



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

[REDACTED]
Antwan N.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 2022001315

Agency No. HSCBP023882019

DECISION

Complainant appealed to the Equal Employment Opportunity Commission (“EEOC” or “Commission”), pursuant to 29 C.F.R. § 1614.403, from a December 23, 2021 Final Agency Decision (“FAD”) concerning an equal employment opportunity (“EEO”) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (“Rehabilitation Act”), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for employment with the U.S. Customs and Border Protection (“CBP” or “Agency”) at the Miami International Airport in Miami, Florida.

On October 17, 2019, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the basis of disability (hearing and speech impairment) when:

On September 12, 2019, CBP denied his medical waiver request and subsequently rescinded his tentative offer of employment for the position of CBP Agriculture Specialist (“CBPAS”), GS-0401-05/09, advertised under Job Opportunity Announcement Number AGS 18-1.

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.

The Agency accepted the complaint and conducted an investigation which resulted in the following evidence. Complainant was diagnosed as profoundly deaf when he was six months old. His primary language is American Sign Language (“ASL”), and he communicates with hearing people by using assistive technology, writing notes, and gesturing.

In or around January 2018, the Agency posted a nationwide job announcement for CBPAS positions grades 5-9. The announcement specified that all applicants must meet minimum medical standards in order to qualify and may undergo medical screening and provided a link to the information with specific metrics for hearing and communication. The primary responsibilities were as follows:

1. Serve as a consultant in the areas of inspection, analysis, intelligence gathering, examination, and law enforcement activities regarding the importation of agricultural/commercial commodities and conveyances at ports of entry.
2. Apply laws and regulations when determining the admissibility of agriculture commodities while preventing the introduction of harmful pests, diseases, and potential agro-terrorism into the United States.
3. Participate in special enforcement, targeting or analysis teams charged with collecting and analyzing information and identifying high-risk targets.
4. Plan and conduct remedial actions such as treating, disinfecting, and decontaminating prohibited commodities, conveyances, contaminants or agricultural materials.

Complainant applied in February 2018, listing multiple locations where he was willing to work. On March 15, 2018, the CPB Hiring Center notified Complainant that he had been tentatively selected for a GS-5 CBPAS position at the Miami International Airport. The notice specified that Complainant would only receive a formal offer if he could meet the pre-employment screening, including medical requirements. When they followed up in April 2018, Complainant informed them that he was deaf and would require reasonable accommodations. At the Agency’s request, Complainant supplied medical documentation of his disability. The Agency provided Complainant with an ASL interpreter for the interview and pre-employment medical exams, which occurred in June and July 2018. For the medical exam, the Agency's Medical Officer and a consulting audiologist determined that Complainant had profound hearing loss “with some sound perception in the left ear.” However, even with a left ear hearing aid, Complainant was unable to demonstrate word recognition regardless of background noise. Complainant met all other pre-employment requirements except for the polygraph, which he was not permitted to take due to his disabilities.

On November 1, 2018, the CBP Hiring Center notified Complainant that he was medically disqualified for the position of CBPAS. Specifically, the Agency concluded that it would be “difficult for [Complainant] to hear or locate hidden pests that make noise.”

In addition, due to his speech impairment, Complainant would “have difficulties, communicating using a telephone to gather and exchange information and communicating verbally with members of the staff and public.” Therefore, “[Complainant’s] hearing loss and speech impairment...would likely affect the safe and efficient performance of the essential job tasks.” The Agency explained that a CBPAS is “expected to be able at any moment to safely and efficiently perform the full range of duties and responsibilities under unpredictable and perhaps life-threatening job conditions, while reacting and responding appropriately in time-sensitive situations that require good judgement and problem-solving ability.” Complainant was informed that he could request a waiver of the CBPAS medical requirement by submitting documentation reflecting that he could safely perform the essential functions of the position with or without a reasonable accommodation.² Complainant submitted a waiver request and, as supporting evidence, he included his resume, a Diploma from the Gallaudet University for the Degree of Bachelor of Arts Biology (December 2010), and two recommendation letters.

On April 3, 2019, Complainant was notified that his waiver request was denied. However, on July 12, 2019, the Agency granted Complainant an additional opportunity to submit a waiver request following EEO mediation. On July 29, 2019, Complainant re-submitted his waiver request and supporting evidence. He also included a lengthy letter recounting his qualifications and experience with the hiring process. The letter identified two other CBP employees who were deaf and working in the same CBPAS position he applied for.³ He also noted that he had communicated with hearing people for his entire life, describing specific examples of how he used gestures, writing, and readily available assistive technology to successfully communicate with past employers, coworkers and the public on a daily basis. He noted that he had highly developed visual perception, as a result of his disability, and that with hearing aids, he would be able to hear gunshots in an active shooter scenario.

On August 6, 2019, the Acting Chair of the Waiver Review Board (“WRB”) issued a decision denying Complainant’s second waiver request. The WRB acknowledged Complainant’s assertion that he could respond to life threatening situations while wearing his hearing aids. The WRB also acknowledged that Complainant had successfully communicated with English and non-English speakers using gestures and readily available technology, including but not limited to Cadzilla or Sorenson Buzzcards, Microsoft Translator, and Federal Video Remote Interpreting.

² Pursuant to 5 C.F.R. § 339.204, agencies may waive a medical standard if the applicant demonstrates, through comparable work experience that they can safely perform the essential duties of the position, despite not meeting the medical requirements. The decision-making body is a Waiver Review Board (“WRB”) comprised of subject matter experts.

³ Complainant provided publicly available articles demonstrating that a CBPAS K9 Handler at the Philadelphia International Airport and a CBPAS at the Savannah Port of Entry were both deaf. The Agency explained and provided personnel documentation establishing that the Philadelphia CBPAS was hired in 2006, well before the current medical standards applied to the position. The Agency did not state when the Savannah CBPAS was hired.

However, the WRB noted that Complainant “did not provide any examples to demonstrate the ability to localize sound and exchange information in emergency situations, particularly in remote environments where technology may not be available.” The WRB reasoned that because they “work in a law enforcement environment,” a CBPAS needed to be able “to hear and interpret conversation or localize a sound source... [and] to communicate and exchange information in emergency situations such localizing gun shots, and relay that information without relying on technological assistance because that technology may not be available.” Ultimately, the WRB concluded that Complainant failed to sufficiently address concerns regarding health and safety for himself, Agency employees, and the public to warrant a medical waiver. Letters dated September 3 and 9, 2019 from the CBP Hiring Center to Complainant reflect that the request was denied, and his tentative selection withdrawn again.

On October 21, 2019, the Chair of the WRB issued an additional decision denying Complainant’s waiver request. The WRB acknowledged the explanations and examples in Complainant’s personal statement establishing that he successfully communicated with hearing coworkers in work environments. However, the WRB noted:

[Complainant] does not provide any recent or relevant examples to demonstrate the ability to exchange information in a similar environment to that of a CBP Agriculture Specialist. Further, the applicant's current and past work history demonstrates that he has always had another person to assist with his communication efforts or had technology available to assist when needed.

The WRB reiterated that the CBPAS position was within a “law enforcement frontline environment,” and needed to be able to effectively convey information to the public without assistance. The WRB also explained that even though Complaint identified CBP employees with comparable conditions, “the WRB evaluates each individual on their own demonstrated ability to perform the position requirements.”

At the conclusion of its investigation, the Agency provided Complainant with a copy of the report of investigation (“ROI”) and notice of his right to request a FAD or a hearing before an EEOC Administrative Judge (“AJ”). Complainant opted for a FAD. In accordance with Complainant’s request, the Agency issued a FAD pursuant to 29 C.F.R. § 1614.110(b). The FAD concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

The instant appeal followed.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to *de novo* review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, (“EEO MD-110”) at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the *de novo*

standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

In order to establish a *prima facie* case of disability discrimination under the Rehabilitation Act, Complainant must demonstrate that: (1) he is an “individual with a disability;” (2) he is “qualified” for the position held or desired, i.e., can perform the essential functions of the position with or without an accommodation; (3) he was subjected to an adverse employment action because of his disability; and (4) the circumstances surrounding the adverse action give rise to an inference of discrimination. See Heyman v. Queens Village Comm. for Mental Health for Jamaica Cmty. Adolescent Program, 198 F.3d 68 (2nd. Cir. 1999); Swanks v. WMATA, 179 F.3d 929, 933-34 (D.C.Cir. 1999); Lawson v. CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001).

The Agency does not dispute that Complainant is an individual with a disability. Therefore, the next inquiry is whether Complainant is a “qualified individual with a disability.” 29 C.F.R. § 1630.2(m). A “qualified individual with a disability” is one who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position and who, with or without reasonable accommodation, can perform the essential functions of such position. *Id.* The Rehabilitation Act prohibits a covered entity from engaging in discrimination against a qualified individual on the basis of disability in, among other things, hiring. 42 U.S.C. §12112(a). Such discrimination includes “using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability ... unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity. *Id.* § 12112(b)(6); see also 29 C.F.R. § 130.10 (making unlawful a covered entity's use of qualification standards that screen out or tend to screen out an individual with a disability unless such standard is job related and consistent with business necessity). The regulations define “qualification standard” as “the personal and professional attributes, including the skill, experience, education, physical, medical, safety, and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.” 29 C.F.R. § 1630.2(q).

CBPAS Medical Qualifications

Under Title 5, C.F.R. Part 339, the Agency is authorized to apply medical requirements to certain positions that are “arduous, hazardous, have physical requirements, or require a certain level of health status or fitness because the nature of the position involves a high degree of responsibility toward the public or sensitive national security concerns.” All applicants for CBPAS series 401 positions up to, and including, second level supervisors are subject to the CBP “Agriculture Specialist Medical Standards” (effective March 11, 2013) and a May 23, 2017, Directive, issued by the CBP Office of Human Resource Management (“HRM”) entitled “Agriculture Specialist, 401 Series Medical Requirements Overview” (“HRM Directive”).

The CBP “Agriculture Specialist Medical Standards” include a minimum Hearing (Audiometric) standard that an applicant can, with or without hearing aids, have a hearing level in each ear that does “not exceed 40 decibels (dB) for the average of the following frequencies 500, 1000, 2000, and 3000 Hertz (Hz),” and specifies a maximum of 15dB difference in hearing level, between right and left ear. Complainant does not dispute that he cannot meet this requirement but asserts that he can perform the essential job tasks.

The CBPAS “List of Essential Job Tasks” identifies 169 tasks essential to the CBPAS position. Relevant to the matter at hand are tasks 134 through 145, regarding hearing and communication requirements of the position:

134. Interview drivers, vehicle or airline passengers, pedestrians, or vessel captains and crew members to determine their point of origin, contents of vehicle and baggage, reason for entering the United States, and their present citizenship.
135. Talk to drivers, airline employees, ship personnel, or railroad personnel to exchange information.
136. Communicate with carriers, brokers, or importers/exporters about the status of a shipment or to provide information pertaining to the import and export of agricultural cargo and material.
137. Communicate with baggage handlers, warehouse personnel, or stevedores concerning where to locate cargo and what items need to be inspected.
138. Communicate with ship captain, ship steward, or other representative of the vessel to gather information during ship inspection (e.g., where garbage stored, where food in stores originated from).
139. Listen to radio/Nextel and distinguish appropriate calls.
140. Hear an order or instruction spoken in a normal tone from a distance of 10-25 feet.
141. Hear conversation over the sounds of machinery or traffic, while interviewing individuals or receiving instructions at a land border, seaport, airport, container terminal, or rail yard.
142. Listen for traffic (e.g., forklift, truck) in immediate area when inspecting cargo at a secondary inspection area, marine terminal, dock, airfield, warehouse, or rail yard location.

143. Identify speech and voice characteristics over the phone (e.g., sex, age, accent), while recording message accurately.
144. Hear differences in sounds resulting from tapping on product containers, cans, boxes to determine if they contain objects or are full or empty.
145. Hear sounds to determine location of pests or birds.

A document in the ROI entitled “Medical Requirements Overview,” issued by CBP HRM, explains that the requirements and essential tasks were determined using a job analysis of data from 2004 through 2006, when the CBP was newly created. It also details the data analysis and approval process involving multiple offices within the Agency, input from the Union, and ultimate approval by the Department of Homeland Security and the Office of Personnel Management. Among other things, the “Overview” specifies that the CBPAS position falls within the U.S. Office of Personnel Management (“OPM”) General Natural Resources Management and Biological Sciences Series, 0401, but that the OPM Individual Occupational Requirements *does not* include any physical or medical requirements. While the Agency is authorized under Title 5, C.F.R. Part 339.203 to establish physical requirements outside OPM approval, it may only do so for “*individual positions... when such requirements are considered essential for successful job performance.*” The regulation specifies that the medical requirements are subject to the EEOC regulations. §§ 339.103, 301(b).

The WRB and the Agency’s explanations for denying Complainant’s waiver request are based on a generalized description of the CBPAS position, which varies significantly by duty station.⁴ For instance, the WRB speculates that Complainant may be in an isolated location without access to technology yet does not address the probability of such a scenario for an entry-level (GS-5) CPBAS working at the Miami International Airport. The Agency also reasons that Complainant needs to be able to pass the hearing test because he is in a “law enforcement environment.” Yet, the CBP HRM “Overview” specifies that the CBPAS position is not itself a law enforcement or weapons carrying position and lacks the other physical requirements of a law enforcement officer (e.g., 1.5-mile run, sit-ups).

Direct Threat

With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement is job related and consistent with business necessity. The regulations provide that an agency can meet this standard by showing that the requirement, as applied to the individual, satisfies the “direct threat” analysis set forth in 29 C.F.R. § 1630.2(r); 29 C.F.R. 1630 App. 1630.15(b) and (c); Nathan v. Dep’t of Justice, EEOC Appeal No. 0720070014 (July 19, 2013).

⁴ The USA Jobs posting included a promotional video emphasizing the wide variety of types of “front lines” protected by the CPB and referencing extensive use of detection technology.

A person is a “direct threat” if he or she poses a significant risk of substantial harm to the health or safety of him or herself or others which cannot be eliminated or reduced to an acceptable level by reasonable accommodation. 29 C.F.R. § 1630.2(r). The “direct threat” evaluation must be based on an individualized assessment of the individual's present ability to perform the essential functions of the job. *Id.* If no such accommodation exists, the agency may refuse to hire an applicant. *Id.*

Complainant asserts he has adapted so that despite his hearing and speech impairments, he can safely perform the duties of a GS-5 CBPAS. The Agency finds that he cannot because of the fact that he failed a hearing examination and did not provide sufficient non-medical evidence to qualify for a waiver. In order to exclude an individual on the basis of future possible injury, the Agency must show there is a significant risk, i.e., a high probability of substantial harm; a speculative or remote risk is insufficient. The Agency must show more than that an individual with a disability seeking employment stands some slightly increased risk of harm. The burden of showing a significant risk is on the Agency. Selix v. U.S. Postal Serv., EEOC Appeal No. 01970153 (Mar. 16, 2000).

In determining whether an individual would pose a direct threat, the factors to be considered include: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm. Alonzo N. v. Dep’t of Homeland Sec., EEOC Appeal No. 0120180739 (Jun. 21, 2019) other citations omitted. A determination of significant risk cannot be based merely on an employer's subjective evaluation, or, except in cases of a most apparent nature, merely on medical reports. Rather, the agency must gather information and base its decision on substantial information regarding the individual's work and medical history. Harrison v. Dep’t of Justice, EEOC Appeal No. 01A03948 (July 30, 2003); Nathan v. Dep’t of Justice, EEOC Appeal No. 0720070014 (July 19, 2013) (finding that as part of its individualized assessment, the agency should examine adaptive behaviors and prior work experience). While we acknowledge that the WRB considered Complainant’s prior work experience and adaptive behaviors, the WRB did not apply these considerations to the GS-5 level CBPAS position at the Miami International Airport specifically.

Moreover, the Agency did not demonstrate a significant risk of substantial harm to the health and safety to Complainant or that the Medical Officer or WRB used this standard by weighing factors such as *the likelihood that the potential harm will occur*. This is inconsistent with the Rehabilitation Act requirement concerning the direct threat standard. See, e.g. Salvatore K. v. Dep’t of Justice, EEOC Appeal No. 0120182095 (Jun. 23, 2021) (“the mere fact that Complainant has Diabetes does not constitute evidence that he posed a direct threat... there is simply no individualized evidence that Complainant posed a significant risk of substantial harm to the health and safety of himself or others which cannot be eliminated or reduced to an acceptable level”); Alonzo N. v. Dep’t of Homeland Sec., EEOC Appeal No. 0120180739 (Jun. 21, 2019) (agency failed to prove direct threat, and discriminated against the complainant on the basis of disability (Aortic Valve Replacement) when it withdrew its tentative selection of the complainant for the position of Deportation Officer, GS-1801-11 in York Pennsylvania, because the Medical Review Board refused to waive the medical standards for the position; no evidence

to support that the complainant would be at an increased risk of severe injury or death from blunt or sharp force trauma in performing law enforcement duties); Joshua F. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120181309 (Aug. 30, 2019) (“results of the visual examination alone were insufficient to establish that there would be a high probability of substantial harm,” agency discriminated against the complainant on the basis of disability when it rescinded a tentative offer for employment as a motor vehicle driver because the complainant failed the portion of the visual examination requiring differentiation of colors, finding that the agency did not conduct an individualized examination but “assumed Complainant would be unable to see traffic signals while driving, but failed to conduct inquiry into how, based on his vision, Complainant obtained and continued to hold his commercial driver’s license and performed successfully in his mass transit Bus Operator position”); Dong F. v. Dep't of the Interior, EEOC Appeal No. 0120140109 (Jun. 3, 2016) (FAD Reversed, disability discrimination found when a Law Enforcement Park Ranger terminated because he was denied a medical waiver for his disability (color blind), the agency reasoned that “Complainant's color deficiency is not correctable and the condition prevents Complainant from performing several essential functions (e.g., the ability to identify suspects by their clothing, vehicles, license plates, etc. in the field and in court). The Agency further asserts that such color deficiency impacts an officer's ability to apprehend suspects or testify reliably at trial, which are all essential functions of the Law Enforcement Park Ranger position,” yet the agency failed to perform an individualized assessment, as the complainant successfully performed in the position for several years).

Here, it is undisputed that Complainant was not hired for the position solely because of his disability. However, the results of Complainant’s hearing tests alone did not constitute adequate evidence that he posed a significant risk of substantial harm to the health and safety of himself or others which could not be eliminated or reduced to an acceptable level. While the Waiver Review Board did allow Complainant to submit evidence regarding the various strategies he used to compensate for his disability, the evidence does not show that the Board applied its concerns about Complainant’s limitations to the particular environment of the position in question – an urban international airport – despite the fact that the record was clear that the duties of the position and, among other things, the use of detection technology significantly varied based on the duty station of the incumbent. As such, we conclude the Agency failed to conduct an adequate *individualized* assessment of factors such as the likelihood that potential harm would occur if Complainant was hired into the position at the Miami airport. Moreover, the Agency has not adequately distinguished Complainant from the two other Agency employees working in the same position with very similar hearing impairments.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we REVERSE the Agency’s final order and conclude that the Agency violated the Rehabilitation Act when it failed to grant Complainant a waiver of the hearing requirements. We REMAND the matter back to the Agency to take corrective action in accordance with this decision and the order herein.

ORDER (C0618)

The Agency shall take the following actions:

1. Within sixty (60) calendar days of the date this decision is issued, the Agency shall offer Complainant a GS-5 CBPAS position at the Miami International Airport. The Agency shall afford Complainant thirty (30) days to determine whether to accept. Should Complainant reject the offer, Complainant's entitlement to back pay shall terminate as of the date of his rejection.
2. Within ninety (90) 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. § 114.501. 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 Complainant for the undisputed amount within sixty (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. 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. 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.
4. Within ninety (90) calendar days of the date this decision is issued, the Agency shall complete a supplemental investigation concerning Complainant's entitlement to compensatory damages and determine the amount of compensatory damages due, then issue a new FAD which addresses compensatory damages and includes appeal rights to the EEOC. The Agency shall pay the determined amount of compensatory damages within sixty (60) calendar days of the date the new FAD is issued.
 - a. During the supplemental investigation, Complainant may submit evidence in support of a claim for compensatory damages, and Complainant shall cooperate in determining compensatory damages, including responding to the Agency's requests for evidence, input, and/or documents.⁵ The

⁵ **Information on determining Compensatory Damages:** EEOC MD-110, Ch. 11 §VII (Aug. 5, 2015) available at https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm, and N.

Agency shall set forth a 30-day time limit for Complainant to reply to any agency requests for information.

- b. Once the new FAD is issued, if there is a dispute regarding the exact amount of compensatory damages, the Agency shall pay Complainant for the undisputed amount. 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."
5. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide two (2) hours of EEO training to the Agency officials involved in the decision to deny Complainant the waiver of the medical qualification standard at issue. The training shall emphasize the Rehabilitation Act's requirements with respect to the Agency's medical/physical standards and medical waiver programs to ensure that similar violations do not occur.
6. Within ninety (90) calendar days of the date this decision is issued, The Agency shall consider taking disciplinary action against the Agency officials found to have discriminated against Complainant. The Agency shall report its decision. 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.

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 U.S. Customs and Border Protection Hiring Center at issue 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.

Thompson, Compensatory Damages in the Federal Sector: An Overview, EEOC Digest Vol. XVI, No. 1 (Winter 2005) *available at* <https://www.eeoc.gov/federal/digest/xvi-1.cfm#article> (explains Carle v. Dep't of the Navy under the subsection "Proof of Damages").

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.

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).

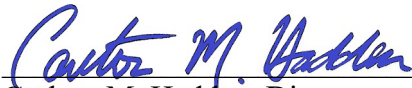
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

December 5, 2022

Date