



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

[REDACTED]
Cherie F.,¹
Complainant,

v.

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

Appeal No. 2022005099

Hearing No. 570-2019-00066X

Agency No. 2004-0688-2018100727

DECISION

Following its September 26, 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 training ordered by the EEOC Administrative Judge (AJ). For the following reasons, the Commission MODIFIES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Licensed Practical Nurse at the Agency's facility in Washington, DC.

On December 9, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of national origin (Nigerian), disability (physical), and in reprisal for prior protected EEO activity when:

1. On December 24, 2014, Complainant was not referred for the position of Registered Nurse (Patient Safety Specialist) under vacancy announcement number VHA-15-1280105;

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.

2. From January 6, 2015, to present, Complainant's request to transfer to another unit has been denied;
3. From June 12, 2015, to December 25, 2016, Complainant's request for details and participation in the Residency Program were denied;
4. On December 28, 2016, Nurse Recruiter failed to change Complainant's title to reflect her BSN degree;
5. On January 3, 2017, the Agency denied Complainant's request to attend a job interview;
6. On January 29, 2017, HR Specialist denied Complainant's request to have her title changed to reflect her BSN degree;
7. On February 3, 2017, Complainant learned she was not selected for the Hepatitis C Case Manager position under vacancy announcement number FQ-16-MGR-1791469; and
8. On October 16, 2017, Complainant learned she was not selected for the position of Staff Coordinator.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission AJ. Complainant timely requested a hearing. The AJ held a hearing on February 3 and 4, 2022, and issued a decision on September 13, 2022.

The AJ drew an adverse inference against the Agency because it failed to provide documentation regarding the Staff Coordinator position involved in claim 8. An Agency official testified that the documents were destroyed pursuant to an Agency practice that did not require the Agency to maintain documents for greater than three years. The AJ rejected this rationale because the documents requested concerning the non-selection were within three years of the selection of the candidate. As such, the AJ found that the destroyed documents went to the issue of Complainant establishing a prima facie case and an adverse inference was appropriate.

As to the merits of claim 8, the AJ found that the Agency failed to meet its burden of production. The AJ said "the record is completely devoid of any documentation regarding the selection process for the Staff Coordinator position. The Agency did not provide the vacancy announcement, applications for the position, the name of the selectee, the names of the individuals on the interview panel, or interview notes. No one with knowledge of the selection criteria testified regarding the basis for distinguishing between the Complainant and any selectee." The AJ found that Complainant was discriminated against on the basis of reprisal when she was not selected for the Staff Coordinator position.

Turning to the hostile work environment claim, the AJ found that the record supported a finding of retaliatory conduct with claims 1, 3, 4, 6, and 8. The AJ found that direct testimony revealed direct evidence of retaliatory animus. Multiple Agency officials testified that Complainant's EEO activity was openly discussed. Agency witnesses were unable to provide a reason Complainant was not being selected for positions.

The AJ found that the Agency failed to provide a legitimate, nondiscriminatory reason for any of its actions in claims 1, 3, 4, 6, and 8, and subsequently found that the Agency harassed Complainant on the basis of retaliation for these claims.

The AJ found that, concerning claims 2, 5, and 7, Complainant did not establish that the actions taken by the Agency officials were due to discriminatory animus. Thus, the AJ found no discrimination as to those claims.

On July 25, 2022, the AJ issued an Order to the Agency, who at that time was represented by a new attorney. The AJ specified that the Agency failed to include any relevant information about the Staffing Coordinator position. To render her decision on damages, the AJ required the job analysis, vacancy announcement, salary range, and other associated information regarding the position. On August 10, 2022, Agency counsel supplied the functional statement for the position, the salary of the position, the Selectee's identity and her starting salary in the position associated with claim 8. Agency counsel proffered that there was no announcement aside from an internal email.

The AJ ordered that the Agency:

1. Retroactively promote Complainant to Staffing Coordinator and Intermittent Staffing Pool Nurse Manager (Staffing Coordinator);
2. Calculate and pay Complainant all relevant back pay, including benefits, with appropriate deductions and contributions, plus applicable interest;
3. Calculate and pay Complainant front pay if no position comparable to Staffing Coordinator was available;
4. Pay attorney's fees;
5. Pay \$75,000.00 to Complainant in compensatory damages; and
6. Post notice of the EEO violation.

The AJ also ordered the Agency to provide specific groups with mandatory training:

1. All individuals involved in the selection process for the Staffing Coordinator position; and
2. The Agency's Attorney of Record, Agency Attorney's first- and second-line supervisors, and all Attorney Advisors involved in the legal sufficiency review and/or litigation of non-selection claims at the Agency's District of Columbia office.

As to the latter group, the AJ explained the necessity in that:

...the Agency failed to provide any information prior to and during the hearing about the Staffing Coordinator position, hiring process for the position or selectee. The record was completely devoid of any documentation regarding the selection process for the Staff Coordinator position until a new Agency counsel was assigned and responded to the Order to Produce on August 10, 2022.

To ensure that similar violations do not recur, in addition to already-required training, it is further hereby ORDERED that the Agency shall provide at least eight (8) hours of training to Agency Attorney, her first- and second-line supervisors since June 2019, and Attorney-Advisors involved in the legal sufficiency review and/or litigation of non-selection claims at the DC VAMC. The training shall include the topics of MD-110 (Chapter 7), Document Retention and Production, and the Agency's evidentiary burden with respect to non-selection claims.

All training was ordered to be conducted by a training group external to the Agency.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant proved that the Agency subjected her to discrimination as alleged and all ordered remedial relief with the exception of the provisions for training. The Agency reduced the training provisions to provide that identified Nursing staff would receive eight (8) hours of training on the topic of implicit bias, retaliation and reprisal, the Rehabilitation Act, and document retention policies. Four (4) hours of training on the topic of reasonable accommodation requests in the selection process, as well as retaliation and reprisal, would be provided to all Nurse Recruiters at the Washington, D.C. VA Medical Center. Finally, two (2) hours of training on the topic of the MD-110 (Chapter 7), Document Retention and Production, and the Agency's evidentiary burden with respect to non-selection claims would be provided to the identified Agency Counsel.

The instant appeal followed.

CONTENTIONS ON APPEAL

The Agency argues that all of the training orders are improper and should be reversed. With regard to training those individuals involved in the selection process for the Staff Coordinator position, the Agency argues that "having already determined that the Agency did not possess documentation or knowledge regarding the individuals involved in the selection process...the Administrative Judge had already determined that the Agency is unable to identify those individuals and therefore knew, at the time of her order, that the Agency would be unable to comply with the order as written."

Regarding training of attorneys, the Agency acknowledges that the order was due to failure of the Agency to maintain proper documentation regarding claim 8. The Agency argues, however, that "the record contains no reference to a legal sufficiency review, nor any suggestion that such a review existed in this case or regularly occurs in non-selections at this location."

Finally, as to the requirement of outside trainers to provide the ordered training, the Agency asserts that this is "is essentially levying monetary punitive damages against the Agency," and that there was no evidence that the internal training office of the Agency had any culpability in the complaint at hand.

ANALYSIS AND FINDINGS

Standard of Review

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. 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.

As an initial matter, the parties dispute the ordered training and do not dispute the AJ’s finding of discrimination or the additional ordered remedies. Therefore, we will not address the non-contested matters in this decision.

With respect to the lack of documentation indicating who was involved in the selection process, the EEO office, when the instant complaint was filed, should have contacted Human Resources to obtain the relevant documents. We have considered the Agency’s argument that there is no possible way to comply with the AJ’s order since the failure to maintain the required documents prevents the Agency from identifying the correct individuals. To that end, while the Agency may not be able to identify each individual associated with the claim, the fact that documents were not properly maintained indicates that the Agency EEO staff and the Human Resources staff responsible for retention of the relevant information should receive live, interactive training on EEOC laws and regulations regarding record retention.

The Commission recognizes that the Agency may no longer have any documentation as to who was on the selection committee or the specific individuals responsible for maintaining records associated with a claim. If such documentation has been identified by the Agency, the individuals involved should also receive training as ordered by the AJ. We note that the Commission does not consider training to be discipline and, when appropriate, has ordered training of all employees at a facility, even including employees “having no demonstrated involvement” with discriminatory acts. Wild v. Dep’t of Defense, EEOC Request No. 05A10058 (Mar. 16, 2001). Here, the Agency’s actions, in failing to preserve evidence relevant to a claim, may make it necessary to train more staff than were involved. Therefore, we find the Agency’s provision of training for identified Nursing staff and Nurse Recruiters at the Washington, D.C. VA Medical Center was appropriate.

Regarding attorney training, the AJ explained that training was ordered because the Agency did not provide any information about the Staff Coordinator position, either during discovery or during the hearing.

The record was, in fact, completely devoid of all relevant information related to this claim until a new Agency representative was appointed six months after the hearing and provided the position description, salary history, and the selectee's information in response to the AJ's Order to Produce to determine damages. While the Commission is concerned with the lack of preservation of documents, we find no evidence of intentional misconduct. As such, we find the Agency's provision of two (2) hours of training on the topic of the MD-110 (Chapter 7), Document Retention and Production, and the Agency's evidentiary burden with respect to non-selection claims to the identified Agency Counsel is appropriate.

As the AJ did not provide rationale as to the necessity for an external group to provide the ordered training, we find that such a requirement is not supported by law or fact. There is no evidence that the Agency's training group is incapable or insufficient to provide the training ordered herein.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final order implementing in part and rejecting in part the AJ's Order on Relief.

To ensure proper compliance, we have restated the orders as outlined in the AJ's decision and included the modification below.

ORDER

To the extent that it has not already done so, the Agency is ORDERED to take the following actions within 60 calendar days of the date this decision is issued, unless otherwise specified:

1. Within sixty (60) calendar days from the day that this decision becomes final, the Agency shall retroactively promote Complainant to the position of Staffing Coordinator and Intermittent Staffing Pool (ISP) Nurse Manager, Nurse Manager I (Level 3), or a mutually agreeable substantially equivalent position, at the District of Columbia Agency Medical Center, with an effective date of September 17, 2017.
2. Within sixty (60) calendar days from the day that this decision becomes final, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant, from September 17, 2017, through the date Complainant is placed in the Staffing Coordinator or substantially equivalent position.
 - a. If promotion and placement into the Staffing Coordinator, or a substantially equivalent position is not available, the Agency is ORDERED to pay front pay for two years at the rate of pay for a Nurse I (Level 3) position, less any amounts Complainant earned in mitigation of her damages. Calculations should include not only Complainant's wages, but also Agency contributions to health benefits, life insurance premiums, Retirement System, and Thrift Savings Plan.

3. Within sixty (60) calendar days from the day that this decision becomes final, the Agency shall pay Complainant the amount of \$75,000.00 in non-pecuniary compensatory damages as detailed in the AJ decision.
4. Within sixty (60) calendar days from the day that this decision becomes final, the Agency shall pay Complainant's reasonable attorney's fees in the amount of \$37,980.00.
5. Within ninety (90) calendar days from the date that this decision becomes final, the agency shall provide appropriate EEO training:
 - a. Eight (8) hours of training on the topic of implicit bias, retaliation and reprisal, the Rehabilitation Act, and document retention policies to the Nursing Staff identified in the Agency's final decision;
 - b. Four (4) hours of training on the topic of reasonable accommodation requests in the selection process, as well as retaliation and reprisal, to all Nurse Recruiters at the Washington, D.C. VA Medical Center;
 - c. Two (2) hours of training on the topic of the MD-110 (Chapter 7), Document Retention and Production, and the Agency's evidentiary burden with respect to non-selection claims to identified Agency Counsel.
6. Within thirty (30) calendar days of the date this decision is issued, the Agency shall post the attached Notice to Applicants and Employees ("Notice), signed by the Agency's duly authorized representative (e.g., chief EEO official) in the Office of Financial Management, Office of the Secretary in Washington, D.C. in accordance with the statement entitled "Posting Order."

The Agency is directed to submit a report of compliance, as provided in the paragraph entitled "Implementation of the Commission's Decision." The report must include evidence that the corrective actions have been implemented. The agency shall send a copy of the report and all its enclosures to the Complainant.

POSTING ORDER (G0617)

The Agency is ordered to post at its Washington, DC, Medical Center copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 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.

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

September 20, 2023

Date