



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

[REDACTED]
Adena J.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2022001544

Hearing Nos. 480-2021-00054X and 480-2021-00055X

Agency Nos. 200P-0691-2015104335 and 200P-0691-2016105330

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), concerning an equal employment opportunity (EEO) complaint claiming 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

During the period at issue, Complainant worked as a Staff Physician, GS-15, at the Agency's West Los Angeles VA Medical Center in Los Angeles, California.

On August 21, 2015, and October 21, 2016, Complainant filed two formal EEO complaints. In Complaint A, (Agency No. 200P-0691-2015104335; Hearing No. 480-2021-00054X), Complainant alleged that she was discriminated against and subjected to harassment based on her age when:

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.

1. on April 29, 2015, Complainant learned that the Chief of Psychiatry planned to reassign her to another office, without her knowledge;
2. Complainant was paid less than younger colleagues, which Complainant learned of on May 29, 2015; and
3. on July 22, 2015, Complainant attended a staff meeting where a retirement presentation was given.

In Complaint B, (Agency No. 200P-0691-2016105330; Hearing No. 480-2021-00055X), Complainant alleged that she was discriminated against and subjected to harassment based on age and in reprisal for prior protected EEO activity when:

1. on August 12, 2016, Complainant was assigned additional workload duties;
2. on August 19, 2016, Complainant was issued a written counseling;
3. since December 2016, and ongoing, the Chief of Psychiatry refused to communicate with Complainant on the issue of who was Complainant's supervisor;
4. from on or about September to December 2016, the Chief of Psychiatry transmitted a weekly newsletter to selected staff members, but not to Complainant; and
5. on March 23, 2017, based on statements by the Chief of Psychiatry, there was staff confusion which resulted in Complainant having to refuse to accept a pager; and

Additionally, Complainant alleged that she was discriminated against and subjected to harassment based on age, disability, and in reprisal for prior protected EEO activity when:

6. on March 27, 2017, the Chief of Psychiatry required that Complainant submit a doctor's note for a two-day absence; and
7. from April 5, 2017 onward, Complainant had not been provided a reasonable accommodation.

After an Agency investigation, Complainant timely requested a hearing for both complaints before an EEOC Administrative Judge (AJ). Thereafter, the assigned AJ consolidated both complaints. On October 22, 2022, the AJ issued an order granting summary judgement in favor of the Agency for claims A1, A3, and B1 – B7. Regarding claim A2, the AJ indicated in the order an intent to issue a decision in favor of Complainant and provided the parties the opportunity to issue a response.

Following responses from Complainant and the Agency, the AJ issued a decision on January 4, 2021, determining that the Agency failed to develop an impartial and appropriate factual record, and the AJ determined that the grave deficiencies had a significant prejudicial effect on Complainant which warranted a sanction. Specifically, the AJ indicated that the record failed to include the following documents: copies of SF-50s of the comparators employees to identify ages and pay differentials, pay panel documentation for the relevant period for pay differentials and potential explanations for differentials, and individualized explanations for comparative employees' higher pay. The AJ determined that the Agency could not provide a specific, clear, and individualized explanation as to why Complainant was paid less than younger colleagues, which Complainant learned of on May 29, 2015. The AJ further concluded that summary judgment in favor of Complainant on the pay claim (Claim A2) was appropriate as Complainant had established a *prima facie* case of disparate treatment based on age, and the Agency failed to provide a sufficient explanation for why Complainant was paid less than younger colleagues.

For remedial relief, the AJ ordered the Agency to provide back pay, as well as to explain in writing how it reached its back pay determination. The AJ further ordered that the Agency provide training and consider disciplinary action for the responsible management officials. Finally, the AJ ordered the Agency to post a notice of discrimination.

On January 19, 2021, the Agency issued a final order fully implementing the AJ's decision including the awards for remedial relief.² The Agency's January 19, 2021, final Order stated the following:

- **Back Pay:** Within sixty (60) days of the date of the final order, the Agency shall immediately pay Complainant back pay for the difference between her pay and that of her highest paid comparatives retroactive to August 21, 2013 (two year prior to filing the complaint). Comparatives include any substantially younger psychiatrist (five years younger or more) employed by the West Los Angeles VA Medical Center, who was paid a higher market pay salary than Complainant from August 21, 2013 to the date of this decision.
 - When determining Complainant's back pay, Complainant must be considered in Tier 1 of the pay schedule with all applicable authorized exceptions (e.g. Blanket Tier Exception for Psychiatrists, dated May 24, 2016) and should not be awarded interest on the back pay award. Where applicable, back pay specifically includes retroactive tax-deferred contributions to Complainant's Thrift Savings Plan account and any earnings which would have accrued during the relevant period.

² The record reflects that on February 3, 2021, the Agency filed an appeal with the Commission objecting to the AJ's January 4, 2021 decision. On appeal, the Commission dismissed the appeal because the Agency had already issued a January 19, 2021 order indicating that it would fully implement the AJ's decision. See EEOC Appeal No. 2021003081 (May 25, 2021).

- After the Agency has calculated and paid Complainants' back pay award, Complainant shall have sixty (60) days following the end of the tax year in which the final payment is received to calculate the adverse tax consequences of any lump sum back pay awards, if any, and notify the Agency. Following receipt of Complainant's calculations, the Agency shall have sixty (60) days to pay Complainant for any adverse tax consequences established, with a written explanation for any amount claimed but not paid.
 - Complainant shall be required to assist management in this regard by providing any information reasonably requested by management, as necessary to implement the relief ordered herein.
- **Written Notification:** Within sixty (60) days of the date of the final order, management shall advise Complainant in writing of (1) the amount of back pay and other attendant benefits due to her, and (2) how management reached its determinations regarding these matters. Management shall provide Complainant and her representatives with this written determination.
- **EEO Training:** Within ninety (90) days of the date of the final order, the Agency shall identify any current employees who served on pay panels involving Complainant's market pay from August 21, 2013 to the date of this final order, and provided eight hours of in-person or interactive trainer-to-trainee video conference training on the prohibitions against age discrimination.
 - The training shall be mandatory, conducted by an Office of Resolution Management Diversity Inclusion (ORMDI) subject matter expert. If an ORMDI trainer is unavailable, ORMDI will provide the training content, and the trainer identified by the facility must be certified by ORMDI as an EEO subject matter expert.
- **Disciplinary Action:** The Agency must consider taking appropriate disciplinary action against the individuals responsible for the discrimination in this case as identified above.
 - ORMDI will provide follow-up with Agency officials responsible or taking disciplinary action in this case. The follow-up will include direction on the timeline for making disciplinary determinations and how they must be documented. In the event that no disciplinary action is taken, management must provide ORMDI with a written explanation for this decision. ORMDI must report the Agency's decision to the Commission and specify what, if any, action was taken. If the Agency decides not to take disciplinary action, then ORMDI shall set forth the reasons for the

Agency's decision not to impose discipline. Training is not considered disciplinary action.

- **Notice Posting:** The Agency is ordered to post at the West Los Angeles VA Medical Center, Los Angeles, California copies of the attached Notice to Employees (Notice) regarding unlawful discrimination in violation of the Age Discrimination in Employment Act. The Agency shall post copies of the Notice, both in hard copy and electronic format, after being signed by the Director of the above-named facility within thirty (30) calendar days of receipt of this Order.

The instant appeal followed. On appeal, Complainant argues, through counsel, that the Agency has not fully complied with all terms of its January 19, 2021 final order. Specifically, Complainant asserts that the Agency has failed to pay her any of the awarded damages (including back pay). Complainant further asserts that the Agency has failed to provide adequate documentation to support its various back pay figures, despite Complainant's numerous requests for this information.

ANALYSIS AND FINDINGS

The Commission's regulations provide that a final action that has not been the subject of an appeal or civil action shall be binding on the Agency. 29 C.F.R. § 1614.504(a). If Complainant believes that the Agency has failed to comply with the terms of a decision, she shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when Complainant knew or should have known of the alleged noncompliance. 29 C.F.R. § 1614.504(b). The agency shall resolve the matter and respond to the complainant, in writing. Id. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or decision. Id. The complainant may file such an appeal 35 days after he or she has served the agency with the allegations of noncompliance but must file an appeal within 30 days of his or her receipt of an agency's determination. Id. If the Commission determines that the Agency is not in compliance with its decision, and the noncompliance is not attributable to acts or conduct of Complainant, it may order such compliance with the decision. 29 C.F.R. § 1614.504(c).

As the record indicates, Complainant had informed the Agency of its non-compliance on several occasions. The Agency attempted to address Complainant's concerns. The record, however, reflects that Complainant was not satisfied with the Agency's attempt to resolve the matter. Therefore, we find that the matter is properly before us pursuant to 29 C.F.R. § 1614.504(b). The issue to be addressed in this appeal relates solely to the back pay award in the Agency's final order and not the other remedial matters.

The record indicates that the Agency provided Complainant four different determinations on the back pay amount she would be awarded. On April 15, 2021, and again on April 19, 2021, the Agency determined that Complainant's back pay amount would be \$224,910.00.

However, another Agency employee determined on June 22, 2021, that Complainant's back pay amount should be \$386,016. Thereafter, the Agency determined that the June 22, 2021 back pay assessment was incorrect because this assessment failed to account for the appropriate comparator, tier, or age. Additionally, the Agency determined that the individual conducting this assessment was not a subject matter expert and failed to consult with the Agency's subject matter expert in market pay compensation.

On August 6, 2021, the Agency informed Complainant she was entitled to \$218,040 in back pay. However, the Agency revised this amount again on December 21, 2021, and determined that Complainant was entitled to back pay amounting to \$228,076.92, and the Agency submitted a pay request for this amount to the Defense Finance and Accounting Service (DFAS), the entity responsible for issuing payment, on February 2, 2022.

In its appellate brief, the Agency asserts that DFAS has thirty business day to begin processing the payment request and an additional thirty to sixty days from the commencement of processing to issue payment to Complainant. In other words, the Agency asserts that it was responsible for providing the documentation supporting the payment amount to DFAS, and DFAS is responsible for processing and issuing the payment. In particular, the Agency explains that it had to generate eighteen SF-50s of the applicable comparator employees to capture the market rate increases from August 2013 through January 2, 2022, to "ensure all market pay back pay due to Complainant is captured."

Although the Agency states that it submitted the SF-50s to DFAS, there is no indication in the record that the Agency provided Complainant these copies, so that Complainant could make her own comparisons and determine the accuracy of the Agency's various back pay computations amounts (\$224,910.00, \$386,016, \$218,040, and \$228,076.92). Complainant indicates on appeal that the June 2021 back pay assessment included comparators who were excluded from the other assessments without explanation. Complainant explains that these excluded comparators had very different market pay amounts which minimized the total pay loss the Agency was required to issue her. Notably, the lack of documentation in the instant appeal is a recurring issue as the AJ determined in his January 4, 2021 decision that despite requests from the EEO Investigator and Complainant, the Agency failed to provide copies of SF-50s of the comparators employees to identify ages and pay differentials.

Additionally, Complainant asserts on appeal that there are inconsistencies in the record as to the date each market pay assessment was conducted. For instance, the record contains a December 2, 2021 email from the Agency's Office of General Counsel explaining that the office was working with human resources to provide Complainant "the market pay review documents for each of the comparator employees listed." The email further explains that the pay review documents would allow Complainant to see:

exact dates that each pay assessment was conducted. ... The pay determination and analysis [Complainant was] provided was based on a review of each market

pay review conducted over the relevant period for comparator physicians who were 5 years or more younger than [Complainant].

However, Complainant asserts on appeal that she never received this documentation from the Agency, and consequently, was never able to verify the dates the market pay reviews were conducted, and ultimately, was not able to verify the amount of back pay she is entitled.

We acknowledge that Complainant's back pay payment is currently pending with DFAS, an entity which the Agency has no control. However, the record supports that the Agency has not complied with its own order regarding providing Complainant clear, written documentation as to how it reached its back pay determinations. What explanations the Agency did provide were insufficient because these explanations are contradictory and fail to clearly explain the inconsistencies with the various back pay determinations. Now that the Commission has explicitly instructed the Agency to provide Complainant documentation (copies of the comparator's SF-50s and market pay rate reviews), the Agency is forewarned that if it is found not to be in compliance with this decision, enhanced efforts may be taken to obtain compliance. 29 C.F.R. § 1614.503(b).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we find that the Agency is not in full compliance with the terms of its January 19, 2021 Order and we REMAND the matter in accordance with the ORDER below.

ORDER

Within ninety (90) calendar days of the date this decision is issued, the Agency is ordered, to the extent that it has not already done so, to complete the following actions in full compliance with its January 19, 2021 Order and the guidance provided by this appellate decision:

1. The Agency shall award Complainant back pay for the difference between her pay and that of her highest paid comparatives retroactive to August 21, 2013 (two year prior to filing the complaint). Comparatives include any substantially younger psychiatrist (five years younger or more) employed by the West Los Angeles VA Medical Center, who was paid a higher market pay salary than Complainant from August 21, 2013 to the date of the Agency's final order.
 - a. When determining Complainant's back pay, Complainant must be considered in Tier 1 of the pay schedule with all applicable authorized exceptions (e.g. Blanket Tier Exception for Psychiatrists, dated May 24, 2016) and should not be awarded interest on the back pay award. Where applicable, back pay specifically includes retroactive tax-deferred contributions to Complainant's Thrift Savings Plan account and any earnings which would have accrued during the relevant period.

- b. After the Agency has calculated and paid Complainants' back pay award, Complainant shall have sixty (60) days following the end of the tax year in which the final payment is received to calculate the adverse tax consequences of any lump sum back pay awards, if any, and notify the Agency. Following receipt of Complainant's calculations, the Agency shall have sixty (60) days to pay Complainant for any adverse tax consequences establishes, with a written explanation for any amount claimed but not paid.
 - c. Complainant shall be required to assist management in this regard by providing any information reasonably requested by management, as necessary to implement the relief ordered herein.
2. The Agency shall advise Complainant in writing of: (1) the amount of back pay and other attendant benefits due to her, and (2) how management reached its determinations regarding these matters, including but not limited to, providing copies of SF-50s of all comparators as well as copies of the market pay reviews for each comparator, and all documentation submitted to DFAS to process Complainant's back pay.

ATTORNEY'S FEES (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/she 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 this decision becoming final. 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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

October 30, 2023

Date