

Don Drennon-Gala,
Petitioner.

v.

Alberto Gonzales,
Attorney General,
Department of Justice,
(Federal Bureau of Prisons),
Agency.

Petition No. 0420060025

Request No. 05A40941
Appeal No. 07A20123
Agency No. P-2000-0086

DECISION ON A PETITION FOR ENFORCEMENT

On June 1, 2006, the Equal Employment Opportunity Commission (EEOC or Commission) docketed a petition for enforcement to examine the agency's compliance with an order set forth in *Don Drennon-Gala v. Department of Justice*, Appeal No. 07A20123 (May 13, 2004). This petition for enforcement is accepted by the Commission pursuant to 29 C.F.R. § 1614.503. Petitioner alleged that the agency failed to fully comply with the Commission's order.¹

Petitioner filed a complaint in which he alleged that the agency discriminated against him on the bases of race (Italian), disability (his wife's disability), and reprisal for engaging in prior protected EEO activity under Title VII of the Civil Rights Act of 1964 in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. Petitioner alleged he was subjected to a hostile work environment, and that he was subjected to unlawful discrimination when he was terminated from his position as Case Manager, GS-11. An EEOC Administrative Judge (AJ) held a hearing, and issued a decision finding that complainant failed to establish that the actions alleged were severe or pervasive enough to rise to the level of actionable hostile work environment harassment. The AJ also found, however, that complainant established, by a preponderance of the evidence, that his termination was motivated by retaliatory animus toward his prior EEO activity. The agency's final order rejected the AJ's finding of reprisal discrimination. On appeal, the Commission reversed the agency's final order and directed the agency to take corrective action in accordance with our order. The Commission's order directed the agency to offer

complainant reinstatement to the position of Case Manager at the agency's Federal Correctional Institute, Oxford, Wisconsin facility. Our decision stated that should complainant accept the agency's offer of employment, he would be placed at the level of pay he would have been placed, had he received all appropriate salary increases and not been terminated in November of 1999. In addition, we found that should complainant accept the agency's offer of employment, he should not be required to serve an additional probationary period for the Case Manager position. Any reference in complainant's personnel records to termination from the position of Case Manager was ordered to be deleted immediately. The order also specified that the agency had to pay petitioner back pay with interest, and consider whether to discipline the Responsible Management Officials who discriminated against complainant.

On or about January 23, 2006, petitioner submitted the petition for enforcement at issue. Petitioner contends that the agency failed to: (1) deduct the proper income taxes from his award of back pay; (2) provide him with proper training; (3) provide him with the results of an updated background investigation; (4) pay him interest on a military buy-back program; and (5) make the appropriate deductions and payments to his CSRS and TSP accounts. In a subsequent brief submitted to the Commission on July 24, 2006, petitioner alleged that the agency had not considered the negative tax consequences of giving him an award of back pay and interest in a lump sum, and thus he had not been "made whole" by the agency. Petitioner further alleged that he should be allowed to participate in all appropriate training courses which similarly situated employees have received.

Initially, the Commission addresses petitioner's allegations regarding the agency's failure to provide him with requested training courses. Petitioner alleged that "except for back pay and interest on that back pay, the Agency has failed to provide job-enhancing benefits." The record reflects that petitioner was reinstated to his position of Case Manager at the agency's facility in Oxford, Wisconsin. Subsequently, petitioner requested that the agency provide him with FY06ART training courses in Atlanta, Georgia. The record reflects that agency management denied petitioner's request for training "as he is a FCI Oxford employee. If he wants to attend annual training, he is more than welcome to attend at Oxford." In addition, we note that our order as stated in Appeal No. 07A20123 provided that petitioner would be offered reinstatement to the position of Case Manager and placed at the level of pay he would have received had he not been terminated in November of 1999. However, our order did not address the issue of whether the agency would be required to provide training to petitioner. Specifically, our order did not provide that the agency was required to provide petitioner with training

at agency facilities other than the Federal Correctional Institution at Oxford. As such, we must reject petitioner's allegations regarding the agency's failure to provide him the training he had requested.² Contrary to petitioner's allegations, simply because the Commission ordered an agency to provide training to a complainant in another case does not mean that the agency failed to comply with the provisions of the order in the instant case by not allowing him to take part in all the trainings he requested as a "job-enhancing benefit." The Commission's order in the instant case did not state that the agency was required to provide petitioner with training and "job-enhancing benefits," and thus the agency did not violate our order by not providing him with training courses.

We next address petitioner's allegation regarding the tax liability on the award of back pay. Petitioner alleged that the agency did not make him whole if they ignored the negative tax consequences of making a lump sum payment of back pay and interest. Petitioner alleged that his receipt of a lump sum payment of back pay subjected him to a negative tax penalty which he would not have incurred absent the act of discrimination. The Commission has held that where an agency pays back pay and other income payments in a lump sum payment, the agency is responsible for a petitioner's proven increased income tax burden. See *Goetze v. Department of the Navy*, EEOC Appeal No. 01991530 (August 22, 2001); *Holler v Department of the Navy*, EEOC Appeal Nos. 01982627 & 01990407 (August 22, 2001). In these cases, the Commission held that an award to cover additional tax liability for receipt of back pay in a lump sum is available and that the petitioner bears the burden to prove the amount to which he claims entitlement. Petitioner will have the burden of establishing the amount of his increased federal income tax liability to the agency. Courts that have discussed claims for compensation for additional tax liability stemming from a lump sum payment have demanded probative calculations by Petitioners. *Barbour v. Medlantic Management Corp.*, 952 F.Supp. 857, 865 (D.C. 1997) (denied award due to failure to provide evidence on difference between taxes paid on lump sum front pay award and amount of taxes that would have been paid had the salary been earned over time). As such, the petitioner must supply the agency with evidence of any negative tax consequences he incurred or is likely to incur as a result of receiving the lump sum back pay award.

Petitioner also alleged that he was entitled to compensation for the interest he paid on his military buy-back for retirement purposes. Petitioner stated that during the period he was wrongfully terminated, the interest rate on his military buy-back payments increased, and additional interest accrued on his account as he could not make the interest payments during this period. Petitioner alleged that at the time he was wrongfully terminated, he was making direct payments from

his paycheck to his military buy-back at the rate of \$25 per pay period. Petitioner alleged that his inability to make these payments during his period of termination caused further interest to be added to his military buy-back in the amount of about \$1,500.00. However, we find that petitioner has shown no evidence that he suffered any harm or loss in this regard. While our order did not specifically provide that the agency provide petitioner with additional interest he incurred on his payments of his military buy-back, our order did provide that the agency would determine the appropriate amount of back pay, interest and other benefits due petitioner under 29 C.F.R. § 1614.501. As it is possible that petitioner would not have incurred the additional interest he alleged absent the act of discrimination by the agency, we note that in this regard, petitioner shall submit any evidence of harm or loss regarding the payment of military buy-back to the agency. The agency may then determine whether petitioner is entitled to be compensated as make-whole relief. Regarding petitioner's other allegations (proper income taxes not taken from the back pay award; results of an investigation were not provided to petitioner; the agency may not have made the appropriate payments to petitioner's CSRS and TSP accounts), we note that these matters were not mentioned in the Commission's order and the agency was not specifically ordered to complete the tasks mentioned by petitioner in his request for enforcement. As such, we cannot find that the agency violated the Commission's order by failing to complete these tasks. To the extent that the agency has not deducted the appropriate amounts from petitioner's back pay award or made the appropriate contributions to his retirement accounts, these matters must be raised directly with the agency. Accordingly, we GRANT petitioner's request for enforcement in part.

ORDER

To the extent it has not already done so, the agency shall provide petitioner with the following remedial relief:

1. Any reference in petitioner's personnel records to termination from the position of Case Manager shall be deleted immediately.
2. The agency shall request from petitioner information regarding his entitlement to reimbursement for adverse tax liability which may have been caused by the lump sum payment of back pay and interest. Petitioner shall cooperate in the agency's efforts to compute the amount of benefits due, if any, due to increased tax liability and shall provide all relevant information requested by the agency.
3. The agency shall request from petitioner information regarding

his entitlement to reimbursement for additional interest he may have incurred regarding his military buy-back payments during the period of his wrongful termination. Petitioner shall cooperate in the agency's efforts to compute the amount of benefits due, if any, due to increased interest payments on his military buy-back account and shall provide all relevant information requested by the agency.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0501)

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 19848, Washington, D.C. 20036. 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.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0900)

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 (Z1199)

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 that the Court appoint an attorney to represent you and that the Court 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 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, Director
Office of Federal Operations

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1 Due to a new data system, your case has been redesignated with the above-referenced request number.

2 We note that petitioner alleged that the agency has not yet deleted any reference in his personnel records to the termination from the position of Case Manager. The agency was ordered to delete any reference to his termination from his personnel records, and as such, to the extent that the agency has failed to do so, it will again be ordered to delete these references from his records.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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