



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

[REDACTED]
Britany N.,¹
Complainant,

v.

Kelu Chao,
Acting Chief Executive Officer,
United States Agency for Global Media,
Agency.

Appeal No. 2022003074

Hearing No. 570-2019-01089X

Agency No. OCR-18-10

DECISION

On April 20, 2022, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's March 21, 2022, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission REVERSES the Agency's final order.

BACKGROUND

During the relevant time, Complainant worked as a Contractor Senior Graphic Designer III at the Agency's Voice of America South Central Asia Division in Washington, D.C.

On March 8, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the basis of sex (female) when, on January 15, 2018, Complainant was notified that she was not selected for the Graphic Artist position with the News Center, GS-1001-13, advertised under Vacancy Announcement DE-10041678-17-AJ.

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.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing on December 9, 2020. On June 14, 2021, the AJ issued an interim decision, finding that Complainant had proven that the Agency discriminated against her with regard to the hiring decision, but that she had not proven that she had been subject to harassment. The interim decision specifically stated that the issuance of the interim decision did not trigger the time for filing an appeal or for the Agency's issuance of a final action for purposes of appeal rights.

Nonetheless, on June 30, 2021, the Agency issued a final action rejecting the AJ's finding. Complainant filed an appeal with the Commission. On August 17, 2022, the Commission administratively closed the appeal, as the Agency's issuance of the final decision, and the subsequent appeal of that decision, were premature due to the AJ's decision being an interim decision, and therefore the decision was not final. 29 C.F.R. § 1614.110(a).

The AJ issued a decision, including notice of appeal rights, on February 28, 2022, consistent with the findings of the preliminary decision as well as addressing damages and attorney fees. The Agency subsequently issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected her to discrimination as alleged, but the Agency did not file an appeal or a brief with the Commission.

Complainant's instant appeal followed requesting that we order the Agency to implement the AJ's decision.

ANALYSIS AND FINDINGS

Standard of Review

Pursuant to 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. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951) (citation omitted). A 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 Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, Chap. 9, at § VI.B. (Aug. 5, 2015).

Agency Failure to Appeal

In this case, the Agency asserted their intent to appeal the AJ's decision to the Commission, but they did not actually do so. Moreover, even after Complainant filed her appeal, the Agency did not respond.

An Agency may not simply decide that they do not wish to comply with an AJ's findings. Rather, regulations specify that, within 40 days of an AJ's final order an agency **shall** issue a final decision and, if the final order does not fully implement the AJ's decision, the agency **shall** simultaneously file an appeal in accordance with § 1614.403 and append a copy of the appeal to the final order. A copy of EEOC Form 573 shall be attached to the final order. 29 C.F.R. § 1614.110(a).

In the instant case, the Agency did not comply with regulations in their failure to implement the AJ's decision. The Agency did not appeal the AJ's decision; the Agency did not even respond to Complainant's appeal by filing a brief on their behalf. As the Agency did not appeal the AJ's decision simultaneous with its issuance of the final decision, the Agency did not issue a final decision consistent with 29 C.F.R. § 1614.110(a) within 40 days of the AJ's decision. Therefore, the AJ's decision became the Agency's final decision. See 29 C.F.R. § 1614.109(i)

To ensure compliance with the AJ's orders, they are restated below.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's decision to not implement the AJ's decision and REMAND for compliance with the orders below.

ORDER (D0617)

To the extent that the Agency has not already done so, the Agency is ordered to take the following remedial actions:

1. Within sixty (60) calendar days of the date that this decision is issued, The Agency shall offer, in writing, to Complainant the position of Graphic Artist, GS-1001-13, or a substantially equivalent position, retroactive to January 15, 2018, the date Complainant was notified of her non-selection.
2. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision was issued. The 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. 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 sixty (60) calendar days of the date the Agency determines the amount it believes to be due. 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. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

3. Within sixty (60) calendar days of the date that this decision is issued, the Agency shall pay to Complainant non-pecuniary compensatory damages in the amount of \$7,500.
4. Within ninety (90) calendar days of the date that this decision is issued, the Agency shall require the responsible management officials, identified in the AJ's decision, to each take at least eight (8) hours of in-person, interactive EEO training in the provisions of Title VII of the Civil Rights Act of 1964, as amended, specifically on non-discrimination and the prohibition against retaliation for engaging in protected EEO activity. The Agency may contact the Commission's Training and Outreach Division for assistance in obtaining the necessary training.
5. Within one-hundred and twenty (120) days of the date that this decision is issued, the Agency shall consider disciplining the relevant management officials identified in the AJ's decision. At the time that the determination is made, the Agency shall report to the Commission whether it proposed discipline and the reason for discipline, or declining to discipline, each relevant management official.
6. Within sixty (60) calendar days of the date that this decision is issued, the Agency shall pay Complainant \$41,343.00 in attorney's fees and \$1,646.60 in costs.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation 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 Agency News Center 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 thirty (30) calendar days of the date this decision was issued, and shall remain posted for sixty (60) consecutive days, in

conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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.

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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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. **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

September 6, 2022

Date