



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

[REDACTED]  
Thomasina B.,<sup>1</sup>  
Complainant,

v.

Jeff B. Sessions,  
Attorney General,  
Department of Justice  
(Federal Bureau of Prisons),  
Agency.

Appeal No. 0120173008

Agency No. BOP-2016-00294

**DECISION**

The Equal Employment Opportunity Commission (EEOC or Commission) accepts Complainant's appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 8, 2017 final decision concerning an 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**

During the period at issue, Complainant worked for the Bureau of Prisons as a Health Information Technician, GS-7, at the Agency's Devens Federal Medical Center in Ayer, Massachusetts.

On December 22, 2015, Complainant filed a formal EEO complaint claiming that the Agency discriminated against her based on race (Hispanic) and sex (female) when, on December 8, 2015, Complainant became aware that her supervisor ("S1") (Asian female) provided a negative reference to the Public Health Service (PHS) and Complainant believes this reference prevented the PHS from hiring her.

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<sup>1</sup> 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 into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). The record does not indicate that Complainant requested a hearing and the Agency issued a final decision on August 8, 2017, pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

In its final decision, the Agency acknowledged that it was reasonable to conclude that S1's September 30, 2015 PHS reference "likely ended any further consideration of Complainant's application" by the PHS. The Agency, however, determined that the record failed to support a determination that S1's critical comments were the result of discriminatory animus.

The Agency also determined that there was no evidence to support a claim that Complainant was constructively discharged from the Agency. We note that the Report of Investigation expressly indicated that the sole matter accepted for investigation was the job reference identified above. Any claim regarding constructive discharge was not accepted for investigation, and we will therefore confine our review of the record and analysis of the accepted claim.

The evidence developed during the investigation shows that Complainant applied for the position in question under a program that allowed Bureau of Prison employees like Complainant to convert and become U.S. Public Health Service (PHS) Officers. If Complainant had been selected, she would have received a promotion. She also would have remained working at the prison facility, although no longer under S1, and would have had equal or greater authority than S1. Complainant met all requirements for this position, and testified she was the only person qualified for the PHS position in her department so likely would have been selected. Complainant, however, stated that PHS headquarters informed her that she was not selected for the position because of a "bad reference" from her supervisor.

Complainant explained that she had a total of four references for the position and she was required to have at least one reference from her supervisor. One reference provided Complainant a copy of the recommendation, two references indicated that they had written an "excellent" and "good" reviews, and the remaining reference was from S1, Complainant's Bureau of Prisons supervisor. Complainant further explained that the PHS officer position would have been a promotion, but S1 only wanted to promote her white staff employees and not Complainant, who is a Hispanic female. Complainant acknowledged that, during this same time, S1 provided Complainant a "great reference" for a position with the U.S. Department of Homeland Security, but asserts that it was because the position was lateral and would have removed Complainant from the Agency. Complainant stated that the Agency also denied her request to be reassigned to another supervisor and Complainant "felt [that she] could not stay there [and she] had to get out of there." Complainant explained that she left the Agency and currently works for the Veterans Affairs Hospital in Bedford, Massachusetts.

S1 testified that she believed that she "provided an honest constructive assessment of [Complainant's] performance," in her PHS reference. S1 further stated that she did "not believe

[her] comment was negative.” S1 explained that she indicated that Complainant had “questionable leave usage” and S1 provided this information “in order to answer the question in the PSH reference for attendance.” Specifically, S1 stated that Complainant had a pattern of using or calling in sick before or after a scheduled day off or a holiday. S1 further explained that there were six occasions within the 12-month period prior to the PSH reference where Complainant used sick leave in combination with her scheduled day off or holiday. However, S1 clarified that “[t]here were no issues regarding [Complainant’s] performance.”

The record includes a copy of S1’s September 30, 2015 reference for Complainant’s application for the PHS officer position. In the comments section, S1 made the following statement:

[Complainant] has been under my supervision since 2006. . . . However, sometimes she is not receptive to change and new assignments. She tends to question and challenge these tasks influencing other peer[s] which reflects throughout the department. Even though she ends up completing the task, her negative demeanor creates friction between management and staff. This impacts my department in a negative way. She has made good improvement the last two years and communicates better with the supervisor. . . . In addition, I am suspicious of her sick leave usage. There is a trend of her calling in sick before or after her approved annual leave scheduled to extend her vacation time when she didn’t have enough of annual leave.

The remaining three references submitted in support of Complainant’s application are also included in the record and reflect that Complainant was given an “outstanding” rating in all elements.

The record indicates that S1 issued Complainant a November 25, 2014 memorandum re-capping a meeting with Complainant regarding leave usage requests. The memorandum informs Complainant that she must obtain leave request approval before use. Copies of Complainant’s leave request slips indicate occasions where Complainant requested sick leave before or after her scheduled day off or holiday.

A December 14, 2015 email from the PHS Recruitment Specialist to Complainant states that “[t]he appointment board’s decision for a non-recommendation was based on poor references.”

The record includes copies of Complainant’s performance evaluations completed by S1 covering the rating periods immediately before and immediately after S1 completed the September 30, 2015 reference.

The performance evaluation, issued before the September 2015 PHS reference, was signed by S1 on November 18, 2014, and states:

[Complainant] displays professionalism through her interactions with staff. . .  
[Complainant] continues to look for career advancement and recently she

successfully obtained the Registered Health Information Administrator. Job well done! . . . [Complainant] follows directives from her supervisor without any issue. She has effectively communicated with other departments. . . . [Complainant] is a great asset to this department and thank you for her hard work.

The performance evaluation, issued after the September 2015 PHS reference, is signed by S1 on January 22, 2016 and states:

In [Complainant's] position as a Health Information Technician, it is necessary for Complainant to interact with a wide variety of people on many levels. She maintains professional in her interactions with all of the medical staff and other departmental staff to include custody and unit teams. She has established professional working relationships with the people in the team.

The record further indicates that Complainant received a "Special Act Award" on July 24, 2015 and a "Time Off Award" on September 18, 2015, in appreciation for her contributions to the Agency.

The Agency found that S1's critical statements were based on Complainant's actions and were not based on Complainant's race or sex. The Agency noted that the record supported that S1 was aware of Complainant's "questionable" leave usage during the time that S1 wrote the September 2015 reference. Although the Agency acknowledged that there was no evidence in the record to support S1's statement regarding Complainant's alleged disruptive behavior, the Agency explained that Complainant's leave usage was a "sufficiently independent basis for the PHS committee to reject Complainant's application."

The instant appeal followed. Complainant, through her attorney, did not submit any arguments or statements on appeal.

### ANALYSIS AND FINDINGS

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. 29C.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").

In the absence of direct evidence, for a claim of disparate treatment, a complainant must satisfy the three-part evidentiary framework established in McDonnell Douglass Corp. v. Green, 411 U.S. 792 (1973). A complainant may establish a prima facie case of disparate treatment

discrimination based on race and sex by showing that: (1) complainant is a member of a protected class; (2) complainant is subject to an adverse employment action concerning a term, condition, or privilege of employment; and (3) complainant is treated differently than similarly situated employees outside the complainant's protected class. See e.g. \*\*\* v. Dep't of the Dep't of the Treasury, EEOC Appeal No. 0120120091 (May 3, 2014), Walker v. U.S. Postal Serv., EEOC Appeal No. 01A14419 (Mar. 13, 2003), Ornelas v. Dep't of Justice, EEOC Appeal No. 01995301 (Sept. 26, 2002).

Once complainant establishes a prima facie case of disparate treatment discrimination, the burden shifts, in accordance with McDonnell Douglas, 411 U.S. 792 to the Agency to articulate a legitimate, non-discriminatory reason for the action. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). The complainant then has the burden of proving by a preponderance of the evidence that the reason offered by the Agency is a pretext for a discriminatory motive. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993).

Here, we find that Complainant has established a prima facie case of disparate treatment based on race and sex. It is undisputed that S1's negative reference resulted in her non-selection for the PHS position despite her qualifications for the position, outstanding recommendations from other Agency references, and favorable performance ratings from S1 both before and after the negative reference. The questionable nature of the negative reference under these circumstances is sufficient to raise an initial inference of discrimination.

In response, the Agency has articulated a legitimate, non-discriminatory reason for the negative reference – that Complainant's own actions, including a questionable attendance issue, resulted in the negative reference.

The ultimate burden of proving discrimination falls to Complainant to establish, by a preponderance of the evidence, that the Agency's proffered reason was a pretext designed to mask the role discrimination played in this matter. Here, we conclude that Complainant has met this burden. S1's statements supporting her negative reference about Complainant's demeanor and interactions with staff are contradicted by S1's own testimony reflecting that "there were no issues regarding [Complainant's] performance." (Investigative Record, Exhibit 9, Interrogatory of S1, Bates no. 000086). Moreover, there is no documentation in the record or proffered by S1 to support that Complainant had a "negative demeanor," "questioned and challenged" task assignments, and caused "friction between staff" as stated in S1's PHS reference. On the contrary, the record shows that S1 evaluated Complainant's performance *before and after* completing the PHS reference. These appraisals, sandwiched around the letter of reference, described Complainant as an employee who is a "great asset" to the department, "displays professionalism," "follows directives without any issue," and "maintains professional interactions" with staff. Complainant also received a time-off award in acknowledgement of her contributions to the Agency 12 days before S1 completed the PHS reference. These performance evaluations and award are consistent with Complainant's three other PHS references who rated Complainant "outstanding" on all performance elements, and they are markedly inconsistent with S1's own assessment of Complainant in the letter of reference. Further, Complainant

testifies that she was the “only qualified individual” in her division for this position and believed S1 did not want a Hispanic female to be promoted to this position. There appears to be no legitimate explanation for S1’s inclusion of these unsubstantiated critical statements in her PHS reference for Complainant. While there is some indication that S1 had questioned Complainant’s leave usage during this period, we are unpersuaded by the Agency’s argument that this is sufficient to legitimize the negative reference and does not negate the fact that S1’s PHS reference included unfounded critical statements against Complainant.

We also disagree with the Agency’s argument that S1 would not have provided “positive” performance evaluations if S1 had a discriminatory animus against Complainant. Our review of the record indicates that S1 provided two references for Complainant during the same period. Presumably, S1’s references for Complainant would have been similar as they were provided during the same period. However, S1 “highly recommended” Complainant for a lateral position that would have removed Complainant from the Agency, but S1 provided a negative reference for the PSH position which was a promotion and would have allowed Complainant to remain at the Agency. There is no legitimate explanation for S1’s inconsistent references for Complainant given that the references were provided during the same period.

The evidence shows that the PHS position would have resulted in a promotion for Complainant. She would have remained working at the prison facility, although no longer a subordinate of S1, but in a position of equal or greater authority than S1. These facts support Complainant’s assertion that S1 intentionally sabotaged her from gaining a promotion within the prison facility as she did not want Complainant, a Hispanic woman, to potentially serve as her superior. As there is no legitimate explanation for the negative reference provided by S1, we are left to conclude that discriminatory animus played a role in its issuance. As such, we find that Complainant has established her claim of discrimination.

### CONCLUSION

Based on a thorough review of the record we REVERSE the Agency’s finding of no discrimination and REMAND this matter to the Agency for further processing in accordance with the ORDER below.

### ORDER

The Agency is ordered to take the following remedial action:

1. The Agency shall immediately designate a management official other than S1 to provide any needed references for Complainant for any future positions for which Complainant may apply.
2. Conduct a supplemental investigation within 90 calendar days of the date this decision is issued, to determine whether Complainant is entitled to compensatory damages and if so, the amount of damages Complainant is entitled for this violation of Title VII.

- a. Notify Complainant of her right to submit objective evidence based our guidance in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)<sup>2</sup> and request objective evidence from Complainant in support of compensatory damages (providing an option and instructions to request an extension in the case of extenuating circumstances).
- b. Issue a written decision on the results of the investigation to Complainant with appeal rights to this Commission.
- c. Pay Complainant the determined amount of compensatory damages. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to the Complainant for the undisputed amount. 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."
- d. Within **90 calendar days from the date this decision is issued**, the Agency shall provide at least eight hours of in-person training to S1 regarding her responsibilities under EEO laws.
- e. The Agency shall consider taking appropriate disciplinary action against S1. 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 S1 has left the Agency's employ, the Agency shall furnish documentation of her departure dates.
- f. The Agency shall immediately post a notice in accordance with the paragraph below.

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.

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<sup>2</sup> **For more information on determining compensatory damages:** EEOC Management Directive 110, Ch. 11 § VII (Aug. 5, 2015), available at [https://www.eeoc.gov/federal/directives/md-110\\_chapter\\_11.cfm](https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm) (provides the types of compensatory damages available under Title VII and "Objective Evidence" of entitlement); and N. Thompson, Compensatory Damages in the Federal Sector: An Overview, EEOC Digest Vol. XVI, No. 1 (Winter 2005) *available at* <https://www.eeoc.gov/federal/digest/xvi-1.cfm#article> (explains Carle v. Dep't of the Navy under the subsection "Proof of Damages").

POSTING ORDER (G0617)

The Agency is ordered to post at its Devens Federal Medical Center facility 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)), 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 (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 (R0610)

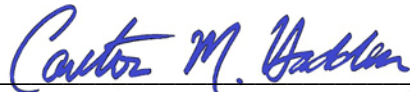
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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. **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:



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Carlton M. Hadden, Director  
Office of Federal Operations

February 27, 2019

Date