



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

[REDACTED]
Alena C.,¹
Complainant,

v.

Peter O'Rourke,
Acting Secretary,
Department of Veterans Affairs,
Agency.

Request No. 0520180409

Appeal No. 0720180003

Hearing No. 460-2015-00064X

Agency No. 2003-0580-2014103738

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 0720180003 (Apr. 12, 2018). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

Complainant, a GS-12 Human Resources Specialist, filed an EEO complaint in which she alleged that the Agency discriminated against her on the bases of race, sex, age, and previous EEO activity by not promoting her to GS-13 and by subjecting her to a hostile work environment. The Agency investigated the complaint and thereafter referred the matter to an EEOC Administrative Judge (AJ). The AJ held a hearing and issued a decision concluding that Complainant had proved her discrimination claim with respect to the non-promotion, but not the hostile work environment. The

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.

AJ awarded various remedies, including an award for non-pecuniary compensatory damages in the amount of \$50,000.

The Agency subsequently issued its final order in which it adopted the AJ's finding of discrimination with respect to the non-promotion but rejected that portion of the AJ's order awarding damages. On appeal, the Agency argued that because Complainant would not have been selected even absent discrimination, she was not entitled to compensatory damages or any other form of personal relief.

On appeal, the Commission reversed the Agency's award regarding damages and remanded the matter to the Agency with directions to award, inter alia, compensatory damages and back pay. We found that even though Complainant had proved that she had been discriminated against on the bases of race and sex, the remedy was complicated by the AJ's finding in a separate case that another applicant who had also been discriminated against in that same promotion action would have been the one entitled to the position. We further stated that, for that reason, Complainant was not entitled to retroactive promotion or back pay. Nevertheless, we determined that Complainant was still entitled to compensatory damages for any harm proven to have resulted from her participation in a discriminatory selection process and upheld the AJ's \$50,000 compensatory damages award.

The Commission emphasizes that a request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (Aug. 5, 2015); *see, e.g., Lopez v. Dep't of Agric.*, EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. The Agency has not done so here. It has not presented any argument or evidence tending to establish the existence of either reconsideration criterion. Although the Agency attempts to characterize the AJ's refusal to adopt the mixed motive analysis as an erroneous interpretation of material fact and law, this was the same argument that the Agency had raised on appeal, and that we had considered and rejected in our previous decision. The Agency has not pointed to any authority contradicting the precedent cited by the Commission therein.

The only issue before us in the Agency's request for reconsideration is Complainant's entitlement to compensatory damages in the amount of \$50,000. The Agency correctly points out, however, that in our previous order for relief, we directed the Agency to award back pay and equitable relief after stating in the text of the decision that Complainant was not entitled to such relief. Accordingly, we modify the prior order so that the equitable relief provision is eliminated. We remind the Agency to provide all of the relief set forth in our previous order that it did not contest, including training and consideration of disciplinary action against the individuals found to have discriminated against Complainant, and posting the appropriate notice.

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the request. Therefore, with the exception of the Order, the decision in EEOC Appeal No. 0720180003 remains the Commission's decision. The Commission's previous Order is MODIFIED as set forth below. There is no further right of administrative appeal on the decision of the Commission on this request.

ORDER (C0618)

The Agency is ordered to take the following remedial action within sixty (60) calendar days of the date this decision is issued:

1. The Agency shall pay Complainant \$50,000 in compensatory damages with interest.
2. The Agency is directed to conduct training for the Human Resources Division who was found to have violated Title VII. The training shall address these employees' responsibilities with respect to Title VII.
3. The Agency shall consider taking disciplinary action against the selecting official. The Agency shall report its decision. 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.

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 Michael E. DeBaakey Medical Center in Houston, Texas 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).

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.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

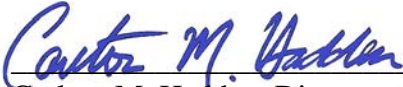
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

October 25, 2018

Date