



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

[REDACTED]  
Jacquetta C.,<sup>1</sup>  
Complainant,

v.

Alex M. Azar, II,  
Secretary,  
Department of Health and Human Services.  
Agency.

Appeal No. 2019002196

Agency No. HHS-IHS-0297-2018

**DECISION**

On March 9, 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 February 11, 2019 final order 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. Our review is de novo. 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 Chief (Supervisory) Pharmacist, GS-0660-13, at the Agency's Cheyenne River Health Center in Eagle Butte, South Dakota. Complainant began her tenure in the position on May 14, 2017, after previously serving at the facility as a Clinical Pharmacist.

On June 29, 2018, Complainant filed an EEO complaint wherein she claimed that the Agency discriminated against her and subjected her to a hostile work environment in reprisal for her prior protected EEO activity when:

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<sup>1</sup> 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.

1. Since November 2017 and continuing until she left the Agency, the Chief Executive Officer (CEO) subjected her to a hostile work environment, when he did such things as (but not limited to):
  - a. On March 28, 2018, Complainant's first-line Supervisor informed Complainant that her retention incentive was denied by the CEO although he had approved a retention incentive for a Clinical Pharmacist.
  - b. The CEO threatened Complainant with Employee Relations/Labor Relations disciplinary actions after she filed a prior EEO complaint.
2. Complainant was constructively discharged due to harassment, bullying and intimidation she received from the CEO.

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). The Agency issued a final order wherein it determined that no reprisal occurred.

With regard to claim (1)(a), the Agency noted that Complainant stated that the CEO was the only reason her retention incentive was denied. Complainant referenced the Deputy Health Systems Administrator's (DHSA) statement that he had been directed by the CEO not to sign the incentive. The Agency observed that Complainant believed she should have received a retention incentive because there were pharmacists who contributed far less than her to the department and had fewer competing job offers yet they were given retention incentives. The Agency stated that Complainant believed that her prior EEO activity was a factor in the denial of her retention incentive because she was not given a valid reason for the denial.

The Agency observed that the CEO denied that Complainant's prior EEO activity was a factor in any of his interactions with Complainant. The CEO asserted that he denied the retention incentive based on Complainant's performance and conduct. According to the CEO, he received a Fraud/Waste/Abuse complaint in late June/early July 2017 from one of the employees supervised by Complainant (Employee 2) alleging the following: "(1) Complainant treated certain employees with favoritism; (2) Complainant held other employees overly accountable; (3) Complainant bullied and treated Employee 2 and a coworker (Employee 1) in a discriminate [sic] manner; and (4) misuse of time and equipment related to extended breaks and inappropriate use of the Skype messaging system. The CEO noted that Complainant also failed to disclose a tenant in her Agency housing unit, which he asserted was dishonest and against policy."

The Agency observed that Complainant's first-line Supervisor (S1) stated that the numbers showed that Complainant deserved a retention incentive. According to the Agency, although S1 stated that the incentive denial was retaliation, she did not link the denial to any specific protected activity of Complainant's nor did she provide any documentary evidence to substantiate her testimony.

The Agency asserted that S1's testimony should be given limited weight in light of her own EEO complaint against the CEO.

The Agency noted that the DHSA stated that he believed the retention incentive was justified for Complainant. The DHSA stated that he was directed by the CEO not to sign the incentive.<sup>2</sup> The Agency stated that the DHSA acknowledged that he did not know if Complainant's EEO activity was a factor in the CEO's decision. According to the DHSA, Complainant's request for removal of a Pharmacist who she supervised and was rumored to be in a relationship with the CEO was a significant reason for the denial of the retention incentive. The Agency reasoned that the proposed removal of the Pharmacist was not protected activity and therefore the DHSA's testimony cannot cast doubt on its explanation for the denial of the retention incentive. The Agency determined that the denial of the retention incentive was not attributable to retaliatory animus.

With regard to claim (1)(b), the Agency dismissed the independent claim pursuant to 29 C.F.R. 1614.107(a)(2) on the grounds that Complainant failed to initiate contact with an EEO Counselor in a timely manner. The Agency stated that Complainant claimed that the CEO told the EEO Counselor during her prior complaint that he would take ER/LR disciplinary action against her for filing the complaint. According to the Agency, the CEO's statement would have been made sometime between November 25, 2017 and December 21, 2017. The Agency noted that Complainant did not initiate EEO contact within the 45-day limitation period as her EEO Counselor contact for the instant complaint occurred on April 17, 2018.

The Agency addressed this incident as part of Complainant's hostile work environment claim. The Agency observed that the CEO denied saying to the EEO Counselor during the processing of Complainant's prior complaint that he would take ER/LR disciplinary action against Complainant. The CEO maintained that during the informal complaint process he informed the investigator that he wanted it to be clearly noted that he was working on an ER/LR against Complainant prior to the filing of the complaint. The Agency determined that the record was devoid of any witness testimony or documentary evidence that casts doubt on management's nondiscriminatory explanation.

As for Complainant's constructive discharge claim, the Agency stated that Complainant gave notice to S1 on April 2, 2018 and separated from the Agency on May 25, 2018. The Agency noted that Complainant presented the following reasons for her departure: (1) her retention incentive being denied; (2) the reversal of her decision to terminate the Pharmacist (Employee 1) under her supervision; (3) her salary without the retention incentive was lower than the market average; (4) stress from hearing rumors that the CEO was trying to take ER/LR action against her; (5) her being questioned concerning her housing arrangement because she was reluctant to share information; and (6) her being subject to reviews by outside pharmacists.

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<sup>2</sup> At the time, the DHSA was serving as the Acting CEO while the CEO was on a detail that began in November 2017.

The Agency stated that a reasonable person in Complainant's position would not have found her working conditions intolerable. The Agency reasoned that these matters were at worst minor annoyances faced by an employee who believed her contributions outweighed any performance/conduct issues. The Agency noted that Complainant acknowledged she did not communicate to management her feeling that she was being harassed until she initiated the EEO complaint process on April 17, 2018.

The Agency challenges the inclusion of the denied retention incentive as part of the constructive discharge claim given that Complainant was seeking alternative employment well before the denial of the retention incentive. The Agency pointed to factors other than reprisal that Complainant mentioned as reasons for the treatment that she received. These reasons included nepotism, injustice, insincerity, the proposed termination of the Pharmacist who may have been in a relationship with the CEO and that Complainant stated she had been subjected to a hostile work environment since she issued two Pharmacists (Employees 1 and 2) below average ratings. The Agency noted that the DHSC stated that the CEO was upset with Complainant about the proposed removal on Employee 1, but the Agency asserted the proposed removal was not protected activity for purposes of Title VII.

The Agency reasoned that Complainant did not involuntarily resign due to intolerable working conditions based on S1's testimony that Complainant was applying for multiple positions prior to the occurrence of any of the incidents at issue. The Agency stated that Complainant had been tentatively selected for a Pharmacist position with the Department of Veterans Affairs on January 26, 2018, which is the position she eventually accepted. The Agency observed that Complainant explained that her new position allowed her to make significantly more money and was in a more desirable location.

The Agency determined that Complainant failed to establish that she was subjected to a hostile work environment because the conduct at issue was not sufficiently severe or pervasive to constitute a hostile work environment. Moreover, the Agency determined that it articulated legitimate, nondiscriminatory reasons for the conduct at issue. As a result, the Agency found that Complainant was not subjected to reprisal or a retaliatory hostile work environment as alleged.

The instant appeal followed.

#### CONTENTIONS ON APPEAL

On appeal, Complainant contends that one Clinical Pharmacist was issued a retention incentive by the CEO in August or September 2017. Complainant states that two Clinical Pharmacists received a retention incentive from the DHSA in his Acting capacity on February 6, 2018, and April 12, 2018, respectively. The record indicates that the CEO had requested while on detail to be informed of all retention incentive requests. Complainant maintains that no comparator had any competing offers.

In contrast, Complainant states that she had three competing offers and none of the comparisons had comparable qualifications or the performance record in terms of pharmacy accomplishments that she possessed at the time of the submission of her retention incentive request. Complainant contends that none of the comparators had prior EEO activity. Complainant points out that despite the CEO's assertion that none of the employees who participated in the matters associated with his denial of her retention incentive received any awards or incentives, that two comparators were frequently present on the Skype messages referenced by the CEO.

Complainant challenges the validity of the complaints cited by the CEO. Complainant points to the CEO's statement that he has no documentation of the allegations made by Pharmacist 2 concerning her Fraud/Waste/Abuse claim, or that she was being harassed. Moreover, Complainant notes that the CEO stated he had no communication from Pharmacist 1 about her reports of harassment, but he believed S1 did. Complainant disputes that S2 referenced Skype messages in her Fraud/Waste/Abuse complaint.

With respect to the accusations of favoritism, Complainant states that this pertained to extended breaks that had precedence under the prior Supervisor and in fact most such incidents occurred under his leadership and were ignored at that point by the CEO

In terms of the housing application issue, Complainant references S1's statement that she did not regard this as a performance issue given there was no clear process for obtaining an Agency house. S1 further stated that Complainant disclosed her intent to allow another employee to reside in her house and subsequently withdrew her application. S1 asserted that she considered it a non-issue and that Complainant's living arrangements were none of her business or that of the CEO's business.

Complainant argues that the CEO raised the specter of ER/LR disciplinary action against her on seven occasions from November 2017 to April 2018. Specifically, Complainant cites three incidents that occurred less than 45 days before her EEO contact in the instant complaint, and all of them occurred after she filed her first complaint. Complainant states that on March 15, 2018, the CEO indicated he was preparing ER/LR action. Complainant states that on April 10, 2018, the CEO denied her retention incentive and informed the DHSA that at the least he was proposing a demotion for her and that he had prepared the ER/LR submission. According to Complainant, on April 11, 2018, the CEO reiterated to a Human Resources official his intent to demote her, he offered to parse the evidence related to the Skype messages, and stated regardless of the preference and approval of the DHSA, S1 and Complainant's second-line Supervisor (S2) of Complainant's performance, he planned to resolve these outstanding issues.

Complainant contends she was constructively discharged in light of her supervisory authority being marginalized in the reversal of her proposed termination of Employee 1; the multiple pharmacy reviews to search for supervisory problems; the denial of her retention incentive and at least eight instances of discussions/efforts to discipline her and statements that would get back to her about ER/LR action. Complainant maintains that this was a 10-month onslaught of harassment.

In terms of her performance, Complainant asserts that she improved pharmacy operations and contributed to the facility passing the Joint Commission Review with flying colors.

Complainant claims that she took a \$60,000 pay cut to join the facility because she wanted to offer quality medical care to an underserved population. Complainant explains that this is the reason she declined job offers in December 2017-January 2018, as she hoped the harassment would stop with the CEO serving a detail. Complainant states that she began seeking other employment opportunities before she learned the CEO would be on detail. Complainant argues that the positions she applied for and were offered were options any rational person would consider given the untenable environment when the CEO was there. Complainant asserts that the fact she declined these positions at the slightest possibility the CEO would not be there when he was detailed links her search for alternative employment to the CEO's harassment being the sole reason for her resignation. Accordingly, Complainant requests that the Commission reverse the final agency decision.

### ANALYSIS AND FINDINGS

#### *Disparate Treatment*

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).

Complainant engaged in prior EEO activity as she stated that she inquired about initiating the EEO process on November 18, 2017, she filed an informal complaint on November 25, 2017, and then a formal complaint on December 21, 2017. Complainant withdrew the prior complaint in February 2018. The record reflects that the CEO learned at some point between November 25, 2017 - December 21, 2017, that Complainant was pursuing the EEO complaint process. Subsequently, Complainant was subjected to adverse treatment in the form of being threatened with ER/LR disciplinary action on several occasions, an attempt to demote her and the denial of her retention incentive. We find that these adverse actions followed Complainant's protected EEO activity within such a period of time that retaliatory motivation may be inferred. We find that Complainant established a prima facie case of reprisal.

The Commission further finds that the Agency has articulated legitimate, nondiscriminatory reasons for its denial of Complainant's retention incentive.

More specifically, the Agency explained as to claim (1)(a) that the CEO denied Complainant a retention incentive based on a Fraud/Waste/Abuse complaint in late June/early July 2017 from Employee 2. The CEO also claimed that Complainant failed to disclose the tenant in her Agency housing unit, which he stated was dishonest and against policy.

Complainant now bears the burden of establishing that the Agency's stated reasons are merely a pretext for discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 9, 1996). Complainant can do this directly by showing that the Agency's proffered explanation is unworthy of credence. Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. at 256.

Complainant attempts to establish pretext by challenging the validity of the reasons cited by the CEO. The CEO stated that he based his denial decision on Complainant's performance and conduct. S1 stated in her affidavit that an employee may receive a retention incentive if they are in a hard-to-fill critical position, with specialized skills or competencies and/or they are likely to leave if they do not receive a retention incentive. In terms of whether Complainant's prior EEO activity was a factor in the denial of her retention incentive, S1 stated that she could not say for certain, however, she suspected given the timing and other retention incentive approvals that it was a factor. S1 asserted that she recommended a retention incentive for Complainant as she was in a hard to fill position, had several other job offers and was performing beyond expectations. S1 noted that Complainant had previously received two retention incentives during her time as a Clinical Pharmacist at the facility.

The DHSA stated in his affidavit that he agreed with S1 that Complainant deserved the retention incentive. The DHSA asserted that the denial of the retention incentive was strictly the CEO's decision. The DHSA observed that the Pharmacy and Health Center Joint Commission Review returned results higher than any other time in the history of the institution, and that in his opinion Complainant contributed greatly to this while she was Chief Pharmacist. The DHSA attached to his affidavit an extensive list of Pharmacy accomplishments during Complainant's tenure as Chief Pharmacist.

With respect to the Fraud/Waste/Abuse complaint referenced by the CEO, S1 stated that she never saw the allegations that Employee 2 purportedly submitted after Complainant gave her a sub-par mid-year evaluation. S1 stated that Complainant was on a one-year supervisory probation and did not receive Supervisory 101 training until 10 months into her supervisory tenure. S1 asserted that Complainant made great efforts to improve as a supervisor. According to S1, in one of the Pharmacy Reviews conducted during Complainant's tenure, the reviewer stated on September 27, 2017, that the current staff does appear to work well together. As for the issue of Complainant participating unprofessionally on Skype messaging with subordinates, S1 stated that she issued a Letter of Expectation to Complainant and all Pharmacy staff, and the matter was reflected in Complainant's PMAP.

Upon review of the record, we find that Complainant's prior EEO activity was clearly a factor in the CEO's decision to deny Complainant a retention incentive. The CEO became vindictive toward Complainant beginning with his reaction to her proposed termination of Employee 1.

Subsequent to nullifying the proposed termination, the CEO subjected Complainant to measures that included pursuing a Fraud/Waste/Abuse report for which he lacked documentation, having three pharmacy reviews performed even though usually only one was conducted each year and seeking Complainant's demotion despite a clear consensus as to Complainant being an excellent Chief Pharmacist. The CEO became aware of Complainant's prior EEO activity at some point between November 25, 2017 – December 21, 2017, and he ordered the denial of Complainant's retention incentive approximately four months later. The record supports that the CEO may have been displeased with Complainant's proposed termination of Employee 1, a proposed termination that was prompted by Employee 1's fundamental mistake that could have endangered patients. We note that not only did the CEO reverse the proposed termination, he also ensured that Employee 1 received a perfect rating for her PMAP closeout by forcing the DHSA to sign the document. In fact, the DHSA stated that he feared retaliation from the CEO if he did not comply. We observe that no other Pharmacist during the relevant time period was denied a retention incentive. Additionally, neither of the two Pharmacists who received retention incentives during the relevant time period had prior EEO activity. We find that the CEO's explanation for denying Complainant a retention incentive is unworthy of credence. We find that the denial of Complainant's retention incentive was attributable to reprisal based on Complainant's prior EEO activity.

### *Hostile Work Environment*

To establish a claim of harassment a complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Therefore, to prove her harassment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of the alleged basis. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself.

The Commission has a policy of considering reprisal claims with a broad view of coverage. See Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000). Under Commission policy, adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 § II.B(2) (Aug. 25, 2016). Burlington N. & Santa Fe Ry. Co v. White, 548 U.S. 53 (2006).



The statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999).

With respect to claim (1)(b), the Agency dismissed this claim on the grounds that Complainant failed to initiate contact with an EEO Counselor in a timely manner. However, the Agency failed to take into account the threats of ER/LR disciplinary action that the CEO made against Complainant that occurred fewer than 45 days before Complainant's April 17, 2018 EEO Counselor contact. We observe that these threats were on March 15, 2018, when the CEO indicated he was preparing ER/LR action; on April 10, 2018, when the CEO denied Complainant's retention incentive and informed the DHSA that at the least he was proposing a demotion for Complainant and that he had prepared the ER/LR submission;<sup>3</sup> and on April 11, 2018, when the CEO reiterated to a Human Resources official his intent to demote Complainant and stated regardless of the preference and approval of Complainant's performance by the DHSA, S1 and S2, he planned to resolve these outstanding issues. We therefore find that Complainant's EEO Counselor contact on April 17, 2018, with respect to this claim was timely.

As to the merits of this claim, Complainant engaged in prior EEO activity when she filed an informal EEO complaint on November 25, 2017, and subsequently filed a formal complaint on December 21, 2017. Complainant maintains that the CEO issued threats of ER/LR disciplinary action against her on seven occasions from November 2017 to April 2018. We find that the identified incidents, considered cumulatively, were sufficiently severe or pervasive to create a hostile work environment and that the incidents were attributable to retaliatory harassment based on Complainant's prior EEO activity. Furthermore, the conduct was sufficiently material to deter Complainant or others from engaging in protected activity in the given context. Accordingly, the Commission finds that Complainant has established that she was subjected to a retaliatory hostile work environment as to claim (1)(b).

Complainant contends that her resignation from the Agency amounted to a constructive discharge. The Commission has established three elements which a complainant must prove to substantiate a claim of constructive discharge: (1) a reasonable person in the complainant's position would have found the working conditions intolerable; (2) the conduct that constituted discrimination against the complainant created the intolerable working conditions; and (3) the complainant's involuntary resignation resulted from the intolerable working conditions. Clemente M. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120160661 (March 11, 2016); citing Walch v. Dep't of Justice, EEOC Request No. 05940688 (April 13, 1995).

Complainant references the CEO's various actions and statements against her as the basis for her claim of construction discharge. Specifically, Complainant cites the denial of her retention incentive, the ongoing threats of ER/LR disciplinary action and the threat of demotion despite her impressive accomplishments.

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<sup>3</sup> S1 stated that she informed Complainant of this threat when she told Complainant that her retention incentive had been denied.

Complainant also cites events that occurred before her prior EEO activity such as the excessive and unwarranted number of pharmacy reviews, the questioning of her concerning her housing arrangements and the marginalization of her supervisory authority by the reversal of a proposed termination of Employee 1. We find that it is clear the CEO pursued a vendetta against Complainant in part based on her prior EEO activity. The conditions that he created for Complainant were such that a reasonable person would find them intolerable. The DHSA stated that it was in Complainant's best interest to resign because in his opinion, the CEO would have made life very hard for her and possibly ruin her career. S1 stated that she was surprised Complainant stayed as long as she did. Complainant was willing to work for significantly less financial compensation than she could have received elsewhere because she was motivated to offer quality care for an underserved community. She declined employment offers based on her hope that her treatment would improve with the CEO on detail. However, his influence in the facility remained strong while he was on detail and the adverse treatment toward Complainant continued. Complainant's resignation was in response to these intolerable conditions. Therefore, we find that Complainant was constructively discharged in reprisal for her EEO activity.

### 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 decision. We REMAND the matter for further processing in accordance with the ORDER below.

### ORDER

The Agency is ordered to take the following remedial action:

1. Within 60 days of the date this decision is issued, the Agency shall offer Complainant reinstatement into her former Chief Pharmacist, GS-13, position, retroactive to the effective date of Complainant's discharge, reportedly May 26, 2018, with all the rights, benefits, and privileges of that position. The Agency shall afford Complainant 15 days to determine whether to accept reinstatement. Should Complainant reject the offer of reinstatement, Complainant's entitlement to back pay shall terminate as of the date of rejection.
2. Within 60 calendar days of the date this decision is issued, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant, pursuant to 29 C.F.R. § 1614.501. The back pay award shall reflect all career ladder promotions to which an employee in Complainant's position who performed in a fully successful manner was entitled. 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 the Complainant for the undisputed amount within 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.

3. 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."
4. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
5. Within 30 days of the date this decision is issued, the Agency shall pay Complainant the amount of the retention incentive she was denied as a result of unlawful reprisal.
6. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's entitlement to compensatory damages, including providing Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages. For guidance on what evidence is necessary to prove pecuniary and non-pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991 (July 14, 1992) (available at [eeoc.gov](http://eeoc.gov)). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issue of compensatory damages no later than 30 days after the completion of the investigation.
7. Within 90 calendar days of the date that this decision is issued, the Agency shall provide EEO training to the management official identified as the Chief Executive Officer, including at least eight hours of in-person or interactive training on Title VII with a specific focus on harassment and the prohibition against reprisal for EEO activity. If this management official has left the Agency's employ, the Agency shall furnish documentation of his departure date.
8. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against the responsible management official identified as the Chief Executive Officer. 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 Chief Executive Officer has left the Agency's employ, the Agency shall furnish documentation of their 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 Cheyenne River Health Center in Eagle Butte, South Dakota 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)

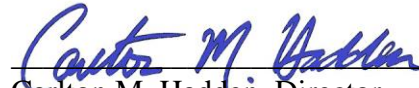
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

June 18, 2020

Date