



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Joey B.,¹
Complainant,

v.

Robert McDonald,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 0720160023

Hearing No. 470-2014-00097X

Agency No. 200J-0583-2013102172

DECISION

The Commission accepts the Agency's timely appeal following its August 18, 2016 final order. On appeal, the Agency requests that the Commission affirm its rejection of part of an Equal Employment Opportunity Commission Administrative Judge's (AJ) determination of relief following a 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Nurse Aid, Escort II, GS-05, at the Agency's Richard L. Roudebush VA Medical Center in Indianapolis, Indiana. On May 11, 2013, Complainant filed a formal complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of race (African-American) and in reprisal for prior protected EEO activity when:

1. On or about February 1, 2013, Complainant's supervisor changed his tour of duty from the evening shift to the day shift;

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. In February 2013, S1 asked the Complainant, "Who is going to hire a black man as a nurse?"
3. Complainant was not paid his overtime pay in a timely manner from January 2013 through March 2013; and
4. On or about March 13, 2013, the Agency terminated his employment during his probationary period.

At the conclusion of the 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. The AJ held a hearing on March 17 and 27, 2015, and issued a decision on July 12, 2016.

In her decision, the AJ found that the evidence showed that the Agency discriminated against Complainant and subjected him to a hostile work environment on the basis of race, as evidenced by his supervisor's racially-charged comment and his supervisor's failure to timely process Complainant's overtime. In addition, the AJ found that the Agency retaliated against Complainant by terminating him on or about March 13, 2013. The AJ determined that Complainant failed to show that the change in his tour of duty was based on discrimination or reprisal. To remedy the discrimination, the AJ ordered the Agency to reinstate Complainant to the Nurse Aid, Escort II, GS-5 position or another position acceptable to both parties; pay Complainant back pay and \$10,000 in compensatory damages; provide training to the responsible management officials and all other employees at the facility; and to post a notice.

On August 18, 2016, the Agency issued a final order. In the final order, the Agency accepted the AJ's finding that Complainant proved that the Agency subjected him to discrimination, reprisal, and a hostile work environment. The Agency agreed to implement the AJ's award of reinstatement; back pay and benefits; and compensatory damages. The Agency, however, did not agree to implement the AJ's order with respect to training. The Agency simultaneously filed the instant appeal.

CONTENTIONS ON APPEAL

In its appeal, the Agency contends that the AJ's order for facility-wide EEO training for all employees was overly broad. The Agency argues that the record did not establish the existence of widespread discrimination at the facility; rather, the discrimination was isolated to one supervisor. The Agency noted that the discriminating official in this case was not in a position of authority or influence in his regular position and was not in a position to set a leadership tone. Instead, the evidence of record established that the discriminating individual in the instant case was placed in a position of advantage over Complainant after working directly with Complainant as Complainant's peer, and that he used his new position to discriminate against Complainant. Accordingly, the Agency requests that the Commission affirm its final order.

Complainant did not respond to the Agency's appeal.

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. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether 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. See 29 C.F.R. § 1614.405(a).

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015).

ANALYSIS AND FINDINGS

At the outset, the Commission notes that on appeal, neither party challenges the finding of discrimination, or remedies other than the AJ's order of facility-wide EEO training. The Commission has the discretion to review only those issues specifically raised in an appeal. EEO MD-110 at 9-10. As such, this decision will only address the issue regarding the training order.

Pursuant to 29 C.F.R. § 1614.501(a)(2), to remedy a finding of discrimination, the Commission may order the Agency to provide full relief, to include corrective, curative or preventive actions to ensure that violations of the law similar to those found will not recur. Based on this regulatory authority, it is well-established that the Commission may properly order an Agency to provide relevant EEO training to employees as a measure to prevent future occurrences of discrimination. See Wild v. Dep't of Def., EEOC Request No. 05A10058 (Mar. 16, 2002). However, the purpose of such training should not be to punish individuals for past discriminatory conduct, but rather, to educate employees concerning the requirements of the law in order to avoid future violations. Textor v. Dep't of Veterans Affairs, Appeal No. 0720060047 (May 15, 2008).

The AJ ordered the Agency to implement appropriate preventive measures to ensure that similar unlawful discrimination would be unlikely to recur. As part of that order, the AJ directed the Agency to provide training regarding Title VII to Complainant's Supervisor, the Human Resources Specialist, and "all employees at the Richard L. Roudebush VA Medical Center in Indianapolis, Indiana." The Commission agrees with the Agency and concludes that

the AJ's training remedy is overly broad. There is no evidence in this case of a facility-wide culture of discrimination. The Commission finds that it is sufficient under the circumstances present to require eight hours of training to the management officials in Complainant's chain-of-command and to the Human Resources Specialist regarding the obligations and responsibilities under Title VII.

CONCLUSION

Therefore, after a careful review of the record, including arguments and evidence not specifically discussed in this decision, the Commission **AFFIRMS** the Agency's final order and **REMANDS** the matter to the Agency to take corrective action in accordance with this decision and the Order below.

ORDER

Within **sixty (60) calendar days** of the date this decision is issued, the Agency is ordered to take the following remedial action to the extent that it has not already done so:

1. Offer Complainant reinstatement to the position of Nurse Aid, Escort II, GS-05, at the Richard L. Roudebush VA Medical Center in Indianapolis, Indiana, retroactive to the date of termination, or in the alternative offer to hire Complainant to another position acceptable to both parties. The Agency shall allow Complainant not less than fifteen (15) business days to determine whether to accept the offer of reinstatement.
2. Pay Complainant \$10,000 in non-pecuniary compensatory damages.
3. 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 of this decision. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the 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 pay Complainant for any increased tax burden incurred because of the back pay award, within sixty (60) calendar days of receipt of Complainant's documentation proving the increased burden. To obtain payment for the increased

- income tax burden, Complainant shall provide to the Agency detailed documentation establishing the increased income tax burden no later than sixty (60) calendar days after receipt of the Agency's documentation on back pay and interest.
5. Provide EEO training to the management officials in Complainant's chain-of-command and the Human Resources Specialist at the Richard L. Roudebush VA Medical Center in Indianapolis, Indiana. Such training shall focus on their responsibilities and obligations under Title VII.
 6. Consider taking appropriate disciplinary action against all responsible management officials still employed by the Agency. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
 7. Post a notice in accordance with the paragraph below.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

POSTING ORDER (G0914)

The Agency is ordered to post at its Richard L. Roudebush VA Medical Center in Indianapolis, Indiana 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 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 at the address cited in the paragraph entitled "Implementation of the Commission's Decision," **within 10 calendar days** of the expiration of the posting period.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must

send a copy of all submissions to the Complainant. 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.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0416)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. The requests may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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).

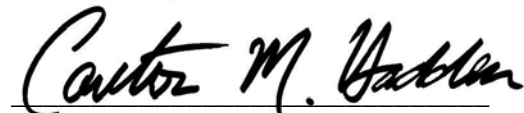
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

December 21, 2016

Date