stated that she had a full-time teacher's aide in her class to monitor students while she worked with small groups. The teacher stated that she had emergency lesson plans as of October 2011. The teacher testified there were times she left her classroom door unlocked and the Principal informed the entire staff they had to secure their classroom doors before leaving the school. According to this teacher, she posted standards in her classroom as of January 2012.

An additional witness was a former teacher (Caucasian female) at the South Korea school who departed the school before the Principal arrived. This witness testified that Complainant was a very good teacher who was well-organized in his lessons and had good classroom management when he was in her classroom. The witness testified that she observed Complainant teach music during specials and also teach her students lessons on behavior and respect.

The Assistant Superintendent testified that she observed Complainant's math class for 15-20 minutes in November 2011. She testified that she did not observe much teaching but rather Complainant checking the students' work against a book. According to the Assistant Superintendent, it concerned her that it looked like he was checking homework and there was not much interaction with the other students. She stated that she disagreed with this approach in an elementary school and that she relayed her concern to the Principal.

The AJ found that Complainant failed to establish a prima facie case of discrimination under the alleged bases of race, sex and reprisal. The AJ stated that there were no similarly situated non-Caucasian or female employees who had the same problems as Complainant yet were retained. The AJ noted that a probationary biracial female was terminated by the Principal due to her performance in 2012 or 2013. The AJ found that the Principal credibly testified regarding her observations of Complainant's teaching deficiencies, a problem with planning when he did not have an emergency lesson for his math class, and the fire extinguisher incident. The AJ stated that the Principal notified Complainant of his performance problems.

With respect to the alleged comments and actions of the Principal regarding the adoption of black children and not offering cake, the AJ stated that these remarks demonstrated poor judgment but were insufficient to show a racial motivation for the termination. The AJ noted that the Ombudsman had credibly testified that the Principal desired to terminate Complainant because she did not trust him as he questioned her authority. The AJ reasoned that this was due to Complainant's role as a faculty representative rather than his race or gender. With respect to Complainant's reprisal claim, the AJ stated that the Principal was not aware of Complainant's complaint to the Superintendent at the time she terminated him. The AJ found that the Principal credibly testified that she decided to terminate Complainant a few weeks before that meeting occurred. The AJ further found that the Agency articulated nondiscriminatory reasons for the termination, which Complainant had failed to prove were pretext for discrimination.

The Agency subsequently issued a final action adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the AJ overlooked evidence at the hearing and in the report of investigation. Complainant states that the AJ did not consider the Agency's past knowledge of the Principal's previous discriminatory behavior toward individuals at other schools. Complainant notes that the teacher at the school in Germany had been falsely accused of child abuse by the Principal, and a settlement agreement led to the removal of the child abuse allegation from his record. Complainant points out that since his termination, the Principal was placed on administrative leave for what he claims was psychological and verbal abuse of children at the school.

Complainant maintains that he did not receive formalized criticism utilizing the performance elements and was not afforded the opportunity to formally challenge the validity of the

Principal's claims. Complainant states that interactions with the Principal were mischaracterized as counseling sessions by the Principal and he was not shown documentation of these events at the time. Complainant references his positive performance review from the prior Principal at the South Korea school as well as before and after his termination in a school district in Kentucky. As to the fire extinguisher incident, Complainant states that he was assisting another student who was leaving the class that day when the incident occurred. Complainant asserts that the students were stopped before a large amount was expelled. Complainant contends that he was formally investigated and the incident was utilized toward his termination, but a non-Caucasian teacher who left students unattended in another room only received a verbal reminder. Complainant states that he was the only teacher who was formally investigated concerning the classroom doors being left unsecured. Complainant further claims that the AJ did not include all of the witnesses he wanted to testify. Additionally, Complainant argues that the Agency was not forthcoming with documentation pertaining to the termination and that evidence was presented at the hearing that had not been previously disclosed.

In response, the Agency asserts that half of Complainant's non-management proposed witnesses lacked contact information. The Agency maintains that four proposed witnesses had never met Complainant and possessed no knowledge relevant to the termination. Moreover, the Agency states that Complainant raised no objections to the AJ's pre-hearing ruling on witnesses and thus waived the issue concerning limiting witnesses. The Agency opposes Complainant's argument concerning a lack of discovery by pointing out that all of its hearing exhibits were provided to Complainant both eighteen months and a week before the hearing. The Agency asserts that although Complainant argues that four of his witnesses testified in support of his teaching ability, not one of them witnessed him teaching in his classroom.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

Disparate Treatment/Reprisal

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411

U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

With regard to Complainant's contention concerning the AJ's refusal to allow all of his proposed witnesses to testify, we find that Complainant has not presented convincing evidence that the AJ acted improperly in the exclusion of any of the witnesses at issue. As for Complainant's claim that evidence was presented at the hearing that had not been previously disclosed, we observe that Complainant has not refuted the Agency's position that all of its hearing exhibits were provided to Complainant both eighteen months and a week before the hearing.

We observe that the Agency adopted the AJ's decision which found that Complainant failed to establish a prima facie case of discrimination under the alleged bases. The AJ stated that there were no similarly situated non-Caucasian or female employees who had the same problems as Complainant yet were retained. We disagree with the AJ's prima facie finding in light of the evidence in the record. Establishment of a prima facie case is not an onerous burden. Everett v. Environmental Protection Agency, EEOC Appeal No. 01941977 (April 21, 1995); Burdine, at 253. We have concluded that "the elements for establishing a prima facie case are not inflexible and must necessarily vary with the factual circumstances and bases of discrimination alleged." Thomas v. Department of Transportation, EEOC Appeal No. 01945798 (December 12, 1996); Scura v. United States Postal Service, EEOC Appeal No. 01965021 (October 8, 1998), request to reconsider denied, EEOC Request No. 05990154 (May 10, 2001).

With regard to disparate treatment, the Commission notes that while comparator evidence is usually used to establish disparate treatment, Complainant need only set forth some evidence of Agency actions from which, if otherwise unexplained, an inference of discrimination can be drawn. See Furnco. The statements by various witnesses suggest that the Principal may have held a bias against Caucasians and men. In light of those statements, we find that Complainant set forth a prima facie case of race and sex discrimination with regard to his termination.

As to Complainant's reprisal claim, the record indicates that the Principal was intent on terminating Complainant before Complainant and the District President of the Teacher's Association raised their concerns about discrimination with the Superintendent in March 2012. The Principal consulted with the Superintendent and Agency labor-management officials a few weeks before the meeting between Complainant and the Superintendent. Although Complainant's termination occurred shortly after her meeting with the Superintendent, we find that the termination had already been set into motion before Complainant began to oppose

alleged discriminatory action. Thus, we find Complainant has not established a prima facie case of reprisal.

The Agency explained that Complainant was terminated based on deficiencies in his job performance. According to the Principal, the decision to terminate reflected Complainant's consistent inability to keep students on task and maintain effective classroom discipline and management. The Principal cited in support of her conclusions instances where she observed Complainant in the classroom. The Principal also focused on the fire extinguisher incident and Complainant's classroom door sometimes being unlocked. The Principal stated that when she discussed Complainant's performance with him, he was confrontational and demonstrated resistance to constructive feedback and recommendations. The Principal asserted that she counseled Complainant for his inability to differentiate instructional techniques and strategies, the importance of having quality emergency lesson plans, to improve his teaching methods to engage all students in the learning process, about students being off task and not understanding lessons and him not checking for learning. We find that the Agency has articulated legitimate, nondiscriminatory reasons for Complainant's termination.

Complainant attempts to establish pretext by challenging the Principal's characterization of his teaching effectiveness and by presenting evidence of a bias that the Principal held toward Caucasians and males. Complainant argues that his positive prior teacher evaluations at the school in South Korea and in Kentucky demonstrate that he is an effective teacher. Several witnesses at the hearing testified that Complainant was well-regarded in the community for his teaching ability. Complainant explained that his use of differentiation was successful but did not necessarily conform to the Principal's philosophy. According to Complainant, the Principal did not provide him with a mid-year review. Complainant pointed out that the Principal improperly conducted a formal observation of him in the upper grades math class rather than the second grade class that was his primary assignment.

It is evident that several factors contributed to the Principal's animus toward Complainant. We take note of the fact that both Complainant and the teacher at the school in Germany were faculty representatives. The record indicates that the Principal's leadership style did not tolerate opposition and that Complainant's status as the faculty representative represented actual and potential confrontation. The Principal and Complainant also represented different teaching philosophies. This added to the Principal's disapproval over time of Complainant's teaching methods. However, the difference in their approach to teaching does not explain why the Principal was intent on terminating Complainant before she became familiar with Complainant's teaching style.

We find that sufficient persuasive testimony was presented to establish that the Principal was biased against Complainant based on his race and that the reasons she articulated for Complainant's termination were pretext intended to hide discriminatory motivation. The Principal's clear display of favoritism toward African-Americans was demonstrated in several contexts. The favoritism was on display in Germany in her treatment of African-American children as opposed to Caucasian children and when she stated that white people should not be

allowed to adopt black children. The teacher in Germany testified that the Principal had conflicts with nearly every Caucasian woman within weeks of her arrival. The favoritism was on display in South Korea when the Principal invited only African-American coaches or enlisted members to social events. Although the magnitude of the preferential treatment was not substantial when the Principal offered cake to only the African-American coaches, it nevertheless was another example of her favoritism on display. Further, a Caucasian teacher in South Korea resigned after the first week of school apparently based on the manner in which she was treated by the Principal. As the Ombudsman testified, the Principal stated after that resignation one down, two to go. Complainant was one of those two employees that the Principal intended to target and she did so in several ways. The District President of the Teacher's Association testified that the Principal treated the other staff equally and that it was clear she targeted Complainant.

The Principal pursued any actual or fabricated deficiency in Complainant's teaching methods that she could detect or create. In light of the testimony that Complainant was generally well-regarded as a teacher and that the Principal was biased against Caucasians, this calls into question the validity of the Principal's criticisms of Complainant's teaching ability. We are not convinced that most of the Principal's criticisms of Complainant's teaching methods were valid. We recognize that Complainant was not perfect and committed a few mistakes. However, as the District President of the Teacher's Association testified, there was nothing substantial enough to justify termination. We find that the AJ's findings regarding the race discrimination claim are not supported by substantial evidence and that Complainant's termination was attributable to the Principal's intent to discriminate against him on the basis of his race.

With regard to Complainant's claim of sex discrimination, the evidence suggests that the Principal frequently had negative interactions with both males and females. The teacher who resigned after the first week of school at Chinhae was female and the Principal had difficulties with a number of female teachers at the school in Germany. We find there is insufficient evidence to support Complainant's claim that his sex was a factor in his termination.

CONCLUSION

The Agency's final action is hereby MODIFIED. The Agency's determination that no reprisal or no sex discrimination occurred is AFFIRMED. The Agency's determination that no race discrimination occurred is REVERSED. The matter is REMANDED to the Agency for further processing in accordance with the ORDER below.

ORDER

The Agency shall take the following actions:

1. The Agency shall make Complainant an offer of placement into a probationary teacher position, either at the Chinhae, South Korea school or a substantially equivalent position with the Agency, at the grade and step where he would have been absent the discrimination, no later than sixty (60) days from the date on which this decision is

issued. See 29 C.F.R. § 1614.501(a)(3). The Agency offer shall include a notice that, if Complainant does not respond or declines the job offer within 15 days of receipt, his right to receive further back pay and other benefits based on the job offer shall terminate as of that date. See 29 C.F.R. § 1614.501(b)(1), (c)(1). If the offer is accepted, the Agency shall place Complainant into the position no later than 30 days from the date of acceptance.

2. The Agency shall issue Complainant a check for backpay with interest for the period of time that Complainant has not been performing the position he held at the time of the discrimination. The Agency shall determine the appropriate amount of backpay (with interest, if applicable) and other benefits due Complainant pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision is issued. Complainant shall cooperate in the Agency's efforts to compute the amount of backpay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of backpay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. The Agency shall conduct a supplemental investigation on compensatory damages, including providing Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages. For guidance on what evidence is necessary to prove pecuniary and non-pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991 (July 14, 1992) (available at eeoc.gov). The Agency shall complete the investigation and issue a final decision appealable to the EEOC determining the appropriate amount of damages within 90 days of the date the decision is issued. The Agency shall pay the amount determined within 30 days from the date of that determination.
4. The Agency shall provide at least eight (8) hours of in-person or interactive training to the responsible management official on Title VII with an emphasis on race discrimination.
5. The Agency shall consider taking appropriate disciplinary action against the responsible management official. The Commission does not consider training to be disciplinary action. Within 30 days of the date this decision is issued, the Agency shall report its decision to the Compliance Officer referenced herein. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the responsible management official has left the Agency's employment, then the Agency shall furnish documentation of her departure date.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include evidence that the corrective action has been implemented.

POSTING ORDER (G0914)

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

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- **within thirty (30) calendar days** of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

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 in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for

continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant’s Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

January 24, 2018

Date