



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Erick N.,¹
Complainant,

v.

Gordon Hartogenesis,
Director,
Pension Benefit Guaranty Corporation,
Agency.

Appeal No. 2022004837

Hearing No. 570-2019-01049X

Agency Nos. 18-005-F, 18-007-F

DECISION

Simultaneous with issuing its September 12, 2022 final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ.

BACKGROUND

During the period at issue, Complainant worked for the Agency as an Accountant, GS-12, in Washington, D.C.

In August 2017, the Agency posted two vacancy announcements (Merit Promotions (MP) and Delegated Examining Procedures (DE)) for a GS-13, Financial Management Specialist position. Hearing Transcript (Hr'g Tr.) Volume (Vol.) I at 161. The announcements noted that more than one selection may be made from the vacancy announcements. Complainant's Hearing Exhibit (Ex.) 3. Complainant applied under both announcements (MP and DE). Hr' g Tr. Vol. I at

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.

171-172, Report of Investigation (ROI) at 93. The Agency's Human Resources provided the selecting official with two certificates of eligibles, one for MP candidates and one for DE candidates.² Hr'g Tr. Vol. I at 171-172.

Complainant was the only candidate on the MP certificate. *Id.* Complainant also appeared on the DE certificate along with five other candidates. ROI 7-12. The selectees appeared on the DE certificate. ROI at 184-185. The selecting official (Caucasian) interviewed the six candidates on the DE certificate, including Complainant, and selected a Hispanic/Latino individual (first selectee). ROI at 165, 187. Approximately, one month after this first selection, the same selecting official used the same DE certificate for another Financial Management Specialist position and selected a Caucasian/White individual. Hr'g Tr. Vol I. at 171, ROI at

Complainant filed two formal EEO complaints. Complainant alleged that the Agency discriminated against him on the bases of race (African-American), color (Black), sex (male),³ age (61), and reprisal for prior protected EEO activity when:

1. On October 17, 2017, he was not selected for promotion to a Financial Management Specialist, GS-0501-13, posted under Vacancy Announcement No. FOD-CCD-2017-0003 and 0002.
2. On January 8, 2018, he was not selected for promotion to a Financial Management Specialist, GS-0501-13, when a second selection was made from Vacancy Announcement No. FOD-CCD-2017-0003 and 0002.

The Agency dismissed these formal complaints on procedural grounds. Complainant filed an appeal regarding the Agency's dismissal of these two complaints. In EEOC Appeal Nos. 0120181496, 0120181497 (July 12, 2018), req. for recons. den., EEOC Request Nos. 0520180554, 0520180555 (Dec. 20, 2018), We reversed the Agency's dismissal of these complaints and remanded them to the Agency for further processing.

On remand, after an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing, and the AJ held a hearing on April 20-21, 2022, and issued a decision on August 1, 2022. The AJ found that the Agency subjected Complainant to race, color, age, discrimination and retaliation regarding the two non-selections.

² DE candidates include sources from outside the federal government, while MP candidates encompass federal status candidates. Hr'g Tr. Vol. I at 161.

³Complainant withdrew the basis of sex during the investigation.

The AJ found that Complainant established a prima facie case regarding the non-selections based on race, color, and age because Complainant was found qualified for the positions and the selectees were outside of Complainant's protected EEO classes and were substantially younger than Complainant. AJ Decision at 11. The AJ found Complainant qualifications were plainly superior to those of the selectees. AJ Decision at 12. The AJ further found that the Agency's articulated reasons for selecting the two selectees over Complainant were unworthy of belief.

The AJ ordered the Agency to retroactively promote Complainant to the GS-13 Financial Management Specialist position or a substantially equivalent position retroactive to October 17, 2017 with back pay, pay \$25,000 in non-pecuniary compensatory damages, pay \$72,151.20 in attorney's fees, provide training for the responsible management official, and post a notice regarding the finding. AJ Decision at 27-28.

The Agency subsequently issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected him to discrimination and retaliation as alleged and filed an appeal. On appeal, the Agency argues that the AJ abused her discretion on multiple procedural rulings. Among other things, the Agency sets forth that the AJ allowed a "last minute" witness to testify. Agency Brief at 16. In addition, the Agency asserts that the order of witnesses was changed and that the Agency was not allowed to examine the witnesses fully. Id. at 17-18.

The Agency further asserts that there is not substantial evidence to support the AJ's findings of discrimination. The Agency asserts that the AJ discounted the legitimate qualifications, skills, and experience of the selectees which the selecting official determined were best suited for the positions at issue. Agency Brief at 28. The Agency also sets forth that the AJ improperly found that federal status was required for the positions. Agency Brief at 30.

Regarding the remedies awarded by the AJ, the Agency argues that the award of compensatory damages and attorney's fees should be set aside. Agency Brief at 47. Regarding the compensatory damages award, the Agency asserts that the AJ improperly considered the length of time from the non-selections until the date of the hearing. Agency Brief at 47. The Agency asserts that Complainant subsequently applied for and was denied other GS-13 positions in which there was a finding of no discrimination issued by the EEOC. The Agency asserts that the AJ did not take this matter into consideration regarding the award of compensatory damages. Finally, the Agency argues that the award of attorney's fees should be reduced regarding the AJ's finding of age discrimination. Agency Brief at 50-51. The Agency also reiterates arguments raised below in its response to Complainant's fee petition.

In response, Complainant, through his attorney, requests that we reverse the Agency's final order rejecting the AJ's finding of discrimination and/or retaliation and award of remedies. Complainant asserts that the AJ's findings are supported by substantial evidence. Complainant asserts that the AJ did not abuse her discretion regarding the various procedural issues raised by the Agency. Complainant asserts the award of \$25,000 in compensatory damages is consistent with Commission precedent and that the AJ's award of attorney's fees is proper.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

Liability

Where Complainant does not have direct evidence of discrimination, a claim alleging disparate treatment is examined under the three-part test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the analysis, a complainant initially must establish a prima facie case of discrimination by presenting facts, if unexplained, reasonably give rise to an inference of discrimination, i.e. that a prohibited consideration was a factor in the adverse employment action. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas 411 U.S. at 802. Next, in response, the agency must articulate a legitimate, nondiscriminatory reason for the challenged actions. See Burdine, 450 U.S. at 253-54; McDonnell Douglas, 411 U.S. at 802. Finally, it is complainant's burden to demonstrate by a preponderance of the evidence that the agency's action was based on prohibited considerations of discrimination, that is, its articulated reason for its action was not its true reason but a sham or pretext for discrimination. See Hicks, 509 U.S. at 511; Burdine, 450 U.S. at 252-53; McDonnell Douglas, 411 U.S. at 804.

We find that there is substantial evidence in the record to support the AJ's finding of race and color discrimination regarding the two non-selections.

Complainant may establish a prima facie case of discrimination in the non-selection context by showing that: 1) he is a member of a protected class; 2) he was qualified for the position; 3) he was not selected for the position; and 4) he was accorded treatment different from that given to persons otherwise similarly situated who are not members of his protected group. Williams v. Dep't of Education, EEOC Request No. 05970561 (Aug., 6, 1998); Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp., EEOC Notice No. 915.002 (Sept. 18, 1996).

Here, Complainant established a prima facie case of race and color discrimination. He was found qualified for the position and candidates outside of his protected classes were selected while he was not. The record reflects that the first selectee is Hispanic and the second selectee is Caucasian. The selecting official acknowledged that the first selectee is lighter in complexion than Complainant. Selecting Official's Deposition at 72.

The selecting official, however, testified that he chose the selectees rather than Complainant because, based on their qualifications, skills, and experience, he believed they were best suited for the positions at issue.

In non-selection cases, a complainant may demonstrate pretext by showing that his qualifications are demonstrably superior to the selectee's. Bauer v. Bailar, 647 F.2d 1037, 1048 (10th Cir. 1981).

There is substantial evidence in the record to support the AJ's finding that Complainant's qualifications were plainly superior to the selectees. Specifically, the AJ noted:

In 1999, Complainant became a federal employee with the Agency as a GS-9 Accountant.⁴ After three years, Complainant received a career ladder promotion to the GS-11 level and then he competed for and was promoted to the GS-12 in 2002...[Complainant's performance was rated] "Exceed Expectations" for rating periods 2015-2018.

At the time of his application, Complainant had worked as an Accountant for the Agency for 15 years. As an accountant, he provided customer service to [Agency] senior management,...attorneys and other federal agencies. Complainant provided training seminars to Agency employees and contractors... AJ Decision at 4-5.

The AJ noted that the first selectee had four years of experience as a contractor for the Agency and that his application had no experience as a federal employee; while the second selectee had eight years of experience as a contractor. AJ Decision at 5. We concur with the Agency's assertion, in its brief, that the pertinent vacancy announcement did not require the candidates to have been federal employees. However, we still find that there is substantial evidence in the record to support the AJ's finding that Complainant's qualifications were plainly superior to those of the selectees.

The AJ highlighted the difference in duties between Accountants who were federal employees, such as Complainant, and contractors:

In contrast, to federal employees, the contractor puts packages together for the accountant such as Complainant...An Accountant, such as Complainant, reviews the package for accuracy and authorizes it for payment and processing. Complainant had authority to review refunds up to a [specified amount] without supervisory review...If the refund was more than his authority, a GS-13...would approve it.

⁴ Complainant had previously worked as a contract employee for the Agency for 13 years.

In contrast, Complainant testified contractors do not have any authority to approve funds for any amount. Contractors do not approve or make determinations of reasonable cause to grant a penalty waiver [and do not perform inherently governmental functions]. AJ Decision at 6 (internal citations to record omitted).

The AJ noted that a Supervisory Accountant in the Financial Operations Department testified that a federal accountant would be more qualified for the position at issue than a contractor. The Supervisory Accountant testified that he would have chosen Complainant over the second selectee.⁵ AJ Decision at 5.

Based on the foregoing and our review of the record, we find that there is substantial evidence in the record to support the AJ's finding that Complainant's qualifications were plainly superior to those of the selectees.

We further find that there is substantial evidence in the record to support the AJ's finding that the selecting official's articulated reasons regarding Complainant's non-selections were pretext for race and color discrimination. The AJ noted that two of the primary reasons that the selecting official articulated for selecting the first selectee over Complainant was the selectee's advanced degree and original writing sample.⁶ Specifically, the AJ set forth that:

[The selecting official] claimed that he was impressed by [the first selectee's] advanced degree, but he did not set out any education qualifications in the vacancy announcement he drafted...In contrast, Complainant possessed a Bachelor's degree in Business Administration with a minor in Accounting.

[The selecting official] testified he selected [the first selectee] because he presented a better writing sample with the original language...I find this explanation to be false and unworthy of belief. First, [the selecting official] admitted that the office uses templates with language on various subjects approved by legal staff. He acknowledged that a letter with original language would have to be scrutinized and approved by the legal and management staff prior to its release to the customer. Moreover, the way [the selecting official] notified the applicants about the importance of the writing raised more suspicion. Specifically, the vacancy announcement...did [not] require a writing sample. According to Complainant, writing became an unexpected addition to the interview process.

⁵ We acknowledge that the Supervisory Accountant was not involved in the selections at issue.

⁶ The selecting official stated he selected the second selectee for his experience with automated premium processing system. The AJ found the selecting official overlooked Complainant's level of experience with the office automation systems. AJ Decision at 14.

Complainant testified that [the selecting official] shifted in his statement to him about the requirement for a writing sample, first telling Complainant it was 90% of the interview and then stating it was not a requirement but was optional.

While [the selecting official] selected [the first selectee] because of his writing sample, he was not impressed with [the second selectee's] writing sample or his educational background. His interview notes revealed that [the second selectee's] writing sample was based on a template, yet inexplicably this did not adversely affect his decision to select [the second selectee]. This contradiction in logic is persuasive evidence that [the selecting official's] reliance on [the first selectee's] writing sample as the basis for his selection was a pretext to mask discriminatory motives.” AJ Decision at 12-13.

The AJ noted that Complainant testified that the selecting official informed him, after the first non-selection, that he had two great candidates but could only choose one but if he had a second choice, he would have chosen Complainant. However, when actually given a second opportunity to make a selection, the selecting official subsequently chose a Caucasian candidate and not Complainant. AJ Decision at 8.

While the Agency raises various procedural issues regarding the order of witnesses and the extent to which it was able to cross-examine some witnesses, AJs have broad discretion in conducting hearings and the determination of whether to admit evidence or permit the testimony of witnesses. See 29 C.F.R. 1614.109. The Commission finds no evidence that the AJ abused her discretion in these matters.⁷

Following a review of the record, we find no basis to disturb the AJ's findings of race and color discrimination. Because we affirm the AJ's finding on the bases of race and color, we need not address the AJ's finding regarding the bases of age and reprisal because it would not alter our remedies.

Remedies

Non-Pecuniary Compensatory Damages

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this “make whole” relief. 42 U.S.C. § 1981a(b)(3).

⁷ While the Agency contested the AJ's decision to allow a specified witness to testify at the hearing, we find that there is substantial evidence in the record to support a finding of race and color discrimination, even if we were not to consider the testimony of this witness.

In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3).

To receive an award of compensatory damages, a complainant must demonstrate that he or she has been harmed as a result of the agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for recons. den., EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

There is substantial evidence in the record to support the AJ's award of \$25,000 in non-pecuniary compensatory damages. Complainant testified that he was embarrassed by the non-selections at issue. Hr'g Tr. Vol. II at 80. He was not able to participate in the mentoring program which is available to GS-13 employees. Id. at 80-81. Complainant further testified that the non-selections caused him stress, "a little bit of high blood pressure" and loss of happiness. Id. at 82.

We find that AJ's award of \$25,000 in non-pecuniary damages is not monstrously excessive and is consistent with the awards in similar cases. See Bryant T. v. U.S. Postal Serv., EEOC Appeal No. 2019006011 (Aug. 20, 2020) (complainant awarded \$25,000 in non-pecuniary damages after one discriminatory non-selection when she experienced stress, listlessness, and mental anguish); Parker v. Dep't of the Navy, EEOC Appeal No. 0720080062 (Feb. 26, 2009) (complainant awarded \$25,000 in non-pecuniary damages after a finding of race discrimination regarding one non-selection when she experienced emotional pain, humiliation, difficulty sleeping and loss of enjoyment of life).

While the Agency asserts that the AJ's award of \$25,000 considers the delay in the processing of this matter in the administrative process, we do not consider these delays in concurring with this award. Moreover, while the Agency argues that the compensatory damages award should be set aside based on a finding by EEOC of no discrimination in a subsequent non-selection case involving Complainant and a different selecting official, we disagree. Our award of \$25,000 in this matter is strictly related to the two non-selections at issue herein and does not compensate Complainant for any alleged emotional harm related to subsequent non-selections.

Attorney's Fees

The Agency is required to award attorney's fees and costs for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. 29 C.F.R. § 1614.501(e)(1)(ii). To determine the proper amount of the fee, the lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate. Hensley v. Eckerhan, 461 U.S. 424 (1983); 29 C.F.R. § 1614.501(e).

There is substantial evidence to support the AJ's award of \$72,151.20 in attorney's fees.⁸ The AJ, in a detailed analysis, set forth how she reached this amount. The AJ set forth that she found it proper to use the Laffey Matrix to determine the proper hourly rate.⁹ The AJ further set forth that it was proper to use the current market rates rather than the historical rates. AJ Decision at 22-23. Thus, the AJ found that \$919 per hour was the proper rate for Complainant's attorney. The AJ further found that it was appropriate to use \$208.00 per hour for the rate for Complainant's attorney's paralegal, which was consistent with the Laffey Matrix. *Id.* at 23. The AJ awarded 71.2 hours of work for Complainant's attorney for a total of (71.2 hours x \$919) \$65,432.80 and 32.3 hours of work for the paralegal for a total of (32.3 hours x \$208.00) \$6,718.40.¹⁰ Thus, the AJ awarded \$72,151.20 in total fees. AJ Decision at 27.

In its brief, the Agency asserts that the AJ abused her discretion by not allowing the Agency to question Complainant with respect to attorney's fees. Agency Brief at 16. The record, however, reflects that the AJ allowed the Agency to respond to Complainant's fee petition. The Agency did submit a response to the fee petition and the AJ, in her decision, addressed various arguments made in the Agency's response. Thus, we do not find that the AJ abused her discretion with respect to this matter.

While the Agency, in its brief, asserts that the AJ should have awarded historical rates, we disagree. The Commission has previously found, consistent with federal case law, that delay in payment is properly measured by compensating a complainant's attorneys at the current, rather than historical hourly rates. See Missouri v. Jenkins, 491 U.S. 274, 283-284 (1989); Rowland v. Dep't of Agriculture, EEOC Appeal No. 0120113022 (Feb. 18, 2012). The Agency also asserts that the award of attorney's fees should be reduced because the ADEA does not allow for attorney's fees at the administrative stage and Complainant's fee petition does not delineate work on the Title VII claim from work on the ADEA claim. We disagree. As set forth above, we only addressed the findings of race and color discrimination herein and set forth that a finding on the other bases would not alter our remedies. We concur with the AJ that "courts have held that fee applicants should only exclude time expended on 'truly fractionable' claims or issues on which they did not prevail...Claims are fractionable or unrelated when they involve 'distinctly different claims for relief that are based on different facts and legal theories.'

⁸ The AJ denied Complainant's requests for costs because he failed to provide receipts. AJ Decision at 24.

⁹ The Laffey matrix, which has its origins in the case of Laffey v. Northwest Airlines Inc., 572 F. Supp. 354 (D.D.C. 1983), reversed in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), is a chart compiled yearly by the United States Attorney's Office in the District of Columbia. It provides a schedule of hourly rates prevailing in the Washington, D.C., area in each year, going back to 1981, for attorneys at various levels of experience.

¹⁰ The AJ denied the hours expended pertaining to one witness.

Here, Complainant's Title VII claim and ADEA claim were not distinctly different claims, as both involved a common core of facts and were based on related legal theories."¹¹ AJ Decision at 25.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we REVERSE the Agency's final order rejecting the AJ's finding of race and color discrimination regarding the two non-selections at issue and we REMAND this matter to the Agency in accordance with the ORDER below.

ORDER

The Agency is ORDERED to take the following corrective actions:

1. Within sixty (90) days from the date this decision is issued, the Agency shall offer to promote Complainant to the position of Financial Management Specialist, GS-501-13, or a substantially equivalent position retroactive to **October 30, 2017**,¹² with back pay. Complainant shall have 15 days from receipt of the written offer to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless Complainant can show that circumstances beyond his control prevented a response within the time limit. If the offer is accepted, the Agency shall place Complainant in the position no later than 30 days from the date of acceptance. The Agency shall amend its personnel records to reflect Complainant's promotion to the position of Financial Management Specialist GS-13 as of October 30, 2017.
2. Within sixty (60) days from the date this decision is issued, the Agency shall determine the appropriate amount of back pay, with interest and other benefits due to Complainant pursuant to 29 C.F.R. § 1614.501. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and/or benefits due and shall provide all relevant information requested by the Agency. If Complainant declines the retroactive promotion, the Agency shall award Complainant a sum equal to the back pay he would have received, computed in the manner prescribed by 5 C.F.R. §

¹¹ While the Agency, in its brief asserts that the AJ failed to address its argument that specified hours were expended for clerical services, the AJ addressed this matter and did not find this argument to be convincing. AJ Decision at 25-26.

¹² While the AJ's decision listed October 17, 2017 as the retroactive promotion date, we change this date to October 30, 2017, because this was the effective date that the first selectee started in the position in question according to the pertinent Notification for Personnel Action Form. ROI at 187.

550.805, from the date he would have been appointed (October 30, 2017) until the date the offer was declined. 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 as set forth in the section below 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 adverse tax consequences, if any, for which Complainant shall then be compensated.
4. Within sixty (60) days from the date this decision is issued, the Agency shall pay Complainant \$25,000 in non-pecuniary compensatory damages.
5. Within sixty (60) days from the date this decision is issued, the Agency shall pay Complainant \$72,151.20 in attorney's fees.
6. The Agency shall pay Complainant reasonable attorney's fees and costs regarding its opposition to the Agency's appeal, as set forth in the paragraph below entitled "Attorney's Fees."
7. The Agency shall post a notice in accordance with the paragraph entitled "Posting Order."¹³

The Agency is directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The report must include supporting documentation that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its **Washington, D.C.** facility 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.

¹³We do not order training for the selecting official or for the Agency to consider taking disciplinary action against the selecting official because the record reflects that the selecting official retired from employment with the Agency in June 2018. Selecting Official's Deposition at 12.

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

ATTORNEY'S FEES (H1019)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

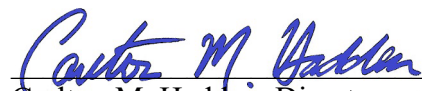
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

October 30, 2023
Date