



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

[REDACTED]
Alan N.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Request No. 2021003175

Appeal No. 2020001528

Agency No. HS-CBP-00743-2017

DECISION ON REQUEST FOR RECONSIDERATION

Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2020001528 (April 8, 2021). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

BACKGROUND

In his underlying complaints, Complainant alleged that the Agency subjected him to unlawful national origin, disability, and reprisal discrimination regarding 11 claims, which included derogatory comments, interpersonal interactions with a Watch Commander, leave and attendance matters, written counseling, and improper disclosure of Complainant's medical information. After an investigation, Complainant requested a hearing before an EEOC

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

Administrative Judge (AJ). However, the AJ subsequently issued a decision by summary judgment in favor of the Agency finding no discrimination.

The Agency issued its final order adopting the AJ's finding that Complainant failed to prove discrimination as alleged. Complainant appealed.

In Appeal No. 2020001528, the appellate decision modified the Agency's final order. The previous decision affirmed the Agency's final order adopting the AJ's decision finding no discrimination as it pertained to 10 incidents and reversed the AJ's finding that the Agency did not violate the Rehabilitation Act in connection with the disclosure of Complainant's confidential medical information. The Agency was ordered to conduct a supplemental investigation to determine Complainant's entitlement to compensatory damages; and to provide a minimum of eight (8) hours of in-person interactive EEO training to the management official identified as Supervisory Border Patrol Agent 2.

Agency's Arguments on Reconsideration

In its request for reconsideration, the Agency largely reiterates arguments that were considered on appeal. However, the Agency argues that reconsideration is warranted because the previous decision erroneously interprets controlling law with respect to the Rehabilitation Act. The Agency adds that the previous decision will have a substantial impact on the policies, practices, and operations of the Agency going forward. According to the Agency, the facts in the instant matter differ from the cases cited in the previous decision because Complainant's information was shared with justification, i.e., the Supervisory Border Patrol Agent made a mistake in typing and selecting an incorrect email list. The Agency contends that the Commission has not found confidentiality breaches involving inadvertent acts. Regarding the ordered remedies, the Agency contests the ordered eight (8) hours of training for the Supervisory Border Patrol Agent that disclosed Complainant's confidential medical information. In support, the Agency argues that the facility at issue is short on supervisors and requiring one supervisor to be assigned elsewhere, even for one day, would substantially hinder the facility's ability to carry out the mission of the Agency. The Agency adds that the training order is not a proportionate remedy to the violation.

Complainant's Response to the Agency's Arguments on Reconsideration

Through counsel, Complainant asserts that the Agency's analysis of the cases cited in the previous decision is erroneous and maintains that the Agency exercised a gross failure in protecting Complainant's medical information. Complainant adds that malice was not a requirement and notes that the Agency admitted to accidental disclosure, which violates the Rehabilitation Act. Complainant contends that the Agency failed to provide case law or evidence to support the claim that the Agency did not violate the Rehabilitation Act when the Supervisory Border Patrol Agent used an incorrect email list.

ANALYSIS AND FINDINGS

The Rehabilitation Act prohibits disclosure of confidential medical information except in certain limited situations, including when managers need to be informed regarding necessary accommodations. 29 C.F.R. § 1630.14(c). Contrary to the Agency's assertions, the Commission has previously held that disclosure, albeit inadvertent, violates the Rehabilitation Act. 29 C.F.R. §1630.14(c); Forde v. U.S. Postal Serv., EEOC Appeal No. 01A12670 (Oct. 9, 2003), req. for recons. den., EEOC Request No. 05A40196 (Feb. 5, 2004) (citing Valle v. U.S. Postal Serv., EEOC Appeal Request No. 05960585 (Sept. 5, 1997)); Mario G. v. Dep't of the Air Force, EEOC Appeal No. 0120150193 (Oct. 19, 2017). Similarly, in this instance, despite the accidental nature of the disclosure, the Agency violated the Rehabilitation Act's prohibition against the release of confidential medical information when individuals without a need to know were provided with Complainant's confidential medical information. See Heidi E. v. Soc. Sec. Admin., EEOC Appeal No. 2020002437 (Mar. 2, 2021).

Regarding the ordered remedy of training for the Supervisory Border Patrol Agent, we are not persuaded by the Agency's argument that required training for one individual will have a substantial impact on its policies, practices or procedures. The ordered training, which is not designed as a punitive measure or as form of discipline but is a corrective action, is not overly broad and was tailored to prevent the recurrence of discriminatory conduct.

A reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. The Agency has not done so here. The Commission finds that the Agency has not presented any argument or evidence tending to establish the existence of either reconsideration criterion.

Accordingly, after reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the request. The decision in EEOC Appeal No. 2020001528 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth below.

ORDER

The Agency shall take the following remedial actions:

1. Within 120 days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages as a result of harm caused by divulging his medical information. The Agency shall afford Complainant an opportunity to establish a causal relationship between the disclosure and pecuniary and/or non-pecuniary losses. Complainant shall cooperate in the Agency's efforts to compute the amount of compensatory damages she

is entitled to and shall provide relevant information requested by the Agency. The Agency shall issue a new Agency decision awarding compensatory damages to Complainant within 60 calendar days after the date this decision is issued. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth below.

2. Within 60 calendar days of the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive EEO training to the management official identified as Supervisory Border Patrol Agent 2 if that individual is still employed by the Agency. The training shall focus on the laws, regulations, and policies governing confidentiality of medical information, and shall include a discussion of the circumstances under which such information shall and shall not be disclosed.

POSTING ORDER (G0617)

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

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/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 receipt of this decision. 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.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

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, 20. 2021

Date