



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

[REDACTED]
Zetta B.,¹
Complainant,

v.

Thomas J. Vilsack,
Secretary,
Department of Agriculture,
Agency.

Request No. 2022000030

Appeal No. 2020003201

Hearing No. 480-2016-00041X

Agency No. FS-2015-00277

DECISION ON REQUEST FOR RECONSIDERATION

The Agency requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2020003201 (September 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). The Agency's request for reconsideration is DENIED; however, the Commission MODIFIES the previous decision on its own motion.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Civil Engineer (Assistant Forest Engineer – Facilities), GS-0810-12, at the Sierra National Forest in Clovis, California. On April 30, 2015, Complainant filed a formal EEO complaint alleging that the Agency discriminated against her on the bases of race (Asian) and sex (female) when:

1. on December 15, 2014, Complainant was notified by her supervisor that she was not selected for the GS-0810-12/13, Supervisory Civil Engineer (Forest Engineer) position, advertised under Vacancy Announcement Number: 14-0515-52425D-mds;
2. in 2012 and 2013, on April 2, 2014, and other unspecified dates, Complainant was denied opportunities to complete a detail as a Forest Engineer; and
3. on several dates, Complainant was subjected to various acts of harassment, including but not limited to:
 - a. in June 2014, management notified Complainant's male coworker of a vacancy announcement for a Forest Engineer position, but failed to provide proof that the same notice was sent to her; and
 - b. on November 20, 2014, a management official expressed surprise that Complainant's colleague was not selected for a leadership program, given that he was Hispanic.

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 EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

The Agency submitted a motion for a decision without a hearing, arguing that claims 2 and 3 should be dismissed due to Complainant's failure to timely raise these claims. The Agency also argued that claims 3(a) and 3(b) should be dismissed for failure to state a claim, as the record showed that Complainant was not harmed by either of the alleged incidents and the alleged comment in claim 3(b) was not directed at her and did not reference her sex and/or race. The Agency also asserted that it had legitimate, nondiscriminatory reasons for taking the alleged actions in claims 1, 2, and 3, and that Complainant's harassment claim must fail because the alleged actions were not sufficiently severe or pervasive to constitute a hostile work environment. The AJ denied the Agency's motion and held a two-day hearing on February 11-12, 2020.²

² The AJ included her denial of the Agency's Motion for Summary Judgment in all three versions of the Amended Order on Initial Conference and Scheduling Order.

Following the hearing, the AJ issued a decision on March 13, 2020. The AJ determined that the Agency subjected Complainant to discrimination in claims 1, 2, and 3(b). Regarding the non-selection to the Supervisory Civil Engineer position, the AJ noted that the Agency selected a witness (W1) (Hispanic, male), who was determined to be qualified at the GS-12 level, while Complainant was found qualified at the GS-13 level. The AJ found that this factor alone was sufficient to refute the Agency's claim that W1 was "better qualified" than Complainant for the position. In addition, the AJ stated that Complainant had certifications, skills, and experience not yet obtained by W1, such as supervisory and training experience. AJ Decision at 9.

The AJ also determined that the Agency's efforts to explain W1's selection, based on his interview performance, lacked credibility. Specifically, the AJ noted that an interviewer cited Complainant's "communication difficulties" during her interview, but he admitted that her purported communication difficulties did not impact her ability to train and had never resulted in counseling or discipline. Further, the AJ determined that the interviewer's assurance that any issue with Complainant's communication skills "has nothing to do with her accent," was indicative of animus towards Asians. Id. at 9-10.

For claim 2, the AJ found that Complainant credibly testified about requesting detail assignments on multiple occasions, which contradicted the Agency's explanation that Complainant was not given detail assignments because she did not request them. Regarding claim 3(b), the AJ determined that the record supported the allegation, which provided a motive for the other claims. The AJ found that the Agency's attempt to justify its actions with respect to claims 1, 2, and 3(b) "utterly failed," and she concluded that the Agency subjected Complainant to discrimination and harassment based on her race and sex. Id. at 10-12.

As for claim 3(a), the AJ found that Complainant failed to prove she had been discriminated against because she was unable to refute the Agency's proffered legitimate, nondiscriminatory reasons for its actions. The AJ then noted that Complainant requested placement into the Supervisory Civil Engineer position, with backpay and benefits from January 2015, but Complainant did not request compensatory damages.³ Additionally, the AJ observed that Complainant's representative was not an attorney, so attorney's fees were not applicable. The AJ ordered the Agency to promote Complainant to a substantially equivalent, permanent, Supervisory Civil Engineer (Forest Engineer) position within her commuting area; retroactive to January 1, 2015, with appropriate benefits. Id. at 8, 12-13.

The Agency issued a final order rejecting the AJ's decision and filed an appeal with the Commission. Complainant appealed the Agency's final order and opposed the Agency's appeal.

On September 2, 2021, the Commission issued a decision affirming the AJ's decision. The appellate decision noted that substantial evidence supported the AJ's findings that the Agency discriminated against Complainant based on her race and sex when it did not select her for the Supervisory Civil Engineer position.

³ Complainant did not appeal the AJ's decision to not award her any compensatory damages.

For example, the record suggested that many of the accomplishments that the Agency cited as evidence of W1's superior qualifications were performed while W1 was under Complainant's supervision. In addition, there was no basis to reverse the AJ's overall credibility determinations, as the evidence supported the AJ's concerns regarding the manner in which W1 represented his qualifications, such as indicating in his resume that he independently performed the work, when in reality, he assisted Complainant and others. Even crediting the Agency's contention that W1 performed better than Complainant during his interview, there was substantial evidence to support the AJ's conclusion that Complainant was plainly superior to W1, given the totality of her qualifications, including the comparative breadth of her supervisory experience. Zetta B. v. Dep't of Agr., EEOC Appeal No. 2020003201 (Sept. 2, 2021).

The appellate decision declined to address the Agency's contentions regarding claims 2 and 3(b), as Complainant would not be entitled to additional remedies. The Commission reversed the Agency's final order and remanded the complaint to the Agency for remedial action, including the completion of a supplemental investigation concerning Complainant's entitlement to compensatory damages.

The Agency requests a reconsideration of the appellate decision, arguing clearly erroneous interpretations of material fact and law. While the appellate decision declined to address the timeliness of claims 2 and 3(b), the Agency argues that the Commission's order to determine the amount of compensatory damages due to Complainant fails to limit the supplemental investigation to claim 1. Therefore, asserts the Agency, the appellate decision should have found that both claims 2 and 3(b) are untimely. It contends that such claims should not have to be considered in the supplemental investigation.

The Agency also argues that the Commission erred in finding pretext simply by concluding that Complainant had superior qualifications. While the Commission has held that a factor in proving discriminatory intent may be demonstrated when an appellant's qualifications are observably superior to the selectee, the Agency asserts that the inquiry does not end here. The Agency states that in Workman v. Department of the Navy, EEOC Appeal Number 01973815 (Sept. 3, 1999), the complainant had to produce credible evidence that gender was considered by the panel in making its selection, and the Agency asserts that this case "mirrors the facts" of the instant complaint.

The Agency requests that the Commission vacate the September 2, 2021 appellate decision and find in its favor. In the alternative, the Agency requests that the Commission find no discrimination regarding claims 2 and 3(b), and rescind the order to conduct a supplemental investigation of compensatory damages. Complainant did not respond to the Agency's request.

ANALYSIS AND FINDINGS

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 Agency argues that the Commission erred in finding pretext for claim 1, simply by concluding that Complainant had superior qualifications. It contends that, while a factor in proving discriminatory intent may be demonstrated when a complainant's qualifications are observably superior to the selectee, the inquiry does not end there and a complainant needs to produce credible evidence that an unlawful factor was considered by the panel in making its selection, citing to Workman, supra.

However, we find the Agency's reliance on Workman is misplaced. It is well established, as noted in Workman, that a complainant can demonstrate pretext for discrimination, either directly by demonstrating that a discriminatory reason more likely than not motivated the agency's action, or indirectly by showing that the agency's proffered reasons are unworthy of credence. In Workman, the Commission overturned an AJ's finding of discrimination because the evidence did not support the AJ's determination that the Agency considered sex when making its selection, which would have been direct evidence of discrimination.

The Agency seems to argue that, in this case, the Commission should overturn the AJ's finding of discrimination because Complainant did not provide direct evidence of discrimination. However, the AJ found that the Agency's proffered reason that W1 was chosen due to his interview "lacks credibility," thereby establishing Complainant's claim of discrimination indirectly. AJ Decision at 9. Accordingly, we find that the Agency has not met its burden to show that the appellate decision involved a clearly erroneous interpretation of material fact or law and DENY the Agency's request for reconsideration.

However, the Commission exercises its discretion to GRANT reconsideration on its own motion in order to MODIFY the previous decision. A review of the AJ's decision shows that she did not award any compensatory damages because Complainant did not request any. AJ Decision at 12-14. As such, the Commission's order is modified to remove the order of a supplemental investigation into a claim of compensatory damages. With the removal of this order, there are no remedies awarded for claims 2 and 3(b), and the Agency's arguments related to these claims are moot. The decision in EEOC Appeal No. 2020003201 otherwise 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

1. Within **thirty (30) calendar days** of the date of this decision is issued, the Agency shall promote Complainant to a substantially equivalent, permanent, Supervisory Civil Engineer (Forest Engineer) position within her commuting area; retroactive to January 1, 2015. The Agency shall retroactively promote Complainant to the next appropriate step

and/or grade, respectively, if appropriate, on the one-year anniversary of her promotion, and then on an annual basis or according to Agency policy;

2. Within **sixty (60) calendar days** of the date this decision is issued, the Agency shall determine the appropriate amount of benefits (with interest) if applicable, due Complainant from January 1, 2015, to the effective date of her promotion to the Supervisory Civil Engineer (Forest Engineer) position. Complainant shall cooperate in the Agency's efforts to compute the amount of benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of benefits, the Agency shall issue a check to Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute, as outlined in the section titled, IMPLEMENTATION OF THE COMMISSION'S DECISION.
3. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall provide eight (8) hours of training to the members of the interview panel and the selecting official. The training shall address the Agency's obligations under Title VII of the Civil Rights Act of 1964.
4. Within **ninety (90) calendar days** from the date this decision is issued, the Agency shall consider disciplining the members of the interview panel and selecting official. 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. If these individuals have left the Agency's employ, the Agency shall furnish documentation of their departure dates.

POSTING ORDER (G0617)

The Agency is ordered to post at its Sierra National Forest facility in Clovis, California 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 24, 2022

Date