



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

[REDACTED]
Sherill S.,¹
Petitioner,

v.

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

Petition No. 2019001468
Request No. 0520140092
Appeal No. 0120131447
Hearing No. 550-2009-00190X
Agency No. 5K0M06013

DECISION ON A PETITION FOR ENFORCEMENT

The Equal Employment Opportunity Commission (EEOC or Commission) docketed a petition for enforcement to examine the enforcement of an Order set forth in EEOC Request No. 0520140092 (April 11, 2014). The Commission accepts this petition for enforcement pursuant to 29 C.F.R. § 1614.503.

BACKGROUND

At the time of events giving rise to this complaint, Petitioner worked as a Human Resources (HR) Assistant, GS-7, within the Agency's Civilian Personnel Office at March Air Reserve Base in California.

Petitioner filed a complaint in which she alleged that the Agency harassed and discriminated against her on the bases of race (Caucasian), sex (female), and in reprisal for prior protected EEO activity arising under Title VII when it terminated her from her HR Assistant position on June 14, 2006, which termination was rescinded on August 29, 2006; she was placed in Absent without Leave (AWOL) status; she was issued a "Fully Successful" rating on her October 1, 2006, appraisal; she was not permitted to telework; and she was forced to resign, resulting in constructive discharge.

¹ This case has been randomly assigned a pseudonym which will replace Petitioner's name when the decision is published to non-parties and the Commission's website.

On December 18, 2012, an EEOC Administrative Judge (AJ) issued a decision finding that Petitioner was not subjected to unlawful discrimination or harassment, which was fully adopted by the Agency. Petitioner appealed the Agency's final decision to the Commission, which initially dismissed her appeal as untimely filed. See EEOC Appeal No. 0120131447 (Oct. 24, 2013).

Petitioner requested reconsideration of the dismissal and, in EEOC Request No. 0520140092, the Commission found that it had erred in dismissing Petitioner's appeal. Additionally, the Commission found that Petitioner's termination was based on her sex/pregnancy and that she was subjected to a hostile work environment and subsequently constructively discharged when the Agency canceled her termination but failed to assign her to a different supervisor. The Agency was ordered to offer Petitioner reinstatement to her HR Assistant position; provide her with the appropriate amount of back pay and benefits with interest; undertake a supplemental investigation to determine her entitlement to compensatory damages; provide eight hours of EEO training to the responsible management official and consider taking disciplinary action against him; and post a notice of the discrimination finding in the workplace. See Kiera H. Dept. of the Air Force, EEOC Request No. 0520140092 (Feb. 13, 2015).

The matter was assigned to a Compliance Officer and docketed as Compliance No. 0620150385 on February 13, 2015. In a final decision dated August 27, 2015, the Agency determined that Petitioner was entitled to \$10,000 in compensatory damages. Petitioner appealed this matter to the Commission. In a decision dated April 5, 2017, the Commission determined that Petitioner was entitled to \$75,000 in compensatory damages. Sherill S. v. Dep't of the Air Force, EEOC Appeal No. 0120160115 (April 5, 2017).

On October 7, 2016, Petitioner alleged to the Commission that the Agency had failed to comply with our order to provide her with back pay. Petitioner noted that the Agency should recreate her pay record from January 2007 to the present as if she had worked throughout the period as a civilian employee with rights provided by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Petitioner maintained that in calculating her entitlement to back pay, the Agency did not compensate her for days in which she was not in military status and would have been on the civilian payroll had she not been constructively discharged. Further, Petitioner maintained that, throughout the back-pay period, she should be paid for all federal holidays and for 15 days per year of military leave. She contended that she should have received \$85,527.68 in back pay, plus interest. Additionally, Petitioner alleged that the Agency did not reinstate her to her position until December 2015, although the Commission had ordered it to do so by April 2015. Further, Petitioner alleged that the Agency had not recreated her Form SF-50.

In a memorandum to the Commission dated February 3, 2017, the Agency reported that on May 12, 2015, Petitioner accepted a GS-7 HR Assistant position; the Agency paid Petitioner \$10,000 in compensatory damages in December 2014; the responsible management official retired March 31, 2014, which made it unable to provide training to or discipline him; the Agency paid Petitioner \$61,766.71 in attorney's fees and costs in December 2015; and the notice was posted in hard copy at March Air Reserve Base from April 10 through June 5, 2015, and electronically posted on

SharePoint on December 21, 2016. Additionally, the Agency reported that it had determined that Petitioner was not entitled to back pay because her interim and unemployment earnings exceeded the amount of money she would have earned had she continued to work in her Agency civilian position.

Petition for Enforcement

On or about March 3, 2017, Petitioner submitted the petition for enforcement at issue. Petitioner contends that the Agency improperly failed to pay her back pay on the basis that she earned more wages while on military orders than she would have as a federal civilian employee. Petitioner maintains that after she was constructively discharged, she worked pursuant to military orders in active-duty status. Complainant further maintains that, for the period after she was constructively discharged, the Agency should pay her for the 245 days she would not have been in military status and would have been on the civilian payroll, as well as 99 days of federal holidays and 135 days of military leave. Complainant maintains that she is owed approximately 3,800 work hours (475 days) at a rate of \$22.46 per hour, or \$85,527.68, plus interest.

Agency Response to the Petition

The Agency contends that the Commission does not have jurisdiction to consider Petitioner's petition because our Compliance Officer already issued a letter dated February 22, 2017, finding that it had complied with the Commission's orders. Additionally, the Agency asserts that Petitioner's petition is untimely because she did not file it within 30 days of its May 2, 2016, final determination on back pay. Regarding the merits of the petition, the Agency reiterates its assertion that Complainant is not entitled to any back pay because her outside earnings must be deducted from any back-pay award, and those outside earnings greatly exceeded any possible back-pay award.

ANALYSIS AND FINDINGS

As an initial matter, we note that the Agency contends that the Commission cannot consider Petitioner's petition for enforcement because we already determined the Agency complied with our orders in a compliance letter dated February 22, 2017. The record reveals that in a letter dated February 22, 2017, our Compliance and Control Division notified the parties that compliance monitoring on this case had ceased because the Agency had provided documentation demonstrating it had taken the ordered corrective actions.

However, EEO Regulations provide that if the Agency does not comply with the Commission's order, Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). This right to petition for enforcement can be exercised even if a compliance determination has been made by our Compliance and Control Division. Further, contrary to the Agency's assertion, there is no time-limit for petitioning for enforcement. Thus, we find that the Commission has jurisdiction to consider Petitioner's petition herein.

Reinstatement

The record contains a copy of a form SF-50 that reflects that the Agency reinstated Complainant to a GS-7 HR Assistant position with an effective date of February 6, 2007, the date of her constructive discharge. Petitioner maintains that the Agency did not process her retroactive reinstatement to her position until December 2015, although the Commission ordered it to do so by April 2015. Upon review, we find that the Agency substantially complied with our reinstatement order, despite its late compliance.

Attorney's Fees

The record reveals that in a final decision dated August 25, 2015, the Agency awarded Petitioner \$61,766.11 in requested attorney's fees and costs, which were paid on December 17, 2015. Thus, we find that the Agency has complied with our attorney's fees order.

Training and Discipline

Personnel records reveal that the responsible management official in this case voluntarily resigned from the Agency effective March 31, 2014, which predated our February 2015 finding of discrimination. Therefore, we find that the Agency has not violated our orders regarding training and disciplining the responsible management official.

Posting Notice

The record contains a copy of a posting notice that indicates it was posted at March Air Reserve Base from April 10 to June 9, 2015. The record also contains a screen shot that indicates a notice of discrimination was posted on March Air Reserve Base's internal websites for at least 60 days beginning on December 21, 2016. Therefore, we find that the Agency complied with this portion of our order.

Compensatory Damages

As previously noted, Petitioner appealed the Agency's final decision awarding her \$10,000 in compensatory damages. In a decision dated April 5, 2017, the Commission increased Petitioner's compensatory damages award to \$75,000 and ordered the Agency to pay her accordingly. Sherill S. v. Dep't of the Air Force, EEOC Appeal No. 0120160115 (April 5, 2017). Commission records do not establish whether the Agency has complied with the Order in EEOC Appeal No. 0120160115 to pay Complainant an additional \$65,000 in compensatory damages. Complainant has not raised this issue in any of the correspondence related to her petition for enforcement correspondence, from which the Commission infers that this payment has been tendered.

Back Pay

The purpose of a back-pay award is to restore to a complainant the income she would have otherwise earned but for the discrimination. See Albemarle Paper Co. v. Moody, 442 U.S. 405, 418-19 (1975); Davis v. U.S. Postal Serv., EEOC Petition No. 04900010 (Nov. 29, 1990). Gross back pay should include all forms of compensation and must reflect fluctuations in working time, overtime rates, penalty overtime, Sunday premium and night work, changing rate of pay, transfers, promotions, and privileges of employment to which the petitioner would have been entitled but for the discrimination. See Ulloa v. U.S. Postal Serv., EEOC Petition No. 04A30025 (Aug. 3, 2004) (citing Allen v. Dep't of the Air Force, EEOC Petition No. 04940006 (May 31, 1996)). In computing the net amount of back pay payable, an agency is required to offset any outside earnings received by an employee for other employment undertaken to replace the employment from which the employee was separated. See 5 C.F.R. § 550.805(e)(1). Specifically, § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), provides that “interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.”

In this case, Petitioner was constructively discharged on or about February 6, 2007. Petitioner reported that she received \$25,850.34 in outside earnings in 2007, including \$11,783.99 in unemployment benefits; \$41,734.74 in 2008; \$70,466.05 in 2009; \$72,856.84 in 2010; \$71,662.80 in 2011; \$73,627.20 in 2012; \$73,132.80 in 2013; \$81,517.14 in 2014; and \$81,517.14 in 2015.

According to Agency calculations that are not contested by Petitioner, Petitioner would have earned \$388,755.58 in her civilian position from her 2007 constructive discharge until her 2016 reinstatement. However, the record reveals that Petitioner received \$587,334.48 in interim earnings, not including \$11,783 in unemployment benefits.² As such, Petitioner’s interim earnings exceeded her gross back pay by \$210,361.90. Nonetheless, Petitioner maintains that she should still receive back pay for 245 days she would not have been in military status from 2007 until 2016, as well as 99 days of federal holidays and 135 days of military leave throughout this period.

We note that, although Petitioner is entitled to back pay as a component of her make-whole relief, she is not entitled to a sum greater than what she would have earned but for her constructive discharge. See Ulloa v. U.S. Postal Service, EEOC Petition No. 04A30025 (August 3, 2004). A remedy which provides petitioner with more relief than necessary to make her whole would constitute an unjustifiable windfall to petitioner. See Thomas v. Department of State, EEOC Appeal No. 01932717 (June 10, 1994), req. for recon. denied, EEOC Request No. 05940792 (May 25, 1995).

² The Commission has stated on numerous occasions that an agency may not deduct unemployment compensation from an employee’s back pay award. See Woodrow B. v. Dep't of Housing and Urban Development, EEOC Appeal No. 0120143194 (May 13, 2016) (citing Collick-Brown v. Dep't of Navy, EEOC Appeal No. 01910904 (Mar. 26, 1991); Dana v. U.S. Postal Serv., EEOC Appeal No. 0192164 (June 11, 1993); Vashi v. U.S. Postal Serv., EEOC Appeal No. 07A50056 (Dec. 5, 2007)).

Moreover, supplemental income earned by a petitioner in addition to regular job earnings have typically been referred to as “moonlighting” earnings. Courts addressing the moonlighting issue have indicated that if the plaintiff could have held both the supplemental job and the job she did not receive because of discrimination, the earnings from the supplemental job will not be used to reduce the back-pay award. See Lilly v. City of Beckley, 797 F.2d 191 (4th Cir. 1986); Whatley v. Skaggs Companies, Inc., 707 F.2d 1129, 1139 (10th Cir. 1983) (where plaintiff could not have held both supplemental job and job he lost because of discrimination, moonlighting earnings are “interim” earnings); Bing v. Roadway Express, Inc., 485 F.2d 441, 454 (5th Cir. 1973) (indicating that if plaintiff could have held both jobs, then supplementary job is not “interim,” but assumes “permanent” nature). The Commission has previously held that whether “moonlighting” earnings can be deducted from a back-pay award as interim earnings depends on whether the complainant (Petitioner herein) could have held the moonlighting job at the same time as the position which he or she was discriminatorily denied. See Wilson v. Dept. of Transportation, EEOC Petition No. 04920005 (August 6, 1992).

Here, Petitioner reports she had interim earnings from full-time active-duty military service after her constructive discharge. Petitioner reports that from April 2, 2007, until May 12, 2016, she was *not* working on active duty military orders for a total of 245 days, or an average of only 27 days per year. In contrast, Petitioner reports that she worked approximately 2,138 hours on military orders during the same period. We find that the record does not reflect that Petitioner could have worked full-time in her civilian job while also working full time in active-duty military status. Therefore, her earnings while on active duty are not moonlighting earnings, but rather are interim earnings which must be deducted from any back-pay award.

To the extent that Petitioner contends that she nonetheless should be paid for federal holidays, military leave, and the time she was not working on military orders, we find that the value of these benefits still do not overcome the much higher interim earnings Petitioner received after she was constructively discharged. Petitioner’s interim earnings exceeded her gross civilian back pay by \$210,361.90. Awarding Petitioner back pay and benefits would amount to a windfall. Thus, we find that the Agency properly concluded that Petitioner has not established she is entitled to back pay. See Cletus W. v. Dep’t of Treasury, EEOC Appeal No. 0720160008 (Aug. 3, 2016) (finding that the record supported the agency’s assertion that complainant earned more during the back pay period than what he would have earned had he been selected); Paulk v. U.S. Postal Serv., EEOC Appeal No. 01970061 (Oct. 4, 2001) (holding that overtime earnings that the complainant earned during the back pay period were considered interim earnings and when deducted from the gross back pay resulted in a back pay award of zero); Diaz v. Dep’t of Homeland Security, EEOC Appeal No. 0120103708 (Feb 21, 2013) (complainant was not entitled to back pay for those pay periods where he received more pay as a Flying Air Marshal than he would have had he been in the supervisor position).³

³ Because we find that Petitioner is not entitled to back pay, she also is not entitled to its concomitant benefits, such as Agency contributions to the Thrift Savings Plan.

CONCLUSION

Consequently, we find that the Agency has complied with our orders in EEOC Request No. 0520140092. Accordingly, the Commission hereby DENIES the petition for enforcement.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. 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. 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.

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 5, 2019

Date