



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

[REDACTED]
Felix R.,¹
Complainant,

v.

Steve Jurczyk
Acting Administrator,
National Aeronautics and Space Administration,
Agency.

Request No. 2022000158

Appeal No. 2019002240

Agency No. NCN18HQ00001

DECISION ON REQUEST FOR RECONSIDERATION

Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Felix R. v. United States Postal Service, EEOC Appeal No. 2019002240 (September 7, 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).

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.

During the relevant time, Complainant was employed by the Agency as Director, Program Planning and Evaluation Division, at the Office of Diversity and Equal Opportunity in Washington, D.C. Complainant was appointed to a one-year probationary period beginning October 30, 2016.

On January 2, 2018, Complainant filed a formal complaint claiming discrimination based on race, sex and disability, as well as unlawful retaliation for prior protected activity. Complainant raised the following two claims:

1. On September 27, 2017, during his probationary period, the Acting Associate Administrator removed him from his SES position and placed him in a GS-15 position within the ODEO Program, Planning and Evaluation Division at NASA Headquarters.
2. Beginning March 6, 2017, he was subjected to a hostile work environment, including but not limited to:
 - a. On several unspecified dates during the summer of 2017, the Acting Associate Administrator referred to previous leadership within the ODEO, which included Complainant, as the “gay mafia.”
 - b. On an unspecified date in April 2017, the Acting Associate Administrator, during an office retreat, said “[Complainant] came out to me last week. I said, ‘Oh really Barry Manilow.’”
 - c. On an unspecified date in June 2017, the Acting Associate Administrator uttered “these people just won’t let it alone,” referring to NASA’s LGBT group inquiring about the President’s proclamation for LGBT Pride Month.
 - d. In late July 2017, the Acting Associate Administrator commented that she guessed “...you white guys’ll do,” in the acting position of Complaints Management Director, ODEO.
 - e. On an unspecified date, after receiving the outcome of the anti-harassment complaint that Complainant filed against the Acting Associate Administrator, she showed concerns regarding comments she made to Complainant which he believes were retaliatory based on his raising EEO concerns.
 - f. On an unspecified date in August 2017, after interviewing a white male candidate, the Acting Associate Administrator commented that the candidate was gay, and not a “good fit” for the organization because his personality was “too big for this office.”
 - g. On April 30, 2018, Complainant became aware that the Acting Associate Administrator was selected for the position of Director, Program Planning

Evaluation (PPE) Division, Office of Diversity and Equal Opportunity (ODEO), which is the position Complainant was placed into after his removal from his SES position.

Following an investigation, Complainant requested that the Agency issue a final decision. On February 12, 2019, the Agency issued a final decision, finding no discrimination for both claims 1 and 2. Complainant appealed.

In EEOC Appeal No. 2019002240, the Commission affirmed the Agency's final decision regarding claim 1. However, regarding claim 2, the Commission reversed the Agency's finding of no discrimination and determined that Complainant established that he was subjected to a discriminatory hostile work environment. The Commission remanded claim 2 to the Agency directing it to comply with a variety of remedial actions.

In the instant request for reconsideration, Complainant argues that the Commission improperly found no discrimination regarding claim 1. Specifically, Complainant argues that the Commission failed to analyze claim 1 as part of an overall harassment claim, together with claim 2 where discrimination was found. Complainant argues further that the Commission failed to employ a "mixed motive" analysis in the prior decision. We note, however, that the prior appellate decision affirmatively determined that the evidence of record established that there were legitimate, non-discriminatory reasons for removing Complainant from the SES position. To wit, Complainant demonstrated ongoing deficiencies in leadership critical for this position because of a history of personnel issues and lack of adequate supervision in the office. Complainant, himself, acknowledged significant challenges with each staff member. Once the decision concluded the removal issue was not motivated by discrimination, it was correct to decline to consider it as part of the overall harassment claim.

We emphasize that a request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9 § VI.A (Aug. 5, 2015); *see, e.g., Lopez v. Dep't of Agric.*, EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, 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. Complainant has not done so here.

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. 2019002240 remains the Commission's decision and its remedial orders regarding claim 2 will be repeated below. There is no further right of administrative appeal on the decision of the Commission on this request.

ORDER

To the extent that it has not already done so, within 120 calendar days of the date this decision is issued, unless otherwise specified, the Agency shall comply with the following orders.

1. Unless he expressly consents, Complainant shall no longer work in a supervisory chain involving S1 [the individual identified 2019002240 as the Acting Associate Administrator]. Complainant may be reassigned to a comparable position only with his consent. Otherwise, the Agency shall remove S1 from Complainant's chain of supervision.
2. The Agency will conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford him an opportunity to establish a causal relationship between the harassment he endured and any pecuniary or non-pecuniary losses. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages. 29 C.F.R. § 1614.110. The supplemental investigation and issuance of final decision will be completed within sixty (60) calendar days of the date this decision becomes final. A copy of the final decision must be submitted to the Compliance Officer, as referenced below.
3. To fulfill its legal obligation to effectively communicate EEO policies and procedures to all employees, the Agency shall disseminate its revised anti-harassment policy statement within thirty (30) calendar days of issuing the revised policy statement. Methods of dissemination include training, webinars, brochures, emails, or other types of written communication. Instructions to Federal Agencies for MD-715 Section I The Model EEO Program, Part I. Element A (B).
4. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive EEO training to the management officials involved in this matter, particularly addressing the parties' responsibilities with respect to eliminating harassment in the workplace.
5. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against S1 and the management officials responsible for the established harassment. 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 any of the responsible management officials have left the Agency's employ, the agency shall furnish documentation of their departure date(s).
6. Within sixty (60) calendar days of the date this decision is issued, the Agency shall post a notice in accordance with the statement entitled "Posting Order."

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 verifying that corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Washington D.C. Office of Diversity and Equal Opportunity 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 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.


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 17, 2022

Date