



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

[REDACTED]

Wes S.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2020002082

Hearing No. 430-2016-00338X

Agency Nos. 200I-0544-2008101608, 200I-0534-2009100620

DECISION

Following its April 9, 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 modification of an EEOC Administrative Judge's (AJ) decision. Specifically, the Agency is only challenging the AJ's decision awarding Complainant interest on back pay pursuant to a finding of discrimination under the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Diagnostic Radiographic Technologist, GS-0647-08, at the Agency's William Jennings Bryan Dorn Veterans Hospital in Columbia, South Carolina. On March 6, 2008, Complainant filed an EEO complaint (Agency No. 200I-0544-2008101608) alleging that the Agency subjected him to discrimination on the bases of sex (male), disability (foot condition, degenerative foot disease), and age (55) when, on December 19, 2007, Complainant was found qualified and was referred for consideration but,

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.

not selected for the position of Diagnostic Radiologic Technologist (CT/DRT) GS-0647-9, under Vacancy Announcement No. 07-122-RAD in Columbia, South Carolina.

On January 27, 2009, Complainant filed a second EEO complaint (Agency No. 200I-0534-2009100620) alleging that the Agency discriminated against him on the bases of his sex (male) when, by letter dated October 21, 2008, he was referred but not selected for the position of Diagnostic Radiologic Technologist, GS-5/6/7/8, under Vacancy Announcement No. CHAS08-114-0029 in Charleston, South Carolina.

The parties entered into a settlement agreement to settle the complaints in August 2009; however, in March 2016 following Complainant's claim that the agreement had been breached, the Agency determined that the agreement did not contain the language required by the Older Workers' Benefit Protection Act. Complainant was given the option to void the agreement and reinstate his EEO complaints from the point processing ceased. Complainant did so and requested a hearing before an EEOC Administrative Judge (AJ). The AJ held a hearing on February 20, 2019, and issued a decision on March 1, 2019, wherein the AJ found that Complainant had been discriminated against on the basis of his age when he was not selected for the position at the Columbia hospital. The AJ found no sex or disability discrimination with respect to this selection and that no discrimination occurred under any basis as to the selection at the Charleston hospital.

To remedy the discrimination, the AJ awarded Complainant back pay with interest from October 17, 2007, the date of the discriminatory nonselection through the date of Complainant's retirement in October 2015. As additional remedial actions, the AJ ordered the Agency to display a Notice to employees informing them of this finding of age discrimination. The AJ further ordered the Agency to take corrective, curative, or preventative action to ensure that similar violations of the law will not recur.

The Agency subsequently issued a final order wherein it accepted the AJ's finding that Complainant proved that it subjected him to age discrimination as alleged, as well as the AJ's findings of no discrimination. The Agency accepted the relief ordered by the AJ with the exception of the award of interest on back pay.

CONTENTIONS ON APPEAL

On appeal, the Agency contends that the AJ erred when he ordered it to pay Complainant interest on back pay. The Agency maintains that interest on back pay is not authorized for federal sector complaints filed under the ADEA. In response, Complainant asserts that the Agency should pay him back pay with interest based on fairness.

ANALYSIS AND FINDINGS

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. Nat'l Labor Relations Bd., 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, Chapter 9, at § VI.B. (Aug. 5, 2015).

As neither party challenges the AJ's decision regarding liability, the only matter before us is whether the AJ erred in including interest in the back pay award. Based on our review of the record, we find that Complainant is not entitled to interest on the award of back pay. Under Commission regulations, interest on back pay is to be included in the back pay computation where sovereign immunity has been waived. 29 C.F.R. § 1614.501(c)(1). Congress has not enacted legislation to amend the ADEA to include interest on back pay. See Ryan v. Dep't of Def., EEOC Petition No. 04960005 (Nov. 7, 1996); Asuncion v. Dep't of the Navy, EEOC Request No. 05940480 (Oct. 13, 1995). Accordingly, the Commission finds that the Agency properly excluded interest from the back pay award.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order, and direct it to implement the order for relief as slightly modified below.

ORDER

To the extent it has not already done so, the Agency is ordered to take the following remedial actions:

1. The Agency shall determine the appropriate amount of back pay and all other benefits due Complainant pursuant to 29 C.F.R. § 1614.501 for the period starting on October 17, 2007 and ending until the effective date of Complainant's retirement in October 2015. Complainant is entitled to any benefits to which he would have been entitled but for the discrimination, as well as expected promotions throughout the period, i.e., step increases and grade increases. 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 enforcement or clarification must be filed with the Compliance Officer at the address referenced in the statement entitled "Implementation of the Commission's Decision."

2. Within 90 days of the date this decision is issued, the Agency shall provide at least eight hours of training to the responsible management official at the Columbia facility identified as the selecting official, particularly regarding age discrimination under the ADEA.
3. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against the responsible management official at the Columbia facility identified as the selecting official. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the responsible management official has left the Agency's employ, the Agency shall furnish documentation of his departure date.

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 Columbia, South Carolina facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (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).

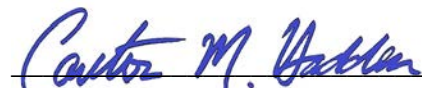
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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 15, 2020
Date