



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

[REDACTED]  
Owen L.,<sup>1</sup>  
Complainant,

v.

Kiran A. Ahuja,  
Director,  
Office of Personnel Management,  
Agency.

Appeal No. 2020000990

Hearing No. 451-2016-00071X

Agency No. 2015013

**DECISION**

Following its November 18, 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 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 Administrative Judge (AJ). Specifically, the Agency requests that the Commission reverse the AJ's order entering a default judgment against the Agency and awarding Complainant equitable relief and compensatory damages. For the following reasons, the Commission MODIFIES the Agency's final order.

**ISSUES PRESENTED**

1. Whether the Agency's appeal was timely filed.
2. Whether the AJ abused her discretion in entering a default judgment against the Agency.

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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.

3. Whether the Human Resources Strategy Group Manager, Complainant's second-line supervisor at the time (S2), discriminated against Complainant by recommending against his career-ladder promotion to GS-13 on September 16, 2014 because of his race (African-American), color (Black), sex (male), disability (multiple conditions), and age (48).
4. Whether S2 subjected Complainant to a hostile work environment for having filed the instant EEO complaint by publishing an email on June 18, 2018, which revealed confidential information about the processing of the complaint, including details of an unsuccessful mediation attempt.

### PROCEDURAL HISTORY

Complainant worked as a Human Resources Specialist, GS-0201-12, at the Agency's Office of Human Resources Strategy - Organization Design and Position Classification (ODPC) in San Antonio, Texas. S2's duty station was located at the Agency's Field Office in Kansas City, Missouri. On January 20, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), color (black), sex (male), disability, and age (over 40), when on September 16, 2014, he was denied a promotion to the GS-13 level.

Following an investigation, the Agency provided Complainant with a copy of the investigative report and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). The AJ assigned to the matter tried unsuccessfully to schedule a hearing via remote video-conferencing (VTC) and ultimately held an in-person hearing from August 19 – August 21, 2019. While the hearing request was pending, Complainant filed two motions for sanctions and a motion to amend his complaint to include issue (4), identified above. On September 30, 2019, after adjudicating both claims, the AJ issued a bench decision in which she granted Complainant's two motions for sanctions and entered a default judgment against the Agency despite finding insufficient evidence of an unlawful motive on the part of S2. The AJ's order for relief included retroactive promotion to GS-13 with back pay and benefits, compensatory damages, and training for S2. The Agency issued a final order declining to implement the AJ's decision and simultaneously appealed. Complainant subsequently filed a cross-appeal.

### BACKGROUND

When asked to specify his disability, Complainant identified the following conditions: sleep apnea; insomnia; back, leg, and ankle injuries; acid reflux; high blood pressure; and migraine headaches. When asked whether his medical conditions limited one or more of his major life activities, he replied, "N.A." He gave the same answer when he was asked whether he had any medically documented restrictions or limitations because of his disabilities. Ex. G, p. 3, ¶¶ 8-11.

Acting on the Agency's behalf, S2 hired Complainant on July 17, 2010 at a job fair for disabled veterans. According to AS1, the career ladder for this position extended from grade GS-9 and reached the full performance level at GS-13, with intermediate grades being GS-11 and GS-12. Complainant averred that he was a GS-12 in 2011. In December 2010, he moved over to ODPC where S1a became his supervisor. During the latter part of 2013, S1a went out on medical leave and in January 2014, she left her position permanently. Over the course of 2014, Complainant was supervised on an interim basis by AS1, AS2, AS3, CW1, and S1b, with S1b taking over permanently in December 2014. Supra n.2; HT 447, 600, 603, 606-07, 610.

### *Career Ladder Promotion*

Complainant testified that early in Fiscal Year (FY) 2014, he asked S2 what he would have to do in order to attain a career-ladder promotion to GS-13. According to Complainant, S2 informed him that he would have to manage a project with a value of at least \$300,000 and prove himself as a technical expert in the field of position classification. He also testified that S2 advised him to obtain a master's in business administration (MBA), notwithstanding that he already had a master's degree. Further, Complainant testified that upon S2's advice he obtained an MBA, that he managed a \$300,000 project for the Department of Veterans Affairs, and that he established himself as an expert in position classification by virtue of having taught a course in that subject for many years. He testified that S2 promised him that he would solicit feedback from all of his acting managers during 2014 to ascertain whether he was ready for promotion to the full performance level of his position. In addition, Complainant testified that S2 informed him that all of the acting supervisors with whom S2 talked, all stated that Complainant was not ready for a career-ladder promotion. Ex. G, p. 5, ¶¶ 18-19, pp. 5-6, ¶ 20, p. 6, ¶ 21, p. 9, ¶ 1; HT 615-18, 620-23, 625, 627.

According to S2, individuals who sought promotion to the full-performance level had to submit a detailed application, referred to as a "promotion package," which clearly demonstrates the applicant's readiness to handle work at the GS-13 level. He testified that he would review the application package, solicit feedback from the applicant's supervisors, assess the applicant's readiness for promotion and make a recommendation to S3, who would ultimately approve the action.

S2 testified that Complainant personally requested a promotion to GS-13 at the beginning of FY 2014, and that he promised Complainant that he would solicit feedback from everyone who served as his acting supervisor during the first six months of the fiscal year. He further testified that around mid-year, he did solicit feedback on Complainant's performance from those who acted as Complainant's supervisors during the time frame in question. S2 specified that his inquiry included the question as to whether Complainant was ready to be promoted to GS-13 at the full-performance level. In his affidavit and again at the hearing, S2 specifically stated that every one of them reported that Complainant was not yet ready for a promotion to GS-13 because he had not demonstrated the competencies necessary to succeed at the GS-13 level. He testified that he accepted their unanimous input and consequently made the decision not to recommend Complainant for promotion.

He emphasized that all of these acting supervisors had personal knowledge of Complainant's performance and capabilities, having worked closely with him on various projects. He testified that he communicated his decision to Complainant, who disagreed with the assessment. Ex. H, pp. 3-5, ¶¶ 7-12; HT 39, 45, 47, 54-55.

In an unsigned affidavit, S1a averred that she had known Complainant since he was hired and that she was his supervisor until the end of 2013. She averred that Complainant had requested a promotion to GS-13 every year and that at the end of each performance cycle, she and Complainant would review his individual development plan, promotion requirements and performance appraisal to determine whether he was eligible, and if not, to develop a promotion plan outlining exactly what would be necessary for promotion to GS-13. Regarding the criteria for promotion, S1a averred that all employees within ODPC perform essentially the same duties but at different levels of performance expectation, responsibility and oversight. She emphasized that levels of performance and responsibility were the most prevalent factors in determining promotion readiness and that just because Complainant had performed similar duties as others at the GS-13 level did not mean that Complainant had done his work with the same levels of responsibility, supervisory guidance, and performance on his part. Finally, S1a averred that as compared to his peers, Complainant had the least amount of experience in federal classification and project management and that his performance was lacking due to not completing developmental assignments independently once he had progressed to GS-12. Ex. I: p. 2, ¶¶ 3, 5; pp. 2-3, ¶¶ 7, 9, 10, pp. 3-4, ¶¶ 12, 13.

CW1 testified that he served as Complainant's acting supervisor for five weeks between February and April 2014. He stated that it was initially his understanding that an employee had to manage a project of a certain dollar value before they could be eligible for promotion to GS-13 but found this not to be true after observing that several people had been promoted without meeting that requirement. He cited CW4 as an example of someone who had attained promotion to GS-13 without managing a high-dollar project. He stated he knew of no written criteria outlining what an individual had to do in order to be promoted to the next grade. He testified that he did not know why Complainant had not been promoted and that Complainant's skill level was equivalent to that of the other consultants in ODPC with comparable experience and time on the job. He further testified that S2 had asked him to train Complainant for promotion to GS-13, and that his purpose in doing so was to ensure that Complainant understood the fundamentals of position classification and could stand on his own in managing projects. CW1 further testified that the usual training process entailed starting the trainee with lower-dollar projects and progressing to higher-dollar projects. He testified that Complainant was allowed to lead projects but could not recall what types of projects Complainant led. He testified, however, that Complainant's work was on par with that of those who were already at the GS-13 level, pointing out that he had passed projects off to Complainant who managed them successfully. When asked if he had ever represented to S2 that Complainant was or was not able to perform at the GS-13 level, CW1 replied that he had no recollection of that. Further, he denied that he rated Complainant as minimally successful and did not remember S2 ever discussing the need for a promotion package as being necessary for promotion to GS-13.

AS1 testified that she had received a temporary 90-day promotion to act as the supervisor for Complainant's team between June and August 2014. She testified that during this period, Complainant had performance issues in project management, written communication, customer service, and teamwork. In particular, she testified that every work product produced by Complainant while under her supervision was either incorrect or so poorly written that it had to be rewritten by one of his colleagues. She stated that during FY 2014, Complainant was still developing his skills in position classification and project management. However, she also testified that S2 had never asked her whether she thought Complainant was ready to be promoted. Ex. J, pp. 5-6, ¶ 15; HT 463-64, 468, 476-77.

AS2 provided an affidavit averring that he did act as Complainant's supervisor from January to February 2014 and again from September to October 2014. AS2 opined that Complainant should have been promoted because he had been performing the duties of a GS-13 level employee and sometimes more.

AS3 testified that she acted as Complainant's supervisor in April and May of 2014. She testified that, based on her own observations, Complainant "should have been promoted a long time ago." She also stated, "I would agree with [Complainant's] assertion that individuals promoted in the last three years have been Caucasian/White," and that "the majority of employees promoted are female and under age 40." She noted that S1b, who was a White female, was promoted over more qualified and experienced candidates. She also noted that S2 did not have the technical expertise and knowledge of the HR specialist's role. She reiterated that Complainant had served in his position long enough to warrant a career-ladder promotion to the full-performance level, and that to the extent that S2 represented otherwise in the spreadsheet, that information was "false and fabricated." At the hearing, AS3 stated that African Americans were subject to what she called the "black tax," meaning that they had to work twice as hard as their white counterparts, checking their work over and over again, in order to move up. AS3 testified that she never told S2 that Complainant was not ready for promotion to GS-13. She also testified that based on her observations, Complainant's work on classification was better than that of some of the other GS-13 level HR specialists, and that if S2 had asked her if Complainant was ready to be promoted to the full performance level, she would have said yes.

Complainant, S2, CW1, AS1, and AS3 testified that ODPC underwent a reorganization sometime in 2011. The testimony of these witnesses is ambiguous as to whether the reorganization had resulted in GS-12 HR Specialists who were performing at a level of at least fully successful being automatically upgraded to GS-13. When asked about the reorganization, AS1 initially testified that she recalled receiving an automatic promotion to GS-13 because of a position-description change affecting the position of the GS-12 HR specialist. She testified that all positions had been upgraded to GS-13 at the time. When S2 was asked whether he was aware of AS1's statement under oath that she was automatically promoted as a result of the 2011 reorganization, S2 testified that that assertion was incorrect and that no one was promoted automatically. When AS3 was asked about AS1's claim that a reorganization had resulted in her automatic upgrade from GS-12 to GS-13, she replied that she did not know anything about that matter.

When CW1 was asked whether an HR Specialist who was performing at the fully successful level could be automatically upgraded to a GS-13, he testified that “that [would be] putting the cart before the horse because there’s different criteria than what you’re asked to perform at the GS-12 level.” CW1 went on to say that at the GS-13 level, one was expected to be a full-fledged project manager, and that he could not recall any GS-12 who had received an automatic upgrade to GS-13. Finally, Complainant himself acknowledged that he was a GS-12 during 2011 and that he was unaware of any reworking of the description for the GS-12 HR Specialist position that would have resulted in him being upgraded to the GS-13 level. HT 247, 388-89, 447, 449, 452-54, 515-17, 610.

*Confidentiality Breach by S2 during Hearing Phase*

Complainant formally requested a hearing in November 2015. The AJ received the investigative report on November 12, 2015. On February 24, 2016, the Agency identified as its representative Counsel 1. On May 4, 2018, after completion of discovery, another representative, Counsel 2, had filed a motion for summary judgment on the Agency’s behalf. Shortly thereafter, Counsel 2 went on leave and was replaced by Counsel 3. AJ’s Bench Decision, p. 7.

On June 8, 2018, Complainant submitted his list of proposed witnesses, which consisted of himself, CW1 and AS3 for purposes of impeachment, and S2 and AS1 as hostile witnesses. In an email to S2 dated June 15, 2018, Counsel 3 informed S2 that he was to be a witness at the upcoming hearing, which had been scheduled for July 10, 2018. Counsel 3 also informed S2 that the other witnesses would include CW1, AS1, and AS3, and that there would be two additional rebuttal witnesses, CW2 and CW3, who might or might not be called to testify but needed to be available just in case. S2 responded that he would not be available on July 10. Counsel 3 then requested S2 to see whether any other scheduling conflicts existed. Complainant’s Motion for Sanctions dated June 22, 2018, Complainant’s Exhibit (CE) 1, pp. 1-3.

On June 15, 2018, S2 issued the first of two emails he sent to CW1, CW2, CW3, AS1, and AS3. The subject line read: “available July 10 to testify re: [Complainant v. the Agency]. The text of the message read as follows:

All: Please see the message below. You are all scheduled to be witnesses in an EEOC hearing regarding our decision not to promote Complainant to the full performance level of GS-13. Could you be available for video testimony on July 10? Please let me know ASAP.

Ex. FF; CE 1, p. 2;

On June 18, 2018, S2 sent out his second email to CW1, CW2, CW3, AS1, and AS3, which read as follows:

All: I've shared your ability with Counsel 3. She will be getting your times scheduled with the judge and reaching out to each of you to discuss the case and what you'll be asked to contribute. To give you context, here is a quick history of this matter.

For the past few years we have decided not to promote Complainant to GS-13 in his career ladder. We have based this decision on our evaluation that he has not demonstrated the capability to successfully perform at the next higher-grade level, which is a requirement for promotion. We based this on our evaluation of the competencies required at the GS-13 level, as stated in our promotion packages we submit to S3 (Leslie Pollack) and me for consideration. Let me be explicitly clear: Complainant's demonstrated lack of capability to perform at the next higher level is the ONLY reason he has not been promoted. I personally hired Complainant at a disabled vet hiring fair. We continue to like and respect Complainant, even though we disagree with his self-evaluation of his performance and capability.

In 2014, Complainant filed an informal EEO complaint inside the Agency, claiming that we had not promoted him due to his race, age, and/or disabled veteran's status. The Agency found our decision not to promote was appropriate based on numerous examples of poor or non-performance on Complainant's part, and we agreed to undergo a mediation process with him.

During the mediation process, we continued to hold that Complainant was not ready for promotion, but in the interest of giving him the best chance we could for him to demonstrate his readiness, we offered Complainant a proposed resolution. We offered Complainant the opportunity to submit his promotion package. This is the same promotion package your supervisors submitted to S3 and me that led to all your promotions to GS-13. Complainant would then have the opportunity to have his package evaluated by a three-person panel; One manager of my choice and any two current GS-13s from our staff of his choice, with a majority ruling on whether he would be promoted or not. In other words, all Complainant had to do was find two GS-13s in HRS-ODPC who would say that he was ready for promotion based upon his package and his capability, and he would be promoted. Complainant turned down this offer, saying he should simply be promoted without the same process everyone else had to undertake, due to his great performance. We continued to disagree with his assessment of his readiness and [Complainant] elected to pursue a formal EEO Complaint process in front of a judge. This is the process under which you have been called to testify.

CW1, AS1, and AS3, I believe you'll be asked about the period when we had rotating acting managers in ODPC and whether at that time you believed Complainant was ready for promotion. Back then I had committed to Complainant I would send feedback from every acting manager as to whether he

was ready to be promoted, and I did that, capturing your input on a spreadsheet with your evaluation of his performance during your time as acting and whether or not he was ready to go to the GS-13 (all of you said not at this time). I believe you'll also be asked about whether you believe we discriminate against non-whites. I would respectfully submit we have gladly promoted people of all backgrounds to the GS-13 as long as they demonstrate the capability to successfully perform at that level. AS3, I believe you'll be specifically asked about your affidavit regarding my comments about hiring a bunch of people from Missouri State University.

CW3 and CW2, I really don't know what you could be asked about, other than CW2's contact from Complainant's lawyer asking about your experience with sexual harassment in the office. I don't see what that would have to do with our evaluation of Complainant's capability, but please answer the questions to the best of your ability. We want to be helpful.

I hope this information is helpful. I've also attached my responses to the investigator's questions, so you'll know what I've shared in the case. Please don't hesitate to reach out to me if you need additional information.

No matter what happens, please know that I'm asking you to speak your mind, share your thoughts, and offer your opinions, whether those agree with mine or not. I value all of you and encourage your full participation in this process. I want nothing more than to give Complainant a fair shake and for him to feel like he's had his day in court, and for the most appropriate outcome to be reached.

In addition, S2 acknowledged that he attached his affidavit from Complainant's EEO case to the June 18, 2018 email. S2 testified that his intent was only to assist the witnesses to "get up to speed quickly" because of the short amount of time until the hearing. He acknowledged his error, stating that he "regretted disclosing the information from the mediation," and that he realized that he probably provided more information than he should have. S2 also stated that he had forgotten that mediation discussions were to remain confidential. Ex. OO: p. 1; p. 2, ¶¶ 5, 6.; S2's declaration dated July 16, 2018, p. 2, ¶¶ 2-7; CE 1, p. 1; HT 25, 32-41, 64.

AS3 and CW1 both stated that the email was unsolicited, that it contained S2's affidavit relating to Complainant's case, and AS3 expressed her belief that S2 was trying to influence their testimony or otherwise pressure them into submitting testimony they believed would be false. They also testified that they were not influenced or otherwise swayed by S2's emails. In addition, CW1 testified that he wanted Complainant to have a "fair shake" regarding the outcome of the EEO complaint. AS3's sworn declaration dated June 22, 2018, ¶ 5; CW1's sworn declaration dated June 22, 2018, ¶ 6; HT 396-98, 434, 436, 568, 572-73.



On June 19, 2018, Counsel 3 filed a notice of withdrawal as the Agency's representative. She stated that she had been assigned to the case in error and that Counsel 2, who had by this time returned to work, would continue as the Agency's representative. However, on June 20, 2018, Counsel 2 notified the parties that she would not be available at any time between July 5 and July 13, 2018.

On June 22, 2018, Complainant filed a motion for sanctions against the Agency for S2's disclosures, claiming that S2 had undermined the integrity of the EEO process. The sanctions requested by Complainant included: that the Agency be precluded from calling S2 as a witness; that the Agency's motion for a continuance of the hearing be denied; and that the matter be referred to a United States Attorney for investigation into witness tampering. In his declaration accompanying the motion for sanctions, Complainant denied giving S2 permission to disclose information contained in his confidential personnel folder or confidential communications made during mediation. Complainant's Sworn Declaration dated June 22, 2018, ¶¶ 2, 3, 4 & pp. 9-10.

On June 26, 2018, Counsel 2 emailed the AJ notifying her that she had a medical emergency and that she and Complainant's representative would work on a reset date upon her return to work in August. Counsel 2 gave no indication as to when she would return to work and did not say who would be in charge of the case during her absence. AJ Bench Decision, p. 8.

On July 5, 2018, the AJ granted the Agency's request for a continuance, temporarily suspending the July 10, 2018 hearing date. In response to S2's disclosures, the AJ ordered the Agency to immediately instruct all witnesses that they are prohibited from discussing the case. In its response to Complainant's June 22, 2018 motion for sanctions dated July 16, 2018, the Agency asserted that while S2 made a mistake in sending out the June 2018 emails, he had not violated any law or Commission regulation, and that his actions were, at worst, naïve.

On September 27, 2018, the parties unsuccessfully attempted mediation for the second time. The following day, September 28, 2018, the AJ rescheduled the evidentiary hearing to be held as a two-day video teleconference (VTC) on October 11 and 12, 2018. On October 2, 2018, Complainant submitted a motion to amend the complaint to include issue (4) regarding S2's June 18, 2018 email. But on October 4, 2018, the evidentiary hearing that was supposed to take place on October 11 and 12, 2018 was cancelled for a second time, due to the Agency's inability to secure the locations to use the VTC or otherwise establish VTC communication. AJ Bench Decision, pp. 2, 8-9.

On December 4, 2018, Counsel 2 notified the AJ and Complainant that she would be transitioning out of the Agency and identified her successor as Counsel 4. That same day, Counsel 4 notified the AJ and Complainant that she would not be available for any purpose from June 13 through June 20, 2019. On June 11, 2019, the AJ issued notice setting the VTC evidentiary hearing dates as June 26 through June 28, 2019. This notice of hearing required the Agency to arrange, establish, and maintain VTC communication between all locations where participants are located throughout the entire process. As stated in previous Orders, the notice specified that parties who failed to abide by the order would be subject to sanctions.

Although the hearing commenced on June 26, 2019, it was cancelled for a third time due to persistent technical glitches. AJ Bench Decision, pp. 9-10.

On June 28, 2019, Complainant submitted a second motion for sanctions in which he requested that sanctions be imposed upon the agency for its repeated failure to establish the VTC communication necessary to conduct an evidentiary hearing. Complainant requested that as a sanction, an in-person hearing be conducted and that the Agency be responsible for arranging the travel of all designated witnesses who are federal employees. The AJ found that the Agency's confusion regarding the assignment of a representative, its inability to find suitable locations for the VTC, and the technical problems experienced once the VTC was underway collectively contributed to a significant delay in the hearing process. On July 18, 2019, the AJ issued a sanction in the form of an in-person hearing, which was held on August 19 through August 21, 2019. Complainant's Motion for Sanctions dated June 28, 2019: p. 10, Sec. II(D); p. 11, Sec. III; AJ Bench Decision, pp. 10-13.

In her decision, the AJ found that S2 knowingly provided false information that all of Complainant's supervisors and acting supervisors had indicated that Complainant was not ready for promotion, and that two of those acting supervisors, AS3 and CW1, had testified that in their view, Complainant had been performing at the GS-13 level. Nevertheless, the AJ found that the record evidence was insufficient to support a finding on Complainant's claim that he was subjected to race, color, sex, age, and disability discrimination when he was not promoted to GS-13 on September 16, 2014. AJ Bench Decision, p. 23.

The AJ found that the emails sent out by S2 on June 15 and June 18, 2018 revealed the specifics of Complainant's EEO complaint to the recipients. In telling SW2 and SW3 they may or may not be called as rebuttal witnesses, S2 had revealed the Agency's litigation strategy. S2 had also revealed the details of the unsuccessful mediation to them and to the other recipients. However, the AJ found the record insufficient to support a finding of hostile work environment or unlawful motive on the part of S2. In particular, the AJ noted that while there was a possibility that S2 may have been acting with discriminatory animus when he published his June 18, 2018 group email, he could find no evidence of pretext. AJ Bench Decision, pp. 22-23.

With respect to Complainant's various motions for sanctions however, the AJ found that due to the Agency's failure to proceed to a hearing on at least three separate occasions, July 10, 2018, October 11-12, 2018, and June 26-28, 2019, and based on S2's issuance of the June 18, 2018 group email, Complainant was entitled to a favorable ruling on his motions for sanctions and was entitled to a partial default judgment that included: promotion to GS-13 retroactive to June 19, 2018; backpay with interest and benefits effective June 19, 2018; \$30,000 in compensatory damages; mentorship for performance at the GS-13 level as appropriate; training and experience necessary for performing at the GS-13 level; and EEO training for S2. AJ Bench Decision, pp. 23-24.

The Agency agreed with the AJ's findings and conclusions on the merits with respect to issues (3) and (4) but declined to implement the AJ's decision regarding sanctions.

Specifically, the Agency argued that it had received no prior warning that the AJ was contemplating sanctions, and that the AJ had abused her discretion by imposing a “make whole” remedy without any finding of discrimination.

On appeal, the Agency reiterates that the AJ abused her discretion. The Agency argues that in concluding that S2 lied under oath, the AJ provided no explanation of why she found AS3 and CW1 more credible than S2 or why she believed that S2 knowingly lied about receiving input regarding Complainant's promotion readiness. In support of its contention, the Agency points out S2's admonition toward the end of the June 18, 2018 email that the recipients speak their mind whether they agree with him or not. In addition, the Agency reiterates that forcing it to promote an employee who is not ready to assume the duties of the position could compromise its relationships with its fee-paying clients. Agency's Final Order dated November 9, 2019, pp. 3-4; Agency's Appeal Brief dated December 9, 2019, pp. 12-13, 16-17, 19-20.

In his response to the Agency's appeal, Complainant reiterates that S2 committed perjury when he stated under oath that all of his acting managers unanimously opined that he was not ready for promotion to GS-13 as of September 2014. Next, Complainant argues that the appeal was untimely in that the Agency was deemed to have received the AJ's decision on October 5, 2019 but did not file its appeal until November 18, 2019, which was more than 40 days after the prescribed time limit for doing so. Finally, Complainant maintains that the sanctions issued by the AJ were an appropriate response to the Agency's violation of the AJ's Orders pertaining to the processing of his hearing request and to the conduct of S2 in issuing the group email on June 18, 2018. Complainant's Response Brief dated December 19, 2019: pp. 5-6. Sec. II(D); pp. 7-10, Sec. III; pp. 10-17, Sec. IV.

In addition to responding to the Agency's appeal, Complainant files a cross-appeal of his own. In his cross-appeal brief, he contends that the AJ's findings and conclusions on the merits of issues (3) and (4) were erroneous. He reiterates that the Agency's only evidence in support of its position that he was not promotion-ready came in the form of S2's uncorroborated assertion, and the AJ failed to give enough weight to the affidavits and hearing testimony of CW1 and AS3, both of whom testified that Complainant was ready to be promoted to GS-13. He argues AS3's and CW1's testimony that S2 did not encourage diversity and was only interested in promoting Caucasian males was sufficient to establish pretext. Complainant's Cross-Appeal Brief dated January 17, 2020, pp. 4-6, 8-9.

In its response to Complainant's cross-appeal, the Agency argues that Complainant failed to establish a prima facie case of discrimination with respect to issue (3). The Agency points out that S3, not S2, was the official responsible for determining whether to grant career-ladder promotions, and that Complainant failed to establish that he was qualified for a career-ladder promotion to GS-13. The Agency also argues that neither CW1 nor AS3 established that they were in a better position to evaluate Complainant's promotion-readiness than S1a, who had been his first-line supervisor for over three years. Third, the Agency argues that Complainant failed to establish that AS1 or any other HR Specialist in the ODPC had been automatically promoted to GS-13.

### ANALYSIS AND FINDINGS

#### *Timeliness of the Appeal*

The Commission's complaint processing regulations specify that if a final order issued by the Agency does not fully implement the decision of the administrative judge, then the agency shall simultaneously file an appeal and append a copy of the appeal to its final order. 29 C.F.R. § 1614.110(a). Such appeals must be filed within 40 days of receipt of the hearing file and decision issued by the AJ. 29 C.F.R. § 1614.402(a).

In this case, while the AJ's decision was dated September 30, 2019, it was not mailed to the parties until October 2, 2019, based upon the postmark. Therefore, in accordance with the notice set forth on the certificate of service, the AJ's decision was presumed to have been received by the Agency within five days or by October 7, 2019. Therefore, the Agency had 40 days from October 7, 2019 to file its appeal with the Commission, which was November 16, 2019. Since November 16, 2019 was a Saturday, the filing period was extended to the next business day, or Monday, November 18, 2019. 29 C.F.R. § 1614.604(d). Since the Agency's appeal was postmarked on November 18, 2019, we find that the appeal was timely filed.

#### *AJ's Abuse of Discretion in Issuing Default Judgment as a Sanction*

EEOC regulations confer upon its AJs "full responsibility for the adjudication of the complaint, including overseeing the development of the record." 29 C.F.R. § 1614.109. During the hearing stage, AJs also ensure the integrity and efficiency of the administrative process. In executing such responsibility, an AJ is authorized, among other things, to "impose appropriate sanctions on parties who fail to comply with orders or requests." Equal Employment Opportunity Directive for 29 C.F.R Part 1614 (EEO MD-110), Chap. 7, Sect. III(D) (as revised Aug. 5, 2015). EEOC Regulation 29 C.F.R. § 1614.109(f)(3) specifically sets forth the types of sanctions an AJ may take when required by the appropriate circumstances. An AJ may: (1) draw an adverse inference that the requested information would have reflected unfavorably on the non-complying party; (2) consider the requested information to be established in favor of the opposing party; (3) exclude other evidence offered by the non-complying party; (4) issue a decision fully or partially in favor of the opposing party; or (5) take other action deemed appropriate. Id.

Before any sanction can be imposed upon a party, however, that party must first be put on notice of its noncompliance and warned that it could be sanctioned for its conduct. Chere S. v. Gen. Serv. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018). This is typically accomplished via an Order to Show Cause, which affords the party an opportunity to explain why sanctions should not be imposed. Id. Show cause orders are unnecessary, however, where one party files a motion for specific sanctions and the non-complying party is given the opportunity to respond. Id., citing Council v. Dep't of Veterans Affairs, EEOC Appeal No. 0120080321 (Apr. 9, 2010). In this case, Complainant filed two motions for sanctions, one in June 2018 for S2's issuance of his emails to his subordinates and the other in June 2019 for the Agency's failure to schedule a VTC hearing.

In neither motion did Complainant request that a default judgment be imposed as a specific sanction. Consequently, the Agency was never put on notice that it could be subject to the specific sanction of a default judgment and was never given a chance to explain why a default judgment should not be imposed. The imposition of the severest sanction without warning clearly constitutes an abuse of discretion on the part of the AJ.

Having found default judgment inappropriate in the absence of notice, we must now consider what sanction is an appropriate response to the Agency's failure to schedule a VTC hearing for more than a year as well as S2's confidentiality breach. The Commission has held repeatedly that sanctions must be tailored to each situation, and that the least severe sanction necessary to respond to the party's failure to show good cause for its actions, as well as to equitably remedy the opposing party should be applied. See Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (Mar. 1, 2007); Rountree v. Dep't of the Treasury, EEOC Appeal No. 07A00015 (July 13, 2001); Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000).

Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Factors pertinent to "tailoring" a sanction, or determining whether a sanction is even warranted, include: (1) the extent and nature of the non-compliance, including the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice, if any; (4) the number of times the party has engaged in such conduct; and (5) the effect on the integrity of the EEO process as a whole. Id.

Even if notice was properly given in this case, a default judgment is still the most severe sanction that can be meted out to an Agency, and as such, should be reserved only for the most egregious acts of non-compliance such as failure to abide by an AJ's orders or requests. Miguelina S. v. Dep't of Justice, EEOC Request No. 2019002953 (Jan. 27, 2020). See also Chere S., supra (filing a second motion to dismiss in direct defiance of AJ's order not to do so); Mirta Z. v. Soc. Sec. Admin., EEOC Appeal No. 0720150035 (March 14, 2018) (defying AJ order to turn over critical evidentiary documents that defense counsel claimed were privileged).

As to the VTC debacle, the Agency's unsuccessful attempts to schedule a VTC hearing for more than a year did result in a significant delay in the processing of the complaint. The AJ did implement a sanction for the Agency's repeated failure to establish the VTC communication necessary to conduct an evidentiary hearing, by ordering an in-person hearing. However, there was still the prejudicial effect of the delay on Complainant and its effect upon the integrity of the overall process.

While the Agency's failure to timely schedule the VTC hearing resulted from a series of errors, there was no deliberate flouting of the AJ's orders or a failure to comply with those orders flagrant enough to justify imposition of a default judgment as there was in Chere S. and Mirta Z.

As to S2's disclosures of confidential information pertaining to Complainant's EEO complaint, there is no question that in sending out his emails of June 15 and June 18, 2018, S2 revealed to unauthorized individuals the details of Complainant's EEO complaint, the Agency's defense strategy, and the unsuccessful settlement attempt, and had done so in clear violation of MD-110, Chapter 2, VII(B)(2). Two of those individuals, CW2 and CW3 were never even called as witnesses and thus were not participants in the litigation. S2's conduct unequivocally compromised the integrity of the process and was seriously prejudicial to Complainant. Nevertheless, S2 admitted his mistake as soon as he was made aware of it and never again repeated his error. Moreover, S2's disclosures did not cause or contribute to the delay in the processing of the complaint, and Complainant himself did not believe that S2's conduct merited a default judgment since he did not ask for it in his June 2018 motion for sanctions. A more appropriate sanction than default judgment, one tailored to address the nature, severity, and impact of S2's disclosures would include training S2 on his responsibilities regarding participation in the EEO process, particularly the need to strictly observe confidentiality, which is exactly what the Agency agreed to do. Consideration of disciplinary action would also be an appropriate sanction. We will therefore enter an order directing the Agency to provide EEO training for S2 and to consider whether disciplinary action should be taken against S2.

#### *Standard of Review on the Merits*

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

#### *Disparate Treatment - Denial of Career-Ladder Promotion*

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 he 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).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where, as here, the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the Agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. Of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Servs., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where, as herein, the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the Agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. Of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Servs., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

According to S2, it was the unanimous opinion of the supervisors and acting supervisors who had worked with Complainant during FY 2014 that he was not ready to be promoted in that he had not demonstrated that he could work with the independence in position classification and project management necessary to interact with the Agency's paying clients.

To ultimately prevail, Complainant must show that the explanation put forth by S2 were a pretext for discrimination. St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 519 (1993). In other words, he would have to prove, by a preponderance of the evidence, that S2 was motivated by unlawful considerations of Complainant's race, color, sex, disability, or age when he declined to recommend him for promotion to GS-13 in September 2014. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000). Pretext can be demonstrated by showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007), req. for reconsid. Den'd. EEOC Request No. 0520080211 (May 30, 2008).

Indicators of pretext include discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, comparative or statistical data revealing differences in treatment across various protected-group lines, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015).

The Commission notes that the credibility of the Agency's explanation is key and must be judged in light of all the evidence obtained. See EEOC Compliance Manual Section 15. "Race and Color Discrimination.", EEOC Notice No. 915.003, § V.A.2 (Apr. 19, 2006). A witness's credibility will be undermined if his or her explanation is unsupported by or contrary to the balance of the facts. See id. Similarly, the credibility of the witness's explanation can be called into question if it is unduly vague, appears to be an after-the-fact justification or otherwise appears fabricated (e.g., the explanation shifts, or inconsistent reasons are given). See id. In addition, the Commission cannot second-guess the Agency's personnel decisions unless there is evidence of a discriminatory motivation on the part of the officials responsible for making those decisions. Burdine, 450 U.S. at 259.

When asked why he believed that his race, color, sex, age, or disability were factors in S2's decision to deny him a career-ladder promotion to GS-13, Complainant replied that the majority of his team were African-Americans over 40, and that his team had more people of color than any other team in ODPC. He did not have an answer regarding discrimination based on sex or disability. Ex. G, p. 10, ¶¶ 4-8.

As noted above, the AJ found that, with respect to Complainant's original complaint, the evidence was insufficient to support a finding of discrimination on his claim that he was subjected to race, color, sex, age, and disability discrimination when he was not promoted to GS-13 on September 16, 2014. AJ Bench Decision, p. 23. This finding appears to rest primarily upon the affidavit, hearing testimony, and spreadsheets provided by S2 in support of his assessment, based upon what he referred to as the unanimous consensus of his subordinate supervisors, that Complainant was not ready for a career-ladder promotion to GS-13 during FY 2014 and to a lesser extent upon S2's testimony that Complainant refused to complete a GS-13 promotion package that everyone else had to complete.

We agree that there are inconsistencies between the sworn statements provided by S2 and those provided by CW1, AS3 and other witnesses. However, none of those inconsistencies are sufficient, either individually or collectively, to establish the existence of a discriminatory animus on the part of S2. Rather, it is likely that S2 sincerely believed that Complainant was not ready for a career-ladder promotion to GS-13, and that his determination was in accord with the policies and procedures in effect at the time. Therefore, after considering the evidentiary record as a whole, we agree with the AJ that the substantial evidence of record is not sufficient to support Complainant's claim that S2 based his decision not to grant him the career ladder promotion to GS-13 upon his race, color, sex, age or disability.



*Hostile Work Environment*

To establish a claim of harassment in connection with S2's disclosure of confidential information about the details of his EEO complaint, Complainant must show that: (1) he belongs to a statutorily protected class; (2) the disclosure was unwelcome; (3) the disclosure was based on his statutorily protected classes; (4) the disclosure had the purpose or effect of unreasonably interfering with his work environment, or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the Agency. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

The antidiscrimination statutes are not civility codes. Rather, they forbid only behavior so objectively severe or pervasive, as to alter the conditions of the victim's employment and create an abusive working environment. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). Therefore, to prove his harassment claim, Complainant must establish that he 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 his membership in protected EEO groups. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself.

We agree with the AJ that the evidence is not sufficient to establish the existence of a discriminatory motive attributable to S2 in his revealing of the details of Complainant's EEO complaint. S2 admitted in his affidavit and at the hearing that he "probably said too much" in connection with his June 18, 2018 email. As we emphasized above, S2 acknowledged his error and owned up to it. Beyond his own assertions, Complainant has presented neither affidavits, declarations, hearing testimony or unsworn statements from witnesses other than himself, nor documents that contradict or undercuts S2's explanation for the disclosure or that calls into question his veracity or credibility on this particular point. As with his disparate treatment claim, we find that Complainant has not presented enough evidence to establish that he had been subjected to a hostile work environment in connection with S2's June 18, 2018 email disclosures pertaining to his EEO complaint.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final order.

ORDER

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

1. Within 60 calendar days of the date this decision is issued, the Agency is ordered to provide eight hours of in-person or interactive training to the official in the ODPC identified in the decision as S2. The required training shall cover that official's responsibilities under Title VII of the Civil Rights Act, the ADEA, and the Rehabilitation

Act, particularly his responsibility to maintain the confidentiality of EEO proceedings, including the confidentiality of what transpires during ADR. If the official identified as S2 is no longer employed, the Agency shall provide documentation of his departure date.

2. Within 60 calendar days of the date this decision is issued, the Agency shall consider taking disciplinary action against the official identified as S2 if this individual is still employed by the Agency. 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.

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.

#### 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 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).

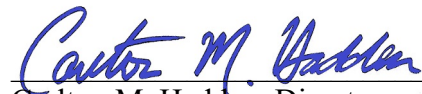
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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

July 15, 2021  
Date