



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

[REDACTED]
Sharon S.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of Defense
(Army & Air Force Exchange Service),
Agency.

Appeal No. 2020002362

Hearing No. 451-2012-0024X

Agency No. 11.102

DECISION

Following its February 18, 2020, final order, the Agency filed a timely 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 affirms its decision to fully implement the EEOC Administrative Judge's (AJ) decision, except for the item in paragraph 3c (pertaining to reimbursement of Complainant's Thrift Savings Program (TSP) account). For the following reasons, the Commission AFFIRMS the Agency's final order.

BACKGROUND

Complainant was employed by the Agency as a Lead Store Assistant, 02/01, at its Main Store at Lackland Air Force Base in San Antonio, Texas at the time relevant to her complaint. In 2011, Complainant filed an EEO complaint alleging discrimination based on her race (African-American), sex (female), and age when she was not selected for a Supervisory Store Assistant position at Lackland Air Force Base.

Following an investigation, Complainant requested a hearing before an EEOC AJ. The AJ held hearings on July 19, 2013, and August 13, 2013, to determine liability and damages, respectively.

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.

In her January 16, 2020 decision, the AJ found that Complainant had been subjected to discrimination based on her race and sex. Among the remedies ordered and most relevant here, the Agency was ordered to: “compute the amounts that should be placed in [her] Thrift Savings Plan (TSP) account to compensate her for any Agency matching contributions which would have been made based on the rate of pay to which she was entitled during the backpay period, as well as earnings which would have been accrued. The Agency shall then pay into Complainant’s TSP account all amounts owed.” No findings were made related to Complainant’s participation in FERS or the existence of a TSP or any other retirement account in Complainant’s name. Complainant did not specifically seek retirement payments as a measure of damages, and no evidence was presented relating to the existence of a TSP or any other retirement account in Complainant’s name.

Following receipt of the AJ’s decision, on February 18, 2020, the Agency issued a final order implementing the AJ’s decision regarding liability and incorporating all remedial corrective actions prescribed in the AJ’s decision, except for the portion of the decision pertaining to the TSP reimbursements. The Agency timely filed its notice of appeal on February 20, 2020.

As a matter of law, Agency employees do not participate in the Federal Employee Retirement System (FERS) because they are not “employees” as defined for that purpose. 5 U.S.C. § 2105(c)(2). Agency employees are not entitled to participate in the TSP. *Compare* 5 U.S.C. § 2105(c)(2) *with* 5 U.S.C. § 8432(a)(1) (limiting participation to *employees* or *members*). We agree with the Agency in concluding that the remedy at issue is clearly erroneous because the backpay award does not “restore to the Complainant the income [she] would have otherwise earned but for the discrimination.” MD-110, Ch. 11, § III.A. The undisputed facts show that Complainant is not entitled to participate in the TSP program. No evidence was ever taken on the existence of a TSP account for Complainant, nor was any evidence introduced that she participated in the program. As a matter of law, Complainant could not have accrued TSP contributions during her time of employment with Agency whether, or not she had been the victim of discrimination. To order such payments, under the guise of back pay, was clearly erroneous, and is not supported by substantial evidence in the record.

CONCLUSION

Accordingly, 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, which incorporates the AJ’s finding of discrimination and remedies, in part.²

² We note that Complainant does not dispute any of the Agency’s arguments on appeal.

ORDER (C0618)

To the extent it has not already done so, the Agency is ordered to take the following remedial action within 60 days from the date this decision is issued as previously ordered by the EEOC Administrative Judge:

1. The Agency is ordered to pay Complainant non-pecuniary compensatory damages in the amount of \$80,000.
2. Complainant is entitled to be reinstated to the Position at the Main Store, for an amount of time equal to the date the selectee first encumbered the Position (June 11, 2011) until Complainant was promoted to the Position as a regular full-time employee. If the parties agree, Complainant may instead be employed as a regular full-time Sales Associate in the Main Store's Customer Services Department for that same length of time.
3. The Agency is ordered to amend Complainant's personnel record to reflect that she occupied the Position as of the date it was first occupied by the selectee, with the appropriate step increases and associated benefits.
4. The Agency is ordered to determine the appropriate amount of back pay, with interest, and other benefits due to Complainant, pursuant to 29 C.F.R. § 1614.501 from June 11, 2011, until the date Complainant was promoted to the Position. 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. 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."
5. The Agency is ordered to pay attorney's fees in the amount of \$31,985.50, and costs in the amount of \$1,996.11, for a total sum of \$33,981.61.
6. The Agency is ordered to provide the responsible management official (S3) with eight hours of EEO training which focuses on identifying and prohibiting race and sex discrimination, addresses her responsibilities with respect to eliminating discrimination in the workplace, and provides education on the current state of law in employment discrimination. The EEO training **may not** be self-administered. Following the completion of the EEO training, the Agency's representative shall provide the Commission with a sworn statement from the person(s) responsible for administering the training, which offers a detailed synopsis of the training provided and identifies and confirms the date on which S3 completed it. If this management official has left the Agency's employ, the Agency shall furnish documentation of his departure date.

7. The Agency shall consider taking disciplinary action against S3. 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 Lackland AFB, including the Main Store (and wherever S3 is now stationed, whether domestically or in a foreign country) 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 (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the complainant or the agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC’s Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party’s request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, complainant’s request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency’s request for reconsideration must be submitted in digital format via the EEOC’s Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party’s request and/or statement or brief in opposition must also include proof of service on the other party, unless complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

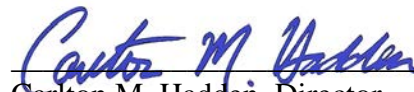
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

October 1, 2020

Date