



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

[REDACTED]
Stephanie A.,¹
Complainant,

v.

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

Appeal No. 0120161052

Hearing No. 420-2007-00107X

Agency No. DIA-00006-2006

DECISION

The Equal Employment Opportunity Commission (EEOC or Commission) accepts Complainant's appeal, pursuant to 29 C.F.R. § 1614.403(a), from the January 14, 2016 final Agency decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.

BACKGROUND

Complainant initially served as a collateral-duty EEO Counselor and Diversity Management Specialist in the Office of Equal Opportunity at the Missile and Space Intelligence Center (MISC) at Redstone Arsenal, Alabama from 1995 through January 1999. In January 1999, Complainant was selected to serve as the full-time EEO Specialist from 1999 through 2003. In November 2000, Complainant notified the Director that a co-worker (CW-1) had posted an article on the Agency's intranet titled "Trail of Beers," a play on the "Trail of Tears." The Director notified CW-1 that he would no longer be allowed to post his site to the Agency's classified intranet.

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.

Additionally, in November 2000, Complainant advised Agency management that the Christmas Social should be renamed the Holiday Social to be more inclusive and to comply with Agency policy. Complainant claimed that as a result of her objections to the “Trail of Beers” and the issue regarding the Christmas Social, CW-1 began to engage in a campaign of retaliation against her for this protected EEO activity. CW-1 challenged employees, through his intranet site, to wish each other “Merry Christmas” at the office to see what the “EEO Gestapo” would do about it and posted a violent, sexual cartoon depicting Complainant.

In March 2001, Complainant filed an EEO complaint alleging that she had been subjected to sexual and religious harassment and reprisal for prior protected EEO activity regarding the above-described events. On March 6, 2002, Complainant, and the Agency signed a settlement agreement in which she agreed to withdraw her complaint, and the Agency agreed to allow her to take a sabbatical so that she could return to school and earn her Master’s degree. Complainant was absent from the workplace from May 2002 through May 2003. Upon Complainant’s return to the workplace in 2003, she assumed a position as a GS-13 Intelligence Analyst, and did not resume any of her duties as an EEO Specialist or as a collateral-duty EEO Counselor.

In September 2005, the Agency conducted EEO training at the facility. The EEO course was part of an Agency program called “Diversity Management and Equal Opportunity in the 21st Century,” and the focus of this particular three-day class was “Prevention of Sexual and Religious Harassment in the Workplace.” CW-1 attended the course; however, Complainant was not present at the training. The trainer invited each of the participants to introduce themselves and share something personal with the class. CW-1 informed the class that he was the webmaster of his own external website, shared the website address with the class, and encouraged them to view it. Several co-workers who were present in the class informed Complainant about this announcement, and she viewed the website. The website contained the same images and writings for which CW-1 was disciplined in 2001.

In October 2005, Complainant contacted the Director to inform him of the public republication of the offensive cartoon, and to advise him of sexual harassment and retaliation by CW-1. On October 24, 2005, the Director spoke to CW-1 about the website, and CW-1 then password-protected the site so that it was no longer publicly available. Subsequently, the Agency blocked access to CW-1’s website from all facility computers so that it could not be viewed in the workplace. The Agency conducted a management inquiry into the allegations, which did not resolve the issue.

On March 14, 2016, Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of sex (female), religion (Christian), and in reprisal for prior protected EEO activity when she was subjected to sexual harassment when she learned in October 2005 that a co-worker published offensive material on his personal website which she believed contained explicit drawings and language of a sexual nature directed at her.²

² The Agency dismissed three additional claims which the Commission subsequently affirmed as properly dismissed.

Following an investigation, Complainant requested a hearing; however, she subsequently withdrew her hearing request. The Agency issued a final Agency decision (FAD-1) finding that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment as alleged. Complainant appealed and, in Tammy S. v. Dep't of Def., EEOC Appeal No. 0120084008 (June 6, 2014), the Commission reversed FAD-1 and found that Complainant had been subjected to a discriminatory and retaliatory hostile work environment for which the Agency was liable. The Commission ordered the Agency to conduct a supplemental investigation into Complainant's entitlement to compensatory damages and to issue a new final agency decision following the investigation. In addition, the Commission ordered the Agency, inter alia, to grant Complainant the appropriate compensation for her time spent working on her complaint and to pay attorney's fees. Complainant subsequently retired from federal service in January 2015.

The Agency requested reconsideration of the Commission's appellate decision and, in Tammy S. v. Dep't of Def., EEOC Request No. 0520140438 (June 4, 2015), the Commission denied the request. The Commission reiterated that the previous decision remained the Commission's decision and ordered the Agency to comply with the remedies ordered.

Following its supplemental investigation (SROI), the Agency issued a final agency decision (FAD-2) regarding Complainant's entitlement to remedies. In FAD-2, the Agency determined that Complainant had demonstrated an entitlement to non-pecuniary compensatory damages. The Agency found that Complainant had been severely affected by CW-1's actions which exacerbated several health issues for an extended period of time after October 2005, including Post-Traumatic Stress Disorder (PTSD). As a result, the Agency determined that Complainant was entitled to \$60,000.00 in non-pecuniary compensatory damages.

With respect to pecuniary compensatory damages, the Agency awarded Complainant \$1,800.00 for past and future treatment from her psychologist, \$1,000.00 in reimbursement for prescriptions, \$75.00 for out of pocket costs for sleep studies, \$150.00 in mileage, and \$88.64 in postage fees. Finally, the Agency found that Complainant was entitled to restoration of 91 hours of sick leave, consistent with federal employee retirement regulations. Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that she is entitled to an award of \$300,000.00 in non-pecuniary compensatory damages. Complainant argues that the Agency's harassment and retaliation resulted in exacerbation of her PTSD and other conditions and caused significant physical, emotional, and financial harm. Complainant contends that the harm she suffered was significant and lengthy, which should have merited a high damages award. Complainant claims that the Agency improperly reduced reimbursement of her pecuniary damages by 50 percent. More specifically, Complainant asserts that she is entitled to the full cost of her medication, sleep studies, and therapy regardless of any insurance offset.

Complainant argues that the Agency failed to award her all the leave she lost due to the harassment she endured. Accordingly, Complainant requests that the Commission modify FAD-2 and increase the remedies awarded.

ANALYSIS AND FINDINGS

Attorney's Fees

As an initial matter, the Commission notes that the previous appellate decision (Tammy S. v. Dep't of Def., EEOC Appeal No. 0120084008 (June 6, 2014)) stated that Complainant was entitled to attorney's fees. Commission regulations further confirm that a finding of discrimination raises a presumption of entitlement to an award of attorney's fees, and any such award of attorney's fees or costs must be paid by the agency that committed the unlawful discrimination in question. See 29 C.F.R. §§ 1614.501(e)(1)(i), (ii). The Commission denied the Agency's request for reconsideration in Tammy S. v. Dep't of Def., EEOC Request No. 0520140438 (June 4, 2015). The reconsideration decision did not specifically reiterate the attorney's fees order; however, the Commission made clear that the previous appellate decision was upheld. Furthermore, the Commission did not modify the remedies awarded in the appellate decision in any manner. Therefore, the Commission determines that the reconsideration decision did not extinguish Complainant's entitlement to attorney's fees. Complainant's representative from 2006 through 2014 has notified the Commission that although he submitted a petition for attorney's fees and costs to the Agency pursuant to our earlier decisions, no award has been forthcoming from the Agency. As FAD-2 did not address this issue, the Commission will remand this matter to the Agency for a determination on attorney's fees and costs.

Non-Pecuniary Compensatory Damages

When discrimination is found, the Agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore her as nearly as possible to the position she would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this "make whole" relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 119 S.Ct. 1906 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3).

Non-pecuniary losses are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.302 at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than punish the Agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be “monstrously excessive” standing alone, but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from complainant concerning her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

Here, the Agency determined that Complainant was entitled to \$60,000.00 in non-pecuniary compensatory damages. Complainant requested \$300,000.00 in non-pecuniary compensatory damages. In support, Complainant affirmed that she experienced severe emotional distress and humiliation by CW-1's actions which made her relive past abuse she suffered as a child. Complainant stated that she suffered nightmares, developed stomach ulcers, anxiety, irritable bowel syndrome, and acid reflux. Family members and friends confirmed that Complainant's health deteriorated as a result of the harassment she suffered. Complainant's ex-husband stated that their marriage became strained following the harassment and Complainant withdrew from family and church activities. Complainant's son asserted that he watched his mother return home from work crying and suffering from anxiety. Other friends and family described Complainant as fearful, stressed, tense, and hyper-vigilant.

While the Agency awarded Complainant \$60,000.00 in non-pecuniary damages, the Commission finds that an award of \$100,000.00 is more appropriate and is consistent with the amount awarded in similar cases. This amount takes into consideration the nature of the discriminatory acts, the severity of the physical and emotional harm suffered, the many years that Complainant suffered the harm, and is consistent with prior Commission precedent. See Demarcus I. v. Dep't of Def., EEOC Appeal No. 0120150529 (May 4, 2017) (\$100,000.00 awarded where harassment resulted in feelings of isolation and PTSD symptoms, severe anxiety and stress, and marital and familial strain); Joannie V. v. Dep't of Homeland Sec., EEOC Appeal No. 0720130010 (Oct. 31,

2013) (\$100,000.00 awarded in harassment case where complainant, for over four years, experienced stress, loss of confidence, high blood pressure, chest pains, anxiety, depression, loss of reputation, and disruption of life and social relationships). Mohar v. U.S. Postal Serv., EEOC Appeal No. 0720100019 (Aug. 29, 2011) (complainant was awarded \$100,000.00 in non-pecuniary compensatory damages where the harassment resulted in complainant suffering major depression and PTSD which was triggered by the work environment which the Agency took no action to address). Accordingly, the Commission concludes that an award of \$100,000.00 will adequately compensate Complainant for the physical and emotional harm she suffered as a result of CW-1's harassment.

Pecuniary Compensatory Damages

Pecuniary losses are out-of-pocket expenses incurred as a result of the agency's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination, or a voluntary settlement. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 11 § VII.B.2 (Aug. 5, 2015) (internal citations omitted). "In a claim for pecuniary compensatory damages, complainant must demonstrate, through appropriate evidence and documentation, the harm suffered as a result of the agency's discriminatory action. Objective evidence in support of a claim for pecuniary damages includes documentation showing actual out-of-pocket expenses with an explanation of the expenditure. The agency is only responsible for those damages that are clearly shown to be caused by the agency's discriminatory conduct. Id. To recover damages, the complainant must prove that the employer's discriminatory actions were the cause of the pecuniary loss." Id. (internal citations omitted).

Complainant requested \$112,981.60 in pecuniary damages. The Agency awarded Complainant only \$3,113.64 of the requested amount. Complainant requested reimbursement for medications she was prescribed from 2005 through 2015 totaling over \$50,000.00. The Agency reduced Complainant's requested costs for these drugs because it found that most of the medications were prescribed for chronic medical conditions Complainant had prior to 2005. The Agency further reduced Complainant's out-of-pocket costs based on its finding that Complainant provided no evidence of any new medications required as a result of the harassment. Complainant argued that while she did experience chronic conditions, statements from her doctor demonstrate that the Agency's harassment made her health deteriorate. The record reveals that in 2001, Complainant's doctor indicated that Complainant had several chronic conditions including migraine headaches, disturbed sleep patterns, and elevated blood pressure. SROI, at 306. By 2005, Complainant's doctor stated that Complainant's health had deteriorated and she was now being prescribed medications to address several additional conditions. Id. at 305. Several other doctors stated that Complainant's conditions had worsened due to stress and that her work environment had worsened her conditions. Id. at 297-303. The voluminous evidence in the record clearly establishes a nexus between Complainant's increased medical care and prescription costs and the Agency's discriminatory actions.

Specifically, Complainant's health care providers confirm that her mental and physical condition, which included diagnoses of PTSD, anxiety, stress, sleeplessness, and hypertension, was directly and proximately exacerbated by the discrimination and harassment she endured. Accordingly, the Commission finds that Complainant has demonstrated an entitlement to the requested out-of-pocket prescription drug and medical care costs.

The Agency further reduced Complainant's requested out-of-pocket costs by what her insurance company paid. For instance, the Agency reduced Complainant's claim for therapy sessions in 2008 because Complainant's insurance company began paying for most of these costs except for her co-pays. Additionally, the Agency reduced Complainant's costs by the portion her insurance paid for sleep studies related to her insomnia in 2012. Complainant contended that the Agency erroneously deducted these insurance contributions and that she is entitled to the full reimbursement for the costs of her medication and medical costs. The Commission has previously held that, under the collateral source rule, payments made by a health insurer for treatment on a complainant's behalf cannot be used to reduce a compensatory damages award. Wallis v. U.S. Postal Serv., EEOC Appeal No. 01950510 (Nov. 13, 1995); Johnson v. Dep't of the Interior, EEOC Appeal No. 01961812 (June 18, 1998). The Commission finds that the Agency improperly deducted payments from Complainant's insurance company from her compensatory damages award.

Finally, Complainant requested \$5,600.00 in costs to attend Fit for Life, a fitness and healthy lifestyle program. Complainant claimed that her sleep doctor recommended this program to help her lose weight which would potentially improve her sleeping issues. The Agency denied the requested costs for the program finding that there was no evidence connecting the need for these services to the harassment she suffered in 2005. Complainant argued that this program was traceable to the insomnia she experienced as a result of the harassment. The Commission finds that Complainant did not demonstrate a sufficient nexus between the harassment and these expenses. Accordingly, the Commission finds that the Agency properly denied Complainant's request for reimbursement for these expenses.

Restoration of Leave

Finally, as to the restoration of leave, the Commission notes that in its previous decision, the Commission only ordered the Agency to "grant Complainant appropriate compensation for her time, whether in the form of compensatory time, restoration of annual leave, or administrative time, as applicable, for the reasonable amount of hours taken by Complainant to work on her complaint." Complainant requested restoration of leave she took as a result of the Agency's harassment as pecuniary damages, and the Agency's decision awarded Complainant restoration of some of the requested leave. The Commission finds that such a request is not compensable as pecuniary damages.

Nonetheless, the record reveals that Complainant claimed 19.5 hours of uncompensated hours she incurred while working on her EEO complaint from 2009. The Agency acknowledged that these hours were compensable, but failed to grant Complainant's request for these hours.

The Commission finds that these hours were properly requested and compensable pursuant to the Commission's previous decision.

CONCLUSION

After a review of the record in its entirety, including consideration of all statements submitted on appeal, the Commission MODIFIES the Agency's final decision and REMANDS the matter for further processing in accordance with the Order below.

ORDER

The Agency is ORDERED to implement the following remedial action to the extent it has not already done so:

1. Within 60 calendar days of the date this decision is issued, the Agency shall pay Complainant \$100,000.00 in non-pecuniary compensatory damages.
2. Within 60 calendar days of the date this decision is issued, the Agency shall pay Complainant \$107,381.60 in pecuniary damages.
3. Within 60 calendar days from the date this decision is issued, the Agency shall restore 19.5 hours of uncompensated leave Complainant incurred while working on her complaint.
4. Within 60 calendar days from the date this decision is issued, the Agency shall determine Complainant's entitlement to attorney's fees and costs as indicated below. The Agency will issue a final decision on the issue of attorney's fees and costs. The final decision shall contain appeal rights to the Commission.

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.

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/she 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).

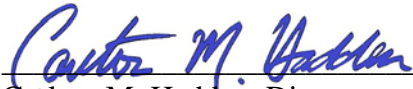
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

June 5, 2018

Date