

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

Karen Stance)	
<i>Complainant,</i>)	
)	
v.)	VA Case No. 200J-0578-2005102928
)	
Secretary,)	
Department of Veterans Affairs)	EEOC Case No. 440-2006-00089X
)	
<i>Agency.</i>)	

FINAL ORDER

INTRODUCTION

In a formal EEO complaint dated July 29, 2005 and subsequent amendment the complainant alleged that officials at the VA Medical Center in Hines, Illinois, engaged in unlawful discrimination against her as referenced below. The Department's Office of Resolution Management accepted the complaint in its entirety and conducted an appropriate investigation.

At the conclusion of the investigation, the Department notified the complainant in writing of the right to request either a hearing and decision by an EEOC administrative judge, with a subsequent final action by the Department, or an immediate final decision by the Department without a hearing. The complainant opted for a hearing, which was held on March 13, 2004. Following that hearing, the administrative judge issued a decision on June 25, 2007.

The Office of Employment Discrimination Complaint Adjudication received the judge's decision on July 3, 2007. The administrative judge's decision concluded that the complainant was discriminated against due to her prior EEO activity in connection with the issuance of an unsatisfactory performance appraisal and eventual termination from the agency.

ORDER

Based on its review of the entire record, the Office of Employment Discrimination Complaint Adjudication finds that the EEOC administrative judge's decision is supported

by substantial¹ evidence. We also find that the judge correctly decided that you are entitled to an award of compensatory damages in the amount of \$25,000.00. We therefore accept the administrative judge's decision in its entirety and hereby ORDER the Department to fully implement it. The relief and corrective action, as described in the judge's decision, as well as any additional relief or other action required by this ORDER, is set forth in the *Remedial Relief* section that follows.

REMEDIAL RELIEF

In view of the above finding of reprisal, we order the following relief and corrective action.

1. EQUITABLE RELIEF

As a result of the finding of discrimination, the Complainant is entitled to full, make-whole relief pursuant to 29 C.F.R. Section 1614.501(a). Therefore, pursuant to 29 C.F.R. Section 1614.501(a)(3) and (a)(4), the agency shall immediately offer to reinstate complainant to the position of Staff Nurse I, Level 3, step 10 or a substantially equivalent position and pay grade within the Chicago commuting area. In addition, the agency shall issue back pay (less interim earnings), interest, and any and all benefits or training that she would otherwise have earned or received but for the prohibited discrimination. *Where applicable*, back pay specifically includes retroactive tax-deferred contributions to the complainant's TSP account and any earnings that would have accrued during the relevant period.) Management shall restore all leave (annual, sick, or leave without pay) taken as a result of the discriminatory action.

Pursuant to 29 C.F.R. Section 1614.501(c)(4), management shall also expunge from all official agency records any reference to the complainant's termination.

The time period used to compute the backpay award shall commence on September 7, 2005 and shall extend to the date of the complainant's reinstatement, or the date complainant declines the offer of reinstatement, or the date the offer of reinstatement expires. The complainant shall be required to assist management in this regard by providing any information reasonably requested by management, including evidence of interim earnings, as necessary to implement the relief ordered herein.

¹ "Substantial evidence" is the most deferential standard of appellate review. It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938). The substantial evidence standard does not allow a court "to reverse the choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 405 (1962) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). A finding of discriminatory intent is a factual finding subject to the substantial evidence review standard. *Pullman Standard Co. v. Swint*, 456 U.S. 273, 293 (1982). The Commission defers to an administrative judge's post-hearing factual findings based on evidence in the record. EEO Management Directive MD 110 at 9-15 to 9-16.

Pursuant to 29 C.F.R. Section 1614.501(a)(5), the agency will commit to the Complainant in writing that it will cease from engaging in the unlawful employment practice found in this case, that it will not engage in similar unlawful employment practices, that it will provide the complainant a work place free from hostility, offensive conduct or abuse, and that no reprisal will be taken against the Complainant for filing and pursuing this or any other complaint under federal EEO law.

Within 30 days of its receipt of all necessary information, management will implement the remedial relief ordered in the foregoing paragraphs, and shall advise the complainant in writing of (1) the amount of back pay and other attendant benefits due her and (2) how management reached its determinations regarding these matters. Management shall provide the complainant and her representative with this written determination.

2. COMPENSATORY DAMAGES

The complainant is entitled to non pecuniary compensatory damages in the amount of \$25,000.00.

3. ATTORNEY'S FEES

As a prevailing party, the Complainant, who is represented by an attorney, is entitled to claim attorney's fees and costs, subject to the provisions of EEOC's regulations codified at 29 C.F.R. §1614.501(e)(2).

Any claim for fees must include verified statement from the attorney of costs and attorney's fees. The statement must be accompanied by an affidavit from the attorney itemizing the charges for legal services. Specifically, the affidavit should chronologically detail the dates on which services were rendered, the person providing such services, the nature and extent of the services performed, and the number of hours expended. This affidavit is only a reconstruction of the services provided and does not, in itself, justify an award of attorney's fees. To be compensable, such services must be documented by contemporaneous billing records prepared the same day on which the services were actually provided. Consequently, copies of the applicable billing records must accompany both the affidavit and verified statement.

In addition to the above information, the affidavit must contain a statement as to the attorney's usual and customary hourly charge, as well as the usual and customary hourly charge for each person who worked on this case. It should, to the extent applicable, explain any distinction between in court and out of court fees, whether the fee was fixed or contingent, the nature and length of the professional relationship with this complainant, and any other factors which might affect the amount of attorney's fees in this case. The affidavit must describe the training and experience of each person who worked on this case, and the date of bar membership as applicable.

The claim should also include affidavits from other attorneys attesting to the prevailing market rate in the relevant geographic area for similar services, and any evidence regarding hourly rates that have been awarded in prior cases. It is the attorney's responsibility to prove the reasonableness of the requested hourly rate. The claim for fees must include a copy of the fee agreement between counsel and the complainant.

Finally, the claim must include any documentation (bills, receipts, statements, invoices, express or certified mail receipt numbers, delivery service documents, *etc.*) to support any charges for costs billed to the complainant. Failure to provide adequate documentation may result in denial of the claimed costs.

Except as noted below, EEOC's regulations permit payment of an attorney fee award only for services performed after the filing of the formal, written complaint, and after notification to the agency that the complainant is represented by an attorney. However, the regulations do permit compensation for services rendered prior to such notification for a reasonable amount of time spent deciding whether to represent the complainant. In addition, the regulations permit compensation for services rendered prior to the filing of a complaint where an EEOC administrative judge issues a decision finding discrimination, the Department issues an order that does not implement the decision, and EEOC upholds the administrative judge's decision on appeal.

Any claim for fees and costs must be submitted to this office and to the VA facility director or staff office head, and to that official's legal representative, within **30 days** of receipt of this decision. The submission to this office must indicate that a copy of the claim was served on that official or legal representative. This office will issue a final fee decision within 60 days of receipt of the claim, provided a copy of the claim has been served on the above official. The final fees decision will include notice of the right to appeal the decision respecting the amount of the attorney fee award.

If the complainant wishes to negotiate a settlement of the attorney's fee award with the facility director or staff office head, rather than having this office decide it, such an agreement must be reached prior to the issuance of a final agency decision by this office. This office will not delay issuance of a decision on attorney's fees because of settlement negotiations unless the complainant's attorney files a written request for an extension of time with this office.

5. OTHER CORRECTIVE ACTION

In addition to making the Complainant whole, a remedy must be tailored to correct the particular source of the identified discrimination and to minimize the chance of its recurrence. Therefore, pursuant to 29 C.F.R. Section 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 those found in this case do not recur.

To this end, management should also consider taking action with respect to the officials and individuals responsible for the discrimination in this case, which action may, in appropriate circumstances, include counseling, reassignment of the offending individual, EEO training, and/or disciplinary action.

An appropriate management official shall sign and conspicuously post at the facility the attached notice of violation for a period of not less than 60 days.

RIGHT OF APPEAL

Within 30 days of receipt of this final action, the complainant has the right to appeal it to: **Equal Employment Opportunity Commission, Office of Federal Operations, P.O. Box 19848, Washington, D.C. 20036**. If an appeal is filed, EEOC Form 573 should be used. A copy of EEOC Form 573 is attached.

A copy of the appeal to the EEOC **must** also be sent to the VA's Office of the General Counsel at the following address: **Department of Veterans Affairs, Office of the General Counsel (024), 810 Vermont Ave., 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 the 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 the 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.

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

within 90 days of receipt of this final action if no appeal to EEOC has been filed; or

within 90 days after receipt of the EEOC's final decision on appeal; or

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 Department of Veterans Affairs as the defendant. Department means the national organization, and not just the local office, facility, or unit in which the complainant works. The complainant may not name just the Department. The complainant must name **R. James Nicholson** 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.

If the complainant decides to file a civil action under Title VII (discrimination due to race, color, religion, sex, 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 the complainant receives the final action or final decision from the Department or the Commission.



CHARLES R. DELOBE
Director, Office of
Employment Discrimination
Complaint Adjudication



Date

Attachment: EEOC Form 573

NOTICE TO EMPLOYEES

This Notice is posted pursuant to a recent Final Action or Decision issued by the Office of Employment Discrimination Complaint Adjudication (OEDCA), which found that a violation of Title VII occurred at this facility.

Federal law requires that there be no discrimination against any employee or applicant because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE OR PHYSICAL or MENTAL DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment. Federal law also prohibits REPRISAL against employees who participate in EEO proceedings or otherwise oppose unlawful discriminatory employment practices.

The Department of Veterans Affairs Medical Center in Hines, Illinois supports and will comply with such Federal law and will not retaliate against individuals because they have exercised their rights under law.

The Department of Veterans Affairs Medical Center in Hines, Illinois, has remedied the discrimination found in OEDCA's Final Action or Decision. The Department of Veterans Affairs Medical Center in Hines, Illinois 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.

The Department of Veterans Affairs Medical Center in Hines, Illinois, 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.

Signature of Appropriate Management Official

Date Posted: _____

Posting Expires: _____