



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

[REDACTED]
Mercedes A.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2021000657

Hearing Nos. 541-2012-00120X, 541-2013-00142X & 541-2015-00079X

Agency Nos. BOP-2012-08470, BOP-2013-0366 & BOP-2014-0430

DECISION

With its November 3, 2020 final order, the Agency simultaneously filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a).² The Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

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.

² The AJ's decision is dated September 22, 2020. The Agency issued its final order and filed its appeal on November 3, 2020, within the 40-day time limit in 29 C.F.R. § 1614.402(a). The Agency submitted an extensive memorandum with its final order explaining the findings in its final order. In opposition to the Agency's appeal, Complainant's attorney contends she did not receive the Agency's December 3, 2020 brief in support of its appeal because it was mailed to her using the wrong zip code. She argues that because she did not receive the brief within 20 days after the Agency filed its appeal (which is the deadline for an Agency to file this brief in 29 C.F.R. § 1614.403(d)), the appeal was not perfected, making it untimely filed. We disagree. The Agency was not required to file a brief. There is no assertion that Complainant's attorney did not receive the timely filed final order and notice of appeal.

BACKGROUND

During the period at issue, Complainant was employed by the Agency as an Accounting Technician, GS-0525-07, in the Management and Specialty Training Center ("Training Center"), Financial Management Department ("Financial Management") in Aurora, Colorado. Financial Management had only four employees, who all reported to one supervisor.

Complainant filed three EEO complaints alleging that the Agency discriminated against her based on her age and sex (older woman – age 61, 62 & 63).³

Complaint 1 (BOP-2012-08470)

Filed on September 5, 2012, and later amended.

1. On April 13, 2012, the Business Administrator, GS-12, who was Complainant's first line supervisor ("S1" male, age 49) and the Director of the Training Center, GS-15 who was her third line supervisor ("S3") (male, age 49) told her that it would be ill advised to challenge an adverse decision on her request to be promoted. Specifically, they refused to contest the decision that denied her request to be promoted to Financial Program Specialist, GS-501-09 because of an accretion of duties.
2. On October 11, 2012, she was informed that her schedule change request was denied. Specifically, her request for a 4/10 schedule with Mondays off was denied by the Deputy Director of the Training Center, GS-14, who was her second line supervisor ("S2") (male age 50) and S3.

Complaint 2 (BOP-2013-0366)

Filed on February 28, 2013.

3. On December 13, 2012, she learned her van fleet operations duties (which we refer to as "fleet manager") were reassigned to the Inventory Management Specialist, GS-9, a coworker in Financial Management ("CW1") (female, age 58).

³ During the hearing process, Complainant withdrew disability as a basis of alleged discrimination. Complainant had also alleged unlawful retaliation for prior EEO activity on Complaint 1 (issue 2), Complaint 2, and Complaint 3. The AJ declined to hear the retaliation portion of claims, determining they were subsumed in a pending class action. The Agency disputes this, arguing this is true only for Complaint 3. It asks that the reprisal portion of the other claims be remanded to the AJ for a hearing. However, in opposition to the appeal, Complainant argues that the AJ's decision should be left intact, in essence withdrawing her retaliation claims from adjudication in this particular proceeding. For this reason, we need not address the Agency's argument for remanding the reprisal basis on issues 2 – 5 to the AJ for a hearing. This leaves Complainant's claims of sex and age discrimination. At the beginning of the hearing, via counsel, Complainant clarified that her sex and age claims were intersectional - based on her being an older woman.

4. On January 25, 2013, S1 gave her a lower rating in her quarterly performance appraisal.
5. On February 20, 2013, she received a revised position description.

Complaint 3 (BOP-2014-0430)

Filed on April 4, 2014.

6. On January 16, 2014, she learned that she was not competitively selected for the position of Procurement and Property Specialist, GS-1101-09, in Financial Management. S1 and S2 supported the selection which was made by S3. The selectee was female, age 37.

The Agency separately investigated each complaint, and Complainant requested hearings before an EEOC AJ on each of them. The complaints were later consolidated.

Following a three-day hearing, the AJ found that Complainant was discriminated against based on being an older woman (age and sex) on issues 2, 3, and 6, found no discrimination on issue 1, and did not make a determination on issues 4 and 5.

The evidence developed during the EEO investigations and the hearing showed Complainant was hired to her job of Accounting Technician, GS-7, in June 2007. In July 2007, performing a monthly proof check and completing the Form 224 Statement of Transactions was added to Complainant's duties because the Budget and Accounting Officer, GS-12, position was eliminated. In April 2008, fleet management was also added to Complainant's duties because CW1, a GS-9, had them but assumed the duties of back-up contracting officer. The parties stipulated that these additional duties given to Complainant were above the GS-7 level.

The proof checks were done for the Training Center and the "STA", a separate entity for accounting purposes. They are a financial reconciliation process that accounts for spending and disbursements. The proof check must match the Form 224. The proof check is reported to the Central Office, and the Form 224 to the Treasury once a month at different intervals.

The Training Center had a fleet of 45 to 50 vehicles so students could drive back and forth between their lodging and the Training Center. As fleet manager, Complainant assigned vehicles and was responsible for them being delivered to students, assisted in purchasing repair parts and supplies for vehicle maintenance, scheduled them for maintenance, kept maintenance records, and issued fuel cards and reconciled them monthly. Inmates in the nearby Federal Correctional Institution Englewood, Colorado ("Englewood") delivered the vehicles, cleaned, and fueled them. Part of the fleet manager duty was overseeing these inmates.

As a result of these additional duties, S1 prepared a request for Complainant's grade to be upgraded, which S3 approved and sent to human resources. The parties stipulated that the request lacked specificity on the complexity of Complainant's accretion of duties, and human resources rejected the upgrade because the described duties were insufficiently complex.

S3 followed up and contacted human resources in hopes of getting Complainant's position upgraded without success.

On issue 1, the AJ found that S1's less than careful attention to the specificity in the upgrade request and less than an enthusiastic effort may have been due to poor management, but the evidence did not support a finding that his carelessness was based on age or sex discrimination.

Complainant's work schedule was 5/4/9, with every other Monday off. With this schedule, in a two-week period Complainant worked nine hours daily for eight days, eight hours for one day, and has one scheduled day off every other week. With a 4/10 schedule the worker works ten hours daily, with one scheduled day off. Regarding issue 2, Complainant approached S1 about working a 4/10 schedule with Monday off, and he said this was fine with him. The request, however, had to be approved by S3. Complainant in writing then requested the schedule change, adding she was willing to exchange her Monday off for another day when necessary to accomplish the mission of the Training Center. In an October 10, 2012 letter, S3 denied Complainant's request for a 4/10 schedule because the majority of her fleet management work was performed on Monday and Friday. S3 added he would consider approving a 4/10 with an off-day of Tuesday, Wednesday, or Thursday.

S3 later stated in his EEO investigatory statement that all four bargaining unit employees in Financial Management, including Complainant, were on a 5/4/9 schedule, with two having every Monday off and two every Friday off, and they were scheduled so there would not be two people off on any one day. S3 stated this made him reluctant to approve Complainant having every Monday off. S3 also stated a big chunk of Complainant's duties were delivering and picking up vehicles and they are delivered on Friday so students arriving over the weekend can get back and forth to their hotels, so Fridays and Mondays were the busiest days, especially Fridays.

Complainant stated that after S3's denial she told S2 she was willing to change her off day when necessary, or in the alternative take Monday off one week, and Wednesday the next if she got a 4/10, but S2 said things do not work that way. On November 19, 2012, Complainant's 4/10 request with Monday off was granted after the union got involved.

The AJ found that because CW1 had Friday off and had the fleet manager duties before, she could cover Complainant on Monday. She found that because the Agency did not treat "all three" employees equally, it allowed for an inference of discrimination.

Regarding issue 3, the decision to remove Complainant's fleet manager duties was made by S2, with S3's concurrence. The parties stipulated that S1, S2, and S3 contended this occurred because of undocumented verbal inmate complaints reported by the Warden of Englewood. They stipulated the undocumented inmate complaints were that Complainant talked down to them. However, this had never been noted as a concern in the many years she performed fleet manager duties.

The AJ found that S2 testified that Englewood told them Complainant was “bossing” the inmates. S3 testified the Warden told S3 that Complainant was short-tempered and talked down to inmates. However, S3 did not speak with the inmates himself. S3 testified that the Warden reported inmates filed official complaints, called “copouts,” with Englewood about how Complainant treated them, and S3 testified he considered inmate complaints about Complainant’s treatment to be serious.⁴ However, neither S3 nor his subordinates made any notations or included this allegedly serious behavior in any performance evaluation of Complainant and never reviewed the copouts themselves. The copouts were not produced for the record. None of the Training Center managers appeared to have questioned these reports, conducted any sort of inquiry, or even talked to Complainant about them.

It is undisputed that disrespectful conduct like insulting or abusive language, including towards inmates, violates the Agency’s Employee Standards of Conduct. A former coworker of Complainant (“CW2”), a Budget Analyst in Financial Management, stated his own performance evaluation was negatively affected by an inmate complaint. But in Complainant’s September 2012 evaluation, S1 wrote Complainant instructed inmates daily on tasks concerning the fleet but did not mention any problems with her interactions with them. The same is true for her evaluation ending in March 2013. Instead, she was highly rated for communication in her evaluations. S2 kept quarterly comments on his employees, and if he observed any negative behavior, he documented it. No notes regarding disrespectful treatment of inmates were in Complainant’s file.

Another coworker (“CW3”) of Complainant in the Training Center testified that he observed Complainant interact with inmates about 10 times and the interactions were professional. Inmate 1, a former inmate, also said he interacted with Complainant daily for about 10 months and testified she was direct and professional. The AJ credited CW3 and Inmate 1’s testimony. Complainant denied ever talking down to inmates and stated treated them right. The AJ found that management’s testimony that the fleet manager duties were taken away from Complainant because of impropriety towards inmates was not supported by the record.

On issue 4, the record shows that after S1 gave her a rating of Excellent on one performance element, Complainant talked to S1, and he changed it to Outstanding.

On issue 5, the record shows that the fleet manager duties were taken out of Complainant’s position description because they had been removed from her duties.

On issue 6, the parties stipulated that the documented management reason for not selecting Complainant for the Procurement and Property Specialist position (in January 2014) was that in the past, she did not have good interpersonal skills in her interactions with inmates. For this reason, S1 and S2 stated they did not recommend Complainant S3, the selecting official.

⁴ Specifically, S3 testified it was serious because the Warden threatened to pull the inmate detail from Training Center which would have a significant impact on the Training Center’s operation.

The AJ found it questionable that in making such an important decision S3 relied on second and third-hand information without his own inquiry into the allegations. The AJ observed Complainant performed procurement work in a prior job with the Department of Veterans Affairs, had a Level I warrant, negotiated and administered contracts, and managed inventories, and was a fleet manager for years. The selectee, who was a secretary, did not have like relevant experience. The AJ found Complainant was significantly more qualified than the selectee. The AJ also questioned S3's testimony that promotions in the civilian federal government are not based on doing a good job. The AJ found Complainant was an older woman, and the selectee, while female was over 25 years younger. Based on Complainant's far superior qualifications and the very questionable reason proffered for not selecting her, the AJ concluded the weight of the evidence established discrimination motivated the selection decision.

Turning to remedies, the AJ found that Complainant argued that the discrimination resulted in her retiring at age 63 rather than 66, resulting in economic damages. As such, the AJ conducted what she characterized as a "damages assessment", and found that the Agency undervalued Complainant and, because of its ongoing disrespect and its effect on her, she felt compelled to retire. Based on this, the AJ ordered the Agency to pay back pay from the date of the selectee was selected for the Procurement and Property Specialist in 2014 to the date Complainant would have retired at age 66, minus the income she received from retirement.

The AJ found Complainant felt management was communicating to her that it did not matter how well she performed her job, and said she felt empty and worthless. She credited the testimony of a friend that Complainant was anxious, depressed, began to withdraw from society, was frequently in tears, and was sullen. The AJ found that unlike before, Complainant dreaded going to work. The AJ found that in the last year before Complainant retired her health deteriorated, her blood pressure went "sky high," and she was depressed. She found Complainant went to health care professionals and got medication for both conditions. She also had migraine headaches, that subsided over time after she retired.

The AJ concluded that Complainant suffered emotional distress, resulting in physical harm, for somewhat over two years. She observed Complainant was a no-nonsense person who was quite strong but worn down over the treatment by the Agency, and awarded her \$50,000 in non-pecuniary damages.

Complainant's attorney requested requesting \$50,025 in fees and \$106.20 in costs, for a total of \$50,131.20 from the Agency. The Agency did not contest Complainant's attorney hourly rate. The AJ found that the hours expended representing Complainant set out in the fee petition were very reasonable overall, except a \$90 charge for completing Complainant's disability application since it was separate from her EEO claims. Mistakenly recounting that Complainant's attorney requested \$51,131.20 in attorney fees, the AJ awarded Complainant \$50,041.20 in attorney fees, and \$106.20 in costs.

The Agency rejected the AJ's findings of discrimination and timely appealed.

ANALYSIS AND FINDINGS

Findings of Discrimination

Per 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (REV. Aug. 5, 2015).

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to prevail, he or 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. McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, 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. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in disparate treatment discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, (inference) need not be followed in all cases. Where the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the Agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't. of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't. of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't. of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Issue 2

The Agency found that the AJ's finding that Complainant initially was not approved for a 4/10 schedule with Mondays off was based on the AJ's determination that her coworkers were treated better her, but this was not true. We agree. When Complainant requested the 4/10 schedule, she was on the 5/4/9 schedule with every other Monday off. Complainant's three coworkers in Financial Management had like schedules – 5/4/9, one with every other Monday off, and two with every other Friday off.

Further, S3 gave a legitimate, nondiscriminatory reason for not initially approving Complainant's 5/4/9 with Mondays off - two employees in Financial Management had every other Monday off and two every other Friday off, and they were scheduled so there would not be two people off on any one day, which made him reluctant to approve Complainant having every Monday off. Complainant has not shown this reason is a pretext to cover age and sex (older woman) discrimination against her. The Agency's finding of no discrimination on issue 2 is affirmed.

Issue 3

On Complainant's fleet duties being reassigned, the Agency disagreed with the way the AJ weighed the evidence in finding inmate complaints were not the true reason for this management decision. The Agency asserted S3 stated he had no reason to doubt the Warden's report of inmate complaints that Complainant talking down to them. The Agency found that S3's decision to reassign the fleet manager duties to CW1 made business sense because the inmate crew was crucial in taking care of the large fleet.

Despite the factors cited by the Agency, following the hearing before the AJ that resulted in credibility determinations of the testimony of both management witnesses and Complainant's witnesses about her interactions with inmates, we conclude the AJ's determination that Complainant was discriminated against based on being an older woman when her fleet management duties were taken from her is supported by substantial evidence of record. No evidence was presented that a concern about her interactions with inmates had ever before been raised about Complainant in the many years she had served as fleet manager and it was not reflected in her relevant performance evaluations or any other personnel records. In fact, Complainant's supervisors gave her positive evaluations on her communication skills and other witnesses who had observed Complainant's interactions with inmates testified to her professional and positive nature. Moreover, there is no evidence whatsoever that Complainant's management conducted any type of inquiry into the allegations before removing her duties. As such, the AJ's conclusion that discrimination played a role in this decision is affirmed as supported by substantial evidence of record.

Issue 6

With regard to the decision not to select her for the Procurement and Property Specialist, GS-9, position, we also conclude the AJ's determination that Complainant was discriminated against based on being an older woman is supported by substantial evidence largely for the same reasons as in Issue 3. In addition, substantial evidence supports the AJ's determination that Complainant was the far superior candidate for the position. Complainant had performed significant procurement work in a prior job, had a Level I warrant, negotiated and administered contracts, and managed inventories, and was fleet manager for years. The selectee, who was over 25 years younger than Complainant, was a secretary who did not have relevant experience similar to Complainant. Here, the evidence supports a finding that the disparities in qualifications between Complainant and the selectee are "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the [selectee] over [her] for the job in question." Cooper v. Southern Co., 390 F.3d 695, 732 (11th Cir. 2004). Based on Complainant's far superior qualifications and the very questionable reason proffered for not selecting her, we conclude that substantial evidence supports the AJ determination that discrimination played a role in the selection decision.

Remedial Orders

Back Pay Order

Complainant argued before the AJ that the discrimination resulted in her retiring at age 63 rather than 66, resulting in economic damages. The AJ found that the Agency undervalued Complainant and, because of its ongoing disrespect and its effect on her, she resigned, making it liable for the harm from this. The AJ, however, characterized this claim not as one of constructive discharge, but rather part of the "damages assessment." Based on this, the AJ found that the Agency must pay back pay from the date of the selectee being selected in 2014 to the date Complainant would have retired at age 66, minus the income she received from retirement.

The Agency, however, asserts Complainant did allege a claim of constructive discharge in Complaint 3. Under the circumstances of this case, we agree. From the very beginning of this matter, Complainant relayed to the EEO counselor that she was left with no choice but to retire after she was not selected for promotion, and in her complaint wrote she wanted backpay up to her full social security retirement age. This was sufficient to raise a clear claim of constructive discharge.

The central question in a constructive discharge case is whether the employer, through its unlawful discriminatory behavior, made the employee's working conditions so difficult that any reasonable person in the employee's position would feel compelled to resign. Kathy D. v. U.S. Postal Serv., EEOC Appeal No. 2020004451 (May 17, 2022).

The Commission has established three elements which a complainant must prove to substantiate a claim of constructive discharge: (1) a reasonable person in the complainant's position would have found the working conditions intolerable; (2) conduct that constituted discrimination against the complainant created the intolerable working conditions; and (3) the complainant's involuntary resignation resulted from the intolerable working conditions. Id. (means same as previous cite)

Here, we have concluded the evidence established two acts of discrimination – that Complainant's fleet manager duties were taken away from her in December 2012, and she was not competitively promoted in January 2014. Complainant has asserted that the Agency's treatment of her triggered her resignation. But the constructive discharge analysis does not end there. To establish a discriminatory constructive discharge, Complainant must also prove that a reasonable person in her position would have found the working conditions so intolerable that they had to resign. Mooney v. United States Postal Service, EEOC Appeal No. 0120060818 (Dec. 5, 2007). After careful consideration of all the evidence of record, we conclude that Complainant has not made this showing.⁵

Because Complainant has not established she was constructively discharged, and constructive discharge is a distinct claim separate from the prior discriminatory acts, we find that Complainant is only entitled to backpay from the effective date she would have gotten the promotion to the Procurement and Property Specialist position if she had been selected to the effective date she separated from the Agency.

Non-Pecuniary Compensatory Damages⁶

To establish a claim for compensatory damages, a complainant must provide proof of actual harm or injury and proof that the unlawful conduct caused the harm or injury. Farrington v. Dep't of Homeland Sec., EEOC App. No. 0720090011 (Jan. 19, 2011) (citing Rivera v. Dep't of the Navy, EEOC App. No. 01934157 (July 22, 1994)); Alexander v. Dep't of the Army, EEOC App. No. 0720060050 (Apr. 15, 2010). See also, EEOC's *Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991*, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

⁵ Even if we considered the backpay award as an award of pecuniary compensatory damages, we do not find sufficient evidence to link the loss of the fleet duties and her non-selection to Complainant's voluntary retirement.

⁶ Non-pecuniary compensatory damages are not available for age cases. See, e.g., Complainant v. Dep't of the Army, 0120132183 (May 8, 2014); Bakken v. Dep't of Transportation, 0120093529 (August 8, 2011), recons. den., 0520110713 (November 29, 2012). Therefore, like the AJ, we are reviewing the compensatory damages award only for the Title VII claims, but note they are inextricably intertwined with the age claims.

Non-pecuniary losses are losses that are not subject to precise quantification and may include things such as emotional pain, loss of enjoyment of life, loss of health, marital strain, and anxiety. Zoila P. v. Dep't of Justice, EEOC App. No. 0720130036 (Nov. 24, 2015). Although damage awards for emotional harm can greatly vary, and there are no definitive rules governing amounts to be awarded, compensatory damage awards must be limited to the amounts necessary to compensate the complainant for actual harm, even if that harm is intangible. It should take into account the severity of the harm and the length of the time the injured party has suffered from the harm. See Carpenter v. Dep't of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995).

Based on the evidence presented, the AJ awarded Complainant \$50,000 in non-pecuniary compensatory damages. We conclude the AJ's award is supported by substantial evidence and is consistent with other similar awards. See Nia G. v. Dep't of Justice, EEOC Appeal No. 0120123467 (Apr. 3, 2015) (\$50,000 in non-pecuniary damages for discrimination where the complainant testified that she suffered stress, shock and humiliation, which manifested itself in absences from work, headaches, rashes, weight fluctuations, depression, anxiety, insomnia, and nightmares); Danita P. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120172149 (July 18, 2018) (an award of \$50,000 in compensatory damages was appropriate where the complainant suffered anxiety, sleeplessness, disengagement from family and high blood pressure); Harvey D. v. Dep't of State, EEOC Appeal No. 0120171079 (Aug. 23, 2018) (\$50,000 in compensatory damages appropriate where the complainant became withdrawn and relationship with husband suffered).

We note the Agency argued that in calculating damages, the AJ applied an unsupported enhancement for the constructive discharge claim. However, a close reading of the AJ's decision does not show this. In the part of the AJ's decision where she actually calculated compensatory damages, there is no discussion of Complainant being constructively discharged, or "enhanced damages." AJ's decision at 14 – 15. Moreover, we have already addressed the Agency's concerns by reaching the conclusion that no constructive discharge was established and amending the AJ's back pay award.

Attorney Fees and Costs⁷

Title VII authorizes an award of reasonable attorney's fees. 29 C.F.R. § 1614.501(e). To establish entitlement to attorney's fees, complainant must first show that he or she is a prevailing party. Buckhannon Bd. and Care Home Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598 (2001). A prevailing party for this purpose is one who succeeds on any significant issue and achieves some of the benefit sought in bringing the action. Davis v. Dep't of Transportation, EEOC Request No. 05970101 (February 4, 1999) (citing Hensley v. Eckerhart, 461 U.S. 427, 433 (1983)).

⁷ Again, we are awarding attorney's fees for Complainant's successful Title VII claims.

Complainant's attorney filed a fee request with the AJ for \$50,025 in fees and \$106.20 in costs, for a total of \$50,131.20. The Agency did not contest Complainant's attorney hourly rate. The AJ concluded that the hours expended representing Complainant, as well as the identified costs, set out in the fee petition were very reasonable overall, except a \$90 charge for completing Complainant's disability application since it was separate from her EEO claims.

No fees are awarded on unsuccessful claims that are "truly fractionable." Nat'l Ass'n of Concerned Veterans v. Defense, 675 F.2d 1319, at n. 13 (D.C. Cir. 1982). Claims are fractionable if they are based on different facts and legal theories. Hensley v. Eckerhart, 461 U.S. 424, 434 – 435 (1983). Where a lawsuit consists of related claims, but the plaintiff has achieved only partial or limited success as opposed to excellent results or substantial relief, the fees awarded should be in relation to the results obtained. The reduction should not be based on the percentage of claims won and lost. Hensley, at 435 – 436, 440, & n. 11.

Here, Complainant prevailed on two of her six claims, but we find all six claims were very interrelated and not truly fractionable. Therefore, it is the AJ was correct in concluding she could not parse out what time was spent on which claims. We find that, under these circumstances, the AJ was correct in calculating attorney fees and costs, particularly because Complainant obtained substantial relief – \$50,000 in non-pecuniary damages and a backpay award.

CONCLUSION

The Agency's final order is AFFIRMED in part and REVERSED in part.

ORDER

The Agency is ordered to take the following remedial actions:

1. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant, per 29 C.F.R. § 1614.501, no later than 60 days after the date this decision, and pay her the undisputed amount within 60 days of the date of its this determination. The back pay period is the effective date Complainant would have been promoted to the position of Procurement and Property Specialist, GS-1101-09, had she been selected up to the date she voluntarily separated from the Agency. Complainant shall cooperate with the Agency's efforts to compute the amount of back pay and benefits due, including providing statements, documents, input and other evidence, and responding to Agency requests for such information and completing Agency forms within 30 days of when the Agency makes a request. If there is a dispute on the exact amount of back pay and/or benefits, Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with our Compliance Officer, via the EEOC Public Portal at <https://publicportal.eeoc.gov/Portal/Login.aspx>, by facsimile to 202-663-7022, by regular mail to the Director, Office of Federal Operations, Equal Employment

Opportunity Commission, P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507.

2. The Agency shall pay Complainant \$50,000 in nonpecuniary damages within 60 days of the date of this decision.
3. The Agency shall pay \$49,935⁸ in attorney fees, and \$106.20 in costs for a total of \$50,041.20 within 60 days of the date of this decision.
4. Within 90 days of the date of this decision, the Agency's EEO shall give training to S1, S2, and S3, if they are still employed by the Agency, on how to identify and avoid disparate treatment prohibited by Title VII and the ADEA. The Agency may contact our Training and Outreach Division for Assistance in obtaining the necessary training via <https://www.eeoc.gov/federal-sector/federal-training-outreach>.
5. If the Agency still employs S1, S2, and S3, within 60 days from the date of this decision it shall consider disciplining them. Training is not discipline. If the Agency disciplines them, it shall identify the discipline. The Agency shall report its reason for disciplining or not disciplining them within 120 days of the date of this decision.

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). 29 C.F.R. § 1614.403(g). 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 Financial Management Department within the Management and Specialty Training Center in Aurora, Colorado, 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).

⁸ This number corrects a small mathematical error made by the AJ discussed above.

ATTORNEY'S FEES (H1019)⁹

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.

⁹ This applies to fees and costs incurred after Complainant's attorney completed her fee petition on August 16, 2019, requesting \$50,025 in fees and \$106.20 in costs.

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).

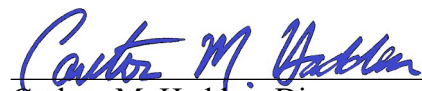
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

October 4, 2022

Date