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

[redacted]
Giselle L.,[1]
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023000741

Hearing No. 420-2021-00119X

Agency No. 200I-0619-2020105354

DECISION

Following its November 15, 2022, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) remedial order to provide EEO training to all management officials at the Tuskegee VA Medical Center due to a finding of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, we MODIFY the Agency's final order.

BACKGROUND

During the relevant time, Complainant worked as a Contract Specialist at the Tuskegee VA Medical Center in Tuscaloosa, Alabama.

On November 10, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of sex (ex-LGBT)[2] and in reprisal 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.
[2] Complainant formerly identified as a member of the lesbian, gay, bisexual, and transgender (LGBT) community, but no longer identifies as LGBT due to her faith.

1. On July 22, 2020, Commodities Branch Chief, made derogatory statements on Complainant's performance evaluation; and
2. On December 15, 2020, Contracting Officer, changed Complainant's entries in Federal Procurement Data System (FPDS).

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. On February 8, 2021, Complainant informed the assigned Administrative Judge (AJ) that she wished to remove claim 2 from the complaint. Thereafter, during a July 1, 2021, teleconference, Complainant raised a new claim of reprisal alleging a *per se* violation when she was instructed to not file an EEO complaint. The AJ added this claim to the complaint on August 5, 2021, and framed it in the following manner:

3. Whether Complainant was instructed not to put in an EEO Complaint.

Following a hearing, the AJ issued a decision on October 27, 2022, finding that the Agency engaged in reprisal when management instructed Complainant not to put in an EEO complaint. To remedy the finding of discrimination, the AJ awarded non-compensatory pecuniary damages to Complainant, as well as attorney's fees. Additionally, the AJ ordered the Agency to, in relevant part, provide two hours of live training on reprisal to management/supervisory officials at the Tuskegee VA Medical Center. In ordering the training, the AJ did not provide any rationale as to why EEO training was needed for all management/supervisory officials at the Tuskegee VA Medical Center.

The Agency ultimately issued a final order on November 15, 2022, adopting the AJ's finding that Complainant proved that the Agency subjected her to discrimination as alleged. The Agency also adopted the AJ's remedial orders, with the sole exception of the AJ's order to provide two hours of live training to all management/supervisory officials at the Tuskegee VA Medical Center. That provision, alone, is at issue in the instant appeal. On appeal, the Agency argues that the AJ's order to provide EEO training to all management/supervisory officials at the Tuskegee VA Medical Center was improper given that only Associate Director was found to have retaliated against Complainant and the AJ did not make any finding of systemic or widespread discrimination.

STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chapter 9, at § VI.B. (Aug. 5, 2015).

ANALYSIS AND FINDINGS

As an initial matter, we note that the parties dispute only the ordered training and do not dispute the AJ's finding of discrimination or the additional ordered remedies. Therefore, we will not address the non-contested matters in this decision.

Having reviewed the record, we find that the AJ's order to provide two hours of live EEO training to all management/supervisory officials at the Tuskegee VA Medical Center is not supported by law or fact. Indeed, we note that the AJ did not provide any rationale as to why such a remedy is needed. Furthermore, our review of the record shows that only Associate Director was found to have engaged in reprisal against Complainant in this case. As there is no evidence of widespread or pervasive discrimination at this facility, we find it appropriate to require only Associate Director to participate in the ordered training. See Latina E. v. Dep't of Homeland Sec., EEOC Appeal No. 2023003595 (Nov. 21, 2023) (finding AJ's order to provide EEO training to all management/supervisory officials to be too broad, as it required the agency to provide training to individuals who were not involved in the case).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final order. To ensure proper compliance, we have restated the order as outlined in the AJ's decision and included the relevant modification below.

ORDER

To the extent that it has not already done so, the Agency is ORDERED to take the following actions within 60 calendar days of the date this decision is issued, unless otherwise specified:

1. The Agency shall pay Complainant compensatory damages in the amount of $5,000;
2. The Agency shall pay Complainant's attorney fees in the amount of $9,760;
3. The Agency shall ensure that Associate Director at the Tuskegee VA Medical Center receives 2 hours of in-person or interactive training on reprisal;
4. The Agency shall take appropriate preventive steps to ensure that Complainant is not retaliated against based on this EEO complaint, and that no employee is subjected to retaliation and to ensure that appropriate steps are taken immediately after Agency management is notified of any such retaliation allegation; and,

5. For the benefit of its employees, the Agency shall post copies of the Notice to Employees attached to this order, after being signed by the Agency's duly authorized representative, in conspicuous places for 60 consecutive days, in its Tuskegee facilities, including all places where notices to employees are customarily posted; the Agency shall take steps to ensure that said Notices are not altered, defaced, or covered.

The Agency is further directed to submit a report of compliance, as provided in the paragraph entitled "Implementation of the Commission's Decision." The report must include evidence that the corrective actions have been implemented. The agency shall also send a copy of the report and all its enclosures to the Complainant.

POSTING ORDER (G0617)

The Agency is ordered to post at its Tuskegee VA Medical Center 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).

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 (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at https://publicportal.eeoc.gov/Portal/Login.aspx. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request.

Any supporting documentation must be submitted together with the 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(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0124)

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 their 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

January 22, 2024
Date