



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

[REDACTED]
Levi P.,¹
Complainant,

v.

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

Request No. 2023001817

Appeal No. 2021004021

Agency No. HS-CBP-00877-2020

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. 2021004021 (January 26, 2023). 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

At the time of events giving rise to this complaint, Complainant was an applicant for employment with the Agency's Office of Field Operations for a location to be negotiated after selection.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

On March 31, 2020, Complainant filed an equal employment opportunity (EEO) complaint alleging that the Agency discriminated against him based on his national origin (Jamaican American) and disability (myasthenia gravis) when on January 30, 2020, he was informed that his tentative selection for the position of a Customs and Border Protection Officer (CBPO), advertised under vacancy number CBPO VRA 19-10, was withdrawn due to his medical ineligibility.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an EEOC Administrative Judge. In accordance with his request, the Agency issued a final decision, concluding that Complainant failed to prove that he was subjected to discrimination as alleged.

The Agency found that Complainant failed to show that he was a qualified individual with a disability with respect to the essential functions of the CBPO position, and that he would pose a direct threat to himself or others in the position. The Agency also determined that Complainant did not prevail on his national origin claim because he did not show that the Agency's reason for withdrawing his tentative offer, namely that he was not medically qualified, was pretext for national origin discrimination. Complainant appealed the Agency's decision. The Agency did not respond to Complainant's appeal.

The Commission reversed, in part, the Agency's final decision. The appellate decision found that Complainant has a disability and that he was subjected to adverse action when the Agency rescinded its tentative job offer. The appellate decision noted that the Agency reviewed Complainant's application materials and initially found him to be qualified and made a tentative job offer after an interview. There was insufficient evidence to support the Agency's claim that Complainant was not qualified to perform the essential functions of the CBPO position, with or without a reasonable accommodation.

The Agency stated that an individualized medical assessment of Complainant's documents showed that his relapse of myasthenia gravis could result in muscle weakness; fatigue; and impaired vision, which disqualified him from the CPBO position. The Agency further found that Complainant's "high likelihood" of relapse if his medication doses were missed or altered did not meet the Agency's medical standards. However, the appellate decision highlighted that, with safety requirements that screen out or tend to screen out individuals with a disability, an employer must demonstrate that the requirement is job-related and consistent with business necessity, which can be met by showing that the requirement satisfied the "direct threat" analysis set forth in 29 C.F.R. § 1630.2(r) and 29 C.R.F. § 1630 App. § 1630.15(b) and (c).

In this case, Complainant's medical providers indicated that there were no contraindications for his work in law enforcement, attesting that Complainant's compliance and response to his medications were currently good and that his condition had been stable, and that he had no limitations in terms of using a firearm or otherwise performing the listed duties of a CBPO position. As such, the appellate decision found that the Agency did not demonstrate a significant risk of substantial harm to the safety of Complainant or others.

The Agency's assessment that Complainant's condition had a "high likelihood" of relapse was far too speculative and remote based on his medical statements that he had been stable and not prone to relapses of muscle weakness or double vision for several years. The Agency ignored the specific circumstances that caused these symptoms when Complainant adjusted or changed his medication, or when he forgot doses while traveling. The Agency improperly concluded a "high likelihood" of debilitating relapse because it assumed that Complainant might miss a dose, which was the type of speculation that is prohibited by the Rehabilitation Act.

Complainant did not dispute the portion of the Agency's final decision related to his national origin claim, and the appellate decision affirmed the Agency's finding of no discrimination with respect to that basis. Based on the finding of disability discrimination, the appellate decision remanded the matter to the Agency to take corrective action, such as Complainant's retroactive placement into the CBPO position.

The Agency filed the instant request for reconsideration on February 6, 2023, and it submitted a brief in support of its request on February 17, 2023. Complainant challenged the timeliness of the Agency's brief on February 17, 2023. The Agency submitted an opposition to Complainant's request to disregard the Agency's brief on February 21, 2023. Complainant filed a second brief on March 1, 2023, in response to the arguments in the Agency's briefs.

ANALYSIS AND FINDINGS

Timeliness of Agency Brief

Through his attorney, Complainant challenges the timeliness of the Agency's brief in support of its request for reconsideration. Complainant asserts that the Agency filed the request on February 6, 2023, and it was required to submit any brief with the request on February 6, 2023. Complainant further notes that the Agency's brief did not indicate that it sought, or was granted, an extension to file its brief. If the Commission accepts the Agency's brief, Complainant requests that he be granted additional time to respond to the Agency's request.

The Agency counters that it properly filed its brief within thirty days of receipt of the appellate decision on January 26, 2023. Agency Counsel explains that the Deputy Director of the Diversity and EEO Division ("Deputy Director") was informed of the intention to file a request for reconsideration. Agency Counsel was on parental leave at the time and planned to file the request upon return to the office. However, the Deputy Director *sua sponte* created the request in the Commission's electronic system on February 6, 2023, and Agency Counsel filed a brief eleven days later on February 17, 2023.

The Agency acknowledges that requests for reconsideration and any supporting brief must be filed within thirty days of receipt of the decision. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VII.B.1 (Aug. 5, 2015). In addition, the appellate decision specified that any statement or brief must be filed together with the request for reconsideration.

Appellate Decision at 10. However, the Agency avers that the Deputy Director's administrative entry was not intended to be the Agency's final submission on the matter. Since the Deputy Director does not write legal briefs on behalf of the Agency, she could not have concurrently filed a legal brief for the Agency. As such, the Deputy Director's premature entry was a harmless administrative error.

Based on the unique facts of this case, we exercise our discretion to consider the Agency's brief as timely. Agency Counsel, who was responsible for the request for reconsideration, explained that the Deputy Director acted without his knowledge while he was on leave to file the request. While the Agency did not submit its brief at the same time as its request for reconsideration, the brief was filed within thirty days of receipt of the appellate decision. As such, we will consider the arguments in its brief, in addition to Complainant's opposition brief, which was filed within twenty days of the Agency's brief. See id.

Request for Reconsideration

The Agency requests reconsideration of the appellate decision based on clearly erroneous interpretations of material fact and law, and due to its substantial impact on the Agency's policies, practices, or operations. Specifically, the Agency argues that:

1. Complainant is not a qualified individual with a disability, and the Commission either improperly shifted the burden to the Agency to prove that Complainant was unqualified or improperly merged this initial burden with the separate and distinct burden of the Agency to prove its defense(s);
2. the Commission's sole reliance on the "direct threat" standard of the Agency's defense to the allegation of disability discrimination is a clearly erroneous interpretation of the law; and
3. the Commission's decision will have a substantial impact on the policies, practices, or operations of the Agency because the remedy bypasses the Agency's background certification process by ordering the placement of Complainant into a position for which he did not complete the pre-employment conditions.

Qualified Individual with a Disability

The Agency asserts that the Commission never held Complainant to his burden to prove that he is a qualified individual with a disability, and it shifted the burden to the Agency to prove that he was unable to perform the essential duties of the CBPO position. However, we are not persuaded by the Agency's contention that there was any improper burden shifting to the Agency to prove that Complainant was unable to perform the essential functions of a CBPO. The appellate decision stated, "we find that there was insufficient evidence to support the Agency's claim that Complainant was not qualified to perform the essential duties of the CBPO position with or without a reasonable accommodation."

Appellate Decision at 6. A fair reading shows that the appellate decision did not place the burden on the Agency to show that Complainant was not a qualified individual with a disability but determined that the Agency's conclusion in its final decision that Complainant is not a qualified individual with a disability was unsupported by the record evidence.

The Agency contends that, if the Commission properly held Complainant to his burden, it would not have found him to be a qualified individual with a disability. The Agency does not challenge that Complainant has a disability. Agency Request Brief at 10. In reviewing the evidence, we find that there was no clear error in the appellate decision's finding that Complainant is a qualified individual with a disability. The term "qualified individual with a disability," with respect to employment is defined as a disabled person who, with or without a reasonable accommodation, can perform the essential functions of the position held or desired. 29 C.F.R. § 1630.2(m).

The Agency avers that Complainant would be expected to complete over 100 essential tasks, such as lifting or carrying objects weighing 30-59 pounds, without assistance. The Agency focuses upon Complainant's Neurologist's statement that "when there is a relapse, he might not be able to perform some of the activities." However, Complainant's Neurologist completed an Agency-provided form that listed the physical requirements of the CBPO position, such as perform duties of vigorous law enforcement. The Neurologist checked "yes" to every listed requirement. The Neurologist also noted that, "as of now, his medical condition is stable," and affirmatively checked that Complainant can "lift, carry, push/pull heavy objects unaided." ROI at 244.

The Agency ignores Complainant's complete medical records, which clarify that he only experiences a relapse when there is a change to his medication routine, or he forgets to take his doses. Complainant experienced relapses in 2014, 2016, 2018, and 2019, but the medical notes do not indicate that Complainant experienced all symptoms every time he had a relapse. For example, in December 2018, Complainant reported a diplopia (double vision) episode for two weeks due to changes in his medication. Complainant also informed the Agency that he has to miss his medications for several months before he experiences weakness. ROI at 243, 70-2, 98, 117, 428.

Complainant's Vision Specialist also checked "yes" to all the listed physical requirements of the position and answered that Complainant had "no impairment," in response to providing a professional opinion of whether he will suffer abrupt/gradual impairment of physical or mental function affecting requirements of the position. ROI at 249-50.

The Agency informed Complainant that the Medical Review Officer assessed the submitted medical information and determined that Complainant was not medically qualified for the CBPO position. ROI at 238.

However, the record contains no affidavit from the Medical Review Officer to explain why he or she disagreed with Complainant's medical professionals,² who both confirmed that Complainant could perform every listed requirement for the CBPO position and currently had no contraindications to performing the specific tasks. ROI at 244-5, 250-1.

The Agency further argues that the appellate decision never analyzed if Complainant could perform the tasks with or without an accommodation. However, the medical evidence does not suggest that Complainant needs a reasonable accommodation to perform the essential functions. To the extent that Complainant experiences any symptoms due to future relapses of his medical condition, he can be accommodated with leave while he adjusts to any changes in his medication or waits for his medication to take effect. Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002). Accordingly, we find that there was no clear error in the appellate decision's finding that Complainant established that he is a qualified individual with a disability.

Direct Threat

The Agency asserts that the appellate decision only focused on the direct threat defense, and this limitation was clearly erroneous. The Agency states that an agency can also raise a defense of a qualification that screens out, or tends to screen out, disabled applicants by showing that the criteria is job-related and consistent with business necessity. The Agency also argues that the qualification standards "may include" a requirement that an individual shall not pose a direct threat to the health and safety of others, and that the Commission created a different interpretation that "may" means "must." Agency Request Brief at 12. However, the appellate decision stated that the Agency "can meet this [qualification] standard by showing that the requirement, as applied to the individual, satisfied the 'direct threat' analysis..." Appellate Decision at 6. We find that the use of "can" was permissive, and it did not equate to "must," as asserted by the Agency.

The Agency argues that the Commission conflated the business necessity and direct threat standards, but we are not persuaded by this assertion. We find that the appellate decision only considered the direct threat defense based on the Agency's rationale for rescinding the tentative job offer due to its determination that Complainant's "medical condition presents an unacceptable safety and health risk." ROI at 238. Further, the Agency included a direct threat analysis in the final decision, but it failed to discuss that its qualification standard was job-related and consistent with business necessity. The appellate decision did not conflate the business necessity and direct threat standards, and it simply did not analyze the business necessity defense because there was no evidence to show that the Agency's action was related to business necessity.

² The Agency only provided affidavits from a Supervisory Nurse Consultant and a Supervisory Human Resources Specialist for the instant EEO complaint. ROI at 318, 327.

The Agency raises this defense for the first time in its request for reconsideration. However, the Commission has held that a party may not raise new arguments in a request for reconsideration. See, e.g., Jones v. U.S. Postal Serv., EEOC Request No. 05950107 (Aug. 24, 1995). A request for reconsideration is not the time to raise new arguments. 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. Here, we find that the Agency did not establish a clear error in the appellate decision to only consider the Agency's previously provided justification that it rescinded Complainant's tentative job offer due to safety concerns.

The Agency further asserts that, even if the direct threat test applied, it submitted sufficient evidence to prove that Complainant did not show that he was not medically qualified. However, the standard for a direct threat is not to show that an applicant is "not medically qualified." A person is a "direct threat" if he or she poses a "significant risk of substantial harm" to the health and safety of himself/herself or others, which cannot be eliminated or reduced to an acceptable level by reasonable accommodation. 29 C.F.R. § 1630.2(r); see also Alonzo N. v. Dep't of Homeland Security, EEOC Appeal No. 0120180739 (June 21, 2019); Candi R. v. Dep't of Defense, EEOC Appeal No. 0120172238 (Feb. 28, 2019).

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. 29 C.F.R. § 1630.2(r). The record lacks any evidence that the Agency considered these factors. Even considering the worst-case scenario that Complainant experiences muscle weakness; fatigue; and problems with his vision while at work, the Agency did not offer evidence related to any risks or potential harms.

The Agency found that, due to Complainant's medical condition, there was "a high likelihood of recurrence of symptoms of muscle weakness or fatigue and impaired vision if medication doses are missed or if timing of medication is altered..." ROI at 238. However, the Agency failed to consider the likelihood of the underlying catalyst of missed doses or changes to Complainant's medication. Complainant's medical providers documented that he forgot his medication, or had a change in medication, and he experienced relapses approximately five times since he has been treated at his current medical clinic since 2011. ROI at 70-2, 98, 117. We find that the evidence does not support that there is a "high likelihood" of Complainant experiencing a relapse of his medical condition.

The Agency cannot exclude qualified individuals with disabilities from employment based upon fear of a future risk of injury, without engaging in the individualized assessment required by the Rehabilitation Act into whether their disabilities pose a "direct threat" of substantial harm. 29 C.F.R. § 1630.2(r). The Agency stated that Complainant needed to be ready to perform his duties "under unpredictable and perhaps life-threatening job conditions, while reacting and responding appropriately in time-sensitive situations that require good judgment and problem solving ability." ROI at 238.

In footnote 1 of its brief, the Agency also avers that it “understands that medical determinations cannot be absolute, but in the absence of specifics, the Agency must take into account what *may* happen in the event a condition ceases to be stable to ensure the safety of the workplace and the public.” Agency Request Brief at 16.

The Agency only proffers speculation that Complainant’s condition “may” affect safety in the event that his condition ceases to be stable, in “perhaps life-threatening” conditions, without offering evidence to show that Complainant’s medical condition posed a significant risk of substantial harm to the health and safety of himself or others. Accordingly, we find that the Agency did not establish a clearly erroneous interpretation of material fact or law in the appellate decision’s finding that the Agency did not prove a direct threat.

Substantial Impact

The Agency avers that the remedy to retroactively place Complainant into a CBPO position will have a substantial impact on its policies, practices, and operations because it places him beyond the point in the pre-employment process, had it determined that Complainant met the medical standards. Prior to receiving a final offer of employment, applicants must undergo and pass other criteria, and the Agency asserts that the Commission is ordering it to hire Complainant without completing a background investigation or polygraph. However, the record does not reveal if Complainant underwent a background investigation or polygraph, and the Agency cites to no evidence to support its contention.

Further, the Commission has found that if the selection process is discriminatory at any phase, Complainant must be awarded full relief, i.e., retroactive placement, unless the Agency can show by clear and convincing evidence that he would not have been selected, even in the absence of discrimination. See Lazaro G. v. Dep’t of Commerce, EEOC Appeal No. 0120170802 (May 17, 2019); request for recon. denied, EEOC Request No. 2019004115 (Sept. 17, 2019); Eyslee v. Dep’t of the Treasury, EEOC Appeal No. 0720100050 (Dec. 7, 2011). The Commission added that placing an onerous burden on the Agency is proper, inasmuch as the Agency’s unlawful acts caused the difficulty in determining what would have resulted had there been no discrimination. See Dereyna, Ellis, and Gillespie v. Department of the Navy, EEOC Appeal Nos. 01980077, 01980078, 01980079 (Jan. 19, 2001); Pryor v. U.S. Postal Serv., EEOC Request No. 05980405 (Aug. 6, 1999). Here, the Agency provided no evidence, let alone clear and convincing evidence, to prove that Complainant would not have been selected absent the discrimination.

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 Agency’s request.

However, the Commission exercises its discretion to GRANT reconsideration on its own motion in order to MODIFY the Order in the previous appellate decision.³ The decision in EEOC Appeal No. 2021004021 otherwise 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

The Agency shall take the following remedial actions:

1. Within sixty (60) days of the date this decision is issued, the Agency shall offer in writing to retroactively hire Complainant into a Customs and Border Protection Officer (GS-1897-07) position, or a substantially equivalent position, in a location that is agreeable to Complainant, as of January 30, 2020 (when his tentative job offer was rescinded). Complainant will have thirty (30) days after receiving the Agency's offer to accept or reject it, and he must do so in writing. If Complainant declines the offer, his entitlement to back pay, if any, will cease on the date he declines.
2. If Complainant accepts the Agency's offer, the Agency shall place him into the agreed upon position with an entry-on-duty date of January 30, 2020, for purposes of seniority. The Agency shall provide other employment benefits, including any within-grade salary increases and career ladder promotions tied to seniority.
3. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision was issued. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and he 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."
4. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay reimbursement, with interest, as a lump sum payment. If applicable, the Agency shall also pay compensation for adverse tax consequences of receiving an award of compensatory damages. Complainant has the burden of establishing the amount of

³ The modified order includes additional terms that the Agency offer a position in a location that is agreeable to Complainant and allow him to accept or decline the offer; provide Complainant with other employment benefits, including within-grade salary increases and career ladder promotions tied to seniority; and pay any proven adverse tax consequences for back pay and/or compensatory damages.

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 he shall then be compensated.

5. The Agency shall undertake a supplemental investigation to determine Complainant's entitlement to compensatory damages, attorney's fees, and costs under the Rehabilitation Act. The Agency shall give Complainant notice of his right to submit objective evidence (pursuant to the guidance given in Complainant v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 6, 1993)) and request objective evidence from Complainant in support of his request for compensatory damages within forty-five (45) days of the date Complainant receives the Agency's notice. No later than ninety (90) days after the date that this decision is issued, the Agency shall issue a decision addressing the issue of compensatory damages. The final decision shall contain appeal rights to the Commission.
6. Within ninety (90) days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive EEO training to the Medical Review Officer, Supervisory Nurse Consultant, and Supervisor Human Rights Specialist on the Rehabilitation Act and avoiding discrimination against individuals with disabilities.⁴
7. Within sixty (60) days of the date this decision is issued, the Agency shall consider taking disciplinary action against the Medical Review Officer, Supervisory Nurse Consultant, and Supervisor Human Rights Specialist. The Commission does not consider training to be disciplinary action. If the Agency decides to take disciplinary action, it shall identify the action(s) 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 any of the responsible management officials have left the Agency's employment, the Agency shall furnish documentation of their departure dates.

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.

⁴ The identity of the Supervisor Nurse Consultant can be found on page 317 of the ROI, and the Supervisory Human Resources Specialist on page 326. The Agency did not reveal the name of the Medical Review Officer who determined that Complainant was not medically qualified, referenced in the Agency's notice on page 238.

POSTING ORDER (G0617)

The Agency is ordered to post at its Customs and Border Protection Hiring Center in Bloomington, Minnesota 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).

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.

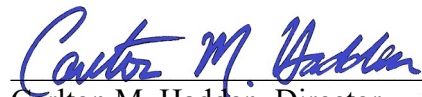
COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (P0610)

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

August 7, 2023
Date