



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

[REDACTED]
Danita P.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Request No. 0520180560

Appeal No. 0120172149

Hearing No. 430-2014-00351X

Agency No. 200406582013103579

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Danita P. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120172149 (July 18, 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 filed an EEO complaint alleging that the Agency subjected her to discriminatory harassment based on her color (black/lighter complexion), disability (systemic lupus), and in reprisal for prior protected EEO activity when:

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.

1. On April 16, 2013, she was restricted on how much Family Medical Leave Act (FMLA) leave she could use;
2. On June 17, 2013, Complainant's Supervisor refused to honor her approved FMLA leave which was approved through Human Resources (HR) as a reasonable accommodation;
3. On June 17, 2013, Manager of Fee Services refused to forward Complainant's medical certification to HR for processing;
4. On June 17, 2013, although she provided documentation to support her being granted more than 15 hours of FMLA leave per month, Supervisor continued to disapprove her leave requests and to charge Complainant with Absent Without Leave (AWOL);
5. On July 27, 2013, she received a letter of indebtedness for \$251.43 due to overpayment for pay period ending March 9, 2013, through May 18, 2013, because of time and attendance change;
6. On August 6, 2013, she discovered that on July 12, 2013, Manager made a corrected time change to sick leave that Complainant had accrued and used was withdrawn;
7. On September 17, 2013, Complainant received a probationary warning letter;
8. On December 16, 2013, she received a letter of indebtedness for \$114.08 due to a corrected time and attendance change; and
9. On January 16, 2014, her request to telework as a reasonable accommodation was denied.

Following an investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ). The AJ held a hearing and issued decision finding that Complainant had been subjected to discrimination with respect to claims (1) and (9). The AJ awarded Complainant \$7,500 in compensatory damages; \$21,255.94 in attorney's fees and costs; a parking space within close proximity to her workplace; and quarterly meetings to assess her needs for reasonable accommodations.² The Agency subsequently issued a final order fully implementing the AJ's decision.

Complainant appealed challenging the amount of the AJ's award of compensatory damages. Our previous decision modified the AJ's decision finding that Complainant was entitled to \$50,000 in compensatory damages.

² The AJ additionally sanctioned the Agency for its failure to respond to Complainant's discovery requests by denying it the opportunity to present witnesses at the hearing and awarding Complainant attorney's fees related to the filing of the motion for sanctions.

The Agency's Request for Reconsideration argues that the Commission's prior decision constitutes a clearly erroneous interpretation of fact and law. The Agency contends that Complainant failed to provide support for her argument that the conditions she experienced were attributable to discrimination and may have predated the incidents of discrimination. Moreover, the Agency argues that the cases cited by the Commission in its prior decision are not analogous to Complainant's facts.

In response, Complainant argues that the Agency's request is deficient. Complainant notes that the Agency appears to be arguing that Complainant is incapable of suffering any additional emotional distress or damage. To the contrary, Complainant provided testimony that she had to work in pain and tend to a highly private condition in public areas and restrooms. Complainant also rejects the Agency's legal arguments as "simply that it likes the cases it cites with lower amounts more than the ones used by the Commission."

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), Chap. 9 § VI.A (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. The Agency does not advance any argument that demonstrates that the Commission's prior decision involved a clearly erroneous interpretation of law to conclude that \$50,000 is an appropriate measure of compensatory damages. Moreover, there was sufficient evidence in the record to justify the increase in compensatory damages. Thus, the Agency has not presented any persuasive evidence to support reconsideration of the Commission's decision.

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. The decision in EEOC Appeal No. 0120172149 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth below.

ORDER

To the extent it has not already done so, the Agency shall complete the following remedial actions within 45 days of the date this decision is issued:

1. Pay Complainant \$50,000.00 in compensatory damages.
2. Pay Complainant \$21,255.94 in attorney's fees and costs.
3. Pay Complainant \$1,500.00 in attorney's fees and costs associated with filing the Second Motion for Sanctions.

4. Provide Complainant with a reserved (or daily access to) a handicapped parking space within close proximity to her assigned workplace.
5. Schedule quarterly meetings with Complainant to assess her needs for reasonable accommodations.
6. Provide four hours of EEO training on the rights and responsibilities under the Rehabilitation Act to the responsible management official (RMO).³
7. Consider taking appropriate disciplinary action against RMO. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer, including whether or not it decided to take disciplinary action, the reasons for its action, and what action was taken.⁴

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision."

POSTING ORDER (G0617)

The Agency is ordered to post at its Veterans Affairs Medical Center in Salem, Virginia, 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).

³ As noted in our previous decision, the Agency included this remedy in its final order and therefore we shall incorporate it in our decision. The final order identified the RMO, previously employed at the VAMC in Salem, as the current Billing Supervisor at the Consolidation Patient Account Center for the Northeast VAMC in Lebanon, Pennsylvania.

⁴ In addition, as noted in our previous decision, this remedy was added by the Agency in its final order.

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 (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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 (Q0610)

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 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

February 13, 2019

Date