



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

[REDACTED]
Jessica E.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2023001252

Hearing No. 531-2019-00499X

Agency No. ARAPG18APR01386

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) regarding her allegations that the Agency failed to comply with the terms of the settlement agreement into which the parties entered. See 29 C.F.R. § 1614.504.

ISSUES PRESENTED

The issues presented are: (1) whether the Agency breached the November 23, 2020 settlement agreement entered into by the parties; and (2) whether Complainant is entitled to various remedies arising from the Agency's alleged failure to comply with the agreement.

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.

BACKGROUND

At the time of events giving rise to this appeal, Complainant worked as a Computer Scientist, GS-13, at the Agency's Software Engineering Center in Aberdeen Proving Ground, Maryland. After the Agency terminated Complainant's employment during her probationary period, Complainant contacted an Agency Equal Employment Opportunity (EEO) Counselor. On July 13, 2018, Complainant filed an EEO complaint alleging discrimination based on sex and in reprisal for prior protected EEO activity.

After the conclusion of the investigation into her complaint, Complainant requested a hearing before an EEOC Administrative Judge (AJ). Ultimately, the AJ awarded Complainant a default judgment against the Agency as a discovery sanction and found the Agency liable for discrimination. Before a damages hearing took place, however, the parties agreed to settle the case.

On November 23, 2020, Complainant and the Agency entered into a settlement agreement to resolve the matter. The settlement agreement provided, in pertinent part:

2. **Consideration from the Agency.** As consideration for the Complainant's settlement, the Agency shall:

. . .

- b. **Back Pay and Leave.** The Agency will submit necessary paperwork to Defense Finance and Accounting Service (DFAS) to initiate the process to calculate all items covered under this paragraph no sooner than January 1, 2021 and no later than January 14, 2021. The Agency will provide Complainant written notice when it transmits said documentation. The Agency will provide Complainant with a calculation of all items under this paragraph within two (2) business days of the date the Agency receives the calculation from DFAS. The Parties will begin the process of reconciling totals no later than four (4) business days after the Agency provides Complainant with the calculation that it receives from DFAS. The Agency and Complainant shall achieve agreement with regard to the back pay calculations within 21 business days after the calculation is first provided by DFAS to the Agency. The Agency agrees to provide weekly status updates to Complainant with regard to any of the above

obligations. The Agency shall make the following payments and leave adjustments:

i. Federal Employees Retirement System (FERS). The Agency's share of FERS contribution amounts necessary to ensure Complainant's full FERS coverage[Footnote 1] from the date of Complainant's hiring, September 19, 2016, to the reinstatement date. It is the Parties' intent that upon reinstatement Complainant's participation in FERS be re-established as if Complainant had never been removed from Federal service;

[Footnote 1:] It is believed that all portions of Complainant's share of FERS previously deducted from her wages and the Agency's share of FERS previously contributed based on Complainant's prior employment with the Agency are still maintained by Office of Personnel Management (OPM). In the event that is not the case, the Agency is responsible for ensuring such previously withheld FERS contributions from the Complainant's wages and the Agency's FERS contributions are paid to OPM covering the period of employment up until the retroactive reinstatement date, and such payments are not to be deducted from any monetary sums owed herein. The Agency will provide Complainant official written confirmation that OPM is in possession of the prior Agency and Complainant FERS contributions discussed herein and will seek to do so within 21 calendar days of the effective date of the Settlement Agreement.

ii. Net back pay. This calculation shall be made by the Agency pursuant to 5 C.F.R. § 550.805 and include grade and within grade increases, and an Acquisition Demo conversion increase Complainant would have received as if she had never been removed from Federal service, less the wages Complainant received from other sources since the date of removal to the date of reinstatement. Within thirty days following the effective date of this Settlement Agreement, and within a reasonable period of time following additional requests, Complainant will provide information and data showing all income received since April 20, 2018. The calculation of the net back pay will

also include appropriate deductions from the gross pay, including but not limited to Federal and State tax withholding, Medicare taxes, OASDI and Complainant's share of FERS contributions, except that it will not include deductions for FEGLI; DENTAL; FEHB; VISION; and TSP SAVINGS (except a maximum of \$2,330.00 may be deducted and deposited into Complainant's TSP account as part of a 2018 contribution);

iii. Thrift Savings Plan (TSP). Agency TSP contribution amounts, including all Unvested, Agency/Service Automatic payments (TSP BASIC) from September 19, 2016, and Agency/Service Matching Contributions (TSP MATCHING) amounts from April 20, 2018, up to and including the date of reinstatement, are owed to Complainant. The Agency shall deposit all TSP BASIC amounts into Complainant's TSP account. The TSP MATCHING amounts will be paid to Complainant in calendar year 2021 as part of the back pay payment provided for in this Agreement. The Parties acknowledge the Agency's obligation to restore the Complainant's TSP account is subject to various Federal regulations, e.g. 5 C.F.R. §§ 1600.01-1690.15; and

iv. Leave. Restoration in kind, e.g. time and not money, of all leave balances not previously paid, including accrued annual and sick leave Complainant would have earned since April 20, 2018, to the date of reinstatement. Leave balances will not count toward the limit on the Agency's pecuniary liability per paragraph 2.f below. The Agency will restore the leave within 30 calendar days of the effective date of this Settlement Agreement. The Complainant acknowledges that the Agency may collect any lump sum annual leave payment from the amounts due hereunder when restoring the Complainant's annual leave—in the event the Agency does collect the lump sum annual leave amount previously paid to Complainant the amount collected will be \$2,908.48 and the Agency will restore 50.75 annual leave hours in addition to all leave hours Complainant[] is entitled to receive in this paragraph;

...

d. **Non-Pecuniary Damages.** The Agency shall make a Lump Sum Non-Wage payment in the amount of 'z' to Complainant for non-pecuniary damages. The amount of 'z' will be determined pursuant to the formula in paragraph 2.f below and will be memorialized in an Addendum to this Settlement Agreement pursuant to paragraph 2.g below. The non-pecuniary damages are for physical sickness and pain and suffering. Within 14 calendar days of the effective date of this Settlement Agreement, the Agency will complete and transmit to DFAS the documentation necessary to process an initial payment of twenty thousand dollars (\$20,000.00) in this sub-paragraph, with the balance paid in calendar year-2021. The Agency will provide Complainant written notice when it transmits said documentation;

...

f. **Limit on the Agency's Financial Liability.** It is the Parties' intent that the Agency's financial liability, not including payments for attorney's fees provided for in paragraph 2.e above, be limited to paying no more than one hundred seventy-two thousand seven hundred eighty dollars (\$172,780.00). In order to achieve this goal, the Parties agree that all payments made pursuant to paragraphs 2.b.ii-iii., 2.c., and 2.d. above will total no more than the difference (denoted as 'x') between one hundred seventy-two thousand seven hundred eighty dollars and the payment owed for the Agency's share of FERS contribution in paragraph 2.b.i above. The amount due from the Agency pursuant to paragraph 2.b.ii and 2.b.iii above shall be calculated and then subtracted from 'x', yielding the difference (denoted as 'y'), which constitutes the pecuniary and non-pecuniary damages. Then, the pecuniary damages identified in paragraph 2.c above shall be subtracted from 'y'. The amount remaining shall constitute the Complainant's non-pecuniary damages (denoted as 'z'). Thus, when all of the sums paid by the Agency pursuant to paragraphs 2.b, 2.c., and 2.d. above are combined they shall total one hundred seventy-two thousand seven hundred eighty dollars (\$172,780.00).[Footnote 2] Similarly, the sum paid by the Agency pursuant to paragraph 2.e. above shall not exceed seventy-seven thousand five hundred dollars

(\$77,500.00). The total of all payments will not exceed two hundred fifty thousand two hundred eighty dollars (\$250,280.00). The payments provided for herein constitute full and complete satisfaction of Complainant's requested monetary remedies and Complainant shall not be paid, individually or to a third party for her benefit, any additional money by the Agency.

[Footnote 2:] For example, \$172,780 - \$39,890 (estimated Agency share of FERS contribution pursuant to para. 2.b.i) = \$132,890 ('x'). The amount denoted as 'x' (\$132,890) - \$78,000 (hypothetical Back Pay and TSP and taxes pursuant to para. 2.b.ii and 2.b.iii) = \$54,890 ('y'). The amount denoted as 'y' (\$54,890) - \$15,000 (pecuniary damages pursuant to para. 2.c) = \$39,890 ('z' or hypothetical non-pecuniary damages pursuant to para. 2.d).

...

h. **Compliance with Administrative Judge's Order.** The Parties acknowledge that the Administrative Judge (AJ) will issue a limited Order of Damages with regard to the Liability Decision After Default Judgment dated July 31, 2020. The Order will address the remedy of a clean record. The Agency will comply with the Order from the AJ and shall initiate the process required to do so within 14 calendar days of the AJ's Order. The Agency agrees to provide a copy of the initial request to initiate the process and weekly status updates to the Complainant with regard to the obligations set forth herein.²

3. **The Defense Finance and Accounting Service (DFAS).** Complainant acknowledges that she must register as an electronic payment recipient with DFAS. The parties will work together to attempt to complete all calculations and submit the paperwork required to process all payments herein by April 2021. Within 14 calendar days of the completion and agreement of the back pay calculations provided for in paragraph 2.b above, the Agency will complete and transmit to DFAS the

² Pursuant to the paragraph 2.h of the settlement agreement, the AJ issued an order on April 9, 2021, instructing the Agency to provide Complainant with a "clean record," including expunging her termination notice and any written warnings from her personnel files.

documentation necessary to make the payments set forth in paragraph 2.b and 2.d herein, subject to paragraph 8 below. All payments of amounts covered in paragraphs 2.b.ii, 2.b.iii, 2.c and 2.d (except as provided otherwise in paragraphs 2.c and 2.d above) are to have the documentation prepared and submitted to DFAS in calendar year 2021 so as to avoid additional, unaccounted for tax liability in calendar year 2020. The Agency will provide Complainant written notice when it transmits the documentation to DFAS. The Parties recognize that DFAS is a separate Federal agency and not under the control of the Agency. The Agency can only forward the necessary documentation to DFAS in a timely manner but cannot control the timing of payment. In the event DFAS fails to make payments within 14 days of the date the Agency transmits the documentation necessary to make any of the payments covered by this Settlement Agreement, the Agency agrees to provide the Complainant with weekly updates concerning the status of all required payments.

...

5. **Settlement, Waiver, and Withdrawal by the Complainant.**

In return for the consideration set forth above, the Complainant shall:

- a. EEO Complaint. Withdraw[] and not re-file, also known as withdrawing with prejudice, the formal EEO complaint identified as EEOC Case No. 531-2019-00499X, Agency No. ARAPG18APR01386[.]

...

8. **Payment and Taxes.** Complainant understands any payment made will be reported to the Internal Revenue Service (IRS) and is potentially subject to Federal and State tax. DFAS may withhold such Federal and State income tax, and other sums, as are specified by law and regulation for some payments provided for herein. The Agency will submit the documents necessary in an effort to have DFAS not withhold any taxes from any payments explicitly identified as being a Lump Sum Non-Wage payment above. The Complainant shall be solely responsible for resolving any issue concerning tax liability with the IRS and

appropriate State agency. The Parties will work to apportion payments for paragraphs 2.b.ii-iii, 2.c and 2.d in separate calendar years as provided for in paragraphs 2.c, 2.d, and 3 above directed by Complainant, and take other lawful efforts to apportion payments so as to reduce any tax burden on Complainant but to accomplish full and complete payment in the earliest timeframe possible. The Agency agrees to timely submit the documents necessary in an effort to have DFAS make payments in a reasonable timely manner.

Soon after the execution of the settlement agreement, Complainant submitted to the Agency three sets of timesheets and other documentation related to the calculation of back pay. After failing to hear from the Agency regarding back pay, on January 12, 2021, Complainant filed the first of five noncompliance notices with the Agency's EEO Director. The Agency responded that it was working on implementation of the agreement and soon requested changes to the previously submitted timesheets. Over the next several months, Complainant followed up with the Agency to request status updates on several outstanding items, including back pay calculations, leave restoration, and written confirmation concerning the Agency's portion of FERS contributions. Although the settlement agreement required weekly updates, Complainant did not receive satisfactory responses.

On May 13, 2021, Complainant submitted her second noncompliance notice. The next month, DFAS generated a remedy ticket to process Complainant's back pay calculations. To assist in this, Complainant resubmitted forms related to her TSP contributions. During the next few weeks, Complainant sent the Agency several emails to ask for status updates and to request biweekly teleconferences with various DFAS and Agency Human Resources officials in order to facilitate implementation of the settlement agreement. At the end of July 2021, the Agency informed Complainant that back pay calculations had been completed and were in quality review. Complainant responded that, per paragraph 2.b of the settlement agreement, the parties were supposed to "reconcile and agree" on the back pay calculations before any payments were processed. Nonetheless, on August 25, 2021, Complainant received a Leave and Earning Statement with the back pay award.

Complainant immediately recognized an error in the back pay calculation and requested an audit to review the amount paid, as it appeared to be an overpayment. This was confirmed by the first audit on August 31, 2021, as DFAS did not account for Complainant's other sources of income to offset

back pay. Soon after, Complainant also identified another error involving TSP contributions. Complainant again requested that the Agency set up teleconferences every two weeks with key players so as to correct the back pay amount. She also asked the Agency to review and reconcile the new back pay calculations with Complainant before DFAS processed any more transactions. The Agency indicated that its leadership was being briefed on the matter and would coordinate with DFAS, but no substantive action occurred over several weeks. On October 27, 2021, Complainant filed her third noncompliance notice with the Agency's EEO Director. She again requested biweekly teleconferences, which the Agency rejected. The Agency indicated it was continuing to work on the outstanding matters.

On December 1, 2021, Complainant filed a fourth noncompliance notice with the Agency's EEO Director. On December 10, 2021, Complainant received a notice of indebtedness from DFAS for \$23,155.19, as a result of the overpayment of back pay made in August 2021. According to Complainant, the indebtedness notice prevented Complainant from timely filing her 2021 tax return and affected her tax liability and ability to contribute to her Roth IRA account. Complainant informed the Agency that the amount of indebtedness in the notice was in fact far short of the full amount she was overpaid, but she received no response. The next day, Complainant paid the debt amount requested, though this was not properly reflected on her 2021 W-2, which subsequently required several corrections.

On December 14, 2021, the Agency sent Complainant a second back pay audit, but it still contained errors. This resulted in DFAS issuing a 2021 1099-INT form to Complainant with an interest amount that was erroneously large, which according to Complainant caused her excessive tax liability for 2021. Complainant maintained that none of these errors would have occurred if the Agency had followed the process outlined in paragraphs 2.b and 3 of the settlement agreement by reconciling the calculations with Complainant and agreeing on an amount prior to DFAS processing payments.

Through the remainder of December 2021 and in January 2022, the Agency conducted several more back pay audits, but these still contained errors. On February 11, 2022, the Agency issued a final decision in response to Complainant's fourth noncompliance notice sent on December 1, 2021. In its final decision, the Agency acknowledged the errors that had been made but found that insufficient time had passed to warrant a finding of breach. The final decision therefore found Complainant's breach claim was premature, but it informed Complainant that she could file another

noncompliance notice in the future if she believed the terms of the agreement had not been fully implemented. Throughout March and April 2021, Complainant received another incorrect tax form and requested status updates from the Agency on several outstanding items, but she felt the Agency's actions were insufficient.

On April 29, 2022, Complainant submitted a request to the Agency's Office of Inspector General (OIG) to seek assistance. According to Complainant, OIG's involvement ultimately prompted the Agency to engage in biweekly teleconferences with DFAS, OIG, and Complainant beginning in July 2022, which led to progress on implementation, though Complainant still had not received written confirmation that OPM was in possession of the Agency's portion of FERS contributions, per Footnote 1 of the settlement agreement. On September 24, 2022, DFAS issued a second indebtedness notice to Complainant for \$41,841.45, which Complainant paid in full on December 12, 2022.

On November 2, 2022, Complainant filed the fifth and final noncompliance letter to the Agency's EEO Director, alleging that the Agency had breached the settlement agreement. Specifically, Complainant alleged that the Agency failed to complete the reconciliation process as required by paragraph 2.b (and subparagraphs 2.b.i and 2.b.iii), failed to provide weekly status updates as required by paragraphs 2.b and 3, failed to provide the written confirmation as required by Footnote 1, failed to make final payments as required by paragraphs 2 and 3, and failed to confirm a clean record as required by paragraph 2.h. Complainant requested that the Agency implement any outstanding terms. After the Agency failed to issue a final decision on Complainant's breach claim within 35 days, Complainant filed the instant appeal.

On or about the same day as Complainant submitted her final noncompliance letter on November 2, 2022, Complainant submitted an application to DFAS to waive the debt payment she made of \$23,155.19.³

CONTENTIONS ON APPEAL

In her brief on appeal, Complainant argues that the Agency failed to comply with the settlement agreement by not reconciling and agreeing on final calculations of back pay as required by paragraphs 2.b and 3, and by not

³ The debt-waiver request and the decision whether to grant it are processed entirely by DFAS, not the Agency.

providing weekly status updates to Complainant. Complainant argues the Agency repeatedly permitted DFAS to process incorrect calculations without ever providing them to Complainant, resulting in an overpayment to Complainant of almost \$65,000 in back pay and almost \$5,000 in interest. Complainant states that the corrections to the back pay amount and other benefits provided for in paragraph 2.b “were only recently almost fully resolved in the past month.” As a result of the Agency’s mistakes and delays, Complainant maintains that she had to spend in excess of 100 hours correcting various items, had increased accountant fees due to delayed processing of her 2021 taxes (and foresees similar costs and tax implications for her 2022 taxes), and suffered other financial damages. Complainant argues that the Agency is DFAS’s customer and that the Agency cannot deny accountability by claiming it had no control over DFAS’s processes. Complainant contends that the Agency should therefore bear the costs of its noncompliance.

Complainant also argues that the Agency failed to pay the final amount of nonpecuniary, compensatory damages owed to her pursuant to paragraphs 2.d, 2.f, and 3. Complainant argues that once the variables were agreed upon—namely, net back pay, the Agency’s portion of FERS contributions, and the Agency’s TSP Basic and Matching contributions—the Agency was required to subtract that amount and \$15,000.00 in pecuniary damages from the settlement cap on Agency liability. The remaining amount would be Complainant’s nonpecuniary damages, which Complainant states has yet to be calculated and reconciled between her and the Agency, nor has the Agency memorialized an amount in an Addendum as required by paragraph 2.d.

Complainant also argues that the Agency failed to provide her with official written confirmation that OPM is in possession of the Agency’s FERS contributions made before her reinstatement, per Footnote 1 of the settlement agreement. Complainant argues that the Agency’s attempts to substantially comply with this provision—by supplying Complainant with her Individual Retirement Record and her Master Pay History—are insufficient because they do not confirm that the Agency’s FERS contributions are in fact maintained by OPM and remain in its possession.

Complainant further argues that the other terms of the agreement (not subject to this appeal) were not complied with over a two-year period and only recently were implemented after constant efforts by Complainant. As an example, Complainant claims that only on December 13, 2022, did the Agency indicate that it had implemented the AJ’s order pursuant to

paragraph 2.h, though Complainant voices concerns that her record may not be “clean” for all government repositories and systems that retain personnel records.

Complainant requests that we order the Agency to fully implement the settlement agreement and provide her with the following relief. Complainant requests that she be awarded equitable relief in the amount she had to repay DFAS as a result of its overpayment ($\$23,155.19 + \$41,841.45 = \$64,996.64$). Complainant argues that this properly compensates her for her additional tax liability in 2021 of almost $\$3,800$, the loss of approximately $\$17,400$ in tax-free earnings over the next 30 years because of her inability to contribute to her Roth IRA in 2021, additional account fees in 2021 and 2022, and her risk of identity theft due to the Agency sending documents with her social security number to several people and corresponding fees of $\$3,000$ for identify theft protection. Complainant also argues that she is entitled to compensatory damages, as there was a finding of discrimination by the AJ as a result of the default judgment. She claims that she suffered emotional stress due to the Agency’s noncompliance and that she not yet been able to fully return to her pre-litigation life and activities and therefore requests nonpecuniary, compensatory damages for the Agency’s breach. She also claims that pecuniary, compensatory damages are warranted because the “significant and prolonged stress” throughout the two years of settlement implementation has caused her unexplained chest pain ($\$844.00$ in doctors’ visits), grinding teeth ($\$6,310.00$ of dental work), emotional support in the form of therapy ($\$4,050.00$, plus anticipated $\$1,120.00$ through 2023), and prescription costs for the above issues ($\$161.00$). Complainant also requests attorney’s fees for this appeal and argues that she should be permitted to submit a petition for fees to the Agency.

In its brief opposing the appeal, the Agency argues that Complainant’s appeal is untimely, as it was filed more than 30 days after Complainant received the Agency’s final decision issued on February 11, 2022. In the alternative, the Agency argues that we should find it did not breach the settlement agreement. In response to Complainant’s arguments about paragraph 2.b, the Agency maintains that the settlement agreement did not require the parties to agree on any financial figures prior to DFAS processing payments, but only required that they share information and attempt to reconcile figures. The Agency argues that it complied with this provision because it provided the financial calculations to Complainant as it received them from DFAS. The Agency further argues that the settlement agreement expressly recognized DFAS as a separate federal agency not under the

Agency's control, meaning that the Agency should not be held liable for the computational and distribution issues that occurred during implementation.

The Agency argues that it engaged in exhaustive, good faith efforts to resolve the various implementation issues and that these efforts are in fact evidenced in Complainant's brief, which enumerated the various back pay audits and included as exhibits dozens of emails from Agency officials regarding implementation. As for the weekly conferences, the Agency argues that such meetings occurred beginning in July 2022, and that it was Complainant who declined to continue them in December 2022. Moreover, the Agency argues that even if it failed to conduct weekly meetings per the settlement agreement, Complainant has not established a link between such meetings and DFAS's failures with regard to implementation or that such meetings would have resulted in a different outcome.

As for Footnote 1 of the settlement agreement, the Agency maintains that it has substantially complied with that provision of the settlement agreement, as the documentation it provided Complainant shows that the Agency contributed the required FERS contributions on behalf of Complainant. The Agency also argues that Complainant's request for the Agency to pay the balance of nonpecuniary damages is not yet ripe because of Complainant's pending request for DFAS to grant Complainant's debt-waiver request of \$23,155.19. The Agency argues that if this request were granted, the debt relief would count toward the settlement cap on Agency liability and therefore reduce the nonpecuniary damages amount.

The Agency argues that even if we were to find that the Agency breached the settlement agreement, Complainant is not entitled to a remedy that includes payments outside of those specifically detailed within the settlement agreement. The Agency contends that paragraph 2.f of the settlement agreement is a hard cap on all financial compensation due, including compensatory damages and attorney's fees. The Agency also argues that awarding Complainant equitable relief in the amount of the debt she paid back to DFAS would be contrary to 5 U.S.C. §§ 5596(b)(1) and 550.805(b), because this would provide Complainant with more compensation than the make-whole relief she received through the settlement agreement.

STANDARD OF REVIEW

As this is an appeal from a decision⁴ issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS

As an initial matter, we find that Complainant's appeal is timely. The Agency mistakenly argues that Complainant is appealing the Agency's final decision issued on February 11, 2022, in response to Complainant's fourth noncompliance notice sent on December 1, 2021. However, that decision found Complainant's claim of breach to be premature and did not make a final determination on any of Complainant's allegations. Moreover, the final decision informed Complainant of her ability to file further noncompliance notices if the implementation issues continued. Complainant filed another such notice on November 2, 2022, and after 35 days passed without an Agency determination on the matter, Complainant properly filed an appeal pursuant to 29 C.F.R. § 1614.504(b).

We also note that both parties' supplemental filings were untimely submitted and will not be considered herein. Even if we were to consider them, however, it would not alter the outcome in this matter.

Breach of Settlement Allegations

EEOC Regulation 29 C.F.R. § 1614.504(a) provides that any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. The

⁴ Although the Agency failed to issue a determination on Complainant's final noncompliance letter alleging breach of settlement, we construe the Agency's brief in opposition to Complainant's appeal as the Agency's final decision that there was no breach of the settlement agreement.

Commission has held that a settlement agreement constitutes a contract between the employee and the Agency, to which ordinary rules of contract construction apply. See Herrington v. Dep't of Def., EEOC Request No. 05960032 (Dec. 9, 1996). The Commission has further held that it is the intent of the parties as expressed in the contract, not some unexpressed intention, that controls the contract's construction. Eggleston v. Dep't of Veterans Affs., EEOC Request No. 05900795 (Aug. 23, 1990). In ascertaining the intent of the parties with regard to the terms of a settlement agreement, the Commission has generally relied on the plain meaning rule. See Hyon O v. U.S. Postal Serv., EEOC Request No. 05910787 (Dec. 2, 1991). This rule states that if the writing appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature. See Montgomery Elevator Co. v. Building Eng'g Servs. Co., 730 F.2d 377 (5th Cir. 1984).

Here, Complainant first argues that the Agency breached paragraph 2.b by failing to reconcile the various calculations and come to an agreement with Complainant before initiating the processing of payments by DFAS. Despite Complainant's arguments about the Agency's failure in this regard, Complainant has not specified any particular payments still outstanding with regard to paragraph 2.b of the settlement agreement. She states in her brief that the errors that plagued the implementation of the agreement were "almost fully resolved in mid-December 2022" and that "all corrections to the back pay and other benefits provided for in the Agreement were only recently almost fully resolved in the past month."⁵ While Complainant argues that her contact with the OIG was necessary to resolve those issues, she has not established that she did not receive the proper back pay and benefits due to her in paragraph 2.b. Therefore, although the Agency may have contributed to the lengthy process of implementation, we find that at this stage, the Agency has substantially complied with paragraph 2.b of the settlement agreement. Given the apparent complexity of the calculations and now that the back pay issues appear to be resolved, there is no longer any specific provision on the back pay issue that is left for us to enforce at this time.

Complainant also claims that the Agency has breached the terms of Footnote 1 in the settlement agreement. The Agency, on the other hand, believes that it has substantially complied with this provision by providing

⁵ Complainant also notes in her brief that her reinstatement, pursuant to paragraph 2.a, was ultimately resolved despite initial errors.

Complainant with her Individual Retirement Record in conjunction with her Master Pay History. The Agency's position is that these documents confirm both Complainant's and the Agency's portion of FERS contributions during the period specified in the settlement agreement. While the Agency concedes that it has not necessarily followed the letter of Footnote 1, it contends that it has provided the required proof that it made FERS contributions on behalf of Complainant to OPM.

We agree with the Agency that it has substantially complied with this provision in Footnote 1. Complainant states her concern that she has no confirmation that such contributions are housed by OPM, but we find the Agency has done what it can to assuage Complainant's concerns about her retirement contributions. We further note that OPM is a separate federal entity, and the Agency has no control or knowledge of OPM's internal processes. The footnote itself indicates the parties' own belief that Complainant's share of FERS is maintained by OPM. Aside from citing her negative experience during the implementation process, Complainant has not explained why she believes the retirement contributions are maintained elsewhere than OPM. Rather, she simply states that the two documents do not follow the requirements of Footnote 1. We find, however, that the Agency's actions—providing extensive documentation of Complainant's and the Agency's FERS contributions over her period of employment—are sufficient for us to find substantial compliance with Footnote 1 of the settlement agreement.

Regarding Complainant's allegation that the Agency breached paragraph 2.d of the settlement agreement by failing to pay her nonpecuniary damages, we agree that the Agency has not complied with this provision. The Agency's argument about Complainant's debt-waiver request to DFAS is unavailing. Such payment is outside the four corners of the agreement. According to Complainant, all variables required in order to calculate the value of "z," pursuant to the formula in paragraph 2.f and Footnote 2, are now known, and the Agency has not disputed this. Complainant's debt-waiver request is being processed entirely within DFAS and, if eventually granted, is separate from the payments contemplated by the settlement agreement and should not count toward the settlement cap on the Agency's financial liability. We therefore shall order the Agency to initiate the process to calculate the amount of nonpecuniary, compensatory damages pursuant to the formula in paragraph 2.f, reconcile with Complainant regarding these calculations, and memorialize that amount in an Addendum to the settlement agreement, as stated in paragraph 2.d.

We note that although Complainant voiced concerns about other aspects of the settlement agreement, she has not explicitly argued that such concerns constitute an allegation of breach. However, because Complainant has not expressly indicated that these issues remain outstanding, we find no breach of the settlement agreement with regard to any other provision.

Remedies

The Commission has held that compensatory damages are not available as a remedy for breach of a settlement agreement. See Martin v. Dep't of Def., EEOC Request No. 05940745 (Aug. 24, 1995). As a remedy for breach, the Commission only may order reinstatement of the complaint, or enforcement of the agreement. See 29 C.F.R. § 1614.504(c). Congress added compensatory damages to federal EEO statutes in order to make the perpetrators of intentional employment discrimination liable for non-wage economic consequences of their acts, to the extent necessary to provide full relief to victims of discrimination. See 137 Cong. Rec. at § 15,484 (daily ed. Oct. 30, 1991). Compensatory damages are not available for allegations of breach since such allegations do not involve a determination of whether discrimination has occurred. Our regulations therefore do not authorize the Commission to award monetary relief for damages caused by an agency's noncompliance with the terms of a settlement agreement. See Thayer v. U.S. Postal Serv., EEOC Request No. 0520120218 (June 13, 2012); Owens v. Dep't of Veterans Affs., EEOC Appeal No. 01976447 (June 2, 1999).

Complainant argues that the AJ's order of April 9, 2021, included a finding of discrimination against the Agency, and therefore she is eligible to receive equitable relief and pecuniary and nonpecuniary, compensatory damages. We find this argument is misguided. The only issues before us in the instant appeal involve whether the Agency breached the settlement agreement. The monetary relief Complainant requests on appeal involves solely the Agency's actions regarding the implementation of the settlement agreement, not acts of intentional discrimination.

Because we find the Agency breached a provision of the settlement agreement, we can only order either specific enforcement or reinstatement of the complaint (that is, invalidation of the agreement). Complainant has requested specific enforcement, and she cannot receive any other damages. Such damages are outside of the settlement agreement. For these reasons, we deny Complainant's request for equitable relief (in the form of payment in the amount of debt she repaid to DFAS), pecuniary compensatory damages, and nonpecuniary, compensatory damages, as they relate only to

the Agency's actions in relation to the settlement agreement. See, e.g., Newbold v. U.S. Postal Serv., EEOC Appeal No. 01962371 (June 11, 1997) (denying "requests that the agency compensate [complainant] for the distress he has incurred due to the agency's settlement agreement breach"), request for recons. denied, EEOC Request No. 05970887 (Mar. 29, 2000).

As to Complainant's request for attorney's fees incurred in pursuing compliance with the settlement agreement, attorney's fees are available for successful compliance efforts when such efforts are necessary. See Von E. v. Dep't of Veterans Affs., EEOC Appeal No. 2023004135 (Jan. 18, 2024). The Commission has awarded attorney's fees and costs in connection with securing compliance with a settlement agreement. See id. (citing O'Neal v. U.S. Postal Serv., EEOC Appeal No. 0120062891 (Apr. 18, 2008); Peralta v. Dep't of Agric., EEOC Appeal No. 01961850 (May 5, 1997) (awarding attorney's fees and costs where attorney's actions, including filing of an appeal, helped secure compliance with a settlement agreement)). Because we found the Agency breached the settlement agreement, Complainant is eligible for attorney's fees and costs associated with this appeal.

CONCLUSION

We find no breach of paragraph 2.b and Footnote 1 of the settlement agreement. The Agency's decision finding no breach of paragraph 2.d of the settlement agreement is REVERSED. We REMAND the matter to the Agency for compliance with provision 2.d in accordance with the Order herein.

ORDER

Within 60 days from the date this decision is issued, to the extent it has not already done so, the Agency shall, in accordance with paragraphs 2.d of the settlement agreement, initiate the process to calculate and pay the amount of nonpecuniary, compensatory damages due Complainant.

ATTORNEY'S FEES (H0124)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), they are 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 receipt of this decision. 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 (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 (T0124)

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 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. 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

December 2, 2024

Date