



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

[REDACTED]

Ira P.,¹
Complainant,

v.

Elaine L. Chao,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Request No. 2019002130

Appeal No. 0720180007

Hearing No. 410-2015-00222X

Agency No. 2014-25794-FAA-03

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. 0720180007 (December 11, 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 worked as an Air Traffic Control Specialist, AT-2152-DH, at the Agency's Air Traffic Control Tower (ATCT) in Columbus, Georgia. Complainant filed an EEO complaint alleging that the Agency unlawfully retaliated against him for engaging in prior protected activity when, on April 30, 2014, he became aware that he was not selected for the promotion/bid to the Asheville, North Carolina ATCT/Terminal Radar Approach Control.

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.

Following an investigation, an EEOC Administrative Judge (AJ1) held a hearing in November 2016 and February 2017. The AJ1 apparently indicated she would be making a determination in favor of Complainant and held a hearing on damages in April 2017. AJ1 left the Commission prior to issuing a final decision on liability or relief, and the case was assigned to a second AJ (AJ2). AJ2 issued a decision concluding Complainant had established his retaliation claim against the Agency. As relief, AJ2, among other things, ordered the Agency to pay Complainant \$65,000 in compensatory damages. The Agency rejected AJ2's finding of retaliation and the ordered relief. Our prior decision reversed the Agency, and upheld AJ2's finding of liability and the award of \$65,000 in compensatory damages among other relief.

In its request for reconsideration, the Agency makes the same arguments that it made below – that AJ2 was bound by the statements made by AJ1.² That argument was addressed in the prior decision when it was determined that AJ1 did not issue any decision on the record and, as such, AJ2 assumed “full responsibility for the adjudication of the complaint.” See Kip D. v. Department of Homeland Security, EEOC Appeal No. 0120160180 (August 29, 2017) (finding a newly appointed AJ had the authority to grant summary judgment even when a previous AJ denied a motion for summary judgment).

We emphasize that a request for reconsideration is not a second appeal to the Commission. See EEO MD-110, Ch. 9, § VII.A. 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.

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. 0720180007 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 take the following remedial actions:

1. Within sixty (60) calendar days of the date this decision is issued, the Agency shall pay Complainant \$65,000 in nonpecuniary compensatory damages.

² According to the Agency's brief, AJ1 made statements “off the record” that she intended to find the Agency liable only for a negative job reference and not for the non-selection, which would limit Complainant's relief.

2. The Agency shall pay Complainant reasonable attorney's fees and costs in accordance with the statement entitled "Attorney's Fees."
3. Within ninety (90) calendar days of the date this decision is issued, the Agency shall conduct a minimum eight hours of in-person or interactive EEO training with a particular focus on retaliation, for the responsible management officials including Complainant's first line supervisor and the selecting official.
4. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider discipline against the responsible management officials identified above, and report its decision to the Compliance Officer referenced herein. 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 provide its reasons for not imposing discipline. If the responsible Agency employees have left the Agency's employment, the Agency shall furnish documentation of their departure dates.
5. Within thirty (30) calendar days of the date this decision is issued, the Agency shall post a notice in accordance with the statement entitled "Posting Order."

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).

POSTING ORDER (G0617)

The Agency is ordered to post at its Columbus, Georgia and Ashville, North Carolina Air Traffic Control Tower 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)), 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 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.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)

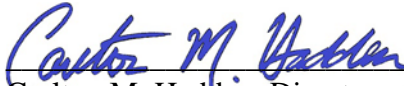
This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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.

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

June 20, 2019

Date