



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

[REDACTED]  
Derrick T.,<sup>1</sup>  
Complainant,

v.

William P. Barr,  
Attorney General,  
Department of Justice  
(U.S. Marshals Service),  
Agency.

Appeal No. 2020001239

Hearing No. 410-2016-00128X

Agency No. USM-2015-01642

**DECISION**

Following its November 26, 2019 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 affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ.

**BACKGROUND**

During the period at issue, Complainant worked as a Deputy United States Marshal, GS-12, at the Agency's Northern District of Georgia in Atlanta, Georgia.

On May 22, 2015, Complainant filed a formal EEO complaint claiming that the Agency discriminated against him based on sex (male) and age (48) when, on February 19, 2015,

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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.

Complainant learned that he had not been selected to serve as Acting Judicial Security Inspector (“JSI”),<sup>2</sup> GS-1811-13, with the United States Marshal Service, Northern District of Georgia.

After an investigation of the claim, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

Following a hearing held on August 17, 2016,<sup>3</sup> a Supervisory AJ issued a decision concluding that the Agency discriminated against Complainant based on his sex and age when Complainant was not selected for the JSI position in February 2015. The AJ determined that the Agency’s legitimate non-discriminatory reasons for Complainant’s non-selection were pretext for discrimination. Specifically, the AJ indicated that the Selecting Official (“SO”)<sup>4</sup> testified that he did not select Complainant for the Acting JSI position because Complainant had not previously work with the entire Judiciary Security Unit (“JSU”) and Complainant did not have Contract Officer Representative (“COR”) certification. However, the AJ reasoned that Complainant provided evidence that he had recently worked on detail in the JSU, while the Selectee had not. The AJ further reasoned that the evidence showed COR certification had not been previously required for the Acting JSI position. Additionally, the AJ considered that after the Selectee was chosen in February 2015 for the 120-day Acting JSI promotion, the SO retired from the Agency in March 2015. Consequently, S2 announced a 90-day Acting JSI promotion, this time via email,<sup>5</sup> which Complainant was selected for and completed after the Selectee had completed her 120-day promotion. In sum, the AJ found that the Agency’s provided reasons for Complainant’s non-selection were pretext for discrimination.

Regarding relief, the AJ issued a separate decision and awarded Complainant \$20,000 in compensatory damages, seven days of back pay to be calculated by the Agency, \$25,352 in attorney’s fees, and a posting notice. The AJ, however, denied Complainant’s request to restore leave used.

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<sup>2</sup> The record indicates that the Acting JSI position was a temporary promotion not to exceed 120 days.

<sup>3</sup> The record indicates that the AJ who was initially assigned to this appeal conducted the August 17, 2016 hearing on the merits and a January 13, 2017 hearing on damages but left the EEOC before issuing a decision. Subsequently, the Supervisory AJ issued a decision on the merits of the appeal as well as the damages.

<sup>4</sup> The SO retired from the Agency in March 2015 and did not complete an affidavit during the investigation. However, the SO testified at the August 17, 2016 hearing.

<sup>5</sup> Complainant and his co-worker testified that the Agency customarily advertised the Acting JSI promotions via email and did so for their 2014 JSI assignment. However, the SO did not follow this practice for the 120-day Acting JSI promotion at issue in Complainant’s complaint.

Regarding the compensatory damages award, the AJ noted Complainant's testimony that he experienced weight fluctuation, sleeplessness, anxiety, increased alcohol intake, and decreased social engagement because of the Agency's discriminatory act. The AJ awarded Complainant \$20,000 in non-pecuniary compensatory damages.

The AJ also determined that the Agency could not, pursuant to 5 C.F.R. § 335.103(c), promote an employee to a higher graded position for more than 120 days through the non-competitive process at issue. The AJ noted that Complainant subsequently received the Acting JSI position and held this position for a total of 113 days after the Selectee completed her 120 day promotion as Acting JSI.<sup>6</sup> Therefore, the AJ offset the 113 days of pay Complainant received as Acting JSI and determined that Complainant was entitled to seven days back pay (the difference between the 120-day promotion for which he was non-selected and the 113-day promotion he later served).

The AJ denied Complainant's request for restored leave because Complainant failed to establish a causal connection between the discriminatory non-selection and his leave usage. As the prevailing party, the AJ determined that Complainant provided proper documentation to support payment of attorney's fees of \$25,352.

On November 26, 2019, the Agency issued a final order rejecting the AJ's finding of discrimination and award of damages and filed the instant appeal.

The Agency makes several arguments on appeal. First, the Agency argues that the AJ did not find that the SO's failure to consider Complainant's work experience in the entire JSU was intentional or motivated by a discriminatory animus toward Complainant's sex and age. Second, the Agency argues that the COR certification was not a required, but rather a desired qualification for the position. Third, the Agency argues that it was not required to advertise the 120-day JSI promotion because, pursuant to Agency Policy Directive 3.10, Merit Promotion Plan, §G.7, the Agency was only required to advertise term promotions that lasted more than 120 days.

The Agency further disputes the AJ's damages award. Specifically, the Agency asserts that Complainant should not be entitled to back pay, non-pecuniary compensatory damages, or attorney's fees given the Agency's argument that there was no discrimination. Alternatively, the Agency argues that Complainant's damages should be decreased.

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<sup>6</sup> The record indicates that Complainant was promoted to Acting JSI for a period not to exceed 90 days effective June 28, 2015. However, Complainant's promotion was extended for an additional twenty-three days which resulted in Complainant serving a total of 113 days in the Acting JSI position.

The Agency notes that while Complainant answered “no” on a physical examination report for Agency operational employees dated April 14, 2016, regarding questions concerning whether he had “recent gain or loss of weight,” “frequent trouble sleeping,” “depression or excessive worry,” “nervous trouble of any sort,” or that he had “been told to cut down or criticized for alcohol use.” Consequently, the Agency reasons that the AJ’s award for compensatory damages should be reduced.

Regarding back pay, the Agency reasons that the AJ’s award of seven days back pay was inappropriate. The Agency explains that Complainant previously held the Acting JSI GS 13 promotion for three weeks from July 2014 through August 2014. The Agency explains that Complainant’s prior promotion occurred during the same twelve-month period as the JSI GS 13 120-day promotion which covered March 8, 2015 through June 27, 2015. Consequently, the Agency reasons that Complainant would only have been able to serve 99 days of the 120-day promotion for which he was non-selected. However, the Agency asserts that Complainant was able to serve an additional fourteen days (a total of 113 days) when he was selected for the second Acting JSI promotion which was effective June 28, 2015. Therefore, the Agency argues that Complainant is not entitled to seven days back pay.

The Agency did not specifically address the AJ’s award of \$25,352 in attorney’s fees or dispute the documentation Complainant submitted in support of this award.

In response to the Agency’s appeal, Complainant argues, through counsel, that the AJ’s finding of discrimination should be upheld. Regarding damages, Complainant argues that the AJ’s compensatory damages award should be increased, his back pay should be increased to cover the entire 120-day promotion, and his used leave should be restored.

### 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. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ’s conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

#### **Non-Selection**

In the absence of direct evidence, for a claim of disparate treatment, a complainant must satisfy the three-part evidentiary framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). A complainant may establish a prima facie case of disparate treatment discrimination based on sex and age by showing that: (1) complainant is a member of a protected class; (2) complainant is subject to an adverse employment action concerning a term, condition, or privilege of employment; and (3) complainant is treated differently than similarly situated

employees outside the complainant's protected class. See e.g. Dunning-Bridges v. Dep't of the Dep't of the Treasury, EEOC Appeal No. 0120120091 (May 3, 2014), Walker v. U.S. Postal Serv., EEOC Appeal No. 01A14419 (Mar. 13, 2003), Ornelas v. Dep't of Justice, EEOC Appeal No. 01995301 (Sept. 26, 2002).

Once complainant establishes a prima facie case of disparate treatment discrimination, the burden shifts, in accordance with McDonnell Douglas, 411 U.S. 792 to the Agency to articulate a legitimate, non-discriminatory reason for the action. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). The complainant then has the burden of proving by a preponderance of the evidence that the reason offered by the Agency is a pretext for a discriminatory motive. Id.

Here, we find that Complainant has established a prima facie case of disparate treatment based on sex and age. The record indicates that Complainant is a male and was 48 years old at the time that he was not selected for the 120-day Acting JSI promotion at issue. The record further indicates that the Selectee is a female and was 34 years old at the time she was selected for the 120-day promotion. The evidence also shows that Complainant was qualified for the temporary promotion but not selected. His qualifications are established by the fact that he was subsequently offered a 90-day (extended to 113 days) Acting JSI promotion after the Selectee has completed her 120-day promotion. Therefore, Complainant has established his prima facie case of disparate treatment based on sex and age.

In response, SO, the selecting official, articulated legitimate, non-discriminatory reasons for Complainant's non-selection – that Complainant had no experience working in JSU, complaints had been received about Complainant during a prior detail, and Complainant did not have COR certification.

The ultimate burden of proving discrimination falls to Complainant to establish, by a preponderance of the evidence, that the Agency's proffered reason was a pretext designed to mask the role discrimination played in this matter. Here, we conclude that that substantial evidence of record supports the AJ's determination that Complainant has met this burden. Complainant testified that the SO first explained to him that he did not receive the position because Complainant did not have prior experience working with the entire JSU. However, the record reflects that in 2014, the SO was the responsible management official who reassigned Complainant to a detail in the JSU. The SO then clarified at the hearing that he based his decision not to select Complainant for the 120-day Acting JSI promotion because of Complainant's performance during his prior JSU detail, as well as Complainant's performance as a Deputy. Specifically, the SO testified that he received complaints from the two Agency officials who oversaw Complainant's performance during his JSU detail assignment. However, both these Agency officials denied having any conversation with the SO about Complainant's performance in the JSU or reporting any issues with Complainant's work performance during his JSU detail. Additionally, Complainant's immediate supervisor ("S1") further denied having any conversation with the SO regarding Complainant's work performance as a Deputy. Notably, the SO acknowledged at the hearing that neither S1 nor Complainant's second level supervisor ("S2") had reported any performance issues regarding Complainant's performance.

Therefore, the SO's reasoning that Complainant had not previously worked with JSU or that there were issues with Complainant's work performance was not substantiated.

In contrast, the SO testified that he chose the Selectee because of her "work ethic," prior experience in JSU, and because she already had the COR certification. However, the record indicates that the Selectee had not, in fact, served in an official detail in the JSU before she was selected for the 120-day Acting JSI promotion.

Regarding the COR certification, the evidence showed that COR certification was only required for the permanent JSI position and was not required for the Acting JSI position. Consequently, Complainant asserted that when he served a prior detail in the JSU, his lack of a COR certification did not prevent him from receiving the detail. Although the SO testified that COR certification was important for the position, the SO eventually acknowledged at the hearing that there was no requirement for the Acting JSI to have COR certification.

Additionally, the record further indicates that the SO testified that he consulted with S1 and S2 regarding his selection for the 120-day Acting JSI promotion. However, both S1 and S2 denied that the SO had any discussion with them about who he wanted to select. Although the SO confirmed in a February 11, 2015 email to Complainant that he would forward Complainant's request for consideration for the Acting JSI promotion to S2, there is no indication in the record that the SO informed S2 of Complainant's interest in the position. Specifically, S2 testified at the hearing that he conducted an email search and could not find any correspondence from the SO regarding Complainant's interest in the 120-day Acting JSI promotion. Consequently, there is no indication in the record that the SO consulted with any management official before making his decision to choose the Selectee.

The SO's shifting testimony as to the reasons for the selection decision, as well as testimony offered by other management officials that directly contradicted SO's testimony in critical ways, is a strong indicator of pretext. While the Agency suggests on appeal that the SO was simply mistaken about the relative qualifications of Complainant and the Selectee, the weight of the evidence suggests a lack of credibility in SO's testimony about this selection from which a reasonable fact finder is left with the conclusion that he was trying to hide why he made the decision he made. We are persuaded that the AJ correctly determined that what the SO was hiding was the role discriminatory factors played in his selection decision.

Therefore, for the reasons discussed above, we find that the AJ correctly determined that the Agency's articulated reason for not selecting Complainant for the Acting JSI position was proven pretext for discrimination.

### **Non-pecuniary Damages**

Non-pecuniary compensatory damages are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of

health. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991 (EEOC Guidance), EEOC Notice No. 915.002 at 10 (July 14, 1992). Objective evidence in support of a claim for non-pecuniary damages claims includes statements from Complainant and others, including family members, co-workers, and medical professionals. See id.; see also Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Non-pecuniary damages must be limited to compensation for the actual harm suffered as a result of the Agency's discriminatory actions. See Carter v. Duncan-Higgans, Ltd., 727 F.2d 1225 (D.C. Cir. 1994); EEOC Guidance at 13. Additionally, the amount of the award should not be “monstrously excessive” standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989)).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Service, EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Department of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from a complainant concerning emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

Here, we find substantial evidence in the record supports the AJ's award of \$20,000 in non-pecuniary compensatory damages. Complainant testified at the damages hearing that the non-selection affected him emotionally. Specifically, Complainant indicated that he had anxiety, difficulty sleeping, social withdrawal, and depression. Complainant explained that when he was non-selected for the Acting JSI position, he began to doubt his work performance and wondered was he as good of a performer as he thought. Three of Complainant's co-workers also provided testimony that Complainant's behavior changed after he was non-selected for the 120-day promotion. The co-workers indicated that Complainant was “devastated,” he alienated himself from others, he became withdrawn from family and friends, appeared at work disheveled, and was no longer the same “upbeat” and “joking” person before the non-selection. And although the SO retired one month after the non-selection, one co-worker noted that Complainant was “still a little bit subdued” even right after the SO left, but “after a while [Complainant's] personality improved some.”

Complainant further alleged that he stopped eating and began drinking more and he sought help through the Employee Assistance Program (“EAP”) on March 18, 2015. Subsequently, Complainant stated that he saw an EAP-provided therapist on March 28, 2015, April 2, 2015, and April 14, 2015. By June or July 2015, Complainant stated that he saw the Agency physician, as part of his annual examination, who indicated that he had hypertension, elevated blood glucose levels, and a weight gain of about 20 pounds.

Complainant asserted that he had never previously had these conditions, and he attributed them to work-related stress, and indicated that his primary care physician placed him on medications to treat these conditions in September 2016.

Although Complainant asserted during his testimony that his work-related stress caused ongoing health problems, we note that approximately one year later, in an April 14, 2016 employee intake medical assessment, Complainant indicated that his present health was good. Complainant further indicated that he was on no medications and he had no depression or excessive worry, no trouble sleeping, no recent weight gain or weight loss, and he had not been asked to cut down his use of alcohol. Consequently, the evidence shows that the duration of Complainant's emotional harm from the non-selection was for no more than approximately one year.

Based on Complainant's proven representations of harm, we find that the AJ's award of \$20,000 is in line with similar EEOC decisions. *See, e.g., Eli Chaparro v. Social Security Administration*, EEOC Appeal No. 01A03785 (Aug. 26, 2002) (\$25,000 in non-pecuniary damages awarded to complainant who was non-selected for a 120-day detail to a senior position and who asserted that he suffered emotional distress and other physical symptoms).

Accordingly, we affirm the AJ's award of \$20,000 in compensatory damages.

### **Back Pay**

The purpose of a backpay award is to restore Complainant the income he would have otherwise earned but for the discrimination. *See Albemarle Paper Co. v. Moody*, 442 U.S. 405, 418-19 (1975); *Davis v. U.S. Postal Service*, EEOC Petition No. 0490010 (Nov. 29, 1990). A backpay claimant generally has a duty to mitigate damages. However, the Agency has the burden to establish, by a preponderance of the evidence that a complainant has failed to mitigate her damages. *See* 29 C.F.R. 1614.501(d); *McNeil v. U.S. Postal Service*, EEOC Request No. 05960436 (Dec. 9, 1999). The Commission recognizes that precise measurement cannot always be used to remedy the wrong inflicted, and therefore, the computation of back pay awards inherently involves some speculation. *Hanns v. U.S. Postal Service*, EEOC Petition No. 04960030 (Sept. 18, 1997). However, uncertainties involved in a backpay determination should be resolved against the Agency which has already been found to have committed the acts of discrimination. *Id.*; *see also Klook v. U.S. Postal Service*, EEOC Petition No. 04A40012 (June 16, 2004).

Here, Complainant requests backpay for the full 120-day Acting JSI promotion he was denied. The evidence shows that pursuant to Agency policy, the Agency could only noncompetitively promote Complainant to a higher graded position for no more than 120 days, and any noncompetitive promotional details Complainant served in the twelve months prior counted towards the 120-day total. The record indicates that Complainant served a 113-day Acting JSI promotion after he was non-selected for the 120-day Acting JSI promotion at issue.



Consequently, Complainant could not have served both the 113-day and the 120-day term promotions, and therefore, he is not entitled to back pay for the full 120-day promotion for which he was non-selected.

We acknowledge that Agency's argument that Complainant would have only been eligible to serve 99 days of the 120-day promotion if he had been selected because Complainant had previously completed a three-week (21 days) JSI term promotion from July 2014 through August 2014. The Agency reasoned that Complainant's prior promotion occurred within the twelve-month period (July 2014 – July 2015) preceding the 120-day promotion occurring from March 8, 2015 through June 27, 2015. We also note that Complainant's subsequent 113-day promotion was effective on June 28, 2015, and partly occurred during the same twelve-month period. Therefore, given the dates of Complainant's prior 2014 JSI term promotion as well as the dates for the 120-day promotion and the subsequent 113-day promotion, Complainant would not have been able to serve a full 120 days in either scenario. Therefore, we find that Complainant is not entitled to backpay. The AJ's award of seven days of backpay is reversed.

### **Restoration of Leave**

Complainant testified that because of work-related stress, he took sick and annual leave to ensure that he had enough rest and energy when he came in the office. Complainant further testified that approximately 90% of the leave he took between his February 2015 non-selection and the August 17, 2016 hearing was attributable to work-related stress. We conclude that the AJ correctly determined that Complainant did not adequately establish a causal connection between his leave usage and the discriminatory non-selection. The record indicates that Complainant's leave usage did not increase significantly after the 2015 non-selection in comparison to the leave usage Complainant had in 2014.<sup>7</sup> Absent additional information, we find no reason to disturb the AJ's denial of Complainant's request to restore his annual and sick leave.

### **Attorney's Fees**

Because neither the Agency or Complainant disputes the attorney's fees award, we need not disturb the AJ's determination that Complainant is entitled to \$25,352 in attorney's fees.

### **CONCLUSION**

Accordingly, we REVERSE the Agency's final order rejecting the AJ's findings of discrimination. We MODIFY the AJ's order as stated in our Order below. We REMAND this matter to the Agency in accordance with the ORDER below.

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<sup>7</sup> The record reflects that Complainant used 164 hours of annual leave and 72 hours of sick leave in 2014, and he used 180 hours of annual leave and 42 hours of sick leave in 2015.

ORDER

The Agency is ORDERED to take the following actions:

1. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$20,000 in compensatory damages.
2. Within sixty (60) calendar days from the date of this decision is issued, the Agency shall pay Complainant \$25,352 in attorney's fees ordered by the AJ.

POSTING ORDER (G0617)

The Agency is ordered to post at its Northern District of Georgia office 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).

ATTORNEY'S FEES (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he 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 this decision becoming final. 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 (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 (R0610)

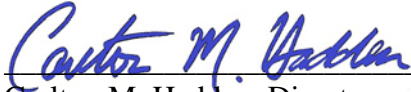
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

December 14, 2020

Date