

WARDEN = JOHN R. OWEN

ASSOCIATE WARDEN = STEPHEN LANGFORD



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

Lissette Sanchez,  
Complainant,

v.

Eric H. Holder, Jr.,  
Attorney General,  
Department of Justice  
(Federal Bureau of Prisons),  
Agency.

Appeal No. 0120122273

Agency No. P-2010-0240

DECISION

On April 16, 2012, Complainant filed an appeal from the Agency's March 14, 2012 final decision concerning her 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. The Commission deems the appeal timely and accepts it pursuant to 29 C.F.R. § 1614.405(a)

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Medical Records Technician at the Agency's Williamsburg Federal Correctional Institution facility in Salters, South Carolina.

The record indicates that Complainant has been involved with the Agency's Affirmative Employment programs and has complained about the Agency's lack of diversity particularly with regard to Hispanic and Hispanic female participation. Complainant has also participated in the EEO complaint process at the Agency, including a prior EEO complaint of her own, a class action regarding reprisal and the complaint of her boyfriend.

In July 2009, Complainant and a colleague ("Colleague," Black female) were selected as a primary and alternate member of the Agency's Affirmative Action Committee. On January 18, 2010, the Union President asked the Warden if Complainant and the Colleague could attend an EEO training session for three days in Maryland in February 2010. The Warden responded in a Memo dated January 27, 2010, stating the he was "authorizing [the Colleague] to attend." He was silent as to Complainant. The Union President emailed the Warden on the same day asking about why Complainant was not also allowed to attend the training. The

Warden responded by Memo dated February 2, 2010, citing the Union Agreement section on Official Time and reiterating that he authorized the Colleague to attend the training in Maryland.<sup>1</sup>

On February 11, 2010, Complainant contacted the EEO Counselor. When the matter could not be resolved informally, on March 5, 2010, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of national origin (Hispanic) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when, in February 2010, the Warden denied Complainant's request for training.

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 EEOC Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The Agency's final decision found that the Agency provided legitimate, nondiscriminatory reasons for its action. Specifically, the Warden and the Associate Warden stated that Complainant was ineligible for training because she was too far behind in her workload to attend training. The Agency noted that there was no evidence to contradict the Warden or Associate Warden's statements. Further, the Agency found that Complainant failed to show that discrimination played any part in its decision. The Agency noted that Complainant and the Associate Warden clashed on matters related to affirmative action, but determined that there was no evidence of discrimination based on Complainant's national origin and/or prior protected EEO activity. As such, the Agency held that Complainant failed to show that the alleged incident constituted discrimination.

The instant appeal followed.

#### ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (November 9, 1999) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions

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<sup>1</sup> The Warden cited Article 11, Section h, Paragraph 1 which states in part, "Employee Union representatives will be excused from duty, workload permitting, to attend trainings which is designed to advise representative on matters within the scope of 5 USC, and which is of mutual benefit to the Employer and the Union."

of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

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, she 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 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. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, (2000); Sr. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

In a reprisal claim, according to the burdens set forth in McDonnell Douglas, Hochstadt v. Worcester Found. for Exper. Biol., Inc. 425 F.Supp. 318 (D. Mass. 1976), *aff'd*, 545 F.2d 222 (1st Cir. 1976) (applying McDonnell Douglas to claims of reprisal), and Coffman v. Dep't of Veteran Affairs, EEOC Request No. 05960473 (November 20, 1997), Complainant may establish a prima facie case of reprisal by showing that: (1) she engaged in protected activity; (2) the Agency was aware of her protected activity; (3) subsequently, she was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse action. Any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the complainant or others from engaging in a protected activity is prohibited. EEOC Compliance Manual Section 8, "Retaliation" No. 915.003 at p 8-13 (May 20, 1998). See also Whitmire, v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (September 25, 2000).

The record shows that Complainant has engaged in her own prior EEO complaint and has been involved with other EEO complaints including the Turner class action,<sup>2</sup> an another complaint filed by her boyfriend. It is undisputed that the Warden, the Associate Warden and the Supervisor were all aware of Complainant's protected activity. It is also undisputed that Complainant was denied the opportunity to go to the EEO training. This is sufficient to establish an inferential nexus between the denial of EEO training and Complainant's prior protected EEO activity. As such, we find that Complainant has established a prima facie case of unlawful retaliation.

The burden now shifts to the Agency to articulate legitimate, nondiscriminatory reasons for denying the training to Complainant. The Warden stated that he responded to the Union President's request. He indicated that he consulted with the Associate Warden and the

<sup>2</sup> Turner et al. v. Dep't of Justice, EEOC No.541-2008-00255X (alleging that the Agency discriminated against employees on the basis of reprisal with regard to promotions).

Supervisor regarding the request. He was told that Complainant was eleven weeks behind in her medical file copying and filing. Therefore, it was determined that, because of this backlog, she should not be allowed time away from the office to participate in the EEO training. The Associate Warden confirmed that he was consulted on the request for Complainant to participate in the EEO training. The Associate Warden stated that Complainant was ten months behind in her work. He also noted that this was determined in consultation with the Supervisor. The Supervisor stated that he had only one conversation over the phone with "his supervisor" about Complainant's request for training.<sup>3</sup> He stated that he only indicated that the medical records were not caught up. He also noted that this was the extent of the conversation pertaining to the training request.

Upon review, we find that Complainant has proven, by a preponderance of the evidence, that the reasons proffered by the Agency were pretextual, and that it is more likely than not that retaliatory animus for her prior EEO activity motivated the responsible management officials. The evidence gathered during the investigation establishes that in May 2009, Complainant's department was scanning medical files. The assignment of files was made in May 2009, and Complainant was assigned to work on 588 files, while all other employees were given approximately 10 to 178 files each. The record included emails from management to Complainant in July 2009, showing that Complainant has been doing a "great job" working on the backlog.

The Warden and the Associate Warden had inconsistent statements about the extent of Complainant's remaining backlog, ranging from 11 *weeks* to 10 *months* respectively. Neither Agency officials provided any support for their assertions that Complainant was behind on her assignment. Further, their statements are inconsistent with the emails praising Complainant for her progress on the backlog. In addition, while the Warden and the Associate Warden indicated that they consulted with the Supervisor when they denied the training, their statements are somewhat inconsistent with the Supervisor's affidavit. The Supervisor said he was only asked if a backlog remained. He indicated he was never asked about how much of a backlog remained in Complainant's assignment. As such, we find that the Warden and the Associate Warden have not substantiated their bald and inconsistent assertion that Complainant had an extensive backlog which would prevent her from going to the three-day EEO training. We also note that when the Supervisor was asked if he recommended that Complainant should not be sent to training, he stated "no." Based on this evidence, we find that it is more likely than not that Complainant was subjected to unlawful retaliation when the Agency denied her request to attend the EEO training.<sup>4</sup>

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<sup>3</sup> We note that the Supervisor was not specific as to who was his supervisor.

<sup>4</sup> Because we have found that Complainant was discriminated against on the basis of her prior protected EEO activity, we need not address any other bases, as Complainant would not be entitled to any additional relief.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final decision and REMAND the matter in accordance with the ORDER below.

### ORDER (C0610)

The Agency is ordered to take the following remedial action:

1. The Agency shall send Complainant to the next EEO Fair Practices Training.
2. The Agency is directed to conduct training for the Warden and the Associate Warden who has been found to have retaliated against Complainant. The Agency shall address these employee's responsibilities with respect to eliminating retaliatory discrimination.
3. The Agency shall consider taking disciplinary action against the Warden and the Associate Warden identified as being responsible for the unlawful retaliation against Complainant. The Agency shall report its decision. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline.
4. Within 15 calendar days of the date this decision becomes final, the Agency shall give Complainant a notice of her right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (January 5, 1993)) in support of her claim for compensatory damages within 45 calendar days of the date complainant receives the Agency's notice. The Agency shall complete the investigation on the claim for compensatory damages within 45 calendar days of the date the Agency receives Complainant's claim for compensatory damages. Thereafter, the Agency shall process the claim in accordance with 29 C.F.R. § 1614.110.
5. The agency shall complete all of the above actions within 120 calendar days from the date on which the decision becomes final.

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

POSTING ORDER (G0610)

The Agency is ordered to post at its Williamsburg Federal Correctional Institution facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted by the Agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

ATTORNEY'S FEES (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she 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 this decision becoming final. 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 (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (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 (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

*Carlton M. Hadden*

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Carlton M. Hadden, Director  
Office of Federal Operations

OCT 12 2012

Date



CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:

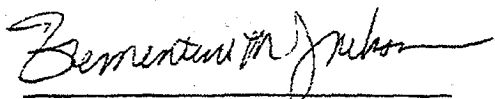
Lissette Sanchez  
[REDACTED]  
[REDACTED]

Jeffrey Atkins  
[REDACTED]  
[REDACTED]

Mina Raskin, Director, EEO Staff  
Department of Justice (BOP)  
320 First St., NW  
HOLC Bldg., Room 1038  
Washington, DC 20534

OCT 12 2012

\_\_\_\_\_  
Date



\_\_\_\_\_  
Equal Opportunity Assistant



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20013

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
An Agency of the United States Government**

This Notice is posted pursuant to an order by the United States Equal Employment Opportunity Commission dated \_\_\_\_\_ which found that a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. has occurred at the Department of Justice's Federal Correctional Institution Williamsburg in Salters, South Carolina (hereinafter this facility).

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, or DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

This facility was found to have retaliated against an employee. The facility was ordered to provide the employee with training and calculate compensatory damages. This facility will ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the requirements of all federal equal employment opportunity laws and will not retaliate against employees who file EEO complaints.

This facility will comply with federal law and will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, federal equal employment opportunity law.

Date Posted: \_\_\_\_\_

Posting Expires: \_\_\_\_\_