



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

[REDACTED]
Terrie M.,²
Complainant,

v.

Michael R. Pompeo,
Secretary,
Department of State,
Agency.

Appeal No. 2019002167

Agency No. DOS-0057-15

DECISION

On January 17, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's December 20, 2018, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

ISSUE PRESENTED

Whether the Agency in its Final Agency Decision (FAD) correctly determined that Complainant was not discriminated against on the bases of disability (pregnancy) and sex (female) when she was not promoted by the Foreign Service Selection Board (the Board) in 2014.

BACKGROUND

¹ The record reflects that Complainant was formerly known as [REDACTED].

² 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.

At the time of events giving rise to this complaint, Complainant worked as a Consular Section Chief, Level 4 Foreign Service Officer (FS-04), at the Agency's U.S. Embassy in Tallinn, Estonia. On March 5, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and disability (pregnancy) when on October 1, 2014, Complainant was not promoted to FS-03.

Complainant explained that her first assignment was an entry-level tour in Islamabad, Pakistan, in January 2008 that was supposed to last one year, but that she was "curtailed out" of Pakistan in July 2008 for medical reasons due to an unexpected pregnancy. Complainant identified that pregnancy as the disabling condition on which she bases the instant complaint. She stated that her second tour was an entry-level two-year tour in Istanbul from 2009 through 2011, and that she served the entirety of that tour. Complainant asserted that her alleged disability has no permanent impact on her health, and that she was only hospitalized for two days in September 2008.

Complainant stated that she is able to perform all the job functions of her position. Complainant's statements are corroborated by record evidence of all of Complainant's Employee Reviews, including the Employee Assessment Review (EAR), demonstrating that she was performing above expectations. Complainant began working at the U.S. Embassy Tallinn in September 2014. She alleged that she was not selected for a promotion by the Selection Board that same year.

Complainant contended that the staff of Human Resources and Personnel Evaluation (HR/PE) had access to her curtailment memo as well as access to her personnel files which contained information about her pregnancy and presumably communicated with post leadership about the curtailment. Complainant also asserted that the Board may have been aware of her pregnancy (presumably from 2008), because the panel works closely with HR on promotions. She alleged that the Board was also aware of the gaps in her tours and the shortened lengths of her tours because that was reflected in her personnel and evaluation files. She asserted that the promotion panels obviously drew adverse conclusions from her shortened tours.

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). In accordance with Complainant's request, the Agency issued a final decision on October 22, 2015, pursuant to 29 C.F.R. § 1614.110(b). Therein, the Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

Complainant filed a timely appeal with the Commission in EEOC Appeal No. 0120160555. The Commission found that the investigative record regarding the issue of Complainant's promotion was inadequate, and therefore the Commission could not make a reasoned determination on the merits of the complaint. In a May 2, 2018, decision, the Commission vacated the Agency's decision, noting that the investigator had only interviewed two witnesses, Complainant and the Deputy Director for HR/PE.

The Commission explained that the Deputy Director (DDHR1) described in her affidavit how the promotion process worked, adding that the record contained documentation entitled "Promotion of Members of the Foreign Service" (3 FAM 2320 - 3 FAM 2329). The Commission stated that the record also contained "Procedural Precepts for the 2014 Foreign Service Selection Boards;" and that it provided information on promotion eligibility for Board review, procedures for identifying and ranking in order of merit those members recommended for immediate promotion, and those that were low-ranked and considered for possible referral to a Performance Standards Board (PSB). The Commission found that evidence inadequate. The Commission stated that although in her affidavit, HDDR1 had provided information on the promotion process itself and how it was to work, her affidavit provided only generalized information. The Commission found that the record lacked evidence providing an individualized assessment regarding how the promotion process was applied in the instant complaint.

Also with regard to the inadequacy of the investigation, the Commission explained that the record revealed that the Board's findings were to include, among other requirements, a "rank-order" list for each competitive category of all candidates whom the Board deemed qualified for immediate promotion; an alphabetical list of members low-ranked with a low-rank statement for each member who was not referred to a PSB, and an alphabetical list of all members referred to a PSB, with a statement explaining the reason for the referral. The Commission stated that those selection documents were not contained in the record. The Commission noted that both Complainant and HDDR1 explained that Complainant was mid-ranked, but those documents were not in the record. The Commission found that there was no explanation provided about the effect of Complainant's ranking as compared to the candidates who were promoted.

The Commission observed that in her affidavit, Complainant had stated that because she had shortened tours, information contained in documentation considered by the Selection Board may have led to her not being considered by the Board for a promotion. The Commission noted that what the Selection Board actually reviewed should be a part of the record. The Commission also noted that the Deputy Director identified six members of the Selection Board. However, no member was interviewed and there was no documentation involving the promotion in question which may have provided support for the actual promotion process or Board members' awareness, if any, of a protected basis.

Regarding both disability and sex, the Commission stated that the investigator needed to clarify the bases of the claim. In addition, the Commission noted that Complainant indicates on appeal that she was also on maternity leave for a portion of time between February 2, 2011, to July 14, 2011, while on tour in Istanbul and based on the record could not determine the relevance, if any, of another pregnancy on her promotion.

Having concluded that the record was not adequate, the Commission did not address whether Complainant was subjected to disparate treatment and whether the Agency articulated a legitimate, nondiscriminatory reason for its actions for which Complainant had failed to show pretext. The Commission ordered that the Agency conduct a supplemental investigation to include, but not limited to, relevant documentation reviewed by the Selection Board in promoting candidates,

information regarding comparators, the listing of candidates selected for promotion, comparative data related to the protected groups, affidavits from the Selection Board members, and the Agency's reasons for the alleged discrimination. The Commission stated that if a Board member was no longer available, an explanation was to be provided for the record.

The Agency conducted the supplemental investigation and provided a copy of the report of that investigation to Complainant. In response to the Agency's supplemental investigation, Complainant argued that the investigator failed to include the Commission's ordered items, asserting that the Agency failed to include relevant documentation reviewed by the Selection Board and information regarding comparators. Complainant added that the investigator did not obtain comparative data related to Complainant's protected class or affidavits from Selection Board members. Complainant asserted that the investigator also failed to obtain a statement of the Agency's reasons for discrimination. She stated that he simply took a statement from the current Deputy Director of HR/PE (DDHR2), who had only been in that position since June 1, 2018, and had no personal knowledge about Complainant's non-promotions. Complainant asserted that all that DDHR2 offered was the same generalized information about the rules governing the selection process that the Commission already found insufficient.

Complainant asserted that, because the Agency has not defended its conduct or provided any evidence to support its case, the Commission should grant her requested remedies. Complainant explained that she originally filed the complaint in early 2015; nearly four years later it is still unresolved. As such, Complainant requested that she be promoted to FS-03 retroactively to October 2012, with all accompanying back pay, interest, and benefits. She also stated that because the non-promotion has now affected her promotion from 03 to 02, she would request that she be promoted to FS-02 retroactively to October 2016, with all accompanying back pay, interest, and benefits.

Following completion of the supplemental investigation, the Agency issued the instant FAD as requested by Complainant. Therein, the Agency noted that Complainant had testified that because her entry-level assignment in Islamabad was shortened, her Career Development Officer (CDO) advised her to seek a third entry-level assignment which she did and served in Singapore from mid-2011 to mid-2013. Complainant contended that her CDO advised her wrongly, and that she later found out that she still could have bid on a mid-level assignment. Complainant alleged that, although she completed the full two-year obligation, had she received an appropriate mid-level assignment, she would have served a three-year mid-level tour. Complainant also stated that she then served a fourth assignment in a mid-level tour in Paramaribo beginning in October 2013. She advised that the assignment was expected to end in October 2015, but that she suffered a stroke in May 2014 and was medically curtailed in July 2014. Complainant did not indicate that the stroke is part of her disability claim.

Complainant asserted that the promotion panels expected her performance reviews to reflect two full entry-level tours, followed by a mid-level three-year tour. She noted that because of the medical curtailment out of Islamabad due to pregnancy, the subsequent two-year assignment in Singapore, and her medical curtailment from Paramaribo, it appeared as if three of her four tours

were unusually short. Complainant asserted that it was clear that the promotion boards made an adverse determination based on perceived shortened tours, which was due to her pregnancy.

Complainant noted that she was recommended for promotion in 2012, although she was not ranked high enough to actually be promoted. She asserted that her file was reviewed and mid-ranked by the 2014 FS Selection Board. Complainant contended that in 2013 and 2014, she was not deemed promotable and the only explanation was that the Board looked at her file and found the shortened tours to be troublesome.

Complainant explained that Foreign Service Officers (FSO) are supposed to be promoted according to expected performance as delineated in the Core Precepts; and that the performance of all FS employees is evaluated and measured against these precepts. She alleged that her EARs reflect that she is clearly performing well at the FS-03 level, including as a Consular Section Chief. Complainant contended that many senior FSOs have reviewed her EARs and they all concur that she had good EARs. She advised that she had a meeting with the Acting Director General who was not able to provide any explanation for the non-promotion and suggested that Complainant pursue further action.

Complainant explained that as a result, although she was promoted to FS-03 in November of 2015, this was overdue as the average time in class for consular positions from 04 to 03 was 3.1 years and the average time in service was 4.7 years. She noted that by the time she was promoted, she had been at level 04 for 7.5 years and had been in service for 9 years. Complainant stated that this has affected her promotion from 03 to 02.

Complainant stated that she was not specifically given documentation that she was not promoted, only that a cable goes out in October as to who is promoted. She asserted that her scorecard reflected that she was not recommended for promotion in 2014, which was confirmed on October 27, 2014, via email with Human Resources (HR) reflecting that her file was reviewed and mid-ranked by the Board. Complainant contended that throughout her career, her EAR consistently recommended her for promotion.

Complainant contended that the staff of HR/PE had access to her curtailment memo as well as access to her personnel files which contained information about her pregnancy and presumably communicated with post leadership about the curtailment. Complainant asserts that the Board may have been aware of her pregnancy because the panel works closely with HR on promotions. Complainant alleged that the Board was aware of the gaps in her tours and the shortened lengths of her tours because that was reflected in her personnel and evaluation files. She asserted that the promotion panels obviously drew adverse conclusions from her shortened tours.

In response, DDHR2 noted that Complainant presented no evidence to show that the Board was aware of her sex or alleged disability. She also noted that HR/PE was not aware that Complainant had or has an impairment. DDHR1 stated that the Board would not have been told anything in that regard. She asserted that the Boards were not provided with specific information regarding gender other than first names; and that HR/PE does not provide Personally Identifiable Information

(PII) on individual employees to the Boards. She noted specifically that for the 2014 promotion process, the Board was provided with no specific information regarding the gender of those under consideration for promotion other than first names.

DDHR1 reiterated the Agency's explanation of its promotion selection process. DDHR1 stated that the Board members are instructed not to share any outside information about the promotion candidates with their fellow Board members. She asserted that no recent Board has had less than 100 files to review, and most will review 300 or more files. DDHR1 asserted that the only guidance given to the Boards is in the Decision Criteria (Core Precepts) and Procedural Precepts. She explained that for the 2014 promotion process at grade level FS-04 for promotion to FS-03, Complainant was deemed eligible for promotion. DDHR1 noted, however, that according to HR records, Complainant was not promoted until April 15, 2015.

She cited the Foreign Service Act of 1980, noting that it provides that promotions in the Foreign Service will be based on the recommendations and rankings of the Selection Boards, with certain narrow exceptions for new employees who are initially promoted administratively. DDHR1 stated that the HR/PE convenes Boards every summer to review employees' performance records. The Boards then rank the employees relative to each other based on demonstrated potential to serve successfully at higher levels and in accordance with Decision Criteria for Tenure and Promotion that are negotiated annually with American Foreign Service Association (AFSA). She asserted that these criteria are grouped into six skill sets: leadership, managerial, interpersonal, communication and foreign language, intellectual and substantive knowledge.

DDHR1 explained that the Board members are sworn in, thoroughly briefed on the procedural and core precepts, and trained to identify examples of the decision criteria in the evaluation reports. She noted that decisions are based only on the documentation in the candidates' Official Performance Folders for the most recent five years and for grades FS-02 and above, on the security incident records.

DDHR1 asserted that there are four phases to the Selection Board process: I. Initial screening phase – The Board reviews the files on the basis of relative performance. II. Low ranking phase – The Board reviews in detail those recommended for low ranking or direct referral to the Performance Standards Board (PSB), writing a statement justifying their decision. III. Detailed screening phase – The Board reviews those identified for promotion and rank orders them, each member making an independent determination of how he/she will rank a candidate. The members discuss any large discrepancies in votes and decide on final votes and rankings. IV. Preparation of the Board findings phase – The preparation consists of rank ordered lists for promotion, low ranking and PSB referral statements, counseling statements and criticisms.

DDHR1 explained that each Board then debriefs the Director General of HR (DGHR) Front Office about its experience and provides recommendations for the DGHR's consideration. She stated that Boards identify high performers for promotion and recommend senior employees for performance pay. However, she noted that the Board also identifies weak performers for counseling or, occasionally, for separation. DDHR1 explained that Foreign Service employees are

not promoted to fill a particular position or positions, rather promotions are used to keep the numbers of employees in rough balance with the number of jobs at each rank and in each occupational category. DDHR1 also explained that the approved lists are sent to the Secretary, who conveys them to the White House. The President nominates the list, and once the Senate attests it, the promotions are affected.

DDHR1 asserted that Board members may recuse themselves from consideration of an employee's file should they believe they cannot fairly consider that employee for promotion. She asserted that requests for recusal are granted almost without exception. DDHR1 stated that the Board members are instructed not to share any outside information about the candidates with their fellow Board members.

DDHR1 stated that when considering how many promotion opportunities will be granted, the DGHR receives a listing of the rank order recommendations by the Boards. She added that the DHRG decides the total number to be promoted from FS-04 to FS-03, noting that 400 employees were promoted in 2014.

DDHR1 explained that Complainant was mid-ranked in 2014. She asserted that in conformity with the Procedural Precepts negotiated with the AFSA, mid-ranked employees are not numerically ranked because the Agency would have to do a detailed screening of each of the individual candidates presented for review. DDHR1 also asserted that the Board notes are only retained for one year after dismissal of the Board.

DDHR2 testified that she was responsible for overseeing the performance of the management processes and policies for the Department of State's career Foreign Service. She explained that she has no supervisory authority over Complainant and did not even know her. DDHR2 provided supporting testimony. She explained that the Selection Board sees exactly what the employee sees upon review of his/her performance folder of the Employee Official Personnel File (eOPF) as can be viewed at any time by the employee, an abbreviated version of the employee's Employee Profile, the Procedural Precepts, and the Decision Criteria for Tenure and Promotion. DDHR2 asserted that issues of curtailment would only be known by the Board if included by the employee in his/her material in the eOPF. She asserted that assignment matters are not presented to the Board and are not known to the HR/PE staff.

DDHR2 also asserted that HR/PE staff does not have information related to, nor will they address, personal or assignment decisions of employees. She noted that only from the material submitted by the employee to his/her eOPF could this information be known, and the Board would not be told anything in this regard, but could see the material in the file if so submitted by the employee. DDHR2 stated that to her knowledge, Complainant's impairment was not a factor in the promotion decision. In its instant FAD, the Agency again found that Complainant was not subjected to discrimination as alleged.

CONTENTIONS ON APPEAL

In her Appeal Brief, Complainant reiterates her response to the Agency's supplemental investigation and restates her requested remedies.

STANDARD OF REVIEW

As this is an appeal from a decision 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 AND FINDINGS

Disparate Treatment – Sex and Disability

In the instant complaint, Complainant has alleged that because she is a woman who got pregnant twice and had to curtail her assignments as a result, she was disadvantaged in the selection for promotion process. To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n.13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency’s explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of sex discrimination, a complainant must show that: (1) she is a member of a protected group; (2) she is qualified for her position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination.

We note that, although a complainant bears the burden of establishing a “prima facie” case, Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), the requirements are “minimal,” St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993), and complainant’s burden is “not onerous.” Burdine, 450 U.S. at 253.

Based on record evidence, we find that Complainant has established a prima facie case of sex discrimination. First, Complainant belongs to a protected group as she is female. Complainant is also qualified for promotion to the FSO-03 position. HDR1 also acknowledged that Complainant was eligible for the promotion; and the evidence shows that Complainant was a high-performing FSO as demonstrated by her EARs. Moreover, Complainant has asserted that she believes her prior curtailments of her assignments overseas due to her high-risk pregnancy impacted the ranking she received in the promotion process. Therefore, Complainant has raised an inference that her sex was a factor in her non-selection for promotion.³

Because Complainant established a prima facie case of sex discrimination, the Agency now has the burden of producing a legitimate, non-discriminatory explanation for not selecting Complainant for promotion.

While we note that an agency's burden of production is not onerous, it must provide a specific, clear, and individualized explanation for its promotion decision. This is required in order for a complainant to have the opportunity to prove that the asserted reason was a pretext for discriminatory animus. See Stewart v. Dep't of Homeland Security (TSA), EEOC Request No. 0520070121 (Nov. 14, 2011) (agency failed to meet its burden of production by simply explaining the general mechanics of the selection process but failed to provide an individualized explanation for complainant's specific score) (citing Boston v. U.S. Postal Serv., EEOC Appeal No. 0120042074 (May 26, 2004)).

Here, DDHR1, corroborated by DDHR2, explained that Complainant was not selected for promotion because she had been mid-ranked by the Selection Board. To support this explanation, the record only includes the same generalized information about the rules governing the selection process that the Commission had previously found insufficient, and which resulted in the complaint being remanded for a supplemental investigation. The record does not include pertinent documentation reviewed by the Selection Board and information regarding comparators. Also missing from the record are comparative data related to Complainant's protected class or affidavits from Selection Board members; and the statement of the Agency's reasons for mid-ranking Complainant that led to her consequent non-selection for promotion. Moreover, the supporting testimony provided by DDHR2 does not add relevance to the instant complaint because, as Complainant stated, DDHR2 had only been in her position since June 1, 2018, nearly four years after Complainant's non-promotion incident. DDHR2 herself indicated that she had no personal knowledge about Complainant or her non-promotion.

In fact, the extent of the Agency's explanations for its actions is that promotion decisions are based only on the documentation in the candidates' Official Performance Folder for the most recent five years and at grades FS-02 and above, on the security incident records. The two DDHRs also stated that PE staff does not have information related to, nor will they address, personal or assignment

³ Having made a finding of sex discrimination, we need not reach a conclusion on Complainant's disability claim because the remedies are the same.

decisions of employees, and only from the material submitted by the employee to his/her eOPF could this information be known.

We find that the evidence presented by the Agency is not sufficient to provide a specific, clear, and individualized explanation as to why Complainant was not selected for promotion in 2014. The Agency explained the general mechanics of the promotion process but failed to provide an individualized explanation for Complainant's specific situation. See, e.g., Koudry v. Dep't of Educ., Request No. 0520100196 (Apr. 13, 2010) (discrimination found where agency merely explained the mechanics of selection process, provided list of candidates deemed best qualified, and summarized applications of selectee and complainant, but failed to provide statements from selecting officials explaining how complainant's qualifications were evaluated compared to selectee's qualifications). The record does not indicate how the Agency determined which 76 candidates were selected for promotion or why Complainant was not one of the 76. Merely indicating that the Selection Boards rely only on information in candidates' eOPF for making promotion decisions is not enough. Moreover, we add that the record also does not identify how or why the 76 candidates selected for promotion in 2014 received their scores and rankings. Simply stating that candidates who are mid-ranked do not receive scores is inadequate.

Moreover, nothing in the record provides a basis for dispelling Complainant's belief that the staff of HR/PE had access to her curtailment memo as well as access to her personnel files which contained information about her pregnancy and presumably communicated with post leadership about the curtailment. Neither did the Agency refute Complainant's assertion that the Board may have been aware of her pregnancy because the panel works closely with HR on promotions; and that the Board was also aware of the gaps in her tours and the shortened lengths of her tours because that was reflected in her personnel and evaluation files. As the Agency never presented any testimony from the Board members who reviewed Complainant's promotion materials, we are left with only Complainant's un rebutted assertions.

Therefore, the Commission finds that the Agency failed to overcome Complainant's prima facie case of sex and disability discrimination, and Complainant prevails without having to prove pretext. Che v. Dep't of Housing and Urban Dev., EEOC Request No. 0720090008 (Aug. 6, 2010) (the consequence of an agency's failure to meet its burden of production under McDonnell Douglas is that the complainant, having established a prima facie case, prevails without having to make any demonstration of pretext), request for recon. den. EEOC Request No. 0520100584 (Jan. 27, 2011). As a result of the Agency's failure to meet its burden of production, we find that Complainant has established that she was subjected to sex and disability discrimination when she was not selected for promotion in 2014.⁴

⁴ We note DDHR2's statements that the Board notes are only retained for one year after dismissal of the FSSB and, therefore, were no longer available. In that regard, because Complainant filed her EEO complaint within a year of her non-selection for promotion, those statements should have been made available to the Investigator, given there was an ongoing EEO complaint being processed on this selection. See EEOC regulations at 29 C.F.R. Section 1602.14 (requiring employers to retain "all personnel records relevant to the charge or action until final disposition")

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's finding of no discrimination with respect to Complainant's non-selection for promotion and REMAND the matter for further processing in accordance with the ORDER below.

ORDER (D0617)

The Agency is ordered to take the following remedial actions:

- I. The Agency will promote Complainant to FS-03 retroactively to the date she would have been promoted in 2014 absent discrimination, within thirty (30) calendar of the date this decision is issued.⁵
- II. The Agency shall pay Complainant back pay with interest from the date in 2014 when Complainant would have started in the FS-03 position. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision was issued. The Agency will ensure that all tax consequences are taken into account. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
- III. The Agency will conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford her an opportunity to establish a causal relationship between the Agency's discriminatory action and her pecuniary or non-pecuniary losses, if any. Complainant will

where a charge has been filed); see also Cornell S v. Dep't of Education, EEOC Appeal No. 0120160444 (March 27, 2018) (cautioning that agencies are required to retain documents pertinent to a charge for a period of one year from the date of the personnel action, at a minimum; and to modify records retention policies to ensure future compliance). See generally, Serita B v. Dep't of the Treasury, EEOC Request No. 0520150006, at pp. 4-5 (Aug. 12, 2020).

⁵ We decline to address Complainant's request for previous and subsequent promotions because there is no evidence to support a determination that Complainant met or would have met the prerequisites for those promotion opportunities.

cooperate in the Agency's efforts to compute the amount of compensatory damages and will provide all relevant information requested by the Agency. The Agency will issue a final decision on the issue of compensatory damages. 29 C.F.R. § 1614.110. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein. Within fifteen (15) calendar days of the date this decision is issued, the Agency shall give Complainant notice of her right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't. of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of her claim for compensatory damages. Complainant shall have forty-five (45) calendar days from the date Complainant receives the Agency's notice to submit her compensatory damages evidence. The Agency shall complete the investigation on the claim for compensatory damages within forty-five (45) calendar days of the date the Agency receives Complainant's claim for compensatory damages. Thereafter, the Agency shall process the claim in accordance with 29 C.F.R. § 1614.110. Within thirty (30) calendar days of determining the amount of compensatory damages due Complainant, the Agency shall pay that amount to Complainant.

- IV. The Agency is directed to conduct eight (8) hours of in-person or interactive training for DDHR1 and the members of the Board who rated Complainant's candidacy for promotion.⁶ The Agency shall address management's responsibilities with respect to eliminating discrimination in the workplace. The Agency shall conduct the training within ninety (90) days from the date the decision is issued.
- V. The Agency shall, within thirty (30) days of the date this decision is issued, post a notice in accordance with the Order below.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Washington, D.C., offices 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

⁶ We direct that DDHR1 be provided training because unlike DDHR2, she is the management official who had first-hand knowledge of Complainant's non-selection for promotion at the time it occurred. Also, because record evidence indicates that DDHR1 was responsible for HR/PE at the time, DDHR1 is most likely in a position to correct the particular source of the identified discrimination and to minimize the chance of its recurrence.

places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (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)

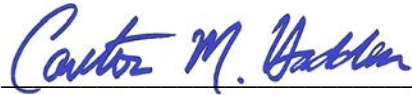
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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

September 22, 2020

Date