



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

[REDACTED]
Rick G.,¹
Complainant,

v.

Kevin McAleenan,
Acting Secretary,
Department of Homeland Security
(Immigration and Customs Enforcement),
Agency.

Appeal No. 0720180009

Hearing No. 570-2014-00051X

Agency No. HS-ICE-21851-2012

DECISION

Following its November 7, 2017, 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. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. Complainant filed a cross appeal. Complainant specifically challenges the AJ's award of non-pecuniary damages.

BACKGROUND

During the period at issue in this complaint, Complainant worked as a Management Program Analyst for the Agency in Washington, D.C.

On May 28, 2012, Complainant filed a formal EEO complaint. Complainant claimed that the Agency discriminated against him based on race (African-American), color (black), age (54), and in reprisal for prior protected EEO activity.

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.

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 February 27-28 and March 20, 2017 and issued a decision on September 28, 2017.

In her decision, the AJ framed Complainant's claims in the following fashion:

(A)(1) Whether the Agency subjected Complainant to discrimination because of his race, color, age, and in reprisal for protected activity when, on January 9, 2012, his supervisor took possession of Complainant's credential which authorized him to receive firearms training.

B. Whether the Agency subjected Complainant to discrimination and a hostile work environment because of his race, color, age, and in reprisal for protected activity when:

1. On February 11, 2013 and February 23, 2013, the Unit Chief conducted a physical inventory of Agency badges, and tampered with or removed badges from the inventory to discredit him.
2. The Unit Chief's subordinate tampered with or removed badges from the inventory in order to tarnish Complainant's reputation as the assigned credential program manager.
3. On April 17, 2013, the Unit Chief presented Complainant with an open mail parcel from which he removed credentials in order to tarnish his reputation as the assigned credential program manager.
4. On April 25, 2013, the Unit Chief sent Complainant e-mail messages which were a "waste of valuable time" and distracted Complainant from his daily inventory duties.
5. On April 26, 2013, the Unit Chief subjected to him to harassment and violated his privacy when she contacted his Employment Assistant Program (EAP) counselor and asked why Complainant was missing so much work.

AJ Decision 1-2.

The AJ found that the Agency subjected Complainant to race and color discrimination with respect to claim (A)(1). The AJ also found that the Agency subjected Complainant to race and color discrimination and retaliation with respect to claims B(1), (3), (5). AJ Decision at 22.

The Agency issued a final order rejecting the AJ's findings regarding discrimination and retaliation. In its final order, the Agency reasoned that the AJ erred in not conducting a prima facie case analysis regarding race or color discrimination. Agency's Final Order at 3. The Agency further found that there was not substantial evidence in the record to support a prima facie case of race or color discrimination. Id.

The Agency simultaneously filed an appeal with the Commission's Office of Federal Operations (OFO) challenging the AJ's findings of retaliation and race and color discrimination.

In opposition to the Agency's appeal, Complainant, through his attorney, asserts that the Agency's appeal is defective for procedural reasons. Complainant asserts that the Agency failed to file an EEOC Appeal Form 573. Complainant also asserts that the AJ's findings of discrimination are supported by substantial evidence in the record.

The Agency in its brief in support of its appeal, raises numerous arguments asserting that the AJ erred in her analysis finding discrimination and retaliation. The Agency also asserts that several of the AJ's credibility determinations were improper. The Agency also argues that the AJ's award of attorney's fees should be reduced. Specifically, stating the hourly rate should be the historical rate at the time and not the prevailing market rate when the fee petition was filed.

As a threshold matter, we find that the Agency properly filed an appeal of the instant matter. The Agency simultaneously filed an appeal with the Commission's Office of Federal Operations. The Agency noted in its coversheet to OFO that it was filing an appeal in the instant matter. In addition, the final order (which was received by Complainant) set forth that "this is [the Agency's] final action in this matter and serves as notice of appeal to the EEOC." We acknowledge that the record does not contain a completed EEOC Appeal Form by the Agency. We find, however, this to be harmless error. The record reflects that OFO sent Complainant an acknowledgment letter dated December 7, 2017, informing him that the Agency filed an appeal. Based on the foregoing, we find that the Agency properly filed an appeal.

Complainant filed a timely cross appeal with respect to the issue of non-pecuniary damages.

In response, the Agency asserts that Complainant's appeal brief should be stricken because it was not served properly on the EEOC. Specifically, the Agency asserts that Complainant filed the brief via facsimile and that it exceeded OFO's page limit for fax submissions. The Agency further asserts that Complainant's brief is untimely in general. Finally, the Agency states that at a minimum, the portion of Complainant's arguments related specifically to his cross appeal should be stricken because they are untimely. Specifically, the Agency states that "[C]omplainant knew that his extension request was not applicable to his brief in support of Complainant's appeal because his initial extension request was rejected before his brief was due. Complainant was specifically instructed that his extension request was only applicable to Complainant's Brief in Opposition to the Agency's Appeal and not to Complainant's cross appeal." Agency's Motion to Strike Complainant's Brief at 4-5.

Complainant's brief with respect to his arguments in opposition to the Agency's appeal is timely. The record reflects that Complainant requested an extension to submit his response "to the Agency's brief filed December 11, 2017." The record reflects that OFO granted Complainant's extension request until January 22, 2018 to file a "statement or brief in opposition" to the Agency's appeal. However, the government shutdown occurred during this period. Complainant filed his brief on January 25, 2018. Based on the foregoing, we find that Complainant's brief regarding his opposition to the Agency's appeal is timely. We further find that Complainant properly served the EEOC with his brief via mail.

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.

Claim (A)(1)- Seizure of Complainant's Credentials

Regarding claim (A)(1), concerning management confiscating Complainant's badge and credentials and did not allow him to train at the firing range, we find that there is substantial evidence in the record to support the AJ's finding of race and color discrimination. A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, 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 McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

The Agency's in its final order asserts that Complainant did not establish a prima facie case of race and color discrimination. We disagree. Complainant is a member of a protected class (African American, black). Complainant was subjected to an adverse action when his badge and credentials were taken away and he was denied the opportunity to train at the firing range. The record contains testimony of an Agency employee (African-American) stating that she believes the responsible management officials treated people differently based on their race such as with issues of training and requests for schedule changes.

Hearing Transcript (Hr'g Tr.) Volume (Vol.) III at 239-251. Based on the foregoing, we find that Complainant established a prima facie case of race/color discrimination with respect to claim (A)(1).

The AJ found that the Agency articulated a legitimate, nondiscriminatory reason for its actions. Specifically, the responsible management official (D1) (Caucasian, white) stated that the training Complainant received at the Federal Law Enforcement Training Center (FLTC) did not authorize him to receive law enforcement credentials. AJ Decision at 11.

We find that there is substantial evidence in the record to support the AJ's finding that Complainant established that the Agency's articulated reasons for its actions in claim (A)(1) was pretext for discrimination. Complainant testified that he had been approved by his supervisors at the time to attend the Seized Property Specialist Course at the FLTC. The training included instructions on the safe handling of firearms. Hr'g Tr. Vol. I at 54, 62. Complainant testified that after the training, he told his supervisors at the time that he had been given his law enforcement badge and credentials at the training. Hr'g Tr. Vol. I at 172. A senior training instructor at the range testified that Complainant was authorized to take familiarization training at the firing range. *Id.* at Vol. II at 61, 62. Another agency official further testified that other non-law enforcement personnel and even civilians were permitted to take familiarization training at the firing range. *Id.* at 86, 95.

The record also supports the AJ's finding that the Agency had issued waivers for Customs and Border Protection (CBP) trained employees who became employed by ERO to obtain credentials. Hr'g Tr. At Vol. III at 56. In addition, Complainant testified that he told D1 prior his badge and credentials being confiscated, that he obtained them after completing training at FLTC. Hr'g Tr. Vol I at 77. Based on the foregoing, we find that the AJ properly found that "[D1's] testimony that he believed Complainant engaged in misconduct by possessing a badge and credentials is not believable in light of the fact that Complainant had qualified for them at the Academy and legitimately applied for the change in his job classification. At the time he confiscated Complainant's badge and credentials, [D1] knew [Complainant] had been firearm certified and graduated from the Academy." AJ Decision at 13.

In her analysis of this claim, the AJ makes several credibility determinations with respect to the testimony of Complainant and his witnesses. We find no reason to disturb the AJ's credibility determinations in the instant matter. Accordingly, we find that there is substantial evidence in the record to support the AJ's finding that Complainant established by a preponderance of evidence that the Agency's reasons for confiscating his credentials and barring him from the firing range were pretext for discrimination.

Claims (B)(1), (B)(3), and (B)(5)-Hostile Work Environment

Complainant can establish a prima facie case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas Corp. v.

Green, 411 U.S. 792, 802 (1973)). Specifically, in a reprisal claim, and in accordance with the burdens set forth in McDonnell Douglas, Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976), and Coffman v. Dep't of Veteran Affairs, EEOC Request No. 05960473 (Nov. 20, 1997), a complainant may establish a prima facie case of reprisal by showing that: (1) he or she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he or she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

Complainant established a prima facie case of retaliation regarding Claims (B)(1), (B)(3), and (B)(5). Complainant had engaged in prior EEO activity when he first contacted the EEO Office in February 2012. ROI at 22. He subsequently filed a formal complaint in May 2012. Complainant's first level supervisor at the time testified that he spoke with Complainant's second level supervisor and the Deputy Assistant Director about Complainant's EEO activity in November 2012. Hr'g Tr. Vol. II at 76-77. While Complainant's second level supervisor (S2) denied this conversation took place, the AJ found Complainant's first-level supervisor's testimony to be credible and "clear and detailed." AJ Decision at 19. We find no reason to disturb the AJ's credibility determination. The record reflects that Complainant was subjected to actions reasonably likely to deter protected activity with respect to the incidents set forth in claims (B)(1), (B)(3), and (B)(5). Finally, we find a nexus exists because Complainant's prior EEO activity which was still ongoing during the events at issue.

There is substantial evidence in the record to support the AJ's finding that Complainant established by a preponderance of the evidence that the Agency's articulated reasons for its actions were pretext for retaliation.

Regarding claim (B)(1) the conducting of a pre-inventory, by Complainant's second level supervisor (S2) at the time, the AJ found that the Agency articulated legitimate, nondiscriminatory reasons for its actions. S2 testified that he conducted the pre-inventory to take care of issues in the annual inventory ahead of time. Hr'g Tr. Vol. II at 148. The record reflects that the annual inventory involves verification to check the status of badges currently assigned to personnel. However, the hearing testimony by multiple witnesses reflects that the pre-inventory largely consisted of checking legacy badges which are not assigned to specific employees and have been taken out of the FACTS computer system. Hr'g Tr. Vol I. at 120; Vol II. at 159; Vol. III at 237-238.

We find that the AJ properly determined that S2's "own description of the annual inventory revealed that a pre-inventory was not designed to fix issues as he asserted. He testified that the annual inventory began when [an email] was sent to all staff in the field units to begin the official inventory.

During the designated period of time, the officer in the field was notified to physically confirm possession of a badge assigned to him/her in the presence of a supervisor. The supervisor in turn is responsible for entering into the FACTS system that the badge had been physically verified...I

find [S2's] explanation for conducting a pre-inventory of legacy badges to correct problems in advance of the official inventory was not plausible." AJ Decision at 16.

Complainant testified that S2 did not follow proper procedures when he opened a piece of mail addressed to him. Complainant stated that all mail is subjected to irradiation and then is resealed by the Agency given the sensitive nature of the contents. Hr. Tr. Vol. I at 131-137.

The AJ found "[g]iven [S2's] demonstrated lack of credibility with respect to his other claims of Complainant's work-related malfeasance, I credit Complainant's version of events with respect to this claim as well." AJ Decision at 18. We find no reason to disturb the Agency's credibility determination with respect to this matter.

Regarding claim (B)(5), S2 contacting Complainant's Employee Assistance Program (EAP), we find that there is substantial evidence in the record to support the AJ's finding of retaliation. The record reflects that in 2013, Complainant started to meet with an EAP counselor. S2 contacted the EAP, referenced Complainant, and inquired about the amount of leave that had to be provided.² Hr'g Tr Vol I at 143-144. S2 testified, however, that Complainant's first level supervisor did not complain that Complainant was abusing time and that he was not aware of any instance of Complainant abusing time and attendance rules. Hr' Tr. Vol II. at 319.

We find that the AJ properly found "[S2's] inquiry directly with EAP...was not appropriate and not adequately explained. [S2] testified that he had no concerns about Complainant's time and attendance and he had not received a complaint from [Complainant's first-level supervisor] that Complainant had abused administrative leave for EAP sessions. Thus, this did not explain his contact with the EAP office. [S2's] claim that he wanted to gather information for establishing a policy was not believable since he happened to call during the period Complainant was receiving EAP counseling."

Based on the foregoing, we find that there is substantial evidence in the record to support the AJ's finding of retaliation with respect to claims (B)(1), (B)(3), and (B)(5).³

² Complainant was later informed by his EAP Counselor of S2's inquiry with the Employee Assistance Program.

³ There is substantial evidence in the record to support the AJ's finding that the incidents set forth in (B)(1), (B)(3), and (B)(5) culminated in Complainant being subjected to unlawful harassment based on her prior protected activity. Because we find that Complainant established unlawful retaliation with respect to incidents (B)(1), (B)(3), and (B)(5), we need not address that these matters also constituted harassment based on race and color because this would not alter our remedies.

Non-pecuniary Compensatory Damages

The AJ awarded Complainant \$20,000 in non-pecuniary damages. AJ Decision at 24. With respect to non-pecuniary compensatory damages, these are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991 (EEOC Guidance), EEOC Notice No. 915.002 at 10 (July 14, 1992). Objective evidence in support of a claim for non-pecuniary damages claims includes statements from Complainant and others, including family members, co-workers, and medical professionals. See id.; see also Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Non-pecuniary damages must be limited to compensation for the actual harm suffered as a result of the Agency's discriminatory actions. See Carter v. Duncan-Higgans, Ltd., 727 F.2d 1225 (D.C. Cir. 1994); EEOC Guidance at 13. Additionally, the amount of the award should not be “monstrously excessive” standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)).

The Agency has requested that the award be reduced and Complainant seeks to increase it. However, we conclude that there is substantial evidence to support the AJ's award. The AJ in reaching this amount reasoned that Complainant testified that he felt afraid he would lose his job and humiliated. Complainant also had difficulties sleeping and eventually sought help from an EAP Counselor despite never having to receive mental health services before. AJ Decision at 23-24. We find that this award is not monstrously excessive and is consistent with the amount awarded in similar cases. See Johnson v. U.S. Postal Serv., EEOC Appeal No. 0720100024 (May 15, 2012) (\$20,000 awarded for race discrimination and reprisal resulting in mood swings, mental anguish, chronic sleeplessness, marital stress, and familial strain).

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).

Determination of a Reasonable Hourly Rate

On appeal, the Agency asserts that the AJ erred by awarding 2016-2017 Laffey rates to Complainant rather than the rates when the work was performed in 2014-2015. The Agency asserts that Complainant has not established that his attorneys were delayed payment, such as through a contingency agreement or pro bono services.

We find that the AJ properly awarded Laffey rates at the time of the fee petition rather than the historical rates when the work was performed. The United States Supreme Court has held that a “reasonable fee” is “to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel.” Blum v. Stenson, 465 U.S. 886, 895 (1984). While Blum only expressly addresses the situation where counsel is from a non-profit entity, later cases have held that “privately practicing but public interest attorneys” should also receive awards at prevailing market rates rather than counsel’s below market rate charged to clients. Save Our Cumberland Mountains, Inc.v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988); Covington v. District of Columbia, 57 F.3d 1101 (D.C. Cir. 1995). The Commission has held that attorneys who demonstrate that they charge reduced rates to federal employees in discrimination cases, based on public interest motives, are entitled to compensation at the higher prevailing market rate, notwithstanding a retainer agreement. See Morales v. USIA, EEOC Appeal No. 01956779 (Dec. 3, 1997).

The record reflects Complainant entered into a retainer agreement. While the record contains a copy of retainer agreement signed by Complainant, we find that Complainant was being provided legal services at a reduced rate based on public interest minded reasons. The agreement, provides, in pertinent part that “the Client understands that, in general, the hourly rates for legal services provided for in the paragraph above are reduced rates that are below the market rates charged by attorneys with comparable skills and that [the named law firm] normally provides reduced rates to further its noneconomic goals of assuring legal representation to individuals attempting to enforce individual, civil, and Constitutional rights.” Based on the foregoing, we find that the AJ properly awarded attorney’s fees at the Laffey rate at the time of the fee petition rather than the historical rate. See Complainant v. Dep’t of Def., EEOC Appeal No. 0720120002 (Sept. 19, 2014) (awarding the prevailing market rate of the Laffey matrix and not the lower amount contained in retainer agreement).

Challenged Hours

The Agency also asserts that Complainant is not entitled to \$2,219 for 8.2 hours of alleged work performed in responding to the Agency’s discovery request. Specifically, Agency counsel asserts there is no record of Complainant serving these discovery responses on the Agency. Agency’s Brief at 45-46. However, we find that there is substantial evidence in the record that Complainant responded to the Agency’s discovery requests. The Agency submits in its response brief a copy of Complainant’s responses to the Agency’s discovery requests. The record also contains an affidavit from Complainant’s counsel that the Agency was sent Complainant’s discovery requests around July 25, 2014.

We also concur with Complainant that the amount of time spent on this matter (8.2 hours) was not excessive given the complexity of the matters at issue and the number of records at issue. Based on the foregoing, we find these hours to be proper and will not reduce the AJ’s award of attorney’s fees.

Accordingly, we REVERSE the Agency's final order rejecting the AJ's findings of discrimination and retaliation and we REMAND this matter to the Agency in accordance with the ORDER below.

ORDER

The Agency is ORDERED to take the following actions:

1. Within sixty (60) calendar days from the date this decision is issued, the Agency shall reinstate and reissue Complainant's Law Enforcement Badge and Credentials issued by the Custom and Border Patrol Service retroactive to January 9, 2012 (the effective date of the Agency's confiscation). The Agency shall permit Complainant entry into the firing range for purposes of taking part in firearm training.
2. Within sixty (60) calendar days from the date this decision is issued, the Agency will expunge its records of any and all references to his supervisors' (as set forth in the AJ's decision) report to the Joint Intake Center regarding the actions at issue and their recommendations for Complainant's removal.
3. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$20,000 in non-pecuniary compensatory damages.
4. Within ninety (90) calendar days from the date this decision is issued, the Agency will require the responsible management officials (as named in the AJ's Decision, AJ Decision at 31) to take at least eight (8) hours of EEO training in the provisions of Title VII of the Civil Rights Act of 1964, specifically, nondiscrimination and the prohibition against and the prevention of harassment based on race and color and the prohibition against retaliation for engaging in protected EEO activity.
5. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay \$82,521.00 in attorney's fees and \$2,650.00 in costs.
6. Within sixty (60) calendar days from the date this decision is issued, the Agency shall provide the Commission's Office of Federal Operations (OFO) with proof that it has instituted a policy against harassment within the workplace and the specific process available to employees of ICE for reporting harassment in keeping with the EEOC Enforcement Guidance on Various Employer Liability for Harassment by Supervisors.
7. Within sixty (60) calendar days from the date this decision is issued, the Agency shall consider taking disciplinary action against the responsible management officials named in the AJ's Decision (AJ Decision at 32). The Agency shall report its decision to the Commission and specify what, if any, action was taken. If the Agency decides

not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline. Training is not considered disciplinary action.

8. Within thirty (30) calendar days from the date this decision is issued, the Agency is required to post a notice in accordance with the paragraph below entitled "Posting Order."
9. The Agency shall also pay Complainant for reasonable attorney's fees and costs associated with its successful opposition to the Agency's appeal (as set forth in the paragraph below entitled attorney's fees).

POSTING ORDER (G0617)

The Agency is ordered to post at its Immigration and Customs Enforcement, Enforcement and Removal Operations (ERO) in Washington, D.C. 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 (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), 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 the date this decision was issued. 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 (K0618)

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.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0617)

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. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request 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 agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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).

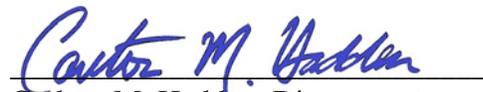
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

April 26, 2019
Date