



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

[REDACTED]
Aracely J.,¹
Complainant,

v.

Dr. Benjamin S. Carson, Sr., M.D.,
Secretary,
Department of Housing and Urban Development,
Agency.

Appeal No. 2020000803

Hearing No. 480-2013-00054X

Agency No. HUD-00126-2011

DECISION

Following its November 7, 2019, final order, the Agency filed an 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) 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, the Commission REVERSES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Senior Management Analyst at the Agency's Office of Field Policy and Management (OFPM), Las Vegas Field Office in Las Vegas, Nevada. From July 25-29, 2011, Complainant's first-line supervisor (S1) appointed her to act in his position while he was in Washington, D.C.² During his trip, S1 learned that their office was selected as a "Priority City," and that it was assigned two Agency Priority Goals

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 S1 left the Las Vegas office in September 2013, and he retired from the Agency on January 1, 2014. Hearing Transcript (HT) Day 2 at 80.

(APGs). Report of Investigation (ROI) at 102-3. Complainant stated that on July 27, 2011, she overheard two coworkers (CW1) (white), and (CW2) (white), discussing work assignments that they received from S1. ROI at 59. On August 11, 2011, S1 emailed Complainant stating that he needed to “loop” her into the planning. ROI at 74. On November 14, 2011, Complainant emailed CW2 asking who were the “we” that developed the milestones and activities for the assignment, and where the data was for the completed goals. CW2 responded that the “we” referred to herself, CW1, and S1. CW2 also stated that they had not yet begun to input their actions because she was still waiting for formatting requirements and guidance. ROI at 86-7.

On November 7, 2011, Complainant was copied on an email from S1, who stated that he was reassigning the sustainability position from Complainant to another coworker (CW3) (Asian). ROI at 90.

On February 27, 2012, S1 emailed Complainant to inform her that he wanted her make a presentation at an upcoming staff meeting on an engagement strategy project. On March 14, 2012, S1 noted that he informed Complainant that she needed to either have a PowerPoint or handouts. S1 also noted that Complainant responded to him in a “loud and offensive manner.” ROI at 163. On March 22, 2012, S1 issued Complainant an Official Reprimand for Refusal to Comply with Orders and Rude Conduct on March 14, 2012. S1 stated that Complainant “failed to provide appropriate handouts or a PowerPoint slide regarding your APG effort as I requested,” and that other staff members heard Complainant raise her voice and slam the phone. ROI at 122-3.

On May 30, 2012, Complainant sent an email to her second-line supervisor (S2) requesting a meeting because S1 was harassing her and creating “an extremely hostile work environment.” Complainant stated that she feared for her safety due to the “anger” directed at her, and she requested S2’s assistance.³

On August 15, 2012, S1 issued Complainant another Official Reprimand for Inappropriate Conduct on August 8, 2012. S1 noted that Complainant asked him if she could pick-up some documents and he responded that she could not, Complainant then forwarded S1’s email. S1 stated that when Complainant forwarded an internal office communication to an external party, she “demonstrated unacceptable and unprofessional behavior as well as a gross lack of judgment.” In September 2012, S1 issued Complainant a Performance Improvement Plan (PIP). As part of the PIP, Complainant was instructed to ensure that her weekly reports, and other work products, were “accurate, grammatically correct and submitted on time.” S1 added that Complainant should not bold, underline, or highlight in red, the text in her email communications. Complainant’s telework was also terminated.

³ Complainant amended her complaint to include additional claims at the hearing stage. As such, the relevant documents were not included in the ROI, and were admitted as exhibits during the hearing.

EEO Complaint

On November 7, 2011, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on her race (African-American) when:

1. on July 27, 2011, S1 informed several members of his staff regarding new assignments, duties, and details, but failed to inform Complainant of the changes, despite her acting in the position of Field Office Director;
2. on November 7, 2011, S1 sent an email effectively stripping Complainant of her title and responsibilities as a Sustainability Officer; and
3. S1 continually failed to inform Complainant, and other African-American staff members, of the day-to-day operations of the OFPM Las Vegas Field Office.

Complainant amended her complaint and alleged that the Agency discriminated against her in reprisal for her protected EEO activity when:

4. on March 22, 2012, she was issued an Official Written Reprimand;
5. on August 15, 2012, she received a second letter of reprimand;
6. on or about September 27, 2012, her telework was terminated; and
7. on or about September 27, 2012, she was placed on a PIP.⁴

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant requested a hearing and the AJ held a hearing on June 11-14, and July 8, 2019.⁵ The AJ issued a decision on September 30, 2019, finding that Complainant established that the Agency discriminated against her based on her race and in reprisal for protected EEO activity.

As an initial matter, the AJ denied the Agency's pending Motion to Strike the testimony of one of the witnesses (W1). The AJ noted that W1's testimony was not relevant because he described S1's behavior from 8-10 years prior to the events at issue. The AJ ruled that W1's testimony was not stricken in its entirety, but that it would be given lesser weight, if any, due to the lack of relevancy to the events at issue.

⁴ We note that the PIP document is dated September 10, 2012.

⁵ The AJ noted that this hearing also covered the issues in Complainant's EEO complaint, EEOC Hearing No. 540-2015-00209X. However, the AJ issued a separate decision for this complaint, which is addressed in EEOC Appeal No. 2020001149.

The AJ found that while the Agency articulated legitimate, nondiscriminatory reasons for their actions, Complainant was able to prove by a preponderance of the evidence that S1's actions were motivated by discriminatory animus, and thus pretextual. For claim 1, the AJ noted that S1 testified that he gave CW1 and CW2 work that was clerical in nature, and he stressed that there was a lot of data entry that needed to be done. However, the AJ noted that S2 testified that there was no data entry or data collection, and S2 described the substantive nature of the work to develop goals and benchmarks. In addition, the AJ found S1 not credible because he attempted to minimize the work and changed his testimony on minor matters. For example, S1 called CW2 an "interim" employee, but the record was replete with evidence that CW2 was an "intern." The AJ also noted that S1 failed to provide a credible explanation as to why he did not inform Complainant of the priorities at the same time as CW1 and CW2. The AJ did not find S1's assertion that he could not reach Complainant to be credible because he was in contact with Complainant via email that day, and S1 could have emailed her the same information that he shared with CW1 and CW2.

Further, the AJ found that CW2's email dated November 14, 2011, demonstrated that her role was more than clerical because she stated that she, along with CW1 and S1, "brainstormed a lot of ideas and came up with milestones." The AJ found that Complainant established that S1's actions were motivated by racial animus due to a lack of S1's credibility and his shifting explanations.

For claims 2 and 3, the AJ found that S1's articulated reasons were not credible and not supported by the evidence. S1 stated that he removed the sustainability duties from Complainant because he wanted her to focus on the APGs. However, the AJ found that Complainant learned that her sustainability duties were removed when she was copied on an email, and that S1 did not explain to Complainant ahead of time his rationale for the change, or how her job duties would be shifted.

The AJ noted that Complainant informed S1 that she felt that he was treating her, and other African Americans in the office, differently. The AJ found one witness (W2) not credible because she was defensive and reluctant to say anything that could be viewed to support Complainant's complaint. The AJ also noted that W2 did not answer directly when asked if Complainant was discriminated against based on race. The AJ also found that another witness (W3) testified to corroborate Complainant's allegations that white employees were treated more favorably. The AJ determined that Complainant was more credible than S1 because her testimony was consistent with the record, while S1's testimony was factually inconsistent with the record, and his blanket denials regarding his temperament and demeanor were contradicted by credible witnesses.

The AJ found that approximately four months after Complainant filed her EEO complaint, S1 issued her an official reprimand, which was not supported by the record. The AJ determined that credible evidence showed that S1 did not request a PowerPoint presentation from Complainant, and that she in fact prepared a handout. Further, S1 approved the handout, noting that it captured the "salient points." While the record showed that other employees sent emails describing Complainant's conversation with S1, the AJ noted that these were the same employees who tracked Complainant's whereabouts and often complained about Complainant. The AJ credited Complainant's account of the events and found that S1's motivation for issuing the reprimand was retaliatory.

For claim 5, the AJ noted that the email that Complainant forwarded was benign. A Union Steward (US) testified that there was nothing in the labor management agreement that prohibited Complainant from sending the email, and that he, and other Senior Management Analysts, regularly forwarded emails. US also testified that he believed that S1 was creating a “paper trail” to ultimately terminate Complainant.

The AJ noted that on May 30, 2012, Complainant emailed S2 to request a meeting because S1 was harassing her and creating a hostile work environment. The AJ found that S2 did not respond to her allegations until September 2012, and that during this time, Complainant was “tracked” by other employees; was required to ask for permission to attend meetings; and her weekly reports were scrutinized. The AJ found that all this scrutiny resulted in Complainant being placed on a PIP, and her telework suspended. The AJ found that Complainant’s email to S2 did not sit well with S1, who took disciplinary action against Complainant. The AJ also found that Complainant’s PIP lasted approximately one month, compared to the typical 90 days; and that S1 did not follow through with the weekly meetings that were required when an employee is on a PIP. The AJ concluded that Complainant met her burden of proof and established that she was retaliated against by the disciplinary action.

The AJ then awarded Complainant \$75,000.00 for non-pecuniary, compensatory damages. The AJ found that Complainant provided compelling testimony about the harm she suffered, including feeling demoralized and marginalized by S1. The AJ also noted the testimony provided by Complainant’s daughter, including her statement that Complainant would unexpectedly break down and cry, and try to hide it from her. The AJ also noted that Complainant was on medication to deal with the medical conditions caused by the discrimination. The AJ noted that Complainant was also entitled to pecuniary damages and out-of-pocket expenses, which she would address in the decision for EEOC No. 540-2015-00209X.

The Agency subsequently issued a final order rejecting the AJ’s finding that Complainant proved that the Agency subjected her to discrimination as alleged.

On appeal, the Agency argues that the AJ erred when she: (1) inappropriately admitted irrelevant and prejudicial testimony; (2) failed to cite to substantial evidence in the record to support her determination that the Agency acted with discriminatory motives and; (3) did not, following a finding that the Agency’s actions were retaliatory, evaluate the Agency’s proffered evidence of Complainant’s work product and conduct, which demonstrated that the Agency would have taken the same actions regardless of discriminatory motives.

The Agency asserts that W1’s testimony should have been stricken in its entirety because the highly prejudicial nature of his testimony substantially outweighs its limited probative value, and it resulted in S1’s character assassination. The Agency argues that any reliance on W1’s testimony is prejudicial, and that the AJ’s order should be overturned.

The Agency states that the AJ’s factual findings that support her determination that Complainant proved pretext for discrimination are not supported by evidence that a reasonable mind would

accept as adequate. The Agency asserts that substantial evidence supports that S1's actions were based on legitimate business needs. The Agency also argues that the AJ did not provide an adequate reason for discrediting S1's testimony for claim 1, and that her finding is not supported by substantial evidence.

For claims 2 and 3, the Agency states that the AJ found that S1's reasons were pretextual because he failed to notify Complainant of actions that would impact her work on a "regular basis," and that he failed to keep her informed about meetings. However, the Agency argues that the AJ failed to provide citations to support these "sweeping statements."

Regarding claim 4, the Agency notes that while S1 did not specifically request a PowerPoint presentation, he requested a "detailed description" of an engagement strategy. Further, while S1 noted that Complainant's initial draft "captured the salient points," he did not understand the draft to be the final product. In addition, the Agency asserts that the AJ disregarded the statements from other employees, and that she did not include any citations to evidence that these were the same coworkers who were "tracking" or "often complained" about Complainant.

For claim 5, the Agency argues that the AJ overlooked an email from another union steward who stated to Complainant that she "just can't forward an email from [your supervisor] to someone outside of the agency." The Agency also asserts that S1 consistently testified that Complainant's action embarrassed him, and that the AJ did not consider this evidence. The Agency notes that the AJ rested her determination on US's "unsupported personal opinion," and while the AJ stated that US noted that he and others regularly forwarded emails, it appeared that US did not make this statement.

The Agency argues that it provided evidence showing that Complainant's poor performance justified the issuance of the PIP. Specifically, the Agency asserts that Complainant's weekly report did not contain "proper formatting, consistent spacing, and proper spelling." For example, in August 2012, S1 informed Complainant that her project application needed to be revised due to issues with "sentence structure, composition, uniform font color, [and] proper use of bullets." The Agency asserts that S1 "credibly testified" that he placed Complainant on a PIP to raise her level of performance.

Complainant submitted a brief to oppose the Agency's appeal. Complainant argues that the AJ's factual findings are supported by substantial evidence in the record and that she proved by a preponderance of the evidence that she was treated disparately based on her race, and in retaliation for her EEO activity. Complainant requests that the Commission uphold the AJ's decision.

ANALYSIS AND FINDINGS

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 EEOC Management Directive 110, Chap. 9, at § VI.B. (Aug. 5, 2015). In this case, we note that the AJ made credibility determinations. The Agency argues that the AJ did not provide an adequate reason for discrediting S1's testimony. However, we find that the AJ stated that she found S1 not credible because he attempted to minimize the work assignments he gave to CW1 and CW2 by stating that they were clerical and data entry; he changed his testimony on minor matters, for example, calling CW2 an “intern” and then an “interim employee”; and he failed to provide a credible explanation for why he did not inform Complainant of the APGs at the same time as CW1 and CW2. We find that the AJ provided specific reasons for not finding S1 credible, and that the Agency has failed to show that we should not accept the AJ's credibility determinations. As such, we will accept the AJ's credibility determinations.

Witness Testimony

On appeal, the Agency argues that the AJ erred when she allowed W1 to testify at the hearing and admitted his testimony into evidence. The Agency asserts that the “highly prejudicial” nature of W1's testimony outweighs its limited probative value, and that W1's testimony resulted in a “character assassination” of S1. We note that under 29 C.F.R. § 1614.109, AJs are granted broad discretion in the conduct of administrative hearings, including the authority to allow witnesses to testify and to admit testimony evidence. See Malley v. Dept. of the Navy, EEOC Appeal No. 01951503 (May 22, 1997). In this case, we find that the Agency has not shown any evidence that the AJ erred when she allowed W1's testimony. We note that the AJ stated that she gave little weight, if any, to W1's testimony, and that she did not cite to any of W1's testimony in her decision. Further, there is no evidence that W1's testimony resulted in S1's “character assassination.” As such, we find that the Agency did not show that the AJ erred when she admitted W1's testimony.

Disparate Treatment

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Service v. Aikens, 460 U.S. 711, 715-716 (1983).

We find that the record contains substantial evidence to show that Complainant established a prima facie case of discrimination based on her race and in reprisal for protected EEO activity, and that the Agency proffered legitimate, nondiscriminatory reasons for their actions. We also find that substantial evidence in the record supports the AJ's finding that Complainant established that the Agency's reasons were pretext for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

For claim 1, substantial evidence supports the AJ's finding Complainant established pretext for discrimination. S1 testified that he spoke with CW1 and CW2 because they were the "least experienced" management specialists, which meant "entering data and doing manual inputs and trying to collect data." HT Day 2 at 13. However, this is contradicted by evidence from CW2, who noted that she, CW1, and S1 developed milestones and activities, and as of November 14, 2011, CW2 had not yet begun to enter any data. ROI at 86-7. As such, we find that Complainant established that she was discriminated against based on her race when S1 failed to timely inform her of the APGs.

Regarding claims 2 and 3, substantial evidence supports the AJ's finding that Complainant was treated differently based on her race. When asked if Complainant was discriminated against based on race, W3 responded that it "depend[ed] on which way you look at it." W3 added that S1 treated CW3 more favorably than Complainant, and that when S1 was away, he would call and ask for CW3 "99% of the time." ROI at 127-8.

Accordingly, we find that Complainant established that S1's reasons were pretext for discrimination, and that the Agency discriminated against her based on her race when it removed her sustainability duties and failed to keep her informed of OFPM operations.

For claim 4, substantial evidence supports the AJ's finding that the reprimand was not supported because S1 did not request a PowerPoint presentation and Complainant provided a handout, as requested. On February 27, 2012, S1 emailed Complainant asking her to present a "detailed description" of the engagement strategy, with no mention of a PowerPoint presentation. On March 14, 2012, S1 created a memo to himself noting that he asked Complainant to prepare a PowerPoint "or handouts." The record contains a copy of Complainant's handout. ROI at 118,163,120-1.

On appeal, the Agency argues that the AJ disregarded the statements from other employees, and that she did not include any citations to evidence that these were the same coworkers who were "tracking" or "often complained" about Complainant. However, the record shows that W3 believed that one of these employees reported Complainant to the Inspector General. ROI at 128. In addition, another witness testified that these three employees were part of the same clique and gossiped together. HT Day 1 at 263-4.

For claim 5, substantial evidence supports the AJ's finding that Complainant established pretext for discrimination when she was reprimanded for forwarding S1's email. While we note that US did not state that he regularly forwarded emails, his testimony supported that there was no "written rule" that prohibited Complainant from forwarding S1's email. HT Day 1 at 240.

Regarding claims 6 and 7, substantial evidence supports the AJ's determination that S1's reasons for terminating Complainant's telework and placing her on a PIP were pretext for discrimination because his actions were inconsistent with Agency policy and practice. US testified that a PIP is normally 90 days; there are usually weekly interactions between the employee and supervisor; and at the end of a PIP, the supervisor would notify the employee that the PIP was ending. US further testified that telework was separate, and that while a fully successful performance level was a condition for telework, even if an employee is placed on a PIP, a final determination was not made that an employee was not performing at a fully successful level. HT Day 1 at 224-6, 229-30. Here, Complainant's PIP lasted approximately one month; and Complainant testified that she did not meet with S1 to discuss anything "substantive," and that the "PIP disappeared." HT Day 4 at 109. Accordingly, we find that Complainant established that the Agency retaliated against her when it issued her two reprimands, issued her a PIP, and removed her telework.

On appeal, the Agency argues that the AJ erred when she did not evaluate if the Agency would have taken the same action, absent the retaliation. Cases where there is evidence that discrimination was one of multiple motivating factors for an employment action, that is, the employer acted on the bases of both lawful and unlawful reasons, are known as "mixed motive" cases. Once an employee demonstrates that discrimination was a motivating factor in the employer's action, the burden shifts to the employer to prove, by clear and convincing evidence, that it would have taken the same action even if it had not considered the discriminatory factor. See Price Waterhouse v. Hopkins, 490 U.S. 228, 249, 258 (1989); Tellez v. Dep't of the Army, EEOC Request No.

05A41133 (Mar. 18, 2005). If the employer is able to meet this burden, the employee is not entitled to personal relief, that is, damages, reinstatement, hiring, promotion, and/or back pay. But the employee may be entitled to declaratory relief, injunctive relief, attorneys' fees, or costs. See Complainant v. Soc. Sec. Admin., EEOC Request No. 05980504 (Apr. 8, 1999).

To meet its burden, the employer must offer objective evidence that it would have taken the same action even absent the discrimination. In this showing, the employer must produce proof of a legitimate reason for the action that actually motivated it at the time of the decision. A mere assertion of a legitimate motive, without additional evidence proving that this motive was a factor in the decision and that it would independently have produced the same result, is not sufficient. The employer must prove “that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same employment action.” Price Waterhouse, 490 U.S. at 276-77 (O'Connor J., concurring).

In this case, the Agency argues that it would have taken the same actions in claims 4-7, absent any retaliation. However, we find that the Agency did not provide objective evidence that it would have taken the same actions. While the Agency provided examples of Complainant's weekly reports, we find that the determinations that Complainant had “poor work product and problematic conduct” were subjective. For example, the Agency states that S1 was “embarrassed” by Complainant's action to forward his email; and while the Agency argues that Complainant's reports are replete with errors, the record showed that S1 did not provide substantive assistance to Complainant to improve her performance, and that she passed the PIP approximately one month after its issuance. We find that the Agency failed to show it would have taken the same actions in claims 4 -7 absent retaliation.

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under Title VII may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this “make whole” relief. 42 U.S.C. § 1981a(b)(3). Here, the AJ awarded Complainant \$75,000.00 for her non-pecuniary, compensatory damages. We note that the Agency has not challenged the amount of the AJ's award; accordingly, we find no reason to disturb the AJ's award of \$75,000.00 in non-pecuniary, compensatory damages.

CONCLUSION

We REVERSE the Agency's final order rejecting the AJ's decision and ORDER the Agency to provide the remedies as specified in the Order herein.

ORDER

1. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$75,000.00 in non-pecuniary, compensatory damages.
2. Within 60 days of the date this decision is issued, the Agency shall remove the two Official Reprimands and the September 12, 2012 PIP from Complainant's personnel records.

POSTING ORDER (G0617)

The Agency is ordered to post at its Office of Field Policy and Management, Las Vegas Field Office in Las Vegas, Nevada 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 (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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(c).

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

March 12, 2020
Date