



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

[REDACTED]
Lazaro G.,¹
Complainant,

v.

Wilbur L. Ross, Jr.,
Secretary,
Department of Commerce
(Patent and Trademark Office),
Agency.

Appeal No. 0120170802

Hearing No. 570-2014-01218X

Agency No. 13-56-14

DECISION

On December 19, 2016, and September 8, 2017, Complainant filed appeals with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 14, 2016, and August 11, 2017, final decisions concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission **AFFIRMS** the Agency's November 14, 2016, final decision and **MODIFIES** the Agency's August 11, 2017, final decision.

ISSUES PRESENTED

The issues presented are (1) whether Complainant is entitled to retroactive placement in a Patent Examiner (Computer Science) position as a remedy for the Agency's reprisal against him in connection with Vacancy Announcement Number CP-2012-0187 and (2) whether the Agency discriminated against Complainant on the basis of disability and in reprisal for prior protected EEO activity when it did not select him for a Patent Examiner (Computer Science) position under four other vacancy announcements.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for employment. He previously worked at the Agency as a Patent Examiner from September 2003 until October 2004. In September 2013, Complainant requested and received a reasonable accommodation from the Agency's Office of Enrollment and Discipline to take the Examination for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office (USPTO).

In a formal complaint filed on February 24, 2013, and amended several times, Complainant alleged that the Agency discriminated against him on the basis of disability and in reprisal for prior protected EEO activity when:

1. on October 26, 2012, Complainant was not selected for the position of Patent Examiner (Computer Science), Grade 9, as advertised under Vacancy Announcement Number CP-2012-0187;²
2. on March 19, 2014, Complainant was not selected for the position of Patent Examiner (Computer Engineering), Grades 7 and 9, as advertised under Vacancy Announcement Number CP-2014-0009;
3. on July 9, 2014, Complainant was not selected for the position of Patent Examiner (Computer Engineering), Grade 11, as advertised under Vacancy Announcement Number CP-2014-0024;
4. on July 15, 2014, Complainant was not selected for the position of Patent Examiner (Computer Engineering), Grades 7 and 9, as advertised under Vacancy Announcement Number CP-2014-0033; and
5. on August 25, 2014, Complainant was not selected for the position of Patent Examiner (Computer Engineering), Grades 7 and 9, as advertised under Vacancy Announcement Number CP-2014-0042.³

In May 2012, the Agency announced a vacancy for a Patent Examiner (Computer Science), GS-1224 07/09, position. The vacancy announcement (number CP-2012-0187) described the position as a "Career/Career-Conditional appointment in the competitive service" and listed the position's promotion potential as GS-13. Complainant applied for the position. He submitted a completed

² The Agency initially dismissed Claim 1 on the ground that Complainant did not raise it in a timely manner. Complainant appealed the dismissal to the EEOC's Office of Federal Operations, which reversed the dismissal and remanded the matter to the Agency for processing. EEOC Appeal No. 0120132041 (Jan. 8, 2014).

³ Complainant raised three other allegations, which he subsequently withdrew.

Declaration for Federal Employment form (OF-306 form) on July 23, 2012. On the form, Complainant answered “yes” in response to a question about whether he had been fired from a job in the past five years. He stated that his previous employer discharged him from a position as a criminal defense attorney and alleged that the discharge resulted from disability-based discrimination. He also stated that his previous employer terminated his employment “immediately” after he requested reasonable accommodation. Complainant answered “no” to the six other “Background Information” questions on the OF-306 form.

In an August 17, 2012, email to Complainant, an Agency Human Resources Specialist (HRS2) informed him that his application “was referred to the selecting official, and [he was] selected for this position.” She told him that a Human Resources representative would contact him “shortly... with an official job offer and any other information needed to move forward.” Also, on August 17, 2012, an Agency Staffing Specialist forwarded Complainant’s resume, his OF-306 form, and a Patent Examiner Hire Cover Sheet to Employee Relations. The Cover Sheet listed September 10, 2012, as the “EOD Date” and stated that the reason for the suitability request was “yes to Question #12.” A Human Resources Specialist (HRS1) wrote on the Cover Sheet that Complainant was “disapproved” for hire.

On September 23, 2012, Complainant emailed a copy of a California Unemployment Appeals Board Administrative Law Judge’s (ALJ’s) September 18, 2012, decision to a different Human Resources Specialist (HRS3). The ALJ found that Complainant was eligible for benefits because he had not been discharged from his prior employment for misconduct. The ALJ noted that Complainant asserted that his former employer, a state entity, stated in a termination letter that Complainant had been habitually late to court, spent too much time talking with clients, accused other attorneys of causing problems, and improperly summoned others to the bench. He also noted that the letter, which was not submitted into evidence, contained only hearsay information. The ALJ found that Complainant was credible and that his alleged poor performance did not constitute willful misconduct. HRS3 forwarded Complainant’s email to HRS1 on September 26, 2012.

In a September 26, 2012, email to the Director of Technology Center 2400 (SO) and other individuals, HRS1 recommended against hiring Complainant. He stated that Complainant was “unsuitable for hire” because Complainant’s previous employer had fired him for being habitually late to court, spending too much time talking with clients, accusing other attorneys of causing problems, and summoning others to the bench improperly. The next day, SO replied, “Agree.” On October 26, 2012, HRS2 informed Complainant that the Agency would not hire him because of information in the OF-306 form.

The record contains a Re-Hiring Analysis for Former USPTO Employees form (RAF form) for Complainant. The SO signed the form on November 15, 2012. The RAF form stated that Complainant had not received any disciplinary action during his prior employment. With respect to whether Complainant had any performance problems that did not result in a warning or a less-than-Fully-Successful rating, the form stated that one supervisor (S1) stated that Complainant had been “transferred to a different art [sic] in an attempt to see if that would improve his performance issues” and another supervisor (S2) stated, “It was a long time ago.

His work was ok until he indicated he would go to law school.” With respect to whether there were any other reasons for or against re-hiring Complainant, the form stated, “When he decided to go to law school, his performance dropped. For example, while he had agreed to move his amendments prior to leaving the Office, his amendments were unmoved.” The SO recommended that Complainant not be considered for reemployment.

Complainant subsequently applied for several Patent Examiner (Computer Engineering) positions, under Vacancy Announcement Numbers CP-2014-0009, CP-2014-0024, CP-2014-0033, and CP-2014-0042. He was named to the Best Qualified Lists for the vacancies, but the Agency did not select him for any of the positions. The Agency selected 65 candidates under Vacancy Announcement Number CP-2014-0009, 8 candidates under Vacancy Announcement Number CP-2014-0024, 29 candidates under Vacancy Announcement Number CP-2014-0033, and 11 candidates under Vacancy Announcement Number CP-2014-0042.⁴

In his affidavits, Complainant stated that he provided information about his disabilities and protected EEO activity on his OF-306 form. He also stated that, during his employment in September 2004, he asked the Agency to provide him with a part-time work schedule as a reasonable accommodation. He believed that a part-time schedule “would have enabled [him] both to fulfill [his] production requirements at the USPTO and succeed in law school simultaneously.” He asserted that S2 denied his request because S2 believed that the request was based solely on Complainant’s desire to attend law school rather than on his disabilities. According to Complainant, he submitted “a one-week notice of resignation” shortly after S2 denied his request.

Complainant argued that the Agency did not select him for the Patent Examiner position in October 2012 because of the “collaborative and combined actions” of HRS1 and the SO. He maintained that the Agency should have hired him for the Patent Examiner positions at issue because of his “superior qualifications, the absence of a simultaneously true, legitimate, and nondiscriminatory reason for not hiring [him], [his] affirmative suitability for the role,” and the Agency’s previous selection of him for a Patent Examiner position.

He asserted that, when an Agency employee told him on October 26, 2012, that the Agency had not selected him for a Patent Examiner position, he told the employee that he “was inclined to file a complaint of discrimination.” Complainant noted that his EEO complaint was pending at the time of his 2014 non-selections. He submitted numerous documents with his affidavit.

HRS1 stated in his affidavit that he made a “pre-suitability determination” and that it was a recommendation, not a final decision.

⁴ According to the Agency’s final decision, “[t]he PHC Director 2 was responsible for signing off and approving the selections made by the HCs for” these Vacancy Announcements. It appears that “HCs” refers to Hiring Coordinators. The Certificate Listing for Vacancy Announcement Number CP-2012-0187 lists the SO as the Selecting Official. The Certificate Listings for the other vacancy announcements at issue here list a different individual as the Selecting Official.

He further stated that he “did not believe [Complainant] was being honest about his termination, . . . did not believe that a federal agency or state government would discriminate against him due to his disability,” and thought that the Office of Personnel Management “may have considered his application as material and intentional falsification because he was not terminated for the disability or for requesting reasonable accommodations. He was terminated for the reasons provided by” Complainant’s previous employer. HRS1 asserted that Complainant “may have disagreed but one should still be honest on the OF-306.” He argued that “Complainant should have put the authentic reasons he was terminated, and then could have explained his viewpoint in Section 16.” He asserted that Complainant, as a lawyer, “should be aware that it is frowned upon to enter information that could be considered fraudulent because it differs from the reasons provided to him for his termination.” HRS1 stated that the Agency hired “approximately two to three individuals” whom the Office of Employee Relations recommended not be hired.

The SO stated in her July 8, 2014, affidavit regarding Claim 1 that she was not aware of Complainant’s disability, requests for reasonable accommodation, or prior EEO activity. In her October 9, 2014, supplemental affidavit, the SO stated that she became aware of Complainant’s EEO activity during the processing of the instant complaint.

The SO stated that it was “entirely possible” that she had hired someone who was not recommended for hire following a suitability and OF-306 review. In addition, the SO stated that she oversees the hiring process, that supervisors make the selections, and that she signs the final paperwork and sends it to the Office of Human Resources (OHR). She also stated that she “made the final hiring decision” regarding Complainant’s non-selection under the vacancy announcements at issue. According to the SO, the Agency did not hire Complainant under Vacancy Announcement Number CP-2012-0187 because of the information provided in HRS1’s email.

The SO explained that OHR screens applications to determine who meets minimum qualifications, forwards a selection certificate to the Patent Hiring Center (PHC), and provides the PHC and the SO with a list of applicants who are former Patent Examiners. The PHC coordinates matters with OHR and the Patents Division. The Selecting Authority Subject Matter Experts group reviews the applications to determine whom to interview, and a Supervisory Patent Examiner contacts the supervisors of former Patent Examiners to inquire about their performance.

According to the SO, Complainant “fell out of the process” when she completed the November 15, 2012, RAF form that recommended that the Agency not re-hire him. She based her recommendation on the comments of S1 and S2, who indicated that “Complainant dropped his work when he went to law school.” The SO stated that Complainant had told his supervisors that he would continue to perform work before he left the Agency, but he did not do so. In response to the EEO Investigator’s question about why the Agency offered Complainant a job in August 2012 if Complainant was not re-hirable, the SO stated that the Agency “just recently formalized this hiring process adjusting the processing time of the RAF in fiscal year 2014, and he may have not been vetted in this manner at that time.”

She asserted, “sometimes things slip through the cracks.” The SO denied that the Agency subjected Complainant to discrimination based on disability or reprisal.

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. On July 26, 2016, Complainant withdrew his request for a hearing on all claims except Claim 1. The Agency issued a November 14, 2016, final decision finding that it had not discriminated against Complainant when it did not select him for four Patent Examiner positions in 2014. On June 13, 2017, Complainant withdrew his request for a hearing on Claim 1. The Agency issued an August 11, 2017, final decision finding that the Agency had discriminated against Complainant in reprisal for protected EEO activity with respect to Claim 1.

Final Agency Decision on Claim 1

In its decision, the Agency concluded “that [it] retaliated against Complainant when conducting its suitability determination.” In its Statement of Facts, the Agency noted that, “[o]n August 17, 2012, Complainant received a conditional offer of employment from the Agency based on his application for CP-2012-0187.” In its Analysis, the Agency quoted from HRS1’s affidavit and also quoted deposition testimony in which HRS1 stated that he did not believe that Complainant had been removed from his previous employment because of his disability and that he would have believed that Complainant was “covering up something” if Complainant had stated that his prior employer discharged him because of his race, sex, or religion. The Agency found that HRS1’s statements constituted direct evidence of a retaliatory motive.

The Agency further found that Complainant engaged in protected activity when he disclosed that he had requested reasonable accommodation and when he made statements opposing his former employer’s alleged discrimination. In addition, the Agency stated that Complainant was subjected to an adverse action when the Agency did not select him for the Patent Examiner position. It concluded that, although HRS1 “was not the decisionmaker in the hiring process,” he was responsible for finding Complainant unsuitable for employment. Accordingly, the Agency imputed HRS1’s retaliatory motive to the selecting official and found that the selecting official was aware of Complainant’s protected activity. Noting that HRS1’s statements demonstrated retaliatory animus toward Complainant’s EEO activity and that HRS1 “acted to disqualify Complainant based at least in part on his animus against those who engage in protected EEO activity,” the Agency concluded that “there is a causal connection between Complainant’s protected activity and the Agency’s unsuitability decision.”

The Agency stated that its “finding of direct evidence of retaliation does not mean the Agency was required to credit Complainant’s reason for his discharge from employment over [that of his former employer]. It means that the suitability determination must be made free from retaliatory animus.” The Agency concluded that, “regardless of whether [HRS1] credited [the former employer’s] reasons for discharging Complainant,” HRS1’s “retaliatory animus was also a factor” in the suitability decision.

The Agency noted that it “has at times hired individuals who OHR has found unsuitable due to a positive OF-306 disclosure” and that it “cannot rely on a blanket policy that it excludes everyone who makes a positive disclosure on [his or her] OF-306.” It concluded that “there is evidence that the Agency’s decision was, at least in part, the product of retaliatory animus. Because the Agency imputed a character unsuitable for hire to Complainant based on his protected EEO activity, it engaged in retaliation when making its negative suitability determination.”

The final agency decision ordered the Agency to take the following remedial actions:

1. Within sixty (60) calendar days of receipt of this decision, Complainant shall furnish a complete OF-306 form that is accurate as of the date it is submitted.
2. Within thirty (30) days of the receipt of the new OF-306, the Agency shall conduct a new suitability recommendation, free of reprisal, by an OHR employee other than the ER Specialist [HRS1] referenced in this decision. A final decision on suitability will be made by a Selecting Official from Patents who is not either of the Selecting Officials for CP-2012-0187. Should the Agency find Complainant suitable for employment, it will have fifteen (15) days to offer Complainant a position as a patent examiner (computer science), GS-1224-09, provided, however, the Agency is not subject to a hiring freeze at the time. In the event of a hiring freeze, the Agency has fifteen (15) days from the end of any such hiring freeze to offer a [sic] Complainant said position. The Agency must copy the Director of OEEOD on any offer of employment. Should the Agency not find Complainant suitable for employment, it will have fifteen (15) days to provide a written explanation to Complainant, with a copy to the Director of OEEOD, as to the reasons for its determination, along with any supporting documentation of its negative suitability determination.
3. Complainant shall have fifteen (15) days to accept any offer of employment. Failure to accept the offer within fifteen (15) days will be considered a declination of the offer, unless Complainant can show that circumstances beyond his control prevented a response within the time limit.

* * *

8. Within sixty (60) days of receipt of this decision, Complainant may submit to the Director of OEEOD a written request for an award of other damages, along with supporting legal and factual documentation, with a copy to the Office of General Counsel. Within thirty (30) days of the Director of OEEOD’s receipt of the request for an award of other damages, the Agency’s Office of General Counsel may submit to the Director of OEEOD a written response to request for other damages along with any supporting

documentation, with a copy to Complainant. The Agency will issue its determination as to an award of other damages, if any, within sixty (60) days of its receipt of any Office of General Counsel response, or if no response is submitted, within sixty (60) days of the expiration of the time to file any such response.

Final Agency Decision on Claims 2 - 5

In its decision, the Agency concluded that Complainant had not proven that the Agency subjected him to discrimination based on disability or reprisal with respect to Vacancy Announcement Numbers CP-2014-0009, CP-2014-0024, CP-2014-0033, and CP-2014-0042. The Agency found that Complainant did not establish prima facie cases of discrimination based on disability and reprisal. The Agency also found that it articulated a legitimate, nondiscriminatory reason for its actions. In that regard, the Agency stated that Complainant's prior performance issues, as outlined in the RAF form, disqualified him from employment. Further, the Agency found that Complainant did not establish that its articulated reason was a pretext for discrimination. The Agency noted that it had completed the RAF form before Complainant filed his prior complaint and that there was no evidence that the Agency treated him differently from the way that it treated other former employees who re-applied for employment. To the extent that Complainant argued that the Agency should have provided him with a reasonable accommodation, the Agency noted that Complainant never requested one with respect to the vacancies at issue in these claims. Finally, to the extent that Complainant speculated that HRS1 was involved in the non-selections for the four vacancies at issue, the Agency found that the record showed that neither HRS1 nor Complainant's OF-306 form played a role in the non-selections.

CONTENTIONS ON APPEAL

Arguments Regarding the Final Agency Decision on Claim 1

On appeal, Complainant, through his attorney,⁵ argues that he "is entitled to reinstatement without a new suitability determination and at the pay grade of GS-1224-13 with the duties of a GS-1224-09." He asserts that, absent the discrimination, the Agency would have hired him and ultimately would have promoted him to the GS-13 level.

Complainant argues that the Agency, in its final decision, erroneously required a new suitability determination.

⁵ Complainant is represented by an attorney with respect to his appeal of the final agency decision on Claim 1. He represents himself with respect to his appeal of the Agency's final decision on Claims 2 - 5. On January 23, 2018, Complainant, through his attorney, submitted a Reply to Agency's Statement in Opposition to Appeal of the final agency decision on Claim 1. Commission regulations, which require that statements in support of appeals be submitted within 30 days of the filing of the notice of appeal, do not provide for consideration of subsequent submissions. See 29 C.F.R. § 1614.403.

He maintains that the Agency selected him for the Patent Examiner position and disapproved him for hire solely because he answered “yes” to the question about being fired from a job. He argues that, without the Agency’s discrimination, he would have passed the suitability determination. Citing Commission decisions, Complainant contends that, “having completed the competitive process, [he] should be restored to the position at the same place as he would have been absent the discriminatory action, namely at the onboarding stage of the hiring process.” He argues that information obtained through a new suitability determination would constitute after-acquired evidence.

Further, Complainant states that the position at issue was a career-ladder position with non-competitive promotion potential to the GS-13 level. He asserts that, if he had begun working at the Agency on the anticipated entry-on-duty date of September 10, 2012, he currently would be in a GS-13 position. Complainant argues that he therefore is entitled to retroactive promotion to the GS-13 level. He also argues, however, that the Agency should provide him with work at the GS-9 level. In that regard, Complainant notes that patent examiners perform work that “is highly technical and requires knowledge of systems unique to the patent office.” He asserts that they “must undergo intensive training and gain experience with certain products and systems in order to perform adequately.” Complainant contends that the Agency should provide him with “the salary he would have obtained, while allowing him to receive the training and experience he requires by starting the position at a GS-1224-09.”

In response, the Agency argues that Complainant “is not entitled to appointment without a new suitability determination.” The Agency asserts that Complainant “never received an official offer of employment, whether conditional or otherwise. [He] received only an email indicating he had been selected.” Citing 5 C.F.R. §§ 731.104 and 731.106, the Agency maintains that federal regulations require it to conduct a suitability review and that Complainant “cannot lawfully hold a Patent Examiner position until he receives a new, favorable suitability determination.” The Agency states that agencies must reinvestigate employees’ suitability at least every five years. According to the Agency, even if Complainant had received a favorable determination in September 2012, “it would be mandatory that he undergo a new investigation and suitability determination now.”

The Agency asserts that the Commission lacks authority to order the Agency to appoint Complainant to a position in the absence of a favorable suitability determination. It contends that Complainant:

was not offered a Patent Examiner position because the Agency determined he was unsuitable. Therefore, the only suitability review conducted for [Complainant] resulted in no suitability determination or a negative suitability determination.” Because a favorable suitability determination is mandatory in order for [Complainant] to be appointed, the Agency cannot be required to appoint him in the absence of one.

Noting that the final agency decision “explicitly made no finding regarding whether [Complainant’s] prior termination rendered him unsuitable,” the Agency argues that Complainant’s assertion that he would have received a favorable determination in the absence of discrimination “is factually unsupportable.” The Agency further contends that its final decision provided Complainant with make-whole relief. It argues that the cases that Complainant cites support the final decision’s “remedy, which entitles [Complainant] to a Patent Examiner position only after he is determined to . . . meet the suitability requirements of the position.”

Finally, citing decisions of the Merit Systems Protection Board (MSPB), the Agency argues that Complainant is not entitled to receive retroactive appointment to the Patent Examiner position. The Agency also argues that Complainant’s contentions regarding retroactive promotion to the GS-13 level “are not yet ripe for review.” In that regard, the Agency notes that its final decision did not address back pay or the rate at which Complainant would have advanced on the career ladder.

Arguments Regarding the Final Agency Decision on Claims 2 - 5

On appeal, Complainant argues that the Agency’s use of the RAF form was discriminatory and retaliatory. He states that, when HRS2 told him on October 26, 2012, that the Agency had not selected him for a Patent Examiner position, he told her that he “was inclined to file a complaint of discrimination.” He “believe[s]” that the SO learned about his “threat of a complaint of discrimination.” In addition, it is his “belief and theory” that the SO discovered that HRS1 had disapproved his application and that she “reacted to her discovery by creating or ordering the creation of the negative RAF.” He alleges that the SO did so because she wanted to uphold the prior disapproval and “make the previous decisions apply with respect to future positions.” Citing Staub v. Proctor, 562 U.S. 411 (2011), Complainant argues that the “cat’s paw” theory of liability applies to his case.

Complainant states that he does not believe that S2 actually provided negative information for the RAF form but notes that he “could be mistaken.” He asserts that he asked the Agency to provide him with a part-time work schedule as a reasonable accommodation, that S2 denied his request, and that he submitted his resignation two days after the denial because he “would not be able to succeed both as a patent examiner and as a part-time law student.” He alleges that S2 was “disappointed and angry” when he resigned and that any negative comments resulted from S2’s anger about his reasonable-accommodation request and resignation.

In addition, Complainant argues that the SO’s assertion that “[s]ometimes things slip through the cracks” does not constitute “a compelling reason for concocting a recommendation that a former applicant and employee not be rehired.” He maintains that the SO’s RAF recommendation against hiring him “more likely resulted from the prejudicial besmirching of [his] work ethic” contained in HRS1’s September 26, 2012, email. He argues that S1’s March 1, 2004, letter recommending him for a legal scholarship award and a former colleague’s March 7, 2007, letter recommending him for admittance to a Master of Business Administration program are more credible than the RAF form’s characterization of his service.

Finally, Complainant argues that the Agency's use of the RAF form has a disparate impact. Noting that he attached "more than 300 pages of EEO-protected information" to his job applications, Complainant claims that the Agency's use of the RAF form allows the Agency "to supersede the anti-discrimination and anti-retaliation laws" regarding reasonable accommodation and reprisal.

In response, the Agency argues that Complainant has not established a prima facie case of discrimination based on disability or reprisal. The Agency further argues that it articulated legitimate, nondiscriminatory reasons for its actions and that Complainant did not show that the articulated reasons were a pretext for discrimination. The Agency maintains that Complainant has not shown that it treated him differently from the way that it treated similarly situated applicants. In that regard, the Agency states that the record contains no evidence that the Agency re-hired any former employees who had negative RAFs. In addition, the Agency contends that the decision not to re-hire Complainant "was based on his adverse employment history with the Agency, and not on any discriminatory or retaliatory animus."

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDINGS

Claim 1 (Vacancy Announcement Number CP-2012-0187)

When discrimination is found, an agency must provide a complainant with a remedy that constitutes full, make-whole relief to restore the complainant as nearly as possible to the position he or 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). Such relief can include subsequent career-ladder promotions that a complainant likely would have received if she or he had been selected for the position in the first instance. See, e.g., Clay W. v. Dep't of the Army, EEOC Appeal No. 0120161031 (June 21, 2018) (noting that back-pay determination should consider that complainant "would have received all step increases and all career ladder promotions to which a fully successful employee was entitled"); Chara S. v. Dep't of Homeland Sec., EEOC Request No. 0520180134 (Apr. 5, 2018) (same); Petitioner v. U.S. Postal Serv., EEOC Petition No. 0420140007 (Feb. 19, 2015) (petitioner should be placed retroactively in EAS-17 position and

then, 18 months after the appointment date, be retroactively promoted to EAS-19 level) (citing Allen v. Dep't of Def. (Def. Logistics Agency), EEOC Request No. 05900807 (Sept. 11, 1990).

In this case, the Agency concluded in its final decision that it retaliated against Complainant for engaging in protected EEO activity “when making its negative suitability determination.” The final decision ordered the Agency to conduct a new suitability review and, if it found Complainant suitable for employment, to offer him a GS-9 Patent Examiner position. On appeal, Complainant contends that the Agency should have awarded him a retroactive appointment to the position and a non-competitive promotion to the GS-13 level. The Agency argues that Complainant is entitled to a new suitability determination but not to retroactive appointment to the position.

We find that Complainant is entitled to retroactive placement in the Patent Examiner (Computer Science) position. In that regard, we find that the evidence of record does not establish that, absent the discrimination that occurred here, the Agency would not have placed Complainant in that position. See Eyslee v. Dep't of the Treasury, EEOC Appeal No. 0720100050 (Dec. 7, 2011) (if the selection process is discriminatory at any phase, complainant must be awarded full relief, i.e., the position retroactively, unless the agency can show by clear and convincing evidence that complainant would not have been selected even in the absence of discrimination).

The Agency informed Complainant on August 17, 2012, that it had selected him for the Patent Examiner (Computer Science) position, and the Patent Examiner Hire Cover Sheet that a Staffing Specialist forwarded to HRS1 listed a September 10, 2012, entry-on-duty date.⁶ HRS1, however, found Complainant unsuitable for hire and recommended against hiring Complainant. The SO accepted his recommendation. The Agency determined that retaliatory animus was “a factor” in the suitability decision. As a result of the reprisal-tainted suitability decision, the Agency did not place Complainant in the Patent Examiner position.

On appeal, the Agency notes that its final decision made no finding about whether Complainant’s termination from his prior employment with a different employer would have resulted in an unfavorable suitability determination. Having discriminated against Complainant, the Agency bears the burden of showing that the termination in fact would have prevented it from hiring Complainant. The record does not support such a conclusion. The Agency points to no evidence that a prior termination automatically disqualifies an applicant. Moreover, as the Agency noted in its final decision, HRS1 and the SO acknowledged that the Agency has hired individuals who received unfavorable suitability reviews based on information in their OF-306 forms. Therefore, we find that the evidence of record establishes that, absent the discrimination, the Agency would have placed Complainant in the Patent Examiner (Computer Science) position.

⁶ The Agency asserts on appeal that Complainant did not receive an “official” employment offer. Complainant did, however, receive a conditional offer. HRS2’s email to Complainant stated that he had been selected for the position, and the Agency stated in its final decision that “Complainant received a conditional offer of employment.”

We further find that full relief includes placement in that position. Accordingly, we will modify the Agency's Order and will order the Agency to place Complainant in the position retroactive to September 10, 2012. In this regard, we find no merit to the Agency's claim that the Commission lacks authority to order the Agency to place Complainant in the Patent Examiner position. Section 505 of the Rehabilitation Act, 29 U.S.C. § 794a, incorporates the "remedies, procedures, and rights" available under section 717 of the Civil Rights Act of 1964, which specifically authorizes the EEOC to enforce its nondiscrimination provisions "through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section," 42 U.S.C. § 2000e-16. The Commission has the authority--indeed, the obligation--to ensure that victims of discrimination receive full, make-whole relief.

As noted above, make-whole relief includes any career-ladder promotions that Complainant would have received absent the discrimination. He has requested a retroactive, career-level promotion to the GS-13 level. It is not clear from the record, however, whether and when Complainant would have received career-ladder promotions. Accordingly, on remand, the Agency should determine the extent to which Complainant would have received career-ladder promotions and should provide the promotions, with back pay.

The Agency asserts that federal regulations require it to investigate the suitability of employees at least once every five years. The record does not disclose whether the Agency has, in fact, reinvestigated the suitability of its employees. To the extent that the Agency has reinvestigated the suitability of the Patent Examiners (Computer Science) whom it hired under Vacancy Announcement Number CP-2012-0187, it may conduct a similar reinvestigation of Complainant. We caution the Agency that any such suitability reinvestigation must be done in a nondiscriminatory manner and must be consistent with the reinvestigations of the Patent Examiners hired under Vacancy Announcement Number CP-2012-0187. We strongly urge the Agency take all necessary steps to ensure that any reinvestigation it conducts is free from retaliatory animus or other discriminatory bias. HRS1, the SO, and other individuals involved in the instant matter may not be involved in the reinvestigation. Complainant is entitled to receive back pay and other relief regardless of the outcome of the reinvestigation, if the Agency conducts one. See Mallek v. Gen. Serv. Admin., EEOC Request No. 04A00914 (May 24, 2002) (noting that agency may complete background-clearance procedures not completed during the hiring process and that their "outcome could conceivably disqualify complainant from further employment, but they will not affect complainant's entitlement to backpay and other remedial relief awarded").

In summary, we find that the Agency would have placed Complainant in the Patent Examiner (Computer Science) position absent the discrimination and that Complainant is entitled to retroactive placement in the position with back pay and career ladder promotions. To the extent that it has not done so, the Agency shall provide the relief outlined in the Order below.⁷

⁷ In the order accompanying its final decision, the Agency stated that it would issue a "determination as to an award of other damages" after receipt of Complainant's request for such an award. Complainant submitted his request, the Agency issued a final decision on the matter,

The Agency may conduct a suitability reinvestigation of Complainant to the extent that it has reinvestigated the suitability of the Patent Examiners (Computer Science) whom it hired under Vacancy Announcement Number CP-2012-0187.

Claims 2 - 5 (Vacancy Announcement Numbers CP-2014-0009, CP-2014-0024, CP-2014-0033, and CP-2014-0042)

Disparate Treatment

To prevail in a disparate-treatment claim, Complainant generally 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 Construction Co. 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. Texas Dep't of Community 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 Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993). Complainant can do this by showing that the proffered explanations are unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons are not credible permits, but does not compel, a finding of discrimination. Hicks at 511.

Complainant can establish a prima facie case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Social Security Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas Corp.). Specifically, in a reprisal claim, and in accordance with the burdens set forth in McDonnell Douglas, Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976), and Coffman v. Dep't of Veteran Affairs, EEOC Request No. 05960473 (Nov. 20, 1997), a complainant may establish a prima facie case of reprisal by showing that: (1) he or she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he or she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). A nexus may be shown by evidence that the adverse treatment followed the protected activity within such a period of time and in such a manner that a reprisal motive is inferred. See Clay v. Dep't of the Treasury, EEOC Appeal No. 01A35231 (Jan. 25, 2005).

and Complainant has appealed the Agency's final decision. We will address that matter in EEOC Appeal Number 0120181501.

An individual can engage in activity protected under Title VII by opposing a practice made unlawful by Title VII or by filing a charge, testifying, assisting, or participating in an investigation, proceeding, or hearing under Title VII. 42 U.S.C. § 2000(e)-3(a). A request for reasonable accommodation is protected activity. EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, at II.A.2.e. (Aug. 25, 2016).

We assume, for purposes of analysis only and without so finding, that Complainant has established prima facie cases of discrimination based on disability and reprisal. We also find that the Agency has articulated a legitimate, nondiscriminatory reason for its actions. The Agency did not select Complainant for a Patent Examiner position under Vacancy Announcement Numbers CP-2014-0009, CP-2014-0024, CP-2014-0033, and CP-2014-0042 because of the performance problems described on the RAF form.

Complainant has not established that the articulated reason was a pretext for discrimination. He has not shown that the statements on the RAF form are unworthy of credence. For example, he has not established that he “move[d] his amendments” prior to leaving the Agency and has not otherwise refuted the statement that his performance dropped after he decided to attend law school. We do not find the March 2004 and March 2007 letters of recommendation, which concerned academic matters, to be more reliable than the RAF form, which specifically addressed whether the Agency should re-hire Complainant. Further, the evidence does not support Complainant’s allegation that the SO created the RAF form because she wanted to uphold HRS1’s disapproval of Complainant’s previous application for a Patent Examiner position. His mere “belief and theory” are insufficient to establish pretext. In addition, there is no evidence that the Agency has re-hired a former employee whose RAF form contained a recommendation against reemployment.

Similarly, Complainant has not shown that discriminatory reasons more likely motivated the Agency’s decision not to select him for the vacancies at issue here. Complainant, who specifically states that he does not believe that S2 provided negative information for the RAF form, nonetheless speculates that negative comments on the form resulted from S2’s alleged anger about his request for reasonable accommodation and resignation. Complainant’s unsupported speculation and conjecture do not establish pretext. Further, to the extent that Complainant asserts that the alleged bias of S1, S2, or HRS1 influenced the SO, he has not shown that to be the case. The evidence in this case does not establish that the RAF comments attributed to S1 and S2 resulted from discriminatory animus. Similarly, the evidence does not establish that HRS1’s bias influenced the SO’s preparation of the RAF form.

Disparate Impact

Pursuant to traditional disparate-impact analysis, a complainant must show that a practice or policy, although facially neutral, had a significant discriminatory impact on members of the protected class. See, e.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988). To establish a prima facie case of disparate impact, the complainant must: (1) identify the specific practice or policy being challenged; (2) show a statistically significant disparity; and (3) show that the disparity is linked to the challenged practice or policy. Id. at 994.

The burden is on the complainant to show that the facially neutral standard in question affects individuals in the protected group “in a significantly discriminatory pattern.” Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

Further, under the Rehabilitation Act, an agency may not use qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the criteria are job related and consistent with business necessity. See 29 C.F.R. § 1630.10(a). Selection criteria that exclude individuals with disabilities on the basis of disability but do not concern an essential function of the position in question are not consistent with business necessity. An employer may not use a selection criterion that is related to an essential function to screen out an individual on the basis of disability if the individual could meet the criterion through reasonable accommodation. 29 C.F.R. app. 1630.10(a).

In this case, Complainant has not established a prima facie case of disparate impact under traditional disparate-impact analysis. He did not present any evidence that the Agency’s use of the RAF form disproportionately screened out applicants with disabilities or applicants who had engaged in prior EEO activity. Similarly, Complainant has not shown that the RAF form was a selection criterion that screened him out on the basis of disability. He has not established a nexus between his disability and the Agency’s use of the form. Complainant’s unsupported allegation that S2 was angry about his request for reasonable accommodation and subsequent resignation does not establish a disability-based disparate impact.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency’s November 14, 2016, final decision finding that the Agency did not discriminate against Complainant with respect to Claims 2 - 5 (Vacancy Announcement Numbers CP-2014-0009, CP-2014-0024, CP-2014-0033, and CP-2014-0042). We MODIFY the Agency’s August 11, 2017, final decision and REMAND this matter to the Agency for further processing in accordance with our Order below.

ORDER

Unless otherwise indicated, the Agency is ordered to take the following remedial action **within one hundred and twenty (120) days** of the date this decision is issued:

1. The Agency shall retroactively place Complainant in the Patent Examiner (Computer Science) position, as advertised under Vacancy Announcement Number CP-2012-0187, or a substantially equivalent position, effective September 10, 2012. The Agency shall grant Complainant fifteen (15) days to determine whether to accept the position. Should Complainant reject the job offer, Complainant’s entitlement to back pay shall terminate as of the date of rejection.

2. Failure to accept the offer within the time period set by the Agency will be considered rejection of the offer, unless Complainant can show that circumstances beyond his control prevented a response within the time limit.
2. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant pursuant to 29 C.F.R. § 1614.501. Complainant is entitled to any benefits to which he would have been entitled but for the discrimination, as well as expected promotions throughout the period, i.e., step increases and grade increases. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay 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 enforcement or clarification 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 also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
4. The Agency shall provide training to the responsible management officials regarding their obligation not to retaliate against employees who exercise their rights to engage in protected EEO activity.
5. The Agency shall consider taking appropriate disciplinary action against the responsible management officials, including HRS1. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. 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 any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
6. The Agency shall pay Complainant reasonable attorney's fees and costs for the work associated with Claim 1.
7. The Agency shall post a notice in accordance with the paragraph below entitled "Posting Order."

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 supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post 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 (K0618)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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

May 17, 2019
Date