

**DEPARTMENT OF VETERANS AFFAIRS
OFFICE OF EMPLOYMENT DISCRIMINATION COMPLAINT ADJUDICATION
WASHINGTON, D.C. 20420**

_____,
)
)
) **Complainant,**)
)
) **v.**)
)
) **Secretary,**)
) **Department of Veterans Affairs,**)
)
) **Agency,**)
_____)

VA Case No. 200P-0644-2015103155

EEOC Case No. 540-2016-00112X

FINAL ORDER

INTRODUCTION

In a formal equal employment opportunity (EEO) complaint, filed on June 16, 2015, and amended on November 4, 2015 and November 23, 2015, Complainant alleged that Agency officials in the Phoenix VA Health Care System in Phoenix, Arizona, discriminated against her as referenced below. The Agency's Office of Resolution Management, Diversity, and Inclusion (ORMDI) accepted and appropriately investigated the matters raised in Complainant's complaint in their entirety.¹

When the investigation concluded, ORMDI notified Complainant in writing of the right to request either (1) a hearing and decision by an Equal Employment Opportunity Commission (EEOC or Commission) administrative judge, with subsequent final action by the Agency's Office of Employment Discrimination Complaint Adjudication (OEDCA), or (2) an immediate Final Agency Decision (FAD) from OEDCA without a hearing. On August 23, 2016, Complainant requested a hearing and decision by an EEOC administrative judge.

¹ By notice, dated November 6, 2018, ORMDI notified Complainant in writing of its decision to "dismiss" some of the matters raised in Complainant's complaint as separately actionable claims of discrimination for untimeliness pursuant to 29 C.F.R. 1614.105(a)(1) and National R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002). Despite "dismissing" these matters as separately actionable claims, ORMDI accepted them as incidents in support of Complainant's underlying hostile work environment claim and investigated them in their entirety.

OEDCA received the EEOC administrative judge's decision on May 11, 2021. Pursuant to this decision, the administrative judge found as follows:

- The Agency discriminated against Complainant based on race (African American) when it required Complainant, previously employed as a Nurse Manager, Grade III, to perform the duties of a Chief Nurse, Grade IV, without either promoting her to the Chief Nurse position or providing her with additional compensation.
- The Agency discriminated against Complainant based on race (African American), sex (female), and reprisal for engaging in prior protected EEO activity when the Agency: (1) denied Complainant a temporary promotion to the position of Deputy Chief of Staff, Purchased Care and (2) prevented her from applying for the position of Deputy Associate Chief of Staff/Chief of Purchased Care because she was not employed as a physician even though she had been performing the duties of the position as a Nurse Manager and served as Acting Chief, Purchased Care.
- The Agency discriminated against Complainant based on race (African American), sex (female), and reprisal for engaging in prior protected EEO activity when she was subjected to a hostile work environment in connection with the Agency placing Complainant on a series of details with ever-increasing duties beyond her functional statement, culminating in a mandatory detail in January 2017.

On May 25, 2021, Complainant filed her Petition for Attorneys' Fees and Costs (Petition). On June 14, 2021, the Agency filed its Response/Objection to Complainant's Petition. On June 21, 2021, Complainant filed her Reply in Support of the Petition. On July 21, 2021, the EEOC administrative judge issued an Order Awarding Complainant Attorneys' Fees and Costs.

ORDER

Based on its review of the entire record, OEDCA finds that the EEOC administrative judge's decision is supported by substantial² evidence. We also find that the administrative judge correctly decided that Complainant is entitled to the following: (1) \$550 in past pecuniary compensatory damages; (2) \$137,000 in non-pecuniary compensatory damages; and (3) a total of \$236,171.51 in attorneys' fees and costs. The judge further decided that Complainant is entitled to post-judgment interest as specified below. **We therefore accept the EEOC administrative judge's decision in its entirety and hereby ORDER the Agency to fully implement it.** The relief and corrective action, as described in the decision, as well as any additional relief or other action required by this ORDER, are set forth in the Remedial Relief section below.

² Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951); Tyree L. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019001222 (April 29, 2020).

REMEDIAL RELIEF

In view of the above finding of discrimination, we ORDER the Agency to implement the following relief and corrective action **within 60 days** of the date of this Final Order unless specified otherwise below.

1. **Equitable Relief**

a. **Back Pay**

The Agency shall pay Complainant the difference, if any, between what she would have earned had she been temporarily promoted to the higher-grade positions she occupied between April 5, 2012 and March 14, 2017 and what she actually earned during that period. Thus, the period for computing back pay is from April 5, 2012 to March 14, 2017.

i. **Pre-Judgment Interest**

Pre-judgment interest shall be paid to Complainant on lost back pay and other applicable employment benefits at the annual percentage rate or rates established by the U.S. Secretary of the Treasury under 26 U.S.C. § 6621(a), and 5 C.F.R. Parts 550.806(d) and (e). Such interest shall be paid from the date Complainant was entitled to additional compensation as referenced above to the date that this monetary amount is paid by the Agency.

ii. **Notice to Complainant**

The Agency shall provide Complainant with a detailed statement of the Agency's calculations regarding all the components of Complainant's back pay, other applicable employment benefits, and interest. The statement shall be in "plain language" and shall include the formulas and methods the Agency used to calculate Complainant's back pay. The Agency also shall provide Complainant with all letters, e-mails, and other correspondence sent to the U.S. Social Security Administration and to the U.S. Office of Personnel Management regarding Complainant's updated earnings.

iii. **Increased Tax Burden**

Having found that the Agency is responsible for paying Complainant a lump sum payment of back pay, the Agency is also responsible for Complainant's proven increased income tax burden. The additional tax liability consists of the total amount of tax Complainant must pay on the lump sum payment of back pay less the total she would have paid if taxed on this payment had it been paid out over the period for which back pay is applicable. Complainant has the burden of establishing this increase in tax liability.

To obtain payment for the increased income tax burden, Complainant shall provide the Agency with detailed documentation establishing the increased income tax burden no later than **60 days** after receiving the Agency's documentation on back pay and interest. The Agency shall pay Complainant for the increased tax burden **within 60 days** of receiving Complainant's documentation proving the increased burden.

b. Implementation of Equitable Relief

The Agency shall engage "qualified consultants" to advise and assist the Agency with implementing the elements of the equitable relief ordered herein. The qualified consultants may be licensed attorneys employed by or contracted with the Agency's Office of General Counsel.

2. Compensatory Damages

The Agency shall pay Complainant **\$550.00** in pecuniary compensatory damages and **\$137,000.00** in non-pecuniary compensatory damages for the harm caused by the discriminatory conduct found to have occurred in this case.

3. Attorneys' Fees & Costs

The Agency shall pay Complainant's attorneys **\$233,761.90** in attorneys' fees. The Agency shall pay Complainant **\$2,409.61** in costs.

4. Post-Judgment Interest

Post-judgment interest shall be paid on all lost back pay and benefits, compensatory damages, attorneys' fees, and costs at the rate(s) allowed by law from the date of this Final Order until the date all monetary amounts are paid by the Agency.

5. Other Corrective Action

Besides implementing the foregoing relief, a remedy must be tailored to correct the particular source of the discrimination found to have occurred in this case and minimize the chance of its recurrence. Therefore, pursuant to 29 C.F.R. Part 1614.501(a)(2), the Agency will take whatever corrective, curative, and preventive actions and will adopt whatever measures are necessary to ensure that violations of federal EEO law similar to the ones found in this case do not recur.

a. EEO Training

Within 90 days of the date of this Final Order, the Agency shall provide a minimum of eight (8) hours of live EEO training, either in-person or virtually (via interactive trainer-to-trainee videoconference) on the prohibition of (1) discrimination based on race, sex, and reprisal, with a focus on non-discriminatory and equitable compensation, (2) a hostile work environment, and (3) reprisal for engaging in protected EEO activities, including per

se reprisal, in accordance with Title VII of the Civil Rights Act of 1964, as amended, Section 701 et seq., 42 U.S.C. Section 2000e et seq., to the following individuals:

(1) Dr. Carlos A. Duarte, former Associate Chief of Staff/Physician, Phoenix VA Health Care System (VAHCS), VM-15, and (2) Dr. Alyshia W. Smith, former Nurse Executive, VN-5, currently serving as Director, Phoenix VAHCS, SES.

The training shall be mandatory, conducted by an Office of Resolution Management, Diversity, and Inclusion (ORMDI) subject matter expert, and completed **within 90 days** of the date of this Final Order. If an ORMDI trainer is unavailable, ORMDI will provide the training content, and the trainer identified by the facility must be certified by ORMDI as an EEO subject matter expert.

The record reflects that the remaining management officials responsible for the discrimination found to have occurred in this case are no longer employed with the Agency. These officials include the following: (1) Dr. Nancy Claflin, former Associate Director, Patient Care Services, Phoenix VAHCS; (2) Dr. Darren Deering, former Chief of Staff Phoenix VAHCS; and (3) Mr. Glen Grippen, former Interim Director, Phoenix VAHCS. Should any of these individuals return to VA employment, please ensure that they receive a minimum of eight (8) hours of EEO training as specified above.

b. Disciplinary Action

The Agency must consider taking appropriate disciplinary action against Dr. Duarte and Dr. Smith. Should the Agency rehire Dr. Claflin, Dr. Deering, or Mr. Grippen, appropriate disciplinary action must also be considered. ORMDI will provide follow-up with Agency officials responsible for taking disciplinary action in this case, if applicable. The follow-up will include direction on the timeline for making disciplinary determinations and how they must be documented.

Training is not considered disciplinary action.

c. Notice Posting

Within 60 days of this Final Order, the Agency shall post copies of the attached Notice, and such notices shall remain in place for **90 days** in conspicuous places in the Phoenix VA Health Care System where similar state and federal employment-related, wage-hour, anti-discrimination, and safety notices are customarily posted. Should any of these notices become defaced or be removed before the posting period expires, the Notices shall be immediately re-posted.

RIGHT OF APPEAL

The Complainant has the right to appeal this final action as follows: (1) to the EEOC within 30 calendar days of receiving this final action **or** (2) as a civil action complaint filed in an appropriate U.S. District Court within 30 calendar days of receiving this final action.

1. Right to File EEOC Appeal

The Complainant may appeal this final action within 30 days of receipt to the following: **Equal Employment Opportunity Commission, Office of Federal Operations (OFO)**, P.O. Box 77960, Washington, D.C. 20013. If an appeal is filed, EEOC Form 573 should be used. A copy of EEOC Form 573 is attached. **Due to COVID-19-related restrictions, OFO currently does not have access to mail. If desired, Complainant may file an electronic appeal at <https://publicportal.eeoc.gov/Portal/Login.aspx>.**

A copy of the appeal to the EEOC **must** also be sent to the VA Office of General Counsel at the following address: **Department of Veterans Affairs, Office of General Counsel (024), 810 Vermont Avenue, N.W., Washington, D.C. 20420.**

Statements or briefs in support of the appeal **must** be submitted to the EEOC within 30 calendar days of the filing of the appeal. A copy of any such statement or brief, including any statements made on EEOC's "Appellant Docketing Statement," must also be sent to the VA's Office of General Counsel at the above address.

If an appeal is filed with the EEOC, the appeal, and any subsequently filed statement or brief, **must** contain a statement certifying the date and method by which copies of these documents were served on the VA's Office of General Counsel.

If the Complainant files an appeal with the Commission beyond the above-noted time limit, the Complainant should provide the Commission with an explanation as to why the appeal should be accepted despite its untimeliness. If the Complainant cannot explain why timeliness should be excused, the Commission may dismiss the appeal as untimely.

2. Right to File a Civil Action


The Complainant also has the right to file a civil action in an appropriate United States District Court. The Complainant may file a civil action as follows:

- (1) Within 90 days of receipt of this final action **if no appeal to EEOC has been filed**; or
- (2) Within 90 days after receipt of the EEOC's final decision on appeal; or
- (3) After 180 days from the date of filing an appeal with the EEOC if there has been no final decision by the Commission.

The Complainant **must** name the person who is the official head of the Agency – the Department of Veterans Affairs – as the defendant. The Complainant must name **Denis McDonough** as the defendant. The Complainant must also state the official title of the Department head. The official title of the head of the Department of Veterans Affairs is **Secretary of Veterans Affairs**. Failure to provide the name or official title of the head of the Department may result in dismissal of the case. **Please consult your District Court’s website for procedures to file a civil action and any COVID-19 related changes in procedures.**

If the Complainant decides to file a civil action under Title VII (discrimination due to race, color, religion, sex (including sexual orientation), national origin, or reprisal) or under the Rehabilitation Act of 1973, as amended, (discrimination due to disability), and if the Complainant does not have or cannot afford the services of an attorney, the Complainant may request that the Court appoint an attorney to represent the Complainant and that the Court permit the Complainant to file the action without payment of fees, costs, or other security. **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend the time in which to file a civil action. Both the request and the civil action MUST BE FILED WITHIN NINETY (90) CALENDAR DAYS of the date that Complainant receives the final action from the Department or the Commission.

Mary L. Popiden
747966

 Digitally signed by Mary L.
Popiden 747966
Date: 2021.08.05 09:46:15 -04'00'

MARY LYNNE POPIDEN
Acting Director, Office of
Employment Discrimination
Complaint Adjudication

Date

Attachment: EEOC Form 573

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
An Agency of the United States Government

This Notice is posted pursuant to an Order of the United States Equal Employment Opportunity Commission, dated May 10, 2021, which found that a violation of Title VII of the Civil Rights Act of 1964 occurred at the Phoenix VA Health Care System in Phoenix, Arizona.

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, DISABILITY, PREGNANCY, or GENETIC INFORMATION with respect to hiring, firing, promotion, compensation, or other terms, conditions, and/or privileges of employment.

This facility was found to have discriminated and harassed an employee at this facility on the bases of race and sex and retaliated against this individual for having engaged in prior protected equal employment opportunity (EEO) activity from 2013 through 2017. Due to the discrimination and retaliation found to have occurred, this facility was ordered to: pay back pay, compensatory damages, and pre- and post-judgment interest; engage consultants; train managers; and post this Notice. This facility will ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the requirements of all federal EEO laws and will not discriminate, harass, or retaliate against employees.

This facility will comply with federal law and will not in any manner, restrain, interfere, coerce, or retaliate against any individual who exercises their right to oppose practices made unlawful by, or who participate in proceedings pursuant to, federal EEO law 29 C.F.R. Part 1614.101 *et seq.*

Director
VISN 22: Desert Pacific Healthcare Network

Date Posted: _____

Posting Expires: _____