



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

[REDACTED]
Melissia M.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Request No. 2021005014

Appeal No. 2020001984

Hearing No. 480-2019-00510X

Agency No. HS-TSA-01892-2018

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2020001984 (August 5, 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).

BACKGROUND

During the relevant time, Complainant worked as a Supervisory Transportation Security Inspector (STSI), J Band, in the Agency's Compliance Department at McCarran International Airport in Las Vegas, Nevada. On August 27, 2018, Complainant filed an EEO complaint, which she subsequently amended, alleging that the Agency subjected her to discrimination based on

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.

national origin (Hispanic, Mexican), sex (female), age, and reprisal for prior protected EEO activity when:

1. On April 25, 2018, the Assistant Federal Security Director for Inspections, Complainant's first-level supervisor (S1), did not give her a 16-hour time-off award, despite issuing time-off awards to other employees;
2. On April 27, 2018, she was issued an unfair performance rating;
3. On April 30, 2018, S1 yelled, "In my office now" to her;
4. On May 8, 2018, management failed to provide her with a copy of her performance rating;
5. On October 29, 2018, she was issued a Notice of Proposed Demotion (NOPD); and
6. On October 29, 2018, she was issued an unfair performance rating.

After the investigation, Complainant timely requested a hearing before an Equal Employment Opportunity Commission Administrative Judge but subsequently withdrew her request. The Agency issued a final decision finding that Complainant failed to establish that she was subjected to discrimination as alleged.

In a decision issued August 5, 2021, the Commission reversed in part the Agency's decision on claims (3), (5), and (6) and affirmed the Agency's findings of no discrimination for the remaining claims. Regarding claim (5), we noted that, although Complainant's proposed demotion was not effectuated until February 4, 2019, after she filed her EEO complaint, the proposed action merged with the effectuated action based on Siegel v. Department of Veterans Affairs, EEOC Request No. 05960568 (October 9, 1997). The appellate decision also found that the mixed-case demotion claim was so firmly enmeshed in the EEO process that it would better serve the interests of administrative economy to address the demotion on appeal than to remand it to the Merit Systems Protection Board (MSPB).

The Commission found that Complainant established a prima facie case of discrimination based on sex and national origin when she was demoted and issued an unsatisfactory performance appraisal. Regarding the Agency's legitimate, nondiscriminatory reasons for its actions, the appellate decision noted that S1 stated that the members of Complainant's team, the Surface Team, did not appear to take her seriously and were reluctant to implement her ideas and noted that three team members complained about an exercise during which Complainant asked team members to express their feelings about each other. S1 added that Complainant allowed a Lead TSI to control meetings and to control team operations, which minimized her leadership presence and led to mistakes. S1 also explained that, during FY2018, Complainant's team performed six times more Risk Mitigation Activity for Surface Transportation (RMAST) activities than required and that the vast majority of the RMAST activities were ineffective and/or included minimal stakeholder involvement. S1 also cited the Surface Team's failure to complete any Security Enhancement Through Assessments (SETA) and Exercise Information System (EXIS) activities during the appraisal period.

We found that Complainant established pretext because the Agency's nondiscriminatory reasons were unworthy of belief. The investigative record included affidavits from two of the seven TSIs supervised by Complainant. One of the TSIs (TSI-1) stated that, although Complainant did not adequately supervise one of her subordinates, S1 improperly evaluated Complainant. TSI-1 averred that, while the Surface Team was supposed to conduct a minimum of 25 RMAST inspections annually, the number of RMAST inspections was not excessive, as they conducted RMASTs connected to the local transit Agency on bus routes in areas like the Las Vegas strip with terrorism concerns in consultation with surface inspectors. TSI-1 added that SETA activities were not on the FY2018 work plan, which was created by Agency Headquarters, and that EXIS activities could only be conducted in conjunction with Agency Headquarters. Another TSI (TSI-2) stated that she believed that S1 subjected Complainant to discrimination based on national origin and sex, noting that S1 had a more cordial relationship with male supervisors. TSI-2, who is Hispanic and Mexican, stated that S1 treated Mexican women like herself and Complainant poorly. A TSI who was not supervised by Complainant (TSI-3) stated that S1 showed favoritism towards non-Hispanic employees and that Complainant may have been subjected to discrimination. Although TSI-1 corroborated S1's assertion that Complainant was not adequately supervising one of her subordinates, we noted that TSI-1 also stated that S1 improperly determined that Complainant's team conducted excessive RMAST inspections and improperly held her responsible for completing no SETA or EXIS activities, when Headquarters, not Complainant, was responsible for whether the Surface Team conducted SETA or EXIS activities. Combined with TSI-2's affidavit and other information in the record, we found that it was more likely than not that S1 was motivated by discriminatory animus based on Complainant's sex and national origin when he issued the Notice of Proposed Demotion, later effectuated on February 4, 2019, and the unacceptable performance rating for FY2018.

Considering Complainant's harassment claim, we found that Complainant established the first three prongs of a hostile work environment based on sex and national origin. We further found that S1's actions were sufficiently severe and pervasive to alter the terms of Complainant's employment and that a reasonable person would find that the cumulative effect of S1's actions created a hostile work environment claim. We determined that the Agency was liable for the harassment because S1 was Complainant's supervisor and the harassment resulted in tangible employment actions, the poor annual performance rating and the demotion. Accordingly, we reversed the Agency's final decision finding no discrimination with regard to claims (3), (5), and (6).

Pursuant to the finding of discrimination, we ordered the Agency to conduct a supplemental investigation and determine the appropriate amount of compensatory damages due Complainant, to offer Complainant reinstatement to her former Supervisory Transportation Security Inspector position, to determine the appropriate amount of back pay, with interest, due Complainant and pay her that amount, to compensate Complainant for the adverse tax consequences of receiving back pay as a lump sum, to expunge its records of all references to the FY2018 Unsatisfactory performance appraisal and replace it with a Satisfactory performance appraisal, and to provide training to and consider discipline against S1.

The instant request for reconsideration followed.

CONTENTIONS ON REQUEST FOR RECONSIDERATION

On request for reconsideration, the Agency contends that, if Complainant wanted to challenge her demotion, she should have amended her EEO complaint or filed an MSPB appeal, as the MSPB was the proper venue for the demotion. The Agency argues that the determination that the demotion was firmly enmeshed in the EEO process was a clearly erroneous interpretation of law. The Agency maintains that Siegel did not support the determination that the proposed demotion merged with the effectuated demotion because Siegel involved the procedural dismissal of a proposed adverse action for failure to state a claim. According to the Agency, because Complainant's EEO complaint was not dismissed on procedural grounds, Complainant could have amended her EEO complaint to address the demotion action, but did not do so. The Agency asserts that, as a result, it was denied the opportunity to present affidavits and other evidence regarding the demotion action.

According to the Agency, the appellate decision also contained "significant" factual errors related to the finding of discriminatory animus. The Agency maintains that Complainant was demoted because management expected her to innovate when deciding on new activities for the Surface Team to perform, including by increasing the performance of existing work plan activities to forestall the loss of staffing for FY2019, and because she failed to effectively manage her subordinates. According to the Agency, the Commission erred in crediting the testimony of three subordinate employees about their understanding of Complainant's duties and responsibilities over the two higher-level managers who were actually responsible for ensuring Complainant performed her supervisory duties at an acceptable level. Although the Agency contends that TSI-1, TSI-2, and TSI-3 were not competent witnesses, the Agency notes that TSI-1 testified that management's actions were not based on discriminatory animus and that TSI-3 stated that she did not witness any discriminatory conduct firsthand. The Agency also asserts that the Commission committed factual and legal errors in its analysis of Complainant's hostile work environment claim because there is no evidence that she was subjected to abusive language based on her protected classes and because the only evidence to support a finding that any actions were based on her protected classes other than Complainant's testimony was TSI-2's testimony. The Agency notes that TSI-2 brought her own EEO complaint against S1 alleging discrimination on the same bases as Complainant.

In response to the Agency's request for reconsideration, Complainant contends that the Agency has not established that the appellate decision was based on clearly erroneous interpretation of material fact and/or law. According to Complainant, although she raised and extensively discussed the demotion action in her appellate brief, the Agency did not address the demotion action or raise its jurisdictional argument in its brief opposing her appeal.

ANALYSIS AND FINDINGS

On request for reconsideration, the Agency argues that the determination that the demotion was firmly enmeshed in the EEO process was clearly erroneous interpretation. The principle set forth in Siegel is that, when an EEO complaint is filed on a proposed action and the agency subsequently proceeds with the action, the action is considered to have merged with the proposal. Although the Agency correctly notes that the underlying EEO complaint in Siegel was dismissed on procedural grounds, the application of the principle is not limited to cases involving a procedural dismissal. See, e.g., Cathy V. v. Dep't of Homeland Sec., EEOC Appeal No. 2021001646 (Aug. 31, 2022) (applying disparate treatment analysis agency's decision to suspend complainant, who raised notice of proposed suspension in EEO complaint, because the proposed suspension merged with the decision to suspend based on Siegel); Leona L v. Dep't of Homeland Sec., EEOC Appeal No. 0120152781 (Mar. 5, 2018) (analyzing whether issuance of five-day suspension was discriminatory, rather than proposed 30-day suspension, even where agency's FAD did not specifically address five-day suspension); Clifton v. U.S. Postal Serv., EEOC Appeal No. 0120101121 (Dec. 16, 2010) (applying disparate treatment analysis to agency's notice of removal because the proposed removal merged with the decision to remove). Accordingly, the proposed demotion has merged with the demotion action. It is well-settled that the Commission may properly assume initial jurisdiction over a mixed-case matter when it becomes so firmly enmeshed in the EEO process that it would unduly delay justice and create unnecessary procedural complications to remand it to the MSPB. See Willia M. v. Dep't of Vet. Aff., EEOC Appeal No. 0120171396 (Nov. 7, 2018); see also Williams v. Dep't of Justice, EEOC Appeal No. 07A40006 (Apr. 23, 2004); Richardson v. Dep't of Vet. Aff., EEOC Appeal Nos. 01982915, 01984977 (Nov. 5, 2001). The Agency has not shown that the determination that the demotion action was firmly enmeshed in the EEO process was clearly erroneous.

Regarding the Agency's contention that the appellate decision erroneously concluded that the Agency's legitimate, nondiscriminatory reasons for its actions were pretextual, we find that the Agency has not established that the appellate decision involved a clearly erroneous interpretation of material fact. We emphasize that a request for reconsideration is not a second appeal to the Commission. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 9, § VII.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. The Agency 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. 2020001984 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

Unless otherwise specified, the Agency is ordered to take the following remedial actions within 120 calendar days of the date this decision is issued:

1. The Agency shall determine the amount of compensatory damages to which Complainant is entitled and pay Complainant that amount:
 - a. Within 60 calendar days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages.
 - i. The Agency shall allow Complainant to present evidence in support of her compensatory damages claim. See Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993).
 - ii. Complainant shall cooperate with the Agency in this regard, including by responding to Agency requests for information and by completing any Agency forms. Complainant shall reply to any Agency requests for information within 30 calendar days.
 - b. Within 30 calendar days of the completion of the supplemental investigation, the Agency shall issue a final decision, with appeal rights to the Commission, addressing the issues of compensatory damages.
 - c. Within 60 calendar days of determining the amount of compensatory damages due Complainant, the Agency shall issue a check to Complainant for the undisputed amount. Complainant may petition for enforcement or clarification of the amount in dispute.
2. Within 30 calendar days of the date this decision is issued, the Agency shall offer Complainant reinstatement into her former Supervisory Transportation Security Inspector position, J Band, retroactive to the effective date of Complainant's demotion, with all the rights, benefits, and privileges of that position. The Agency shall afford Complainant 15 calendar days to determine whether to accept reinstatement. Should Complainant reject the offer of reinstatement, Complainant's entitlement to back pay shall terminate as of the date of rejection.
3. Within 60 calendar days of the date this decision is issued, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant, pursuant to 29 C.F.R. § 1614.501, beginning from the effective date of her demotion and continuing until the date she is reinstated to a Supervisory Transportation Security Inspector position or declines an offer of one. The back pay award shall reflect all career ladder promotions to which an employee in Complainant's Supervisory Transportation Security Inspector position, J Band, who performed in a fully successful manner was entitled. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency within 30 calendar days. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within 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.

4. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
5. Within 30 calendar days of the date this decision is issued, the Agency shall expunge its records of any and all references to the FY2018 Unsatisfactory Performance Appraisal issued to Complainant on October 29, 2018 and remove any related Agency records of actions that this decision has found to be discriminatory. The Unsatisfactory Performance Appraisal shall be replaced by a Satisfactory Appraisal.
6. Within 90 calendar days of the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive training EEO training to the management official identified as the Assistant Federal Security Director (S1), with an emphasis on Title VII and harassment and discrimination. If this management official has left the Agency's employ, the Agency shall furnish documentation of his departure date. The Agency may contact the Commission's Training and Outreach Division via email at FederalTrainingandOutreach@eeoc.gov for assistance in obtaining the necessary training. The Commission does not consider training to constitute disciplinary action.
7. The Agency shall consider taking disciplinary action against the responsible management official identified as the Assistant Federal Security Director (S1). 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 the Assistant Federal Security Director (S1) has left the Agency's employ, the Agency shall furnish documentation of his departure date.
8. Within 30 calendar days of the date this decision is issued, the Agency shall post a notice in accordance with the statement entitled "Posting Notice."

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). 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 Compliance Department at McCarran International Airport, Las Vegas, Nevada 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.

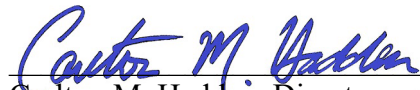
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)

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

October 4, 2022

Date