



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

██████████
Leon B.,¹
Complainant,

v.

Michael R. Pompeo,
Secretary,
Department of State,
Agency.

Appeal No. 0120182144

Agency No. DOS-0307-17

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 4, 2018, final decision concerning his 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the Agency discriminated against Complainant on the basis of race, color, age, or disability when it terminated his candidacy for a Diplomatic Security Foreign Service Special Agent position.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for a position as a Special Agent, FP-1811-0606, with the Agency's Diplomatic Security Service (DSS).

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.

On August 22, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on race (Hispanic),² color (brown), age (46), and disability (physical) when his candidacy for a Diplomatic Security Foreign Service Special Agent position was terminated on July 12, 2017.³

On December 8, 2016, the Agency announced a vacancy for a Diplomatic Security Foreign Service Special Agent (SA), FP-2501-06. According to the vacancy announcement, SAs provide security services, manage security operations, supervise staff, conduct investigations, assess security threats, and conduct security-related training.

Complainant applied for the position, and a Supervisory Human Resources Specialist (HR Specialist) sent him an email scheduling him for a July 12, 2017, assessment. The HR Specialist informed him that the assessment involved “two phases: (1) a writing exercise, and (2) an oral assessment administered by a member of the Board of Examiners and a subject matter expert.” An Information Sheet included with the letter stated,

Various phases of the assessment process are scored using the following dimensions: oral communication skills, working with others, resourcefulness, initiative and leadership judgment, composure, cross-cultural experience, information integration and analysis, planning and organizing, objectivity and integrity, motivation, and written communication skills. In addition, candidates will be given hypothetical situations concerning the Diplomatic Security Special Agent position.

Complainant appeared for the scheduled examination at the Agency’s Los Angeles Field Office. The Assistant Special Agent in Charge (ASAC), who served as the subject-matter expert, and the BEX Examiner conducted the oral assessment. By letter dated July 12, 2017, the Staff Director of the Board of Examiners for the Foreign Service (Staff Director) notified Complainant that he “did not reach the cut-off score in the Oral Assessment necessary to continue” his candidacy. She stated that Complainant’s score was 67 and the cut-off score was 80. She further stated, “The Oral Assessment is designed solely to evaluate your performance against the 12 dimensions that measure the knowledge, skills, and abilities identified by a comprehensive job analysis as essential to perform effectively as a Diplomatic Security Special Agent.”

² The Commission notes that it considers the term “Hispanic” to denote national origin rather than race.

³ Complainant also alleged that the Agency discriminated against him based on veteran’s preference. Noting that veteran’s status does not fall within the purview of the statutes enforced through the EEO complaint process, the Agency dismissed this allegation on the ground that it failed to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). The Commission has repeatedly held that veteran’s preference or status is not a protected basis for filing an EEO complaint and therefore such complaints are not within the purview of EEOC Regulations. See Rowe v. Dep’t of Commerce, EEOC Appeal No. 0120073253 (Oct. 11, 2007) (citing Devereux v. U.S. Postal Serv., EEOC Request No. 05960869 (Apr. 24, 1997)).

In his sworn affidavit, Complainant maintained that he was “highly qualified” for the position. He asserted that he never exceeded time constraints during the oral assessment, that the timer that the assessors used never went off, that he “was cut off frequently by the examiner when answering his initial questions,” and that “the examiner stopped writing multiple times during the oral test process.” He alleged that some of the questions “were related to age” and that an “interviewer asked, ‘Why now? Why do you want to join in this stage of your life? Why not join the CIA, FBI, or other three letter agencies.’” Complainant argued that his race, color, age, and medical condition were factors in the termination of his candidacy because he applied for the position “many times” and was not selected, even though he had “reinvented” himself and “obtained more training and earned another degree.” According to Complainant, “there is a low percentage of Hispanics being employed by DSS” and “a lack of equality in the DSS hiring process.” Complainant submitted a March 30, 2012, Department of Veterans Affairs letter stating that he has a 60 percent service-connected disability rating. In his rebuttal statement, Complainant asked for an analysis to determine whether the questions posed to him were the same as those “prepared by the Diplomatic Security recruitment team.”

The ASAC stated in his sworn affidavit that “Complainant did not achieve a high enough score in the assessment process to continue his candidacy.” He also stated that “[a]ll candidates were asked the same questions from the examination material and assessed against the same rating anchors.” He did not remember Complainant’s answers to the questions. The EEO Investigator requested documentation regarding how the interview was scored, and the ASAC replied that “DS Recruitment maintains copies of the anchors.” With respect to Complainant’s allegation that an interviewer asked him why he wanted to join at this stage in his life and not join other agencies, the ASAC stated, “The Examiner did ask this question to the Complainant and every other applicant during the assessment. The same questions were asked to every candidate in all of the assessments that I participated in.” Although he did not “recall the specifics,” he did “recall that the Complainant provided elaborate and extended responses to all of the questions. In order to get through all of the questions in the allotted time the Examiner kept the process moving.” The EEO Investigator asked the ASAC to provide the name, title, race, color, and ages of the applicants who were found suitable to continue their candidacy for the position. In response, the ASAC stated, “I do not know this information. DS Recruitment would be better able to provide this information.” Similarly, the ASAC could not identify the applicants whose candidacy was terminated, or not terminated, for the same reasons as Complainant’s candidacy. He denied that Complainant’s race, color, age, or impairment was a factor in the assessment.

Like the ASAC, the BEX Examiner stated in his sworn affidavit that candidates were asked the same questions and rated according to “anchors.” He explained that, following Complainant’s interview, he “and another interviewer rated each answer based on anchored rating scales,” an administrative assistant added the scores, and Complainant did not attain a passing score. In response to the EEO Investigator’s request for specific examples of how “Complainant’s responses did not measure up to the individuals whose candidacy. . . was not terminated,” the BEX Examiner stated, “I do not have access to candidates[’] file nor notes. I have no documentation that would enable me to comment on specific examples. We do not measure one candidate against another. Responses are scored based on anchors.” He did not remember any specific scores.

With respect to Complainant's allegation that an interviewer asked him why he wanted to join at this stage in his life and not join other agencies, the BEX Examiner stated, "This is not the exact language. I am not able to provide the questions we used." He then referred to "the FOIA [Freedom of Information Act] Privacy rules and exemptions, exemption (k)(6)," and quoted the exemption. He noted that the Agency asks candidates to sign non-disclosure agreements "to protect the integrity of the assessment process."⁴ The BEX Examiner, like the ASAC, stated that he did not have access to information about the applicants who were found suitable to continue their candidacies or whose candidacies were terminated or not terminated for the same reasons as Complainant's candidacy. He referred the EEO Investigator to the HR Specialist's office for that information. In response to the Investigator's request for documentation that supported the decision to terminate Complainant's candidacy, the BEX Examiner stated that "[s]coring sheet and notes are kept in" the HR Specialist's office. He denied that Complainant's race, color, age, or impairment was a factor in the assessment. According to the BEX Examiner, the "structured interviews focus on the job skills required and the specific answers to questions asked."

In her sworn affidavit, the HR Specialist stated that the "examination team uses the approved assessment materials when conducting oral assessments." According to the HR Specialist, candidates who pass the assessment must obtain a top-secret security clearance and a "class-one medical clearance with the Special Agent supplemental medical pass," must pass a suitability review, and must take a physical-readiness test before being placed on the Agency's "register." "Their score from the assessments, plus applicable veterans' points and language points. . . determin[e] their ranking on the score based register. When final offers are extended by the registrar's office, the Registrar starts at the number one name and works her way down until she fills class." An individual's candidacy terminates after 18 months on the register. Like the BEX Examiner, the HR Specialist asserted that "the FOIA Privacy rules and Exemptions" prevented her from providing the assessment materials. She submitted a copy of the nondisclosure agreement that Complainant signed. The EEO Investigator asked the HR Specialist to provide the name, title, race, color, and ages of the applicants for the position. She replied that the Agency assessed 726 candidates under the vacancy announcement and that the candidates "range from all ages, races and gender[s]." The EEO Investigator asked for the same information about candidates who passed, and did not pass, the assessments. The HR Specialist replied that the 454 candidates who had not passed the assessments as of December 11, 2017, "ranged from all ages, races and gender[s]" and that the 272 candidates who passed the assessments "range from all ages, races and gender[s]." She denied that Complainant's race, color, age, or impairment was a factor in the termination of his candidacy. The HR Specialist averred, "All candidates are solely assessed on the answers they provide against the 12 dimensions. The same scoring anchors are used for all candidates."

⁴ The Privacy Act, 5 U.S.C. § 552a, generally permits an individual to inspect and challenge the accuracy of government records about the individual. Pursuant to 5 U.S.C. § 552a(k)(6), an agency may exempt from disclosure "testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process."

The HR Specialist submitted a copy of the Agency's policy "3 FAM 2218 Foreign Service Specialist Appointments." The policy states the following with respect to oral assessments:

Candidates are selected for an oral assessment through an initial screening process. The oral assessment will be given by a panel of assessors, at least one of whom will be proficient in the Foreign Service functional field for which the candidate is being tested. The examination may include a writing assessment. Candidates taking the oral assessment will be graded numerically according to standards set by the Board of Examiners. The candidacy of anyone whose score is at or above the passing level set by the Board will be continued. The candidacy of anyone whose score is below the passing level will be terminated. The candidate may only reapply after the first-year anniversary date of the original application.

On February 14, 2018, at the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge. In a March 9, 2018, email to an Agency EEO Specialist, Complainant requested a final agency decision. Complainant, through his attorney, submitted a March 12, 2018, rebuttal to the ROI and a request for a default judgment. He argued that the ROI was inadequate and requested, among other things, a list of the assessment questions, lists of the candidates who passed and did not pass the assessment, and notes and scoring sheets from his assessment.

On May 4, 2018, the Agency issued a final agency decision (FAD) finding that Complainant did not prove that the Agency subjected him to discrimination as alleged. In its decision, the Agency noted that Complainant had alleged that the investigation was inadequate. According to the Agency, it conducted an internal inquiry "into those claims and the claims were found to be without merit." The Agency stated that it explained its findings in a "letter, dated May 2018," which it incorporated by reference into its final decision. The record does not contain a copy of the May 2018 letter.

The Agency found that Complainant did not establish prima facie cases of discrimination based on race, color, age, and disability because "Complainant failed to identify any similarly situated employees [sic] who were treated differently under similar circumstances, i.e., did not have their candidacies terminated." Assuming that Complainant had established prima facie cases of discrimination, the Agency found that management articulated legitimate, nondiscriminatory reasons for the Agency's action. In that regard, the Agency stated that "management consistently testified that Complainant's candidacy was terminated because he failed to achieve a competitive enough or passing score to meet the cutoff criteria on the assessment for continuation in the hiring process."

The Agency further found that Complainant did not establish that the articulated reasons were a pretext for discrimination. Noting that the HR Specialist stated that the 454 candidates who did not pass the assessment "ranged from all ages, races and gender[s]," the Agency concluded that there was no merit to Complainant's claim of "a lack of equality" in the hiring process.

The Agency also noted that the HR Specialist, the ASAC, and the BEX Examiner maintained that Complainant's race, color, age, and medical condition were not factors in the termination of his candidacy. It determined that management's explanations were "reasonable and credible." Finally, the Agency pointed out that 454 of 726 candidates did not pass the assessment and the Agency concluded that this "thereby disput[ed] any underlying discriminatory animus."

In a Notice of Appeal/Petition form completed on May 17, 2018, Complainant stated that he received the FAD on May 4, 2018. On May 17, 2018, Complainant submitted "Complainant's Rebuttal Statement to Agency's Final Agency Decision, . . . Motion to Compel and Sanction Agency, [and] . . . Motion for Default Judgment. . . ." Complainant asserted, among other things, that "the Agency knowingly issued a deficient ROI." He argued that the ROI was inadequate because it did not include the interview test questions, the interview panel's notes, and lists of the candidates who passed and did not pass the test. He also argued that he established prima facie cases of discrimination based on race, color, age, and disability.

By letters dated June 19, 2018, the Agency notified the Commission's Office of Federal Operations (OFO) and Washington Field Office that the Agency "received a simultaneous request for an EEOC hearing and Notice of Appeal from Complainant." In June 26, 2018, letters to the parties, OFO stated that it had received the appeal on June 18, 2018. Although the Hearings Unit of EEOC's Los Angeles District Office⁵ initially docketed Complainant's hearing request, it dismissed the request on August 24, 2018, because Complainant had requested a final decision from the Agency.

In a June 19, 2018, submission, the Agency noted that Complainant sought to appeal the FAD on May 17, 2018. The Agency argued that Complainant's statement in support of his appeal did not explain his reasons for opposing the FAD's determination that the Agency did not discriminate against him when processing his employment application. Noting that Complainant "again raises concerns about the processing of his complaint," the Agency stated that there was "no additional information" that it wanted to provide.

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").

⁵ It appears that the Commission's Los Angeles District Office processed the hearing request because the assessment examination occurred in Los Angeles, California.

ANALYSIS AND FINDINGS

To prevail in a disparate-treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n.13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to 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 may establish a prima facie case of discrimination by showing that: (1) he is a member of a protected class; (2) he applied and was qualified for the position; (3) he was not selected for the position; and (4) the position remained open and the agency "continued to seek applicants from persons of complainant's qualifications." McDonnell Douglas, 411 U.S. at 802. Although Complainant bears the burden of establishing a "prima facie" case, Burdine, 450 U.S. at 252-53, the requirements are "minimal," Hicks, 509 U.S. at 506, and a complainant's burden is "not onerous." Burdine, 450 U.S. at 253.

Here, the evidence establishes that Complainant is a member of protected classes, he applied and was qualified for the Diplomatic Security Foreign Service Special Agent position, the Agency terminated his candidacy, and the Agency continued to assess and process other candidates for the position. Further, the HR Specialist stated that candidates who passed the assessment "ranged from all ages [and] races." "All" ages and races would reasonably include candidates who are substantially younger than Complainant as well as candidates whose races/national origins are different from Complainant's. Accordingly, we find that Complainant has established prima facie cases of discrimination based on national origin and age.

We disagree with the Agency's conclusion that Complainant did not establish a prima facie case of discrimination because he did not identify any similarly situated individuals whose candidacies were terminated. Certainly, the HR Specialist's broad statement that the candidates who passed the assessment "range from all ages, races and gender[s]" does not contain the type of detailed information normally produced in an EEO investigation--and does not provide the specific information that the EEO Investigator requested. Nonetheless, as noted above, the reference to "all" races and ages includes candidates who are not in Complainant's protected groups.

Once a complainant has established a prima facie case, the burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Burdine, 450 U.S. at 253.

The Supreme Court has described this burden as being met “if the [agency’s] evidence raises a genuine issue of fact as to whether it discriminated against the [complainant],” and has noted that, “[t]o accomplish this, the [agency] must clearly set forth, through the introduction of admissible evidence, the reasons for the [complainant’s] rejection.” *Id.* at 254-55. Moreover, the agency must “frame the factual issue with sufficient clarity so that the [complainant] will have a full and fair opportunity to demonstrate pretext. The explanation provided must be legally sufficient to justify a judgment for” the agency. *Id.* at 255-56. Although the agency’s burden of production is not onerous, it must nevertheless provide a specific, clear, and individualized explanation for the treatment accorded a complainant. *Lorenzo v. Dep’t of Def.*, EEOC Request No. 05950931 (Nov. 6, 1997) (finding race/national origin discrimination where “the agency’s articulation consisted of a conclusory statement that [complainant] did not have the required skills without explaining what those skills were so that [complainant] could respond”).

We find that the evidence presented by the Agency is not sufficient to provide a clear, individualized explanation for why the Agency terminated Complainant’s candidacy after the assessment process. The ASAC and the BEX Examiner stated that Complainant did not achieve a passing score in the assessment process. In her letter to Complainant, the Staff Director stated that his oral assessment score of 67 fell below the cutoff score of 80 and that the oral assessment was designed to evaluate his “performance against the 12 dimensions that measure the knowledge, skills, and abilities” necessary for the position. The HR Specialist stated that the Agency assessed candidates based “on the answers they provide against the 12 dimensions” and used the same “scoring anchors” for all candidates. She did not identify the “scoring anchors.” Further, the Agency provided no information about the questions posed to the candidates, Complainant’s answers to the questions, how the reviewers scored Complainant’s answers, or the bases for the scores given to Complainant and the other candidates. In fact, the BEX Examiner and the HR Specialist expressly refused to provide information about the questions and assessment materials.

The Agency officials’ vague, conclusory statements about the assessment process do not explain why the Agency terminated Complainant’s candidacy. See *Fullman v. U.S. Postal Serv.*, EEOC Appeal No. 1A31036 (Mar. 18, 2004) (agency statement that selectee was “better suited for the position” was “so generalized, conclusory and vaporous as to offer no substantive explanation of the agency’s action”). The Agency, which failed to explain why Complainant received a score of 67 in the oral assessment, has failed to meet its burden of production. See *Garret W. v. U.S. Postal Serv.*, EEOC Appeal No. 0120173051 (Oct. 30, 2018) (agency did not meet its burden of production where selecting official provided “scant information about the candidate interviews” and his explanation for scoring complainant lower than selectee “consisted mostly of conclusory statements”); *Stewart v. Dep’t of Homeland Sec.*, EEOC Request No. 0520070124 (Nov. 14, 2011) (agency failed to meet its burden of production where it simply explained the general mechanics of the selection process but failed to provide an individualized explanation for complainant’s specific score).

Therefore, the Commission finds that the Agency failed to overcome Complainant's prima facie cases of discrimination based on race/national origin and age and that Complainant prevails without having to prove pretext. Saynna-Chhe v. Dep't of Housing and Urban Dev., EEOC Request No. 0720090008 (Aug. 6, 2010) (the consequence of an agency's failure to meet its burden of production under McDonnell Douglas is that the complainant, having established a prima facie case, prevails without having to make any demonstration of pretext). Accordingly, we find that Complainant has established that the Agency discriminated against him on the bases of race/national origin and age when it terminated his candidacy for the position of Diplomatic Security Foreign Service Special Agent. Having found that Complainant established discrimination based on national origin and age, we need not determine whether the Agency discriminated against him based on color or disability because such a determination would not change the remedy.

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 she or he 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). Make-whole relief includes an unconditional offer of placement in the position the complainant would have occupied but for the discrimination. 29 C.F.R. § 1614.501(a)(3).

In this case, absent the discrimination, Complainant would have passed the assessment, and his candidacy would have continued. Accordingly, we will order the Agency to change Complainant's oral assessment results to reflect a passing score. In that regard, we will direct the Agency to give Complainant the same score given to the candidate who received the highest oral assessment score under the December 8, 2016, vacancy announcement for a Diplomatic Security Foreign Service Special Agent (SA), FP-2501-06. The Agency shall then process Complainant's candidacy in the same manner that it processed the candidacies of other applicants who received passing scores. As listed by the HR Specialist, the next steps in the process are for Complainant to obtain a top-secret security clearance and a medical clearance, to pass a suitability review, and to take a physical-readiness test. If he meets those requirements, then the Agency should determine the ranking that Complainant would have had on the "register" absent the discrimination. That is, the Agency should determine the ranking based on the new assessment score and the applicable veterans' and language points. The Agency should then place Complainant in the Diplomatic Security Foreign Service Special Agent position, retroactive to the date that the Agency hired the candidate who held the same ranking on the register that Complainant is deemed to have held.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's finding of no discrimination and REMAND the matter for further processing in accordance with the ORDER below.

ORDER (C0618)

The Agency is ordered to take the following remedial action:

- I. Within thirty (30) calendar days of the date this decision is issued, the Agency shall change Complainant's oral assessment results to reflect the same score given to the candidate who received the highest oral assessment score under the December 8, 2016, vacancy announcement for a Diplomatic Security Foreign Service Special Agent (SA), FP-2501-06.
- II. The Agency shall apply to Complainant the same process that it applied to other candidates regarding the requirement to obtain a Top-Secret Security Clearance, to obtain a class-one medical clearance with the Special Agent supplemental medical pass, to pass a suitability review, and to take a physical-readiness test. If Complainant meets these requirements, the Agency shall determine Complainant's ranking on the "register" based on the new assessment score and the applicable veterans' and language points. The Agency shall then place Complainant in the Diplomatic Security Foreign Service Special Agent position, retroactive to the date that the Agency hired the candidate who held the same ranking on the register that Complainant is deemed to hold.
- III. The Agency shall pay Complainant back pay with interest from the date on which it is determined that Complainant would have started the Diplomatic Security Foreign Service Special Agent position. 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, no later than sixty (60) calendar days after the date this decision is issued. The Agency will ensure that all tax consequences are taken into account. 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 clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
- IV. The Agency shall conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages under Title VII⁶ and will afford him an opportunity to establish a causal relationship between the Agency's discriminatory action and his pecuniary or non-pecuniary losses, if any.

⁶ We note that compensatory damages and attorney's fees are not available under the ADEA and that Complainant's entitlement to such relief results from the Commission's conclusion that the Agency violated Title VII.

Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages and will provide all relevant information requested by the Agency. The Agency will issue a final decision on the issue of compensatory damages. 29 C.F.R. § 1614.110. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein. Within fifteen (15) calendar days of the date this decision is issued; the Agency shall give Complainant notice of his right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't. of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)), in support of his claim for compensatory damages. Complainant shall have forty-five (45) calendar days from the date he receives the Agency's notice to submit his compensatory damages evidence. The Agency shall complete the investigation on the claim for compensatory damages within forty-five (45) calendar days of the date the Agency receives Complainant's claim for compensatory damages. Thereafter, the Agency shall process the claim in accordance with 29 C.F.R. § 1614.110. Within thirty (30) calendar days of determining the amount of compensatory damages due Complainant, the Agency shall pay that amount to Complainant.

- V. The Agency is directed to conduct eight (8) hours of in-person or interactive training for the Assistant Special Agent in Charge and the BEX Examiner. The Agency shall address management's responsibilities with respect to eliminating discrimination in the workplace. The Agency shall conduct the training within ninety (90) days from the date the decision is issued. The Commission does not consider training to be discipline.
- VI. Within sixty (60) days from the date the decision is issued, the Agency shall consider disciplining the Assistant Special Agent in Charge and the BEX Examiner. The Agency shall report its decision. If the Agency decides not to issue any disciplinary action to any of the named management officials, it shall set forth the reason(s) for its decision not to impose any disciplinary action. If any of the named management officials are no longer employed by the Agency, the Agency shall furnish proof of the date(s) of separation.
- VII. Within thirty (30) days of the date this decision is issued, the Agency shall post a notice in accordance with the Order 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.

POSTING ORDER (G0617)

The Agency is ordered to post at its Los Angeles, California, 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 (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/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 receipt of this decision. 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 (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

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:



Carlton M. Hadden, Director
Office of Federal Operations

November 5, 2019
Date