



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

[REDACTED]
Carroll R,¹
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Request No. 2022002375

Appeal No. 2020002891

Hearing Nos. 460-2016-00163X and 460-2018-00002X

Agency Nos. 16-0044-F and 16-0671-F

DECISION ON REQUEST FOR RECONSIDERATION

Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Carroll R. v. Dep't of the Treasury, EEOC Appeal No. 2020002891 (Feb. 14, 2022). 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).

During the period at issue, Complainant worked as an Internal Revenue Agent, GS 13, in the Internal Revenue Service (IRS) Large Business and International Division (LB&I) in Houston, Texas.

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.

On December 30, 2015 and November 7, 2016, Complainant filed two formal EEO complaints.

As further explained below, Complainant's complaints alleged, in pertinent part, reprisal for prior protected EEO activity. The record indicates that Complainant filed a prior EEO complaint on May 19, 2008 (Complaint No. C14HOU08007) regarding the Agency's removal of Complainant from the Advanced Management Selection Development (AMSD) program. The Territory Manager JKE,² Complainant's first level supervisor, recommended that Complainant remain in the AMSD program for an extended period. However JKE's supervisor denied the request, which resulted in Complainant begin removed from the program. Ultimately, Complainant's prior complaint was settled during an August 4, 2008 settlement agreement where the Agency agreed to transfer Complainant to the Large and Mid-Size Business Division, and with satisfactory performance, the Agency would transfer Complainant to an available AMSD position. However, in 2009, the AMSD no longer accepted applicants from LB&I and Complainant was never able to obtain an AMSD position.

Agency No. 16-0044-F: Whether the Agency discriminated against Complainant and subjected him to harassment based on race (African-America), color (Black), sex (male), age, disability, and in reprisal for prior protected EEO activity (2008 settlement agreement) when:³

Issue No. 1: In or around 2002, Complainant applied to a position with the Agency. While Complainant was not selected for the position, he was a highly-qualified candidate based on his vast experience as a Certified Public Accountant, Personal Financial Specialist, and Certified Financial Planner. Complainant also maintains a distinguished military record as a former Commissioned Officer in the U.S. Army.

Issue No. 5: In or around 2007, former Team Manager MTV who retired in 2017, stated to Complainant, "African-American CPAs are doing business for the most affluent people in Texas and they cut corners," or words to that effect.

Issue No.6: On or about April 13, 2008, Complainant was subsequently demoted from Acting Team Manager with AMSD. Notably, Acting Director of Field Operations KE authorized and signed Complainant's demotion paperwork. However, KE was not in Complainant's chain of command and he never reported directly or indirectly to KE.

Issue No. 9: In or around 2008, and continuing to the present, Complainant applied for over 30 GS-14 and Team Manager positions at the Agency. Although Complainant was considered "best qualified" for several of those positions, he was not chosen for any of the aforementioned positions.

² All Agency officials are identified by their initials.

³ The EEO Administrative Judge (AJ) dismissed claims 2, 3, 4, 7, 8, and 15. Complainant did not dispute the dismissal of these claims, and therefore, these claims are not at issue.

Issue No. 10: In or around 2010, Territory Manager EEJ was overheard stating: “Three highly qualified African-American Agency employees in the Houston-Leland office have been targeted as ‘not to succeed’ by the Agency Management Team,” or words to that effect.

Issue No. 11: In or around February 2010, Complainant applied for a Team Manager position in which no other employee expressed an interest. Complainant was rated, once again, as “best qualified.” However, Senior Territory Manager KMK not only rejected Complainant for the position, she also selected a lesser-qualified employee without conducting an interview. KMK failed to consider Complainant’s outstanding evaluations, performance awards, publications, teaching, and participation in the Career Assistance Mentoring Program.

Issue No. 12: In or around December 2010, Complainant was advised by National Treasury Employees Union (NTEU) steward, BT, to transfer from Natural Resources and Construction (NRC) due to the retaliation he was suffering after filing an EEO complaint in 2008. Complainant moved to Pre-filing and Technical Guidance in the Large Business and International Division.

Issue No. 13: In or around February 2011, Complainant incorrectly received a negative Mid-Term Evaluation from Joint Committee Team Manager CCD. When Complainant attempted to discuss the evaluation with CCD, he did not receive a response. This negative evaluation prevented Complainant from making presentations in Houston and Dallas, Texas, and other areas of the country, as well as blocking Complainant's opportunity to travel and train with the Senior Joint Committee reviewer, and prevented Complainant from receiving valuable training and experience.

Issue No. 14: In or around May 2011, Coworker AHS and Coworker DR conducted a Joint Committee presentation for KE’s and KMK’s Territories in the Houston Leland Building, which is Complainant’s place of duty. Complainant offered his assistance as a co-presenter, but he was denied the offer, despite having an extensive history of successful presentations.

Issue No. 16: In or around 2013, during an interview for a promotion, KMK referred to Complainant in a condescending manner. Specifically, KMK denoted Complainant as the “[Complainant’s nickname] guy thing,” or words to that effect.

Issue No. 17: From in or around 2013 through 2014, Supervisory Revenue Agent CMD confirmed that the Agency was targeting Complainant for his prior EEO activity in 2008. CMD also informed Complainant that other Agency employees who possessed a Career Learning Plan were obtaining requested acting assignments. These acting assignments lead directly to promotional opportunities. To date, despite being qualified, Complainant has not received any acting assignment that would allow for his promotion.

Issue No. 18: In or around May and July of 2014, Complainant received absolutely no acting assignments, while a Caucasian male peer received one acting assignment and a Caucasian female peer received two acting assignments.

Issue No. 19: In or around February 2015, Complainant was transferred back to NRC. Upon his return, Complainant was immediately subjected to an extremely hostile working environment. As an example, KMK frequently micro-managed Complainant. She also would regularly monitor and question any and all actions taken by Complainant in carrying out his duties and responsibilities.

Issue No. 20: In or around February 2015, Supervisory Revenue Agent DDC called Complainant into her office and told him that she was “very angry” about Complainant’s initial EEO complaint, or words to that effect.

Issue No. 21: On or about April 29, 2015, Complainant notified the Agency that it failed to abide by their portion of the 2008 Settlement Agreement. While Complainant withdrew his formal EEO complaint based upon the Agency’s assertions, the Agency has specifically failed to reinstate Complainant to the AMSD program.

Issue No. 22: On or about June 26, 2015, Complainant’s Career Learning Plan (CLP) was submitted to DDC. The CLP requested that Complainant be assigned as Acting Team Manager. However, it was ignored by DDC and KMK, who is the Agency official who decides on Acting Team Manager assignments.

Issue No. 23: In or around August 2015, Chief of Work life and Wellness Programs DHJ, IR-04, who was Complainant’s co-worker at LB&I, said to Complainant that AHS had been recruited for an acting assignment and promoted to GS-14. DHJ said that this action was unusual because the Agency reached across multiple organizational structures to promote AHS.

Issue No. 24: On or about August 19, 2015, upon returning from sick leave, Complainant learned that he was transferred from a major global oil and gas case to a much smaller, lower-profile matter, without cause or justification, which had little, if any, opportunity for promotion.

Issue No. 25: On or about September 14, 2015, during a power point presentation attended by over 30 Agency employees, KMK presented a slide entitled, “What Baggage Might Be Attached to You?” The presentation specifically addressed the consideration of an employee’s “baggage” during the Agency’s selection process. KMK indicated that factors outside of the application and Employee Personnel File (EPF) are used to determine who will be selected for a position. Complainant questioned KMK regarding the information used for selecting individuals for promotion and how one would determine what was considered “baggage.” KMK replied that “Perception is reality,” or words to that effect.

Issue No. 26: On or about September 17, 2015, KMK arbitrarily lowered Complainant's Leadership Readiness Rating from "Ready Now" to "Not Ready" without cause or justification. The downgrade was effectuated without any explanation.

Issue No. 27: On or about September 18, 2015, the President, National Treasury Employees Union, Chapter 222, advised Complainant that any factors used to determine employment and promotion outside of the application and EPF violates Agency policy.

Issue No. 28: On or about September 18, 2015, upon review of his Employee Performance File, Complainant learned that several significant current year contributions were omitted, including, but not limited to: (a) a letter of appreciation for Complainant's presentation on the Oil and Gas Unit II class; and, (b) e-mail correspondence with recommended changes to a Notice of Proposed Adjustment template for the benefit of the entire global case team.

Issue No. 29: On or about October 5, 2015, Complainant learned that Coworker LHM, who is far less qualified than Complainant and has no managerial experience, was appointed as Acting Team Manager of Complainant's team.

Issue No. 30: On or about October 21, 2015, Complainant met with KMK, who provided Complainant with an overview of the skills and experience KMK believed necessary for a promotion to a managerial or technical GS-14 position. After Complainant cited examples of his competency and skills, KMK explained that being assigned to Acting Team Manager greatly enhances the qualifications that are desired for the application process, implying that, because Complainant had not received an assignment as an Acting Team Manager, it had affected his applications.

Issue No. 31: On or about October 26, 2015, Complainant was offered and accepted a 10-day acting assignment as a GS-14 Account Coordinator for a Coordinated Account Program. However, the prior four acting assignments for this position were for up to 120 days for other employees, including four Agency employees outside Complainant's protected status.

Issue No. 32: Shortly after October 26, 2015, Coworker MDB was assigned as an acting Account Coordinator for a 120-day period, while Complainant had received only a 10-day assignment.

Issue No. 33: In or around December 2015, after approximately three months of determined attempts by Complainant to revise the September 2015 Leadership Readiness Rating, KMK finally complied and properly restored the rating to "Ready Now."

Issue No. 34: On or about January 8, 2016, EEJ told LHM that, "[Complainant] has not done or shown me anything as a GS-13 Agent" or words to that effect.

Issue No. 35: On or about January 11, 2016, Co-worker MBD, who had been assigned as an acting Account Coordinator for a 120-day period, was reassigned to her role as Team Member due to prior obligations for that role. MBD continued to retain full GS-14 pay for the 120 days, even after she was reassigned as Team Member.

Issue No. 36: On or about January 11, 2016, Complainant learned KMK and EEJ had rejected him for the long-term GS-14 Account Coordinator Acting assignment. Instead, KMK and EEJ selected a different Agency employee as the permanent GS-14 Account Coordinator, notwithstanding that the employee was physically located in a different territory in New Orleans, Louisiana, which will require her to travel to Houston, Texas, on a monthly or quarterly basis.

Issue No. 37: On or about January 11, 2016, Co-worker LHM informed Complainant of EEJ's statement from on or about January 8, 2016. Complainant expressed his concerns over the negative comment, noting that he possessed email correspondence from EEJ and performance appraisals providing positive feedback regarding his work.

Issue No. 38: On or about January 12, 2016, LHM e-mailed EEJ to inform her, inter alia, that although Complainant only received a short acting Account Coordinator assignment, Complainant exhibited an "excellent job" and he demonstrated that he can "step up and play a more significant role when needed."

Issue No. 39: On or about January 12, 2016, Complainant communicated with a different Team Manager to follow-up on his prior conversation with LHM. Complainant, once again, expressed his concern that EEJ's unfounded negative comments unjustly tarnish his reputation and credibility.

Agency No. 16-0671-F: Whether Complainant was discriminated against based on race (African-American), color (Black), sex, age, disability, and in reprisal for prior protected EEO activity (2008 settlement agreement) when:

Issue No. 40: On February 18, 2016, at a grievance meeting, KMK interrupted Complainant with an offensive comment.

Issue No. 41: On June 22, 2016, Complainant was denied the opportunity to be a presenter at a briefing for certain Agency Executives.

Issue No. 42: On July 19, 2016, Complainant learned that his Coordinated Assurance Program issues for a current case were reassigned, and he was not given Primary Team Coordinator permissions in the Issue Management System.

Issue No. 43: On July 21, 2016, Complainant was not selected for the position of Team Manager, IR-0512-04, under Vacancy Announcement Number 16CS6-LBM0354-0512-04-CC.

Issue No. 44: On July 29, 2016, Complainant was not selected for the position of Supervisory Revenue Agent, GS-0512-14, under Vacancy Announcement Number 16CS6-LBB0473-0512-14-CC.⁴

Issue No. 45 (Amended Claim):⁵ On or about June 21, 2017, Complainant received an erroneous Leadership Succession Review (LSR) report where the Agency's management impermissibly downgraded and rated him one level below the next step in the following competencies: (1) Leading Others with Managing Performance; and (2) Business Results with Problem Solving and Decision Making, Leveraging Resources, and Strategic Planning and Implementation.

After its investigation, the Agency provided Complainant with copies of the reports of investigation and notices of right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing for each complaint, which the AJ consolidated. The Agency then moved for partial summary judgment and in response, Complainant withdrew the following bases from both of his complaints: sex, age, and disability. Thereafter, the AJ held a hearing on the claims.

On August 9, 2019, the AJ issued a bench decision. The AJ dismissed claim claims 2, 3, 4, 7, 8, and 15, finding that these claims failed to state a claim, but ultimately found that the Agency subjected Complainant to a hostile work environment based on race, color, and prior EEO activity. The AJ reasoned that Complainant was more qualified for the position vacancies at issue than the selectees. The AJ further reasoned that the Agency retaliated against Complainant when it did not provide Complainant temporary promotions and assignments after Complainant had filed his first complaint. The AJ also determined that the Agency engaged in *per se* reprisal when KMK made comments that applicants with "baggage" were less likely to be selected. The AJ further determined that discriminatory animus based on race and color were evident based, in pertinent part, on Complainant's testimony that KMK had a reputation for using the "n" word.

The AJ awarded, in pertinent part, Complainant \$275,000 in nonpecuniary compensatory damages; retroactive promotion to Senior Revenue Agent, GS 14, back pay, restored leave, and all damages including: \$6,653.37 in pecuniary medical costs, \$1,295.14 in non-attorney litigation costs, \$85,421.50 in attorney's fees, \$10,355.37 in attorney litigation costs, and \$5,149.31 in credit card interest on attorney's fees.

⁴ The record supports that this vacancy announcement was for a Senior Revenue Agent position.

⁵ The record indicates that Complainant amended his formal complaint to include this claim after his complaints were consolidated.

The AJ also ordered required training for management officials and the posting of a written notice indicating that discrimination had occurred at the Agency. Thereafter, the Agency issued a May 20, 2019 final order rejecting the AJ's finding of discrimination and damages award and filed an appeal before the Commission.

On appeal, the Commission modified the AJ's decision. The Commission determined that the AJ erred by failing to dismiss claims 1, 5 – 6, 9 – 14, 16 – 23 for untimely EEO Counselor contact. The Commission further determined that the AJ erred by failing to dismiss claims 27, 30, 35, and 37 – 39 for failure to state a claim because the Commission found that these claims did not alleged any actions that would reasonably deter Complainant or others from engaging in the EEO process. However, the Commission noted that the circumstances involved in claim 25 did state a claim and could reasonably deter Complainant or other from engaging in the EEO process. Consequently, the Commission indicated that the remaining claims for analysis were claims 24 – 26, 28, 29, 31, 32, 34, 36, and 40 -45.⁶

The Commission found that Complainant established he was subjected to a retaliatory hostile work environment regarding claims 24 (transfer), 25 ("baggage incident"), 26 (LSR rating), 34 ("not shown me anything" comment), and 40 (CPA comment). The Commission noted that management's comments in question were likely to deter a reasonable person from engaging in the EEO process.

Regarding Complainant's non-selection claims (claim 43 and 44), the Commission determined that the record indicated that Complainant ranked and scored lower than the selectees for either position. Therefore, the Commission found that Complainant failed to establish that he was discriminated against based on his race, color, or in reprisal for prior EEO activity when he was not selected for these positions. Consequently, the Commission reversed that AJ's award of retroactive promotion, back pay, and front pay because there was no finding of discrimination on any of Complainant's non-selection claims.

Regarding damages, the Commission clarified that Complainant was only entitled to damages for claims where there was a finding of discrimination – claims 24, 25, 26, 34, and 40. The Commission noted that Complainant provided evidence that he suffered physical and emotional harm resulting from the Agency's retaliatory hostile work environment which included anxiety, insomnia, stress, a short temper, crying episodes, tension-related headaches, melancholy moods, and elevated blood-pressure. Therefore, the Commission reduced Complainant's nonpecuniary, compensatory damages award to \$15,000.

The Commission also reduced Complainant's pecuniary damages award to \$226.33, finding that the cause of Complainant's physical and emotional symptoms was also attributed to other factors.

⁶ The Commission clarified that the dismissed claims would be used as background evidence of discrimination in support of Complainant's remaining claims.

Moreover, the Commission denied the AJ's award of 500 hours of restored leave finding that Complainant failed to establish that the leave he used was connected to the finding of retaliatory harassment.

The Commission also denied the AJ's award for mailing and printing costs because Complainant failed to provide sufficient evidence that these costs were directly related to the processing of his case. Similarly, the Commission denied the AJ's award for credit card interest on legal fees because Complainant failed to establish that the interest was directly attributable to the legal costs incurred rather than outstanding charges to that account.

Regarding attorney's fees, the Commission determined that the AJ erred in awarding the entire amount, because Complainant did not prevail on all claims, and the Commission reduced the award of attorney's fees by 75% to \$21,355.37. The Commission also reduced the attorney's costs by 75% to \$2,588.84. Finally, the Commission affirmed the AJ's award of \$750 in expert fees covering the appearance of Complainant's physician at the hearing, and the Commission affirmed the AJ's order requiring EEO training for responsible management officials and the posting of a notice of discrimination.

In the instant request for reconsideration, Complainant submits, through counsel, a statement expressing disagreement with the appellate decision and reiterating arguments previously made on appeal. However, 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. 2020002891 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request.

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

July 6, 2022
Date