



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

[REDACTED]
Glenna D.,¹
Complainant,

v.

Dr. Heather A. Wilson,
Secretary,
Department of the Air Force,
Agency.

Appeal No. 0720180026

Hearing No. 410-2017-00022X

Agency No. 9R1M16011

DECISION

In conjunction with its July 9, 2018 final order, the Agency filed an appeal of an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge's (AJ) decision concerning Complainant's equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Equal Pay Act (EPA) of 1963, as amended, 29 U.S.C. § 206(d) et seq. 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 General Engineer (Environmental), GS-801-12, in the Air Force Civil Engineer Center (AFCEC), East Region, Installation Support Team, at the Robins Air Force Base located in Warner Robins, Georgia. During the relevant time, the Robins Installation Support (IST) Team Lead was Complainant's first level supervisor (S1). Complainant's second level supervisor was the AFCEC East Region Chief (S2). Complainant's third level supervisor was the AFCEC Division Chief (S3).

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.

The AFCEC is divided into three main regions: West, East, and Midwest.² Each region has one employee, the Regional Environmental Management Systems (EMS) Lead, assigned the responsibility of, in part, planning and conducting environmental audits or inspections of the Agency's military installations within their region.

On August 7, 2014, S2 sent an email message to several AFCEC employees explaining that the duties and responsibilities of GS-13 Employee A would be divided among several other AFCEC employees, including Complainant, who was already designated as Employee A's alternate with respect to some duties, while Employee A was on a 120-day temporary duty (TDY) assignment. A chart attached to the email delineated which responsibilities were being reassigned to which employees. Employee B, GS-13, was reassigned eight of Employee A's duties, two with assistance from another employee, Person C. Complainant, who was a GS-12 at the time, was reassigned six of Person A's duties, one with assistance from another employee, Person D. Three more GS-13 employees, Person E, Person F, and Person G, were each assigned one of Person A's duties. Person C, a contractor not on the GS pay scale, was reassigned two of Person A's duties, but both with assistance from Person B. In addition, Person D, the only other GS-12 employee involved, was reassigned two of Person A's duties, one with assistance from Complainant. S2 testified that all of the employees who were reassigned Person A's duties saw their workload increase by one to two hours per week; except for Complainant, who saw her workload increase by 12 or more hours per week.³ The record indicates that none of Complainant's existing duties were reassigned, modified, or eliminated while she was performing the additional duties. Person A's temporary duty (TDY) assignment ended in November 2014, but the record indicates Complainant continued to perform at least some of his duties afterward.

The record reveals only one of Person A's duties was not reassigned: developing and facilitating training. S2 decided that because none of the available employees were capable of performing the duty, she would cancel any training activities, "until further notice." S2 testified it was Person A's training role, and only his training role that warranted his GS-13 pay grade. S2 did not explain why virtually all of Person A's duties were reassigned to other GS-13 employees, with the exception of Complainant who was assigned six of those duties and Person I who was assigned two of those duties.

On March 2, 2015, S2 sent another email message to several AFCEC employees advising that Complainant, a GS-12, had been designated the, "new East Region lead for EMS and IG Inspections/Environmental Assessments." Complainant replaced Person A in this role. At the time, the West Region EMS Lead was Person H and the Midwest Region EMS Lead was Person I; both were GS-13 employees before they were designated to serve as the respective EMS Leads for the West and Midwest Regions. Person J was the Midwest Region EMS Lead immediately

² The record indicates that AFCEC also had two overseas regions, but that neither is comparable to the three main regions.

³ S1 testified that he believed Complainant's workload increased by 8 to 10 hours per week, but that he was not surprised to learn that S2 estimated the increase was closer to 12 hours per week.

prior to Person I, and he was also a GS-13 employee before he became the Midwest Region EMS Lead.

On May 15, 2016 Complainant was promoted to the GS-13 level, but only after she applied for, and received, the promotion in connection with a posted vacancy announcement.

On January 26, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Black) and sex (female) when:

1. From March 2, 2015 to the present, she has been performing higher graded duties as a GS-0819/0801-13, but not paid at that level; and
2. On September 22, 2015, she was not selected for the position of Interdisciplinary Environmental Engineer/General Engineer position on announcement number 9R-ROBINS-1493322-404241-LC.

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 AJ. Complainant requested a hearing. On April 18, 2017, Complainant filed an unopposed Motion to Amend and Partially Withdraw Complaint. By Order dated June 13, 2017, the AJ granted Complainant's Motion, which resulted in the elimination of her nonselection claim (claim 2). The AJ held a hearing on the remaining claim (claim 1) on February 1 - 2, and 5, 2018, and issued a decision on February 5, 2018.

Regarding her EPA claim, the AJ found Complainant identified only one male comparative in connection with her sex discrimination claim: Person J, the Midwest Region's EMS Lead just prior to Person I's assignment to that position in early 2015. However, the AJ noted that Person J simultaneously performed two different roles: that of IMS Lead and that of the ISS Lead. In the East Region, S1 served as the ISS Lead while Complainant served as the EMS Lead. Thus, the AJ found Complainant did not receive less pay than any individual of the opposite sex for equal work, requiring equal skill, effort, and responsibility.

Regarding her claim of disparate treatment on the basis of sex, the AJ found Complainant did not identify, and the record did not reveal, any male comparatives who were similarly situated. The AJ noted the only potential male comparatives, Person J and Person A, performed duties that were substantially different and more involved as compared to those Complainant performed. The AJ further found there was no other evidence in the record that gave rise to a reasonable inference that Complainant was paid less than comparably situated male employees. Thus, the AJ found Complainant did not establish a prima facie case of disparate treatment on the basis of sex.

The AJ found Complainant established a prima facie case of disparate treatment on the basis of race. The AJ noted the record indicated that, at the time of Complainant's assignment to the EMS Lead position in March 2015, Person H occupied the same position in the West Region, while Person I occupied that position in the Midwest Region. The AJ noted that both Person H and

Person I were Caucasian, but that Person H served as both the EMS Lead and the ISS Lead in her region, and as a result had significantly more duties and greater responsibilities as compared to Complainant. The AJ found the record established that Person I and Complainant performed the same duties with the same level of oversight, had the same responsibilities and workloads, and did their jobs in virtually the same manner, with limited differences related to their regions' respective "Business Rules." Thus, the AJ found Complainant and Person I were similarly situated. The AJ determined given the similarities between the two Regional EMS Leads (Complainant and Person I), the only relevant differences between the two, their race and pay grade, gave rise to a reasonable inference of race discrimination.

The AJ recognized the Agency put forth a number of explanations for the difference in pay between Complainant and Person I: (1) despite being a GS-12 Regional EMS Lead, Complainant was not required to perform any duties that fell outside her "core doc"⁴; (2) GS-13 employees were held to different expectations and standards with respect to level of supervision and job duties as compared to GS-12 employees; (3) the Regional EMS Lead position was not explicitly classified as a GS-13 position; and (4) apart from Complainant, all of the GS-13 Regional EMS Leads had been promoted to the GS-13 level prior to their assignments to those positions.

Next, the AJ considered whether Complainant met her burden of establishing by a preponderance of the evidence that the Agency's reasons were pretext for discrimination. Regarding the Agency's first argument, the AJ noted Complainant did not dispute the Agency's factual accuracy that she was not required to perform duties that fell outside her core doc. However, given the substantial similarities between Complainant's GS-12 core doc and her (and the other Regional Leads') GS-13 core doc, which applied after Complainant's May 2016 promotion, and further considering the relative vagueness and broad applicability of the various duties/responsibilities listed in the core doc, the AJ found the Agency's argument carried little persuasive value. Further, the AJ found the fact that Complainant did not work outside the scope of her core doc while performing the Regional EMS Lead role as a GS-12, must be balanced against the equally if not more critical fact that Complainant also effectively worked *within* the scope of the GS-13 core doc, and the fact that for over a year she did the same work as a GS-13 Regional EMS Lead with approximately 30 years of experience at that grade level.

The AJ then considered the Agency's second argument, that GS-13 employees were held to a higher standard than GS-12 employees, specifically with respect to the level of supervision required and assigned duties. The AJ found the Agency's argument "more theoretical than practical." The AJ noted that although Complainant should have required more supervision as a GS-12 employee than a GS-13 employee, and should have had fewer responsibilities as a GS-12 employee than she did as a GS-13 employee, the evidence did not show that she actually required, or was even subjected to, greater supervision before her promotion to the GS-13 level, or that her workload increased by any significant degree after her promotion.

⁴ The record contains an Air Force Standard Core Personnel Document also referred to as the SCPD or "core doc" in the record for the relevant GS-12 and GS-13 positions.

With respect to Complainant's level of independence, both S1 and S2 testified that Complainant required, or should have required, more supervision before her promotion, but the AJ found the evidence was ambiguous at best, as neither manager quantified the amount of supervision they exercised over Complainant except in the vaguest terms, provided any specific examples that would highlight any change in the level of supervision before and after Complainant's promotion, or contrasted the amount of supervision that Complainant required as a GS-12 Regional EMS Lead with the purportedly lower level of supervision that Person I, as a GS-13, required. Moreover, the AJ noted that Complainant's and Person I's testimony credibly and consistently indicated that no notable change occurred with respect to Complainant's level of supervision before and after her promotion.

With respect to Complainant's increased workload, the AJ noted S1 testified that Complainant gained some additional responsibilities upon her promotion to the GS-13 level, but that those responsibilities only accounted for between four to five hours of additional work per week; in contrast S2 testified that there was no practical change in Complainant's workload before and after the promotion. The AJ noted Complainant and Person I echoed S2's testimony, emphasizing that the only notable change that occurred upon Complainant's promotion was in her level of compensation. The AJ found that, even if Complainant's responsibilities did increase after her promotion consistent with S1's testimony, the increase in her workload was minimal and had no real bearing on the ultimate question of whether Complainant performed higher-graded work between March 2015 and May 2016.

The AJ considered the Agency's third and fourth arguments together. The Agency's third argument was that the Regional EMS Lead position was not technically classified as a GS-13 position and its fourth argument was that, because all of the other Regional EMS Leads had reached the GS-13 level prior to their assignment to the position, no inference can be made that one's assignment to the Regional EMS Lead position necessitates a promotion to the GS-13 level.

The AJ found the fact that the Regional EMS Lead position lacks a GS-13 classification establishes only that employees of other grade levels, both above and below the GS-13 level, could conceivably have been assigned to the position. The AJ determined this did nothing to rebut the weight of evidence indicating that the Agency, with Complainant representing the lone exception, only assigned experienced GS-13 employees to occupy the position, and that the Agency, therefore, deemed the work to be of sufficient complexity and significance that it had to be performed by employees at that grade level.

Finally, the AJ found the fourth argument, when viewed against the backdrop of the remaining evidence of record, did not adequately explain why the Agency compensated Complainant at the GS-12 level while simultaneously compensating a Caucasian employee at the GS-13 level for doing exactly the same job. The AJ found the Agency's established practice, in all cases except for Complainant, of assigning experienced GS-13 employees to Regional Lead positions tends to establish that the Agency viewed the work as sufficiently significant and complex that it could only be performed by such experienced employees.

The AJ determined Complainant demonstrated by a preponderance of the evidence that the Agency's articulated reasons for compensating her less than her Caucasian counterpart in the Midwest Region were pretext for race discrimination. The AJ noted Complainant was the only GS-12 employee ever assigned to the Regional EMS Lead position, and not coincidentally, also the only employee who was not Caucasian. The AJ found the evidence persuasively indicates that Complainant and Person I held the same job title and did virtually identical work during the same time period with the same levels of quality, supervision, and independence, but at different pay grades. The AJ found that none of the Agency's arguments cast doubt on any of the facts, and none offer a reasonable and rational justification for compensating employees differently for doing the same job under the same conditions.

Also, the AJ noted that the Agency's disparate distribution of Person A's job duties to various other employees in August 2014 represented a second instance in which Complainant's race appears to have influenced the Agency's actions. The AJ noted Person A was a GS-12 at the time. The AJ noted Complainant, a GS-12 at the time, was Person A's alternate with respect to some of his duties, but the evidence established that, in Person A's absence, she was required to work an additional eight to twelve, or even more, hours per week, while none of her other duties were modified, eliminated, or reassigned. The AJ noted the other employees who assumed one or more of Person A's responsibilities during his absence, all but one of them being GS-13s, were required to work only an additional one to two hours per week and that it appeared all of those employees were Caucasian. The AJ found that in addition to representing another instance in which Complainant appears to have been subjected to disparate treatment by the Agency, the Agency's actions were clearly inconsistent with its own purported practice of assigning less responsibility and work to GS-12 employees than GS-13 employees.

Thereafter, on April 20, 2018, the AJ conducted a second hearing to address Complainant's entitlement to relief for the finding of discrimination on the basis of race. On May 30, 2018, the AJ issued a Decision on Damages. The AJ determined Complainant was entitled to back pay at the GS-13 level from March 2, 2015, through the date that she became a GS-13, Step 4,⁵ plus interest, tax-deferred contributions to her retirement account, and a tax offset for the 2018 tax year, less Complainant's GS-12 level salary earned from March 2, 2015, to May 15, 2016, and less Complainant's GS-13, Step 3 salary earned from May 15, 2016, until she became a GS-13, Step 4.

The AJ rejected the Agency's argument that Complainant waived her right to recover compensatory damages and proceeded to address Complainant's request for damages. The AJ determined Complainant was not entitled to past pecuniary damages. The AJ awarded Complainant nonpecuniary, compensatory damages in the amount of \$5,000. The AJ found

⁵ The AJ stated Complainant was entitled to back pay as a GS-13, Step 3, from March 2, 2015, through March 1, 2016, and as a GS-13, Step 4, from March 2, 2016, to May 15, 2016. The AJ noted Complainant is further entitled to back pay as a GS-13, Step 4, from May 15, 2016, through the date that she became a GS-13, Step 4, or through the present date and continuing until she becomes a GS-13, Step 4, if she has not already done so.

Complainant was not entitled to restoration of any annual or sick leave. Further, the AJ ordered the Agency to provide training to the discriminating management officials and to consider taking disciplinary action against the discriminating management officials.

The Agency subsequently issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected her to discrimination as alleged.

On appeal, the Agency notes that in support of his finding, the AJ stated that "the administrative record further reveals, however, that [Person I] *only* (emphasis added) performed the EMS Lead role in the Midwest region, as Complainant did in the East Region." The Agency states it takes issue with this finding because it assumes Person I had no other duties aside from the EMS Lead, while the record took care to note that Complainant had other assigned duties. The Agency notes when questioning Person I, the AJ asked whether Person I had an opinion regarding the appropriate grade level for that EMS Region position that she and Complainant performed. The Agency noted in response, Person I stated, "My opinion is that it should be a 13 because of the breadth and scope of the influence in working with Headquarters Air Force and with regulatory agencies." The Agency claims that Person I's answer to the AJ's question indicated her duties in the GS-13 Core Personnel Document which state that an Environmental Manager "negotiates and corresponds with regulatory agencies and resolves community issues as they relate to Air Force operations which must comply with environmental laws and regulations." The Agency notes in the AJ's examination of the difference between the GS-12 and GS-13 core documents, S2 stated that "it's the level of expertise that we would expect from a GS-13 from a GS-12. Compliance agreement negotiations are of course more complicated than staff business or installations on interaction with installation counterparts. So the C [Standard C from core document] on [GS-]13 you're working with our JA⁶ partners, you're working with the regulators. So it's a much more complicated process. And your responsibility is higher."

Further, the Agency states that during the AJ's examination of Person I regarding the differences between the GS-12 and GS-13 responsibilities, the AJ stated it appeared to him that the primary difference between GS-12 responsibilities and GS-13 responsibilities had to do with the amount of oversight or independence of the individual in the role. The Agency notes that Person I agreed that was part of it and also stated that "At the GS-12 level you work more supervision and your scope of influence is somewhat last. You're working within your base organization more. At the 13 level, you're influencing policy with a broader range or organizations. So for example, I would work a lot more closely with Headquarters Air Force and with other regions. And with [Environmental Protection Agency] and other regulatory agencies at the 13 level than I would do at the 12 level."

The Agency asserts that the AJ erroneously relied on Complainant's core doc in assessing whether she performed higher-graded duties and did not give due consideration to the GS-13 core doc in his higher-grade duty assessment. The Agency notes Complainant did not dispute that she was not asked to perform any duties that fell outside her core doc. The Agency argues the AJ's finding

⁶ "JA" is not defined, but could represent Judge Advocate.

that Person I was a similarly situated comparative to Complainant was not supported by the evidence.

In response to the Agency's appeal, Complainant requests the Commission uphold the AJ's ruling that she was subjected to race discrimination. Complainant notes the Agency argues that Person H was not a similarly situated comparative because she served as EMS Lead in the West Region and Complainant served as Lead in the East Region. Complainant argues that all EMS Leads, regardless of Region, perform the same job functions for the AFCEC under the Environmental Management Directorate. In addition, Complainant argues she consistently performed higher grade duties above and beyond her GS-12 core doc.

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.

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 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

At the outset, we note that neither the Agency nor Complainant challenge the AJ's finding that Complainant failed to establish she was subjected to sex discrimination under Title VII or the EPA. Thus, we do not address the sex discrimination claim under Title VII or the EPA.

Generally, claims of disparate treatment are examined under the tripartite analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found., for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). 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. McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978).

Once a complainant has established a prima facie case, the burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Com. Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency

acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983).

In the present case, Complainant (African American) claimed that she was subjected to an adverse action when she was paid less than Person I (Caucasian) despite the fact that they both performed the same job as Regional EMS Leads.

On appeal, the Agency argues that the AJ erred in finding that Person I was a similarly situated comparative to Complainant. The Agency argues the AJ erroneously relied on Complainant's GS-12 core doc in assessing whether she performed higher-graded duties and did not give due consideration to the GS-13 core doc in his assessment. The Agency cites Person I's statement during the hearing that the grade level for the EMS position that she and Complainant performed should be a 13 because of the breadth and scope of influence in working with Headquarters Air Force and with regulatory agencies. The Agency argues that Person I's answer to the AJ's question about the appropriate grade for the position she and Complainant performed indicated her duties in the GS-13 core doc which state that an Environmental Manager "negotiates and corresponds with regulatory agencies and resolves community issues as they relate to Air Force operations which must comply with environmental laws and regulations."

Even assuming Person I's statement corresponded to language in the GS-13 core doc, we find, as did the AJ, that the relevant core documents are of limited value in this case. Specifically, we note that both core docs were interdisciplinary in nature, meaning they applied to a wide variety of Agency positions, including environmental engineers, biologists, physical scientists, and community planners. Because the relevant core docs are interdisciplinary in nature, we find they are vague in most respects and do not clearly reflect the day-to-day functions unique to the Regional EMS Lead position.

Further, we note that during the hearing, S2 stated "if you take the core doc for the 12 and 13 because [they're] interdisciplinary, there's very little difference except for the fact of the supervision" and the ability to work independently. When comparing the core docs for the GS-12 and GS-13 positions, S2 stated that a GS-12 would distribute policy and guidance but as a GS-13, you actually prepare and disseminate guidance. She further stated that a GS-13 would independently prepare staff correspondence and a GS-12 would recommend to their supervisor ways to improve work methods. The AJ recognized the distinctions in language in the core docs and proceeded to ask S2 from a practical perspective, to provide day to day examples. Specifically, the AJ asked S2 to give any examples of Complainant performing GS-13 work consistent with the listed responsibilities after her promotion to the GS-13 that she did not do before the promotion. S2 responded that the difference was the level of supervision and that as a GS-13 she worked more independently. S2 deferred to S1 to explain what Complainant actually did on a daily basis.

S1's testimony attempted to highlight the smaller workload of a GS-12 Regional EMS Lead as compared to a GS-13 Regional EMS Lead. Specifically, S1 testified upon her promotion in May 2016, Complainant assumed some additional duties, including acting for him when necessary, but he also testified that all of those additional duties accounted for just four to five hours of additional

work per week. We note as did the AJ, that this testimony is inconsistent with the testimony of S2, who stated that there was no practical difference between Complainant's workload before and after her promotion. Both Complainant and Person I also testified that Complainant's workload remained the same before and after her promotion. Regarding the level of supervision, substantial evidence supports the AJ's conclusion that there was no notable change with respect to Complainant's level of supervision before and after her promotion.

On appeal, the Agency appears to argue that Person I had other duties aside from the EMS Lead. However, when asked if she performed other duties along with being the EMS Lead for the mid region, Person I responded "No. Nothing job related." Moreover, when asked to compare her work during the relevant time to Complainant's work, Person I responded that they had different business rules that laid out how they executed their jobs but their responsibilities, scope of influence and expertise were the same. Upon review, we find the record supports the AJ's determination that Complainant and Person I performed the same work during the relevant time. Although the Agency presented a number of explanations for the difference in pay between Complainant and Person I, substantial evidence supports the AJ's determination that the articulated reasons for compensating her less than Person I are pretext for race discrimination.

Next, we turn to the issue of relief as a result of the finding of discrimination based on race. We note that in its appeal, the Agency does not challenge the relief ordered by the AJ. Additionally, we note Complainant does not ask for additional relief.

CONCLUSION

Accordingly, we AFFIRM the Agency's final order finding no discrimination regarding sex discrimination. We REVERSE the Agency's final decision finding no discrimination regarding race claim. The Agency shall comply with the relief in the following Order.

ORDER

The Agency shall take the following actions:

1. Within 60 days of the date this decision is issued, the Agency shall determine the amount of back pay with interest and other benefits due Complainant. The Agency's determination shall be based on the fact that, absent discrimination, Complainant would have been compensated as a GS-13, Step 3, from March 2, 2015, to March 1, 2016, and then as a GS-13, Step 4, from March 2, 2016, through the present date and continuing until she becomes a GS-13, Step 4, if she has not already done so.

The Agency shall also pay Complainant 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 the adverse tax consequences, if any, for which Complainant shall then be compensated.

The Agency shall provide to Complainant a clear and detailed plain language explanation of its back pay calculations, including the calculation of all benefits provided to Complainant. The Agency shall also provide documentation supporting its calculations and information concerning who prepared the computations and any relevant Agency policy or Office of Personnel Management guidelines. The Agency shall provide Complainant with a reasonable opportunity to respond to its back pay and other calculations. Complainant must cooperate with the Agency in providing information requested by the Agency where the information is appropriate and relevant to calculating a back pay determination.

Within 60 days from the date of the Agency's determination on the amount of back pay due, the Agency shall pay Complainant the back pay and/or benefits due. 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 60 calendar days of the date the Agency determines the amount it believes to be due.

2. Within 60 days of the date this decision is issued, the Agency shall pay Complainant nonpecuniary, compensatory damages in the amount of \$5,000.
3. For purposes of all future career ladder promotions and within-grade increases, the Agency shall consider Complainant to have been a GS-13, Step 4, as of March 2, 2016.
4. Within 90 days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive training to the responsible management officials regarding the prohibitions against race discrimination under Title VII.
5. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against the management officials identified as being responsible for the discrimination perpetrated against Complainant. The Commission does not consider training to be a disciplinary action. 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.

The Agency is further 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). Further, the report must include supporting documentation that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Robins Air Force Base located in Warner Robins, Georgia 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 (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

June 6, 2019

Date