



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

[REDACTED]
Merlin W.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Request No. 2022000013

Appeal No. 2020002711

Agency No. 19-4523A-00428

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2020002711 (Sept. 2, 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). For the reason's stated below, the Commission DENIES the Agency's request for reconsideration. However, on our own motion, we MODIFY the relief ordered.

During the relevant time, Complainant worked as a Health Physicist (HP) at the Agency's Radiological Controls Office, Puget Sound Naval Shipyard & Intermediate Maintenance Facility (PSNS&IMF) in Yokosuka, Japan.

In our previous decision, we modified the Agency's final decision and found that Complainant established that he was denied accommodation for his bona fide religious belief (against shaving his beard).

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

In so finding, we noted that there was evidence of a possible alternative accommodation regarding Complainant's request for a waiver of the respirator certification. We observed that another coworker (CW2) discussed the idea of using a Powered Air-Purifying Respirator (PAPR), which was a full hood that sealed at the neck, torso or shoulders, instead of the face. We noted that while the Director of Radiological Control (DRC) stated that the alternate respirator "would not be available in Japan," there was no explanation for the predicted unavailability. Moreover, the Agency had not argued undue hardship with respect to obtaining the PAPR for Complainant. We therefore found that the Agency did not meet its burden to show that it could not have accommodated Complainant's religious beliefs.

Additionally, in the appellate decision we concluded that Complainant was subjected to retaliatory harassment when the Agency directed him to exercise his return rights on October 24, 2018. In so finding, we noted that Complainant expected to remain in Japan until July 2019, but the Agency instructed him to return to San Diego after it denied his request for a religious accommodation. We found that the Agency's instruction for Complainant to prematurely end his assignment in Japan, which meant that Complainant and his family had to unexpectedly relocate overseas within 30 days, was materially adverse, and would deter a reasonable person from engaging in protected EEO activity. While Complainant's personal circumstances prevented the early end of his assignment in Japan, we noted that the focus should properly be on the Agency's actions.

To remedy the discrimination, the Agency was ordered to, among other things, conduct a supplemental investigation with respect to Complainant's claim of compensatory damages, attorney's fees, and costs. We also ordered the Agency to:

[P]rovide one (1) hour of EEO training for all PSNS&IMF supervisors and managers on the Agency's duty to appropriately respond to employees' requests for a religious accommodation. In addition, the Agency shall provide four (4) hours of interactive EEO training to DRC; this training shall emphasize the obligation to not engage in retaliatory harassment, to ensure that similar violations do not occur.

In its Request for Reconsideration, the Agency asserts, inter alia, that Complainant was not required to attend respirator training, shave, or perform work requiring a respirator. The Agency contends that Complainant maintained full employment and was never disciplined for refusing to shave his beard. The offer of an alternative respirator (PAPR) was not relevant, argues the Agency, as Complainant was never required to have a respirator qualification and did not request the use of the PAPR. Therefore, asserts the Agency, Complainant failed to establish he was denied accommodation for his religious beliefs.

The Agency additionally argues that Complainant never claimed he had been subjected to retaliatory harassment, and therefore this claim should not have been addressed in our prior decision. Alternatively, the Agency contends that the record does not reflect that Complainant was subjected to retaliatory harassment.

According to the Agency, Complainant and his family remained in Japan until July 2019, as originally scheduled, and Complainant simply chose to leave Japan through his voluntary resignation from federal service.

With respect to our order requiring the Agency to provide EEO training for all PSNS&IMF supervisors and managers, the Agency argues it is overly broad. According to the Agency, its PSNS&IMF has 15,000 employees, including approximately 2,600 supervisors and managers. The Agency further says that PSNS&IMF is an industrial facility with workers spread all over the globe at various detachments, including, the detachment in Yokosuka, Japan, where the incidents relevant to this case arose. As such, the Agency argues that it is impossible to train that number of employees within the 90-day time period. The Agency requests that we revise our order, by either limiting training to only the supervisors and managers of its Yokosuka, Japan detachment or extend the time to provide such training.

As an initial matter, we note that the Agency did not submit a brief in opposition to Complainant's appeal. The Agency is reminded that a request for reconsideration is not a second appeal to the Commission. Notwithstanding, we find that the Agency's arguments in this request do not 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.

In so finding, there is no dispute that CW2 raised the idea of using the PAPR with management officials, and Complainant was never provided with the PAPR. We also note that a Physical Science Technician attested that, shortly after Complainant requested accommodation, management told Complainant that it was exercising the right to send him back before his obligated time in Japan ended. Report of Investigation (ROI), at 514-515. The Physical Science Technician further recalled that Complainant was only given a couple weeks' notice after management in Japan made the decision to send Complainant back to San Diego. *Id.* As noted in our previous decision, while Complainant's personal circumstances prevented the early end of his assignment in Japan, our focus is upon the Agency's actions. Moreover, while Complainant may not have specifically listed reprisal as a basis in his EEO complaint, the Commission has the discretion to address an additional basis based on a review of the record and a fair reading of a complaint. See Martina S. v. U.S. Postal Serv., EEOC Appeal No. 2021003375 (Sept. 7, 2021) (finding that a fair reading of the record, regarding complainant who only checked genetic information as a basis, indicated that she intended to raise claims of race, color, sex, religion, reprisal, as well as genetic information discrimination); Harry E. v. U.S. Postal Serv., EEOC Appeal No. 2020000585 (Feb. 26, 2020) (finding that a fair reading of the record reflected that complainant alleged reprisal based on prior EEO activity).

We do find, however, that our previous decision improperly ordered the Agency to conduct EEO training for all its managers and supervisors within PSNS&IM. Our previous decision did not specify a reason for issuing the expansive training order. The record reflects that only management within the Agency's Yokosuka, Japan detachment were responsible for the discrimination at issue.

Moreover, in this case, there is no evidence of a culture of discrimination within the Agency. See Joey B. v. Dep't of Veterans Affairs, EEOC Appeal No. 0720160023 (Dec. 21, 2016) (ordered EEO training for all employees was overly broad, as there was no evidence of a facility-wide culture of discrimination). Therefore, we modify our order so that only the supervisors and managers within the Agency's Yokosuka, Japan detachment will be provided training.

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. However, on our own motion, we MODIFY the relief ordered. 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

1. Within ninety (90) days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages, attorney's fees, and costs related to the Agency's denial of his request for a religious accommodation on August 31, 2018, and the retaliatory harassment when it directed Complainant to exercise his return rights on October 24, 2018. The Agency shall allow Complainant to present evidence in support of his compensatory damages claim. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages, attorney's fees, and costs no later than thirty (30) days after the completion of the investigation.
2. Within ninety (90) days of the date this decision is issued, the Agency shall consider developing internal procedures for processing requests for religious accommodation, based on the EEOC's recommended best practice of having internal procedures for processing requests for religious accommodations. See Compliance Manual, § IV. To support the Agency's efforts, the EEOC's Federal Sector Programs will provide one hour of technical assistance.
3. Within ninety (90) days of the date this decision is issued, the Agency shall provide one (1) hour of EEO training for all PSNS&IMF Yokosuka, Japan detachment supervisors and managers on the Agency's duty to appropriately respond to employees' requests for a religious accommodation. In addition, the Agency shall provide four (4) hours of interactive EEO training to DRC; this training shall emphasize the obligation to not engage in retaliatory harassment, to ensure that similar violations do not occur.
4. Within sixty (60) days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against S1 and DRC. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline.

If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

5. The Agency shall immediately post a notice in accordance with the paragraph below.

POSTING ORDER (G0617)

The Agency is ordered to post at its Puget Sound Naval Shipyard & Intermediate Maintenance Facility in Yokosuka, Japan copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

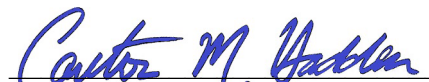
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)

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

March 28, 2022
Date