



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

[REDACTED]
Ileana H.,¹
Petitioner,

v.

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

Petition No. 0420180004

Appeal No. 0720170016

Agency No. FBI-2011-00261

Hearing No. 420-2013-00064X

DECISION ON A PETITION FOR ENFORCEMENT

The Equal Employment Opportunity Commission (EEOC or Commission) docketed a petition for enforcement to examine the enforcement of an Order set forth in Ileana H. v. Dep't of Justice, EEOC Appeal No. 0720170016 (Apr. 21, 2017). The Commission accepts this petition for enforcement pursuant to 29 C.F.R. § 1614.503. For the reasons stated below, the Commission GRANTS IN PART and DENIES IN PART Petitioner's Petition for Enforcement.

BACKGROUND

At the time of events giving rise to this complaint, Petitioner worked as an Investigative Operations Analyst at the Agency's Montgomery Resident Agency in Montgomery, Alabama. On August 19, 2011, Petitioner filed a formal complaint alleging that the Agency discriminated against her in reprisal for prior protected EEO activity when allegations of misconduct were made against her, thereby resulting in an internal investigation being initiated on June 8, 2011, and her indefinite suspension on February 24, 2012.

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

At the conclusion of the investigation, Petitioner requested a hearing before an EEOC Administrative Judge (AJ). The AJ held a hearing and issued a decision finding that Petitioner had been subjected to reprisal. The AJ ordered the Agency to pay Petitioner back pay; expunge the suspension from all personnel and Agency-associated records; pay her \$75,000.00 in non-pecuniary compensatory damages; pay \$65,013.00 in attorney's fees and \$2,869.25 in costs; provide training to all employees in the Montgomery Resident Agency; and to post a notice.

The Agency subsequently issued a final order. In the final order, the Agency accepted the AJ's finding of reprisal and agreed to implement the AJ's order of back pay; attorney's fees and costs; EEO training for Agency officials; and expungement of the suspension. The Agency, however, did not agree to implement AJ's non-pecuniary compensatory damages award of \$75,000.00. Instead, the Agency argued that an award of \$20,000.00 was more appropriate. The Agency simultaneously filed an appeal with the Commission. In Ileana H. v. Dep't of Justice, EEOC Appeal No. 0720170016 (Apr. 21, 2017), the Commission modified the final order finding that the AJ properly found that Complainant was entitled to \$75,000.00 in non-pecuniary compensatory damages. The Commission ordered the Agency to pay Complainant \$75,000.00 in compensatory damages and all other relief previously ordered. The matter was assigned to a Compliance Officer and docketed as Compliance No. 0620170463 on April 21, 2017.

On October 5, 2017, Petitioner submitted the petition for enforcement at issue. Therein, Petitioner contends that the Agency has not fully complied with the Commission's order. Petitioner argues that the Agency improperly calculated her back pay award. Complainant argued that six months of back pay at the GS-09, Step 9 level, equaled \$30,048.50, but the Agency had only paid her \$13,093.26. In addition, Complainant argues that she is entitled to restoration of leave that she used as a result of the discrimination she suffered. Further, Complainant requests that the Agency submit proof that the suspension has been expunged from her personnel and Agency records and that the Agency has provided training and posted the required notice. Additionally, Complainant requests additional attorney's fees and costs, including the contingency fee and travel expenses.

In response, the Agency contends that it has fully complied with the Commission's order for corrective and remedial relief. The Agency states that it paid Complainant \$75,000.00 in non-pecuniary compensatory damages; paid Complainant's attorney \$67,882.25 in attorney's fees and costs; posted the required notices; and administered the ordered EEO training. With respect to back pay, the Agency contends that it paid Complainant \$13,093.26, which included deductions for interim earnings as ordered by the AJ and the Commission. The Agency further notes that restoration of leave was not ordered by the AJ or Commission. Accordingly, the Agency requests that the Commission find that it has fully complied with the Commission's decision.

ANALYSIS AND FINDINGS

Complainant first challenges the Agency's back pay payment and contends that the Agency has not fully paid all to which she is entitled. Complainant acknowledges that the Agency paid her \$13,093.26, but notes that the Agency provided no evidence or documentation showing how it calculated that amount. Complainant argues that she is entitled to six months' pay at the GS-9, Step 9 level, which equals \$26,054.16 after deducting taxes and the unemployment benefits she received during the suspension. The Agency provided a document indicating that it made a payment of \$13,093.26 on August 25, 2017, to Complainant; however, the Agency failed to produce any evidence demonstrating its calculations.

The Commission recognizes that precise measurement cannot always be used to remedy the wrong inflicted, and therefore the computation of back pay inherently involves some speculation. See Hanns v. U.S. Postal Serv., EEOC Petition No. 04960030 (Sept. 18, 1997). The Commission finds that it is reasonable to require the Agency to provide a clear and concise "plain language" statement of the formulas and methods it used to calculate petitioner's back pay. See Vashi v. U.S. Postal Serv., EEOC Petition No. 0420060009 (Dec. 5, 2007). Consequently, the Commission is unable to ascertain from the documentation provided whether the Agency is in full compliance with the Commission's order regarding back pay and interest. Accordingly, the Commission finds that the Agency has not demonstrated that it is in compliance with the Commission's back pay order.

With regard to Complainant's claim for restoration of leave, the Commission notes that neither the AJ nor the Commission awarded Complainant leave restoration. Consequently, the Commission finds that the Agency properly denied Complainant's request to restore her annual leave. As to the expungement of her suspension, the Commission finds that the Agency provided sufficient evidence demonstrating that the suspension was removed from Complainant's personnel records and Agency records. Regarding Complainant's request for proof that the Agency provided EEO training to its employees, the Agency submitted documentation demonstrating that it provided employees eight hours of EEO training on June 19, 2017. Likewise, the Agency has submitted sufficient evidence that it posted the required notice in 11 conspicuous places for 60 days as ordered.²

Finally, as to Complainant's request for additional attorney's fees and costs, Complainant argues that her attorney did not include his 40% contingency fee in his submitted attorney's fees petition. Thus, Complainant claims that she was required to pay her attorney 40% of the compensatory damages she was awarded and requests that she be reimbursed for this fee. The Commission notes that any contingency fee agreement between Complainant and her attorney is a private contractual matter not within our purview.

² While Complainant argued that the notice should have been placed in Agency offices throughout the Mobile Division, the Commission only ordered the notice to be placed at the Montgomery Resident Agency Office.

As a result, the Commission finds that Complainant is not entitled to any additional attorney's fees or costs related to any contingency fees. Furthermore, Complainant requests travel expenses that she incurred to travel to the hearing. The AJ denied these charges in her decision and the Commission did not include the charges in its order. Accordingly, the Commission finds that the Agency properly denied these charges.

CONCLUSION

Based on a thorough review of the record, the Commission GRANTS IN PART and DENIES IN PART Complainant's petition for enforcement. The Commission finds that the Agency has not fully complied with the Commission's Order in EEOC Appeal No. 0720170016 (Apr. 21, 2017), specifically regarding the calculation and documentation of back pay and benefits due Complainant. The Commission REMANDS this matter to the Agency for further processing in accordance with the ORDER below.

ORDER

Within thirty (30) days of the date this decision is issued, the Agency shall send all back pay calculation information to Petitioner, so she can be given the opportunity to question or rebut such calculations. As discussed above, this must include detailed documentation regarding the Agency's back pay calculations which should include: evidence indicating the applicable pay rate used by the Agency (such as salary tables); a clear and concise "plain language" statement of the methods of calculations used; evidence of the actual calculations applying said formulas and methods; and clear calculations of the interest and benefits paid to Petitioner. Complainant shall then have thirty (30) days from the date she receives that documentation to submit a rebuttal to the Agency regarding its back pay calculations. To the extent that the parties determine that Complainant is entitled to additional back pay, the Agency shall pay that amount within 90 (ninety) days of the date this decision is issued. Complainant may petition for enforcement or clarification of any 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."

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.

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).

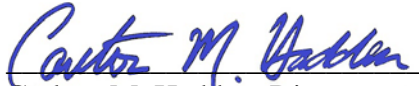
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

September 28, 2018

Date