



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

AUG 12 2010

Vincenza Pizzo,  
Complainant,

v.

Janet Napolitano,  
Secretary,  
Department of Homeland Security,  
(Citizenship and Immigration Services),  
Agency.

Appeal No. 0720100027

Hearing No. 443200900019X

Agency No. HS08CIS004320

DECISION

Following its February 19, 2010, final order, the Agency filed a timely appeal which the Commission accepts pursuant to 29 C.F.R. § 1614.405(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of 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 Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. For the following reasons, the Commission AFFIRMS in part and REVERSES in part the Agency's final order.

ISSUES PRESENTED

The issue presented herein is whether the AJ properly issued a decision finding discrimination and ordering appropriate remedial action.

BACKGROUND

At the time of events giving rise to this complaint, Complainant initially worked as a term Adjudications Officer at the Agency's District Office facility in Chicago, Illinois. The record indicated that Complainant was under Supervisor 1 from April 1, 2005. Supervisor 1 issued Complainant a performance review and then left the Agency. Complainant challenged the review with the Branch Chief for the period ending September 2007. Complainant was then rotated out of her section to the citizenship section under Supervisor 2 on October 1, 2007. During this time, Complainant applied for a permanent Adjudications Officer position.

On May 23, 2008, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of reprisal for prior protected EEO activity when:

1. On February 1, 2008, she became aware that she had not been selected for a permanent Adjudication Officer position, GS-1801-11/12, in the Chicago District, as advertised under vacancy announcement CIS-PJN-152151

Complainant subsequently requested an amendment to her complaint to include the following claims of unlawful retaliation:

2. On July 1, 2008, she received a mid-term review for the rating period October 1, 2007, through March 31, 2008, which did not properly reflect her performance during that time; and
3. On August 12, 2008, Complainant discovered that on October 1, 2007, when she transferred out of the 245 section and was rotated to the Citizenship section, rather than close out her unadjudicated cases, 36 of her open cases were placed on a shelf in a file room labeled, "Please do not touch"

The Agency dismissed Complainant's amended claims. Therefore, claim (1) was investigated by the Agency. 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). Complainant timely requested a hearing. As an initial matter, the AJ found that the Agency's dismissal of claims (2) and (3) was inappropriate. Further, the AJ added to claim (3) to include:

3. On August 12, 2008, Complainant discovered that on October 1, 2007, when she transferred out of the 245 section and was rotated to the Citizenship section, rather than close out her unadjudicated cases, 36 of her open cases were placed on a shelf in a file room labeled, "Please do not touch," and subsequently when Complainant applied for a permanent position she was told one of the reasons she was not hired was because of her backlog of open cases.

The Agency objected to the AJ's clarification of claim (3). The Agency indicated that Complainant, at the time of the amendment request, referred to the potential of the Agency using the back log against her in the future. However the AJ determined that Complainant clearly argued that the open cases in her back log were considered in the denial of the permanent position for which she applied. Therefore, the AJ found that the claim (3) was appropriately defined as stated above.

The AJ held a hearing on May 15, 2009, and a hearing on remedies on December 16, 2009. The AJ issued a decision on January 11, 2010. As to claim (1) regarding the non-selection, the AJ noted that the Agency used "The Rule of Three" which is a process whereby each applicant is ranked by the unit based on their answers to a series of questions, their resume, and if applicable,

veteran's preference. Once ranked, a certificate is generated and sent to the Agency listing the applicants in order. When the selection process begins, the selecting officials are required to consider first the top three ranked applicants. The selected applicant is then eliminated from the round; the two non-selected applicants and the next applicant are considered for the next position. Each applicant must be given three considerations, and if they are not selected after considerations only then can they be eliminated from the list. If one of the applicants in the group of three is not selected the Agency is prohibited from hiring from further down on the list and no further selections can be made from that list. For the position at issue in claim 1, the AJ noted that Selectee 1 and Selectee 2 were chosen for the position. At the third round, no applicant was selected, therefore, the selection process ended for the certificate upon which Complainant was listed lower than all the candidates considered for the position. The AJ found that the Agency provided legitimate, nondiscriminatory reasons for not selecting Complainant. The AJ determined that Complainant had not presented any evidence to indicate that the Agency deviated from the Rule of Three during the selection process for this position and the numerous other positions the Agency was filling.

As to the performance evaluation, the AJ noted that there was an issue as to whether Supervisor 2 knew of her prior protected activity. The AJ determined that Complainant presented enough evidence to establish that Supervisor 2, more likely than not, knew of her prior EEO complaint. Finding that Complainant established a prima facie case of retaliation, the AJ found that the Agency articulated legitimate, nondiscriminatory reasons for the evaluation. The Agency showed that Complainant's evaluation was based on: 1) Complainant's struggle to control her backlog; 2) her need to do research before referring cases to Supervisor 2; 3) Complainant's completion of 70% to 80% of her work on time; 4) return of Complainant's work due to grammatical errors; 5) Complainant's work was inadequate; and 6) Complainant had problems starting exams on time. In response to the Agency's reasons, the AJ indicated that Complainant spent little time discussing the performance evaluation. The AJ held that Complainant failed to show that Supervisor 2's statement of Complainant's work was not accurate. Further, the AJ found no causal connection between Complainant's protected activity and the evaluation. Therefore, the AJ concluded that Complainant failed to establish a prima facie case of unlawful retaliation, nor that the Agency's reasons were pretext for discrimination.

Finally, as to claim 3, Complainant asserted that the Branch Chief retaliated against her for her prior EEO activity when Complainant's adjudication files were left open. Then Complainant's backlog was used as a reason for not hiring Complainant for the permanent position for which Complainant applied in September 2007. The AJ noted that when Complainant was rotated to the citizenship section, the Branch Chief placed Complainant's files on hold. The Branch Chief indicated that the files were kept on the case file shelves because: a) Complainant requested that the Branch Chief reconsider her performance evaluation; b) the Branch Chief had to wait and see if changes were made to Complainant's performance evaluation were going to be approved and the evaluation for 2007 finalized; and c) the Office of Security and Investigations needed to complete its investigation into Complainant's entry into the file room. The AJ noted that based on the Branch Chief's affidavit, the Branch Chief kept the files when Complainant was rotated in October 2007 and by December 2007, she could have released the files. However, the AJ

determined that the Branch Chief did not provide any reason for holding the files on the shelves through August 2008, well beyond the standard procedure for the Agency. The AJ also noted inconsistencies in the Branch Chief's claims for keeping the files on the shelves based on the Agency's internal investigation. The AJ noted that final approval of Complainant's 2007 evaluation happened in June 2008; therefore, the files should not have been on the shelves on hold in August 2008. The AJ determined that the evidence in the record showed that the Branch Chief used the backlog issue as a means to give Complainant a negative recommendation during the interview process. The AJ indicated that the Branch Chief's notes during the interview stated that Complainant had "4 shelves of backlog cases."<sup>1</sup> Further, the AJ held that the backlog was an important consideration during the hiring process. In sum, the AJ found that Complainant presented facts to establish unlawful retaliation. Further, the AJ determined that the Branch Chief's negative job referral also constituted unlawful retaliation.

The AJ then ordered the Agency to provide relief to Complainant. Complainant was awarded \$15,000 in compensatory damages based on the low ratings, the intentional and malicious injury to her character, reputation, and her name by the Branch Chief, and the stress caused to by the unlawful retaliation. The AJ also determined that the Branch Chief's intentional retaliation resulted in Complainant not being selected for a permanent Adjudications Officer position. As such, the AJ ordered that the Agency give Complainant the opportunity to interview for the same position again, with a priority consideration.

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

#### CONTENTIONS ON APPEAL

The Agency appealed asserting that the AJ's decision erred on three counts. First, the Agency reasserted its argument that claim (3) was not properly defined; constituting an abuse of discretion by the AJ. Further, the Agency indicated that the AJ erred in finding discrimination as to claim (3) and that there was no nexus between the alleged retaliatory action and Complainant's EEO activity. Finally, the Agency argued that the AJ's remedies were inappropriate. First, the Agency asserted that Complainant should not be provided two opportunities for priority consideration. The Agency noted that in a non-selection case, the appropriate remedy should be to place Complainant in the position. However, since the AJ did not find unlawful retaliation regarding the position in claim 1, Complainant should not be awarded priority consideration or placement in a permanent Adjudications Officer position. Finally, the Agency asserted that the award of compensatory damages was excessive.

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<sup>1</sup> The AJ noted that the size of Complainant's backlog was also mischaracterized as large and determined that the record showed that backlogs was a common problem not unique to her. The record indicated that two other employees who rotated out of the same section had left over 600 open cases, well above what was left behind by Complainant.

Complainant also appealed asserting that the AJ erred in failing to find discrimination with claims (1) and (2). Complainant argued that the AJ should have found that she was subjected to unlawful retaliation. Further, Complainant argued that she was entitled to \$88,202 in compensatory damages, an increase from the \$15,000 awarded by the AJ and the position rather than mere priority consideration.

### 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. (November 9, 1999).

#### *Definition of Claims*

We note that the Agency alleged on appeal that the AJ improperly included claim 3 as a separate claim. Upon review of the record, we find that the Agency correctly argued that “it is unclear how the two parts of [claim] 3 are one coherent issue that stand apart from [claim] 1.” As such, the Agency contends that claim 1 and claim 3 should be merged. A review of the record indicates that Complainant alleged discrimination when she was not selected for the position as raised in claim 1. However, later, Complainant discovered that the Branch Chief separated her case files out and labeled them with a sign stating “Please do not touch.” Complainant believed that the cases files placed on the shelves were used against her when she applied for the position at issue in claim 1. Therefore, we determine that claim 3 is merely supporting evidence regarding Complainant's claim of non-selection raised in claim 1. Therefore, we shall only review Complainant's two claims of unlawful retaliation, namely the mid-term performance evaluation and the non-selection for the permanent Adjudications Officer position.

#### *Performance Evaluation*

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For complainant to prevail, one 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). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder 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 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dept. of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dept. of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dept. of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Upon review of the record, we find that the Agency articulated legitimate, nondiscriminatory reasons for the evaluation. Supervisor 2 testified as to the reasons for his evaluation including: 1) Complainant's struggle to control her backlog; 2) her need to do research before referring cases to Supervisor 2; 3) Complainant's completion of 70% to 80% of her work on time; 4) return of Complainant's work due to grammatical errors; 5) Complainant's work was inadequate; and 6) Complainant had problems starting exams on time. Complainant failed to show that Supervisor 2's reasons were pretext for unlawful retaliation. Therefore, we affirm the AJ's decision finding no discrimination as to the instant claim.

### *Non-Selection*

As noted above, Complainant 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). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder 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 (1993)

Complainant can establish a prima facie case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Social Security Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Specifically, in a reprisal claim, and in accordance with the burdens set forth in McDonnell Douglas, Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976), and Coffman v. Dept. of Veteran Affairs, EEOC Request No. 05960473 (November 20, 1997), a complainant

may establish a *prima facie* case of reprisal by showing that: (1) he or she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he or she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dept. of the Air Force, EEOC Appeal No. 01A00340 (September 25, 2000).

Complainant established that she filed a prior complaint in June 2007 regarding Supervisor 1's evaluations of her performance. The Branch Chief was well aware of the prior EEO complaint just months before she placed Complainant's case files on the shelves with a sign stating "Please Do Not Touch." We note that the prior complaint involved Supervisor 1's critical review of Complainant's work and the Branch Chief placed Complainant's work on the shelves in order to review them to see if Supervisor 1's assessment of Complainant's work was accurate. Therefore, we find that there was a link between the placing of the cases on the shelves and Complainant's prior protected activity. Complainant was not selected for a permanent Adjudications Officer position. As for the nexus, the record indicates that the Branch Chief was on the panel for the selection of the position in question. The Branch Chief cited Complainant's four shelves of backlogged cases as a significant reason for her ranking of Complainant in the selection process. Therefore, contrary to the Agency's arguments on appeal, we find a nexus between the prior complaint and the non-selection.

The burden shifts to the Agency to establish legitimate, nondiscriminatory reasons for its action. The AJ properly determined that the Agency met its burden. As noted above, the record indicated that the Agency used the Rule of Three. The applicants were interviewed and ranked by the panelists. Complainant was not ranked high enough to be considered for the position. Based on a review of the record, we find that the Agency has articulated legitimate, nondiscriminatory reasons for its action.

The burden now shifts to Complainant to establish that the Agency's reasons were pretext for discrimination. We note that the AJ found that Complainant failed to do so. However, the AJ continued her analysis to find that the Branch Chief who was one of the three members of the selection panel placed Complainant's caseload on the shelves and used her backlog to retaliate against Complainant. We find that the AJ should have used these findings of fact and law as related to the non-selection. The record clearly showed that the Branch Chief added her "personal knowledge" about Complainant in rating and ranking Complainant amongst the candidates for the position at issue. The first item listed by the Branch Chief was "4 Shelves of backlog cases." We also note that the AJ determined that the Branch Chief had provided no reason for keeping Complainant's cases past January 2008, when the Branch Chief had made changes to Complainant's performance evaluation for 2007. Further, the AJ found that comments made by the Branch Chief indicated that Complainant was a "poor" employee based on the backlog. As such, the AJ concluded that the backlog was an important consideration during the hiring process and that the other panel members received input from the Branch Chief regarding the backlog. The AJ then noted that Complainant's backlog was not out of the ordinary and noted that evidence in the record showed that backlog was a common problem not unique to Complainant. Accordingly, the AJ concluded that the Branch Chief used the backlog

to in essence sabotage Complainant's efforts to gain permanent employment. The AJ believed that such action constituted unlawful retaliation.

We find that the record supports the AJ's findings regarding the Branch Chief's use of the backlog to retaliate against Complainant. The AJ noted that Complainant never had a fair chance at getting selected for one of the positions available based on the Branch Chief's tainting of the selection process. Based on the AJ's conclusions, we find that the AJ should have taken this evidence and to establish that the Agency's reasons for not selecting Complainant were pretext for unlawful retaliation. Therefore, we conclude that Complainant has shown that she was subjected to unlawful retaliation when she was not selected for the Adjudications Officer position.

### *Remedies*

#### Position of Adjudications Officer

We note that the AJ awarded Complainant two opportunities for priority consideration for the next two positions within the Agency that are at the same or substantially equivalent (same grade, same promotion potential and same tenure) to the position of permanent Adjudications Officer GS-1801-11/12, for which she is qualified and for which she applies. As an alternative to the priority consideration process, the AJ noted that the Agency does have the option of offering the Complainant employment to an identical job as the permanent Adjudications Officer, GS-1801-11/12 (same series, same grade, same promotion potential, same tenure, same geographic location or any location the Complainant deems acceptable) or an equivalent job (same grade, same promotion potential, and same tenure) for which the Complainant qualifies.

However, we have found that the selection process for the Adjudications Officer position was tainted by unlawful retaliation. As noted by the Agency, in such a situation, the appropriate remedy is to place Complainant in the position at issue. See Madrigal v. Social Security Admin., EEOC Appeal No. 01981123 (February 9, 1999). As such, we find that the Agency should have been ordered to place Complainant in to the position she would have been absent the retaliatory act by the Branch Chief. As such, the AJ should have merely awarded Complainant the position of permanent Adjudications Officer, GS-1801-11/12. Accordingly, we modify the AJ's order with respect ordering the Agency to place Complainant into the position at issue.

#### Compensatory Damages

In addition, the AJ awarded Complainant \$15,000 in non pecuniary damages. The Agency argued that such an award was too high. Complainant also appealed asserting that she should have been entitled to \$88,202. Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes his or her claim of unlawful discrimination may receive, in addition to equitable remedies, compensatory damages for past and future pecuniary losses (*i.e.*, out of pocket expenses) and non-pecuniary losses (*e.g.*, pain and suffering, mental anguish). 42 U.S. C. § 1981a(b)(3). For an employer with more than 500 employees, such as the agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. Id.

The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in EEOC Notice No. 915.002, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (July 14, 1992). Briefly stated, the complainant must submit evidence to show that the agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. *Id.* at 11-12, 14; Rivera v. Dept. of the Navy, EEOC Appeal No. 01934157 (July 22, 1994). The amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to the complainant and the extent to which other factors may have played a part. EEOC Notice No. N 915.002 at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the complainant, and the duration or expected duration of the harm. *Id.* at 14.

The Commission notes that, in its brief submitted on appeal, the Agency asserted that Complainant's alleged harm of feeling like a zero was solely discovered during the investigation of the complaint at hand rather than at the time of the non-selection. Further, the Agency pointed to Complainant's claim that her "character, reputation, and her name" have been injured. Again, the Agency argued that such harm was a result of the EEO process, not of the alleged discrimination. As such, the Agency argued that the award of \$15,000 was excessive comparing the award to other non-selections where Complainants were awarded between \$5,000 and \$8,000 in compensatory damages. Complainant on the other had requested that the amount of damages should be increased to \$88,202. Complainant noted that she believed that she was subjected to unlawful retaliation based on the performance appraisal as well as the non-selection. She stated that the Branch Chief's acts of retaliation "has intentionally and maliciously injured my character, my reputation, and my name." Complainant indicated that her concern over her reputation and name was a key factor in the stress she felt. Complainant also produced a witness who supported her claims that she was placed under stress due to the unlawful retaliation and financial strain she has experienced since the non-selection.

Taking into account the evidence of non-pecuniary damages submitted by the complainant, including the fact that the harassment was ongoing for over two years and resulted in a diagnosis of a number of serious psychiatric disorders, we find the AJ's award of \$15,000 to be appropriate. This amount takes into account the severity of the harm suffered, and is consistent with prior Commission precedent. See Hvizdak v. U.S. Postal Serv., EEOC Appeal No. 07A20112 (June 30, 2003) (awarding \$15,000 where Complainant testified as to depression, financial stress, and loss of reputation); Wood v. Dept. of Agriculture, EEOC Appeal No. 01A15274 (January 6, 2003) (awarding Complainant \$15,000 where Complainant showed damage to reputation, stress, marital problems, loss of sleep, and worry); see also McGraw v. Dept. of Veterans Affairs, EEOC Appeal No. 07A20121 (November 27, 2002) (awarding Complainant \$15,000 finding he experienced stress, depression, sleeplessness, weight gain, and self doubt).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's adoption of the AJ's finding of no discrimination as to claim 2. However, we REVERSE the Agency's decision to reject the AJ's finding of unlawful retaliation as to claims 1 and 3 as consolidated. As such, we REMAND the matter in accordance with the ORDER below.

ORDER (D0610)

The Agency is ordered to take the following remedial action:

1. To offer Complainant the identical job as the permanent Adjudications Officer, GS-1801-11/12 (same series, same grade, same promotion potential, and same tenure) or an equivalent job (same grade, same promotion potential, and same tenure);
2. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision becomes final. The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. The Agency shall pay Complainant \$15,000 in compensatory damages.
4. The Agency is directed to conduct training for the Branch Chief who was found to have violated Title VII. The agency shall address the issue of unlawful retaliation.
5. The agency shall consider taking disciplinary action against the Branch Chief. 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.
6. The agency shall complete all of the above actions within ninety (90) 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 of the Agency's calculation of backpay and other benefits due Complainant, including evidence that the corrective action has been implemented.

#### POSTING ORDER (G0610)

The Agency is ordered to post at its District Office 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

AUG 9 2010

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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:

Vincenza Pizzo  
263 Monarch Dr  
Streamwood, IL 60107


Timothy M. Scheffler  
Stix Law Offices  
700 Rayovac Drive, Suite 117  
Madison, WI 53711

U.S. Department of Homeland Security  
Office for Civil Rights and Civil Liberties  
245 Murray Ln., SW Bldg. 410  
Washington, DC 20528

EEO Complaints Resolution Division  
Office of Equal Opportunity and Inclusion  
U.S. Citizenship and Immigration Services  
3050 Metro Drive, Suite 101  
Bloomington, MN 55425

AUG 9 2010

\_\_\_\_\_  
Date

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



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

**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 Citizenship and Immigration Services' District Office in Chicago, Illinois (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 subjected an employee to unlawful retaliation when an employee was not selected for a position. The facility was ordered to award the employee the position, pay the employee compensatory damages, provide training to the management official who has been found to have retaliated against the employee, and consider discipline for this management official. 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.

Duly Authorized Agency Representative: \_\_\_\_\_

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

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