



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Priscilla H.,¹
Complainant,

v.

Kilolo Kijakazi,
Acting Commissioner,
Social Security Administration,
Agency.

Appeal No. 2021001678

Agency No. L-20-0254

DECISION

On January 13, 2021, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 12, 2021, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission AFFIRMS, in part, and REVERSES, in part, the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Claims Specialist, GS-11, at the Agency's Field Office in Nashville, Tennessee.

In February 2019, Complainant applied for a promotion via the Agency's internal application system. Record of Investigation (ROI) at 111-12. Complainant was found to be qualified and was referred to the selecting official. *Id.* at 148, 337. Complainant was not selected for a promotion. *Id.* at 112, 341. Two other candidates were selected. Namely, they were Selectee 1 (White, male) and Selectee 2 (Hispanic, female). Both of the selected candidates have prior EEO activity. *Id.* at 291, 335. Complainant argued that she had as much experience as the selected candidates. However, Complainant stated that she was informed by Nashville District Manager that she was not selected for the promotion due to lack of claims experience. *Id.* at 112.

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.

There was no interview for the promotion, nor was there a selection panel. Id. at 112-13, 137. Complainant's Assistant District Manager, in coordination with Nashville District Manager, selected Selectee 1 and Selectee 2 for the positions. Id. at 136, 142, 147. Assistant District Manager and Nashville District Manager, however, asserted that Complainant was not hired because she was not highly recommended by her supervisor, whereas Selectee 1 and Selectee 2 were highly recommended. Id. at 138, 147, 149. Assistant District Manager stated that she could not remember the names of the supervisors who were used for references for Complainant, Selectee 1, and Selectee 2. In addition, the file contained no documentation of the conversations or the references received for any of the candidates for the promotion. Id. at 136. All involved officials denied that the selectees were treated more favorably than Complainant. Id. at 138.

On December 19, 2019, Complainant was notified via message that her personnel records had been updated. Her Performance Assessment and Communication System (PACS) had been marked "declined to sign." Complainant reported that Operations Supervisor told her that Nashville District Manager told him to so indicate that she had declined to sign her 2019 Fiscal Year PACS. Complainant confirmed she did not sign the PACS prior to her transfer because "it was being used to harass me." Complainant claimed that this was evidence of her personnel records being "tampered with." Id. at 114. Nashville District Manager, however, asserted that her records were not "tampered with." Id. at 150. Rather, Nashville District Manager stated that he provided routine guidance to a supervisor regarding routine administrative actions regarding personnel records; he identified Operations Supervisor as the supervisor. Id. at 150, 152. He went on to state that all PACS documents must be recorded as either signed or unsigned. Id. at 152. Operations Supervisor, in the position since August 19, 2019, confirmed Nashville District Manager's account of events in that he was merely instructed to close out Complainant's PACS from 2019 as "declined to sign." Id. at 159, 236. Baltimore Division Director confirmed that, if an employee declines to sign their PACS, it is common for management to add a statement that the employee declined to sign the PACS; in fact, a PACS document from 2018 also indicates that Complainant declined to sign the document. Id. at 173, 233, 245.

On October 2, 2019, Complainant was issued a proposed notice of suspension (Proposed Notice). Id. at 343. The Proposed Notice specified that Complainant was issued a compassionate detail to the Nashville Office from December 21, 2018, through April 12, 2019, to include an extension therein. At the expiration of the compassionate detail, Complainant was granted leave pursuant to the Family Medical Leave Act (FMLA) through June 5, 2019, and that she should return to the office June 6, 2019. Complainant requested additional time, as she was requesting a service animal as a reasonable accommodation. Six days later, Baltimore Division Director notified Complainant that they needed documentation to process her request. He reminded Complainant of the documentation, and the deadline, four days later. This was more than 25 days before the date that the documentation was needed. Complainant did not provide any of the required documentation to either Baltimore Division Director or the Agency's medical officer. Id. at 345-46. The day after the deadline for the receipt of the documentation, Baltimore Division Director closed the request for the reasonable accommodation due to failure to comply.

Moreover, as Complainant's leave without pay (LWOP) was only provisional to obtain the necessary documentation for the reasonable accommodation, and because she did not provide any, her LWOP was converted to absence without leave (AWOL). Id. at 346. The absences, which totaled in excess of 230 hours spanning 31 days, were subsequently converted to AWOL. Id. at 343-45. Complainant was not charged with AWOL for the hours required to work on affidavits related to EEO findings. Id. at 346.

On July 19, 2019, Complainant accepted a hardship transfer to the Nashville office. Id. at 346.

On December 20, 2019, Complainant was notified that the proposed suspension was upheld and that she was suspended from work for 14 calendar days, to begin on December 30, 2019. Id. at 358. Complainant affirmed that she was on leave pursuant to the Family Medical Leave Act (FMLA) prior to transferring to the Nashville office, pursuant to settlement of a prior EEO complaint. Complainant argued that Nashville District Manager suspended her for not presenting herself for work. Complainant stated that Nashville District Manager received this information from Baltimore Division Director and that this was in retaliation for prior EEO activity. Id. at 115. Nashville District Manager contradicted this statement noting that he merely delivered the suspension. He was neither the proposing nor the deciding official for the suspension. Id. at 151. Baltimore Division Director confirmed that he was the proposing official for the suspension. Id. at 170. Baltimore Division Director asserted that Complainant had accumulated over 230 hours of AWOL between June 6, 2019, and July 19, 2019. The proposed suspension clarified that Baltimore Division Director also considered Complainant's past disciplinary record, including a five-day suspension in April 2018 for failing to follow Agency telework policy. Id. at 347.² He asserted that he attempted to contact Complainant twice via postal mail, and both attempts were returned as undeliverable. He, then, delivered the proposed suspension via email. Complainant had ten days to respond to the proposed suspension, but she did not. Id. at 170, 181.

Complainant did not provide contradictory evidence, nor did she specifically contest, the course of events as outlined in the proposed suspension and suspension letters.

On or about January 2020, Complainant reported that she discovered a time and attendance error. She stated that she addressed the issue with Nashville District Manager, who told her that it could not be modified. She went on to assert that Nashville District Manager waited until a second email from the official timekeeper before correcting the error. Complainant asserts that this was harassment. Id. at 116. Nashville District Manager simply stated that there was a discrepancy on or about December 2019, and that it was corrected shortly after management was made aware of the problem. Id. at 152.

² Baltimore Division Director also issued Complainant a proposed suspension in February 2018 for conduct unbecoming, AWOL, and failure to follow time and attendance procedures. ROI at 171

Complainant specifically alleged that Nashville District Manager has a pattern of harassment and discrimination against minorities, and that there is no other explanation for “the treatment [Complainant] received from him.” Id. at 117.

On May 13, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African American), sex (female), color (Brown), and in reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. on December 16, 2019, she was not selected for the GS-0105-12 Operations Supervisor positions advertised under Vacancy Announcement Numbers SG-10532095-19-MBJ and SG-10427129-19-MBJ.
2. on December 19, 2019, management tampered with her personnel records; and
3. on December 26, 2019, she was suspended for 14 days.
4. Complainant also alleged that the Agency subjected her to harassment from January 13, 2020, to present, in terms of time and attendance, altering records for her 2019 personnel records for her 2019 PACS, non-selections, and working conditions.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant’s request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The instant appeal followed. The Agency contested the appeal. Neither party has submitted arguments on appeal.

ANALYSIS AND FINDINGS

Standard of Review

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Emp. Opportunity Mgmt. Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

Disparate Treatment

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For a complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the Agency to articulate a legitimate, non-discriminatory reason for its actions. See Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

Non-Selection

Complainant may establish a prima facie case of discrimination in the non-selection context by showing that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she was not selected for the position; and (4) she was accorded treatment different from that given to persons otherwise similarly situated who are not members of his protected group, or in the case of age, who are considerably younger than her. Obas v. Dep't of Just., EEOC Appeal No. 01A04389 (May 16, 2002); Williams v. Dep't of Educ., EEOC Request No. 05970561 (Aug. 6, 1998). Complainant may also set forth evidence of acts from which, if otherwise unexplained, an inference of discrimination can be drawn. Furnco Constr. Corp., 438 U.S. at 576. We note that, although a complainant bears the burden of establishing a “prima facie” case, Burdine, 450 U.S. at 252-53, the requirements are “minimal,” St. Mary's Honor Ctr., 509 U.S. at 506, and complainant’s burden is “not onerous.” Burdine, 450 U.S. at 253.

In the current complaint, Complainant alleged that she was subject to disparate treatment when she was not selected for either available Operations Supervisor position in December 2019. She has established a prima facie case inasmuch as she is an African American female with brown skin. Complainant was deemed qualified for the position for which she applied, and she was referred to the selecting official. She was not selected for the position, and those selected for the positions were outside her protected groups.

Because Complainant established a prima facie case of discrimination based upon race, sex, and color, the Agency now has the burden of producing a legitimate, nondiscriminatory explanation for not selecting Complainant. While we note that an agency’s burden of production is not onerous, it must provide a specific, clear, and individualized explanation for its selection decision.

This is required in order for a complainant to have the opportunity to prove that the asserted reason was a pretext for discriminatory animus. See Stewart v. Dep't of Homeland Sec., EEOC Request No. 0520070121 (Nov. 14, 2011) (agency failed to meet its burden of production by simply explaining the general mechanics of the selection process but failed to provide an individualized explanation for complainant's specific score) citing Boston v. U.S. Postal Serv., EEOC Appeal No. 0120042074 (May 26, 2004).

We find that the evidence presented by the Agency is not sufficient to provide a specific, clear, and individualized explanation as to why Complainant was not selected for the position. The Agency explained the rationale of the selection process but failed to provide an individualized explanation for Complainant's supervisory recommendation. See Koudry v. Dep't of Educ., EEOC Request No. 0520100196 (Apr. 13, 2010) (discrimination found where agency merely explained the mechanics of selection process, provided list of candidates deemed best qualified, and summarized applications of selectee and complainant, but failed to provide statements from selecting officials explaining how complainant's qualifications were evaluated compared to selectee's qualifications). We have held that an Agency fails to articulate a legitimate, non-discriminatory reason when it fails to provide specific information to explain why Agency officials assigned their respective ratings or scores to a complainant. See, e.g., Myles v. Soc. Sec. Admin., EEOC Appeal No. 0120092511 (Feb. 10, 2011) (Agency failed to meet burden of production when it merely said that complainant was not selected because Review Panel ranked him lower in scoring because this was not a specific, clear, and individualized explanation for Complainant's non-selection); Glomski v. U.S. Postal Serv., EEOC Appeal No. 01955157 (July 17, 1997) (agency failed to meet its burden of production because it did not provide an explanation of the review committee's assignment of scores to complainant and the selectee).

In this case, we find that the Agency has not met its burden of production. The Agency has failed to offer any evidence of the actual recommendations provided to the selecting officials, or the reasons for selection. Contrary to the Agency's assertion that its decision was in response to the recommendation received from the supervisors of Selectee 1 and Selectee 2, the record contains no record of the recommendation that any supervisor gave either Complainant or the other applicants, including Selectee 1 and 2. Moreover, the record is devoid of testimonial or documentary evidence explaining either the recommendations or the rationale for them. While the selecting officials asserted that Complainant was recommended and the selectees highly recommended, the identities of the supervisors providing recommendations were not provided nor were these supervisors interviewed. The selecting officials did not recall the names of the alleged recommending supervisors and there was no documentation of the specific recommendations for any of the candidates in question. It is not apparent from the record why the selectees received a highly recommended rating whereas Complainant received a only a recommended rating, nor is there evidence that those were, in fact, the respective recommendations at all. See Jackson v. Lowndes Cnty. Sch. Dist., 2010 WL 91245 (N.D. Miss. 2010) (defendant failed to meet its burden of production when it merely stated that it did not hire plaintiff because he scored lower in his interview than candidate who was hired and provided tally sheet reflecting scoring of candidates on a scale of one to five, but failed to explain reasons for scores).

Given the absence of any information regarding the asserted rationale for selecting Selectee 1 and Selectee 2, the Commission is unable to determine if the selectees were better qualified than Complainant. See Clemente v. Dep't of Just., EEOC Appeal No. 0720080012 (Sept. 24, 2008) (agency failed to meet burden of production when it provided description of selection process, generally stated that selectees were more qualified than complainant, and provided no record clarification of specific qualities that made selectees better qualified than complainant.).

Therefore, we find that the Agency failed to overcome Complainant's prima facie case of race, sex, and color discrimination, and Complainant prevails without having to prove pretext. Chhe v. Dep't of Hous. & Urb. Dev., EEOC Request No. 0720090008 (Aug. 6, 2010) (the consequence of an agency's failure to meet its burden of production under McDonnell Douglas is that the complainant, having established a prima facie case, prevails without having to make any demonstration of pretext), request for recon. den., EEOC Request No. 0520100584 (Jan. 27, 2011). As a result of the Agency's failure to meet its burden of production, we find that Complainant has established that she was subjected to discrimination based upon race, sex, color, and in reprisal for prior EEO activity when she was not selected for the position of Operations Supervisor.³

Personnel Records

Complainant has the initial burden of establishing a prima facie case of discrimination or retaliation. A prima facie case of discrimination based on race, color, or age is established where appellant has produced sufficient evidence to show that: (1) she is a member of a protected class; (2) she was subjected to an adverse employment action; and (3) similarly situated employees outside her protected class were treated more favorably in like circumstances.

A prima facie case of retaliation is established where complainant has produced sufficient evidence to show that: (1) she engaged in protected activity; (2) the agency was aware of her participation in the protected activity; (3) she was subjected to an adverse employment action or action reasonably likely to deter others from participating in protected activity; and (4) a nexus exists between the protected activity and the agency's adverse action. Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass. 1976), *aff'd*, 545 F.2d 222 (1st Cir. 1976); Van Druff v. Dep't of Def., EEOC Appeal No. 01962398 (Feb. 1, 1999).

Assuming, *arguendo*, that Complainant has established a prima facie case of discrimination or retaliation, we now turn to the Agency to assert a legitimate, non-discriminatory reason for their actions.

³ As Complainant would not be entitled to any additional remedies, we do not find it necessary to address whether the Agency's actions were also motivated by reprisal.

While Complainant asserted that her personnel documents, specifically her 2019 PACS, were “tampered with,” the evidence of record does not support this allegation. Rather, the evidence in the record demonstrates that all PACS documents must be closed as either signed or indicating that the employee declined to sign. Therefore, as an administrative manner, when an employee refuses to sign their PACS, it is commonplace for supervisors to sign the document as declined to sign. In fact, Complainant’s employment file demonstrates that this is not the first of Complainant’s PACS documents that has been marked “declined to sign;” this has been done on PACS documents for previous years. Complainant concedes that she refused to sign the PACS document and previous PACS documents related to Complainant’s performance were so administratively indicated as declined to sign. There is no evidence that Complainant’s declination to sign resulted in negative employment consequences.

Complainant has offered no evidence to persuade the Commission that the Agency’s actions were based upon her protected class.

In light of the above, the Commission finds that she has not established that she experienced an adverse employment action and, therefore, has not established a prima facie case with regard to discrimination or reprisal and we find that the Agency’s finding of no discrimination or reprisal is proper as to this claim.

14 Day Suspension

Assuming, *arguendo*, that Complainant has established a prima facie case for discrimination, the Commission now turns to the Agency to provide a legitimate, non-discriminatory reason for which they prescribed the adverse employment action. In this case, the Agency asserted that Complainant was suspended for being AWOL for over 230 hours, despite a prior suspension for misuse of Agency telework.

Complainant has not contradicted the Agency’s asserted reasons for the suspension, has not asserted that she was not AWOL, and has not offered any evidence that this was due to a protected class or protected activity. As such, Complainant has not met her burden to provide, beyond her mere opinion, the Commission with sufficient facts to find, by a preponderance of the evidence, that the Agency acted on the basis of a prohibited reason, and the Commission finds that the Agency’s finding of no discrimination as to claim 3 was proper.

Harassment

In Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986), that harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of a complainant's employment. A complainant can show that harassment alters the conditions of her employment by showing that the harassment culminated in a tangible employment action or that the harassment was sufficiently severe or pervasive to create a hostile work environment. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753-54 (1998).

To ultimately prevail in her claim of retaliatory harassment, Complainant must show that she was subjected to conduct sufficient to dissuade a “reasonable person” from making or supporting a charge of discrimination. See Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53, 57 (2006); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016). Only if both elements are present, retaliatory motivation and a chilling effect on protected EEO activity, will the question of Agency liability for reprisal-based harassment present itself. See Janeen S. v. Dept of Com., EEOC Appeal No. 0120160024 (Dec. 20, 2017).

To establish a claim of harassment a complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment.” Harris, 510 U.S. at 21. The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Sys., Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

In the case of claim 4, Complainant has not established a prima facie case of harassment. While she does belong to a protected class, the time sheet in question was corrected. While the Agency did not correct the timesheet until after the second email, the timesheet error was corrected. There was no adverse employment action, no denial of leave, or no leave debt alleged. As such, this instance was not sufficiently severe to alter the conditions of her employment. This event is also not sufficient to create an abusive work environment. Moreover, Complainant has not offered any evidence that this incident was connected to her prior EEO activity.

As such, the Commission finds that Complainant has failed to establish a prima facie case of harassment with regard to claim 4 and that the Agency’s finding of no harassment was proper.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency’s decision with regard to claims 2, 3, and 4. With regard to claim 1, we REVERSE the Agency’s decision and REMAND the matter for further processing in accordance with the Order below.

ORDER (D0617)

The Agency is ordered to take the following remedial action:

- I. Within thirty (30) calendar days of the date this decision is issued, the Agency shall offer Complainant the position of Operations Supervisor, or a substantially equivalent position. Complainant shall have fifteen (15) days, from the date of the offer, to accept or decline the position. If Complainant should decline the Agency's offer, the date of her rejection shall be the end date for any back pay due Complainant.
- II. The Agency shall pay Complainant back pay, with interest, from the date on which it is determined Complainant would have started in the Operations Supervisor position. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision was issued. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
- III. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
- IV. The Agency shall conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford her an opportunity to establish a causal relationship between the Agency's discriminatory action and his pecuniary or non-pecuniary losses, if any. Within fifteen (15) calendar days of the date this decision is issued; the Agency shall give Complainant notice of her right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't. of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of her claim for compensatory damages. Complainant shall

have forty-five (45) calendar days from the date the Complainant receives the Agency's notice to submit her compensatory damages evidence. The Agency shall issue a final decision, with appeal rights to the Commission, on the issue of compensatory damages. 29 C.F.R. § 1614.110. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein. Within thirty (30) calendar days of determining the amount of compensatory damages due Complainant, the Agency shall pay that amount to Complainant.

- V. Within ninety (90) days from the date the decision is issued, the Agency is directed to conduct eight (8) hours of in-person or interactive training for the selecting officials⁴ for the Operation Supervisor's position. The Agency shall address management's responsibilities with respect to eliminating discrimination in the workplace and training in EEOC regulations concerning the maintenance of records under 29 C.F.R. § 1602.14. Within thirty (30) calendar days of the date the training is completed, the agency shall submit to the Compliance Officer appropriate documentation evidencing completion of such training.
- VI. Within sixty (60) days from the date the decision is issued, the Agency shall consider disciplining the selecting officials for the Operations Specialist position. The Commission does not consider training to constitute disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides not to issue any disciplinary action, it shall set forth the reason(s) for its decision. If any of the named management officials is no longer employed by the Agency, the Agency shall furnish proof of the date(s) of separation.
- VII. The Agency shall, within thirty (30) days of the date this decision is issued, post a notice in accordance with the Order below.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Nashville, Tennessee Field Office facility 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

⁴ The selecting officials were Assistant District Manager and Nashville District Manager, as identified on page 2 of this decision and in the ROI on pages 134 and 146.

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.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if 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, a 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

January 18, 2022
Date