

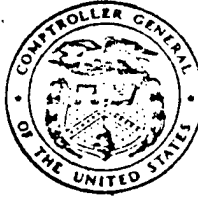
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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

OGC
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FILE:

B-206014 *et al.*

DATE: March 7, 1983

MATTER OF:

Equal Employment Opportunity Commission--
Informal Settlements of Discrimination
Complaints--Monetary Awards

DIGEST:

1. In view of authority granted to EEOC under Title VII of the Civil Rights Act of 1964, as amended, GAO does not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in other agencies of the Government. However, in view of GAO's authority to determine the legality of expenditures of appropriated funds, GAO may determine the legality of awards agreed to by agencies in informal settlements of discrimination cases arising under Title VII.

2. Agencies have the general authority to informally settle a discrimination complaint and to award backpay with a retroactive promotion or reinstatement in an informal settlement without a specific finding of discrimination under EEOC regulations and case law. Title VII of the Civil Rights Act of 1964, as amended, and EEOC regulations issued thereunder provide authority for agencies to award backpay to employees in discrimination cases, independent of the Back Pay Act, 5 U.S.C. § 5596. Thus, backpay is authorized under Title VII without a finding of an "unjustified or unwarranted personnel action" and without a corresponding personnel action.

3. Informal settlements without a specific finding of discrimination are authorized by Title VII of the Civil Rights Act of 1964, as amended. In such informal settlements Federal agencies may authorize backpay awards, attorney fees, or costs without a corresponding personnel action. However, agencies are not authorized to make awards not related to backpay or make awards that exceed the maximum amount that would be

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recoverable under Title VII if a finding of discrimination were made. An award may not provide for compensatory or punitive damages as they are not permitted under Title VII.

4. The scope of remedial actions under Title VII is generally for determination by EEOC. However, EEOC's present regulations on informal settlements do not provide sufficient guidance for Federal agencies to carry out their responsibilities under Title VII of the Civil Rights Act of 1964, as amended. We recommend that EEOC review and revise its present regulations to provide such guidance. Until that time agencies may administratively settle Title VII cases in a manner consistent with the guidelines in this decision.

We have consolidated four cases,¹ and will consider them jointly in this decision since they present related questions on the appropriateness of certain awards proposed in informal settlements of Federal employee discrimination complaints processed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (Supp. IV 1980). The cases discussed below essentially present the questions of whether an agency has the authority to informally settle a discrimination case: (1) by awarding backpay without effectuating a corresponding personnel action such as a retroactive promotion or reinstatement; (2) by awarding a monetary sum not based on backpay; or (3) by paying backpay without deductions or backpay computed without reference to the backpay regulations, 5 C.F.R. Part 550, Subpart H (1982).

¹The four cases are B-206014--Small Business Administration; B-203194--Department of the Interior; B-202552--Department of the Army; and B-202521--Department of the Navy.

B-206014

FACTUAL BACKGROUND

In B-206014, a former employee of the Small Business Administration (SBA) who had been removed from his position filed a complaint of discrimination against the agency, contesting his removal. In order to resolve the complaint the SBA agreed to an informal settlement without rehiring the employee and without a specific finding of discrimination. As part of that settlement the SBA agreed to pay the sum of approximately \$30,000. The amount represents the employee's gross salary for a part of the period of removal, including all pay and within grade increases due, as well as a lump-sum payment for accrued annual leave. The certifying officer forwarded the case to this Office requesting a decision as to whether the settlement award may be paid, and, if so, what deductions, such as interim earnings, if any, must be made from this award.

In B-203194, an employee of the Department of the Interior had been temporarily promoted to a GS-13 position for a period of 120 days, and then returned to her GS-12 position. However, the employee continued to perform the duties of the GS-13 position for an additional 5 months. This additional 5-month period, together with all her previously recognized temporary promotions to the GS-13 level, allegedly gave the employee over 1 year's experience at the GS-13 level. The employee filed a discrimination complaint against the Department of the Interior after she was determined to be ineligible for a promotion to a GS-14 position because she did not meet the time-in-grade requirements. As part of the informal settlement reached without a specific finding of discrimination, the Department of the Interior agreed that the employee would receive backpay at the GS-13 level for a period of 5 months and the employee's records would be corrected to show she had satisfied the time-in-grade requirement for a GS-14 level position. In addition, the employee would receive backpay for the difference between the salary she received at the GS-12 level and that of the GS-14 level for an additional 4 months. The case was forwarded to this Office on the question of whether the proposed award under the settlement agreement is authorized in view of our decision in Donald L. Bressler, 58 Comp. Gen. 401 (1979), which relates to overlong details to higher graded positions.

B-206014

FACTUAL BACKGROUND

In B-206014, a former employee of the Small Business Administration (SBA) who had been removed from his position filed a complaint of discrimination against the agency, contesting his removal. In order to resolve the complaint the SBA agreed to an informal settlement without rehiring the employee and without a specific finding of discrimination. As part of that settlement the SBA agreed to pay the sum of approximately \$30,000. The amount represents the employee's gross salary for a part of the period of removal, including all pay and within grade increases due, as well as a lump-sum payment for accrued annual leave. The certifying officer forwarded the case to this Office requesting a decision as to whether the settlement award may be paid, and, if so, what deductions, such as interim earnings, if any, must be made from this award.

In B-203194, an employee of the Department of the Interior had been temporarily promoted to a GS-13 position for a period of 120 days, and then returned to her GS-12 position. However, the employee continued to perform the duties of the GS-13 position for an additional 5 months. This additional 5-month period, together with all her previously recognized temporary promotions to the GS-13 level, allegedly gave the employee over 1 year's experience at the GS-13 level. The employee filed a discrimination complaint against the Department of the Interior after she was determined to be ineligible for a promotion to a GS-14 position because she did not meet the time-in-grade requirements. As part of the informal settlement reached without a specific finding of discrimination, the Department of the Interior agreed that the employee would receive backpay at the GS-13 level for a period of 5 months and the employee's records would be corrected to show she had satisfied the time-in-grade requirement for a GS-14 level position. In addition, the employee would receive backpay for the difference between the salary she received at the GS-12 level and that of the GS-14 level for an additional 4 months. The case was forwarded to this Office on the question of whether the proposed award under the settlement agreement is authorized in view of our decision in Donald L. Bressler, 58 Comp. Gen. 401 (1979), which relates to overlong details to higher graded positions.

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In B-202552, an employee filed a discrimination complaint against the Department of the Army based upon his nonselection for a GS-11 position. As part of an informal settlement reached without a specific finding of discrimination, the agency agreed to pay the employee the sum of \$3,000. The settlement agreement specifically stated, "[t]he aforementioned monetary adjustment is not and shall not be construed or interpreted as an award of back pay, attorney's fees, or damages of any other type." The case was forwarded to this Office for a decision on the propriety of the award.

In B-202521, a GS-7 employee filed a discrimination complaint against the Department of the Navy based upon her nonselection for a GS-9 position. As part of an informal settlement reached without a finding of discrimination, the employee was reassigned to a GS-7, target GS-9 position. Although the employee was not given a retroactive promotion, the agency agreed to pay the employee backpay at the GS-9 position from the date of her nonselection to the date of settlement. The case was forwarded to this Office for a decision on the question of whether an employee may receive backpay at the GS-9 level where a retroactive promotion to GS-9 was not a part of the settlement agreement.

All of the above proposed settlements were negotiated under the authority of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (Supp. IV 1980), and corresponding regulations promulgated by the Equal Employment Opportunity Commission (EEOC). See 29 C.F.R. §§ 1613.217 and 1613.221.

LAW AND REGULATIONS

Title VII of the Civil Rights Act of 1964, as amended, was made applicable to Federal employees in 1972, and the governing statutory provision as amended is found in 42 U.S.C. § 2000e-16 (Supp. IV 1980), which provides:

"(a) * * * All personnel actions affecting employees or applicants for employment * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin.

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"(b) * * * Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. * * *"

EEOC's regulations promulgated under authority of Title VII and published in Title 29 of the Code of Federal Regulations, provide as follows:

"§ 1613.217 Adjustment of complaint and offer of hearing.

"(a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file. * * *

"If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant. An informal adjustment of a complaint may include an award of back pay, attorney's fees or other appropriate relief. * * *"

* * * * *

"§ 1613.221 Decision by head of agency or designee.

"(a) The head of the agency, or his designee, shall make the decision of the agency on a complaint based on information in the complaint file. A person designated to make the decision for the head of the agency

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shall be one who is fair, impartial, and objective.

* * * * *

"(c) the decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issue of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. * * *"

DISCUSSION

In view of the authority granted to EEOC by the statute, GAO does not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in other agencies of the Government. See Clem H. Gifford, B-193834, June 13, 1979. However, in view of GAO's authority to determine the legality of expenditures of appropriated funds, we have issued several decisions on the legality of awards agreed to by agencies in informal settlements of discrimination cases arising under Title VII. See, for example, B-199291, June 19, 1981 (agencies have the authority to award attorney fees to prevailing complainants at the administrative level, such awards to be made from the agency's operating expense as a necessary and proper expense); Gene A. Albarado, 58 Comp. Gen. 5 (1978) (agency has no authority to allow interest in settlement of an EEO complaint under Title VII); and 54 Comp. Gen. 622 (1975) (applicable retirement deductions should be made against gross salary entitlement, even though amount payable is reduced by interim earnings, in remedial action for employment discrimination).

To place the present cases in the proper perspective, it is beyond question that an agency has the general authority to informally settle a discrimination complaint and to award backpay with a retroactive promotion or reinstatement in an informal settlement without a specific finding of discrimination. These issues have been affirmatively resolved by EEO regulations and are no longer questioned by this Office. See 29 C.F.R. § 1613.221(c), and Shaw v. Library of Congress, 479 F. Supp. 945 (D. D.C. 1979). It is

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clear that Title VII itself provides authority for awarding backpay to employees in a discrimination case, independent of the Back Pay Act of 1966, 5 U.S.C. § 5596, and its requirements of a finding of an "unjustified or unwarranted personnel action." The connection between Title VII and the Back Pay Act arises only because EEOC has provided in its regulations on remedial actions that when discrimination is found, an award of backpay under Title VII is to be computed in the same manner as under the Back Pay Act regulations. See 29 C.F.R. § 1613.271.

In view of EEOC's authority in this area, we requested its comments on these cases. The EEOC states that section 717 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-16), together with its legislative history, EEOC's regulations, and the current case law, provide sufficient authority for informal adjustments of discrimination complaints in the Federal sector to contain monetary payments which are independent of any personnel action. In its comments to this Office, EEOC states that Title VII's legislative history:

" * * * is unequivocal in stressing that conciliation and voluntary settlement are the keystones of the eradication of employment discrimination, both in the public and private sectors, and that the broadest of latitude exists in determining the appropriate remedy for achieving this end."

In EEOC's view the legislative history supports the conclusion that the term "appropriate remedies" is to be broadly construed. For example, the legislative history of section 717 of Title VII, states that:

"Thus the provision in section 717(b) for applying 'appropriate remedies' is intended to strengthen the enforcement powers of the Civil Service Commission by providing statutory authority and support for ordering whatever remedies or actions by Federal agencies are needed to ensure equal employment opportunity in Federal employment. Remedies may be applied as a result of

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individual allegations of discrimination, CSC investigation of equal employment opportunity programs in Federal agencies or their field installations, or from review of agency plans of action and progress reports. Remedies may be in terms of action required to correct a situation regarding a single employee or group of employees or broader management action to correct systemic discrimination and to improve equal employment opportunity program effectiveness to bring about needed progress. The Commission is to provide Federal agencies with necessary guidance and authority to effectuate necessary remedies in individual cases, including the award of back pay, reinstatement or hiring, and immediate promotion where appropriate." (Emphasis added.) S. Rep. No. 92-415, 92nd Cong., 1st Sess. 15 (1971).

As further support EEOC cites the case of Shaw v. Library of Congress, 479 F. Supp. 945 (D. D.C. 1979), which held that Title VII provided the Library of Congress with authority to award a retroactive promotion and backpay in settlement of a discrimination case without a specific finding of discrimination. In that case, the District Court of the District of Columbia stated:

"The authorities are legion that Congress and the courts intended employers, private and public (including the Library), to have and to exercise broad authority to remedy employment discrimination. * * * Devices to achieve these objectives are freely available in court, at the administrative level and as management techniques of employers." 479 F. Supp. at 948-49. (Citations omitted.)

Additionally, in its letter to us, EEOC notes that:

"It has long been the practice in the private sector for companies to enter into settlements which contain cash payments where there has been neither a finding of discrimination,

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either judicially or administratively, nor an admission by the employer of any wrongdoing."

Thus, EEOC concludes that the specific remedial action proposed in one of the pending cases, B-202521--payment to employee of a sum equal to the backpay at a GS-9 position from the date of nonselection to date of the settlement agreement even though the employee is not to receive a retroactive promotion to the position--is not only proper but to be encouraged.

The EEOC, while concluding that informal settlements may contain monetary payments which are independent of any personnel action, defines the limits of those monetary payments as follows:

"Section 1613.217 permits informal settlement agreements to include back pay, attorney's fees or costs as monetary amounts. Courts have given the term 'back pay' a very broad interpretation covering many benefits of employment, in addition to salary, that form part of the employee's compensation, including overtime, sick pay, and shift differentials. These cash awards do not constitute damages of any kind, but are economic restitution necessary to restore employees to the economic position they would have but for the alleged discrimination. * * * Thus agencies can agree to pay back pay, reasonable attorney's fees and costs. Compensatory or punitive damages, or back pay amounts in excess of a complete back pay award, would not be permissible." (Footnotes omitted.)

Under EEOC's view, agencies are authorized to informally settle a Title VII complaint without a specific finding of discrimination, and to make monetary awards for backpay, attorney's fees or costs, whether or not the employee is actually promoted or reinstated. The limit of any monetary award is the amount of backpay, attorney's fees, or costs that the employee would have been entitled to if discrimination had been actually found.

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We recognize that public policy favors the amicable settlement of disputes, and agreements accomplishing this result will be disregarded only for the strongest of reasons. Cities Service Oil Co. v. Coleman Oil Co., Inc., 470 F.2d 925 (1st Cir. 1972); Lichtenstein v. Lichtenstein, 454 F.2d 69 (3rd Cir. 1972). It is clear that this policy in favor of informal settlement of disputes applies to Title VII cases, in both the private and public sectors. See Sears Roebuck and Company v. EEOC, 581 F.2d 941 (D.C. Cir. 1978) and Shaw v. Library of Congress, 479 F. Supp. 945 (D. C. 1979).

In Shaw v. Library of Congress, the court said:

" * * * In light of the historic policy favoring the amicable settlement of disputes and the particular settlement policy of Title VII, no regulation should be interpreted as intending to limit the bargaining options available to an agency confronted by a bona fide discrimination complaint unless the language of the regulation is specific and unambiguous. * * *" 479 F. Supp. at 949.

Although the EEOC regulations do not explicitly provide for settlements of the types proposed here, we cannot say that the interpretation given Title VII and these regulations by the EEOC is improper, and we are hereby adopting that interpretation. We believe that, in light of the authorities cited above, it is the appropriate interpretation.

Thus, we conclude that Federal agencies have the authority in informally settling discrimination complaints filed under Title VII of the Civil Rights Act of 1964, as amended, to make awards of backpay, attorney's fees or costs, without a corresponding personnel action and without a finding of discrimination, provided that the amount of the award agreed upon must be related to backpay and may not exceed the maximum amount that would be recoverable under Title VII if a finding of discrimination were made. The award may not provide for compensatory or punitive damages as they are not permitted under Title VII. DeGrace v. Rumsfield, 614 F.2d 796 (1st Cir. 1980).

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Generally, the maximum amount that would be recoverable under Title VII if a finding of discrimination is made, and the maximum amount that could be awarded under an informal settlement, is the gross amount of backpay the employee lost minus any interim earnings and other deductions listed in 5 C.F.R. § 550.806(e). For example, in B-206014, the SBA agreed to pay a monetary sum which represented the employee's gross salary for a part of the period of his contested removal. If the amount agreed upon is less than the maximum amount that would be recoverable under Title VII, if a finding of discrimination had been made, and his recovery calculated under the Back Pay Act regulations, it may be paid. The sums agreed upon in B-203194 and B-202552, which apparently represent backpay for allegedly lost promotional opportunities, may likewise be paid if they represent an award which does not exceed the maximum amount that would be recoverable under Title VII if a finding of discrimination had been made.

However, we have insufficient information concerning the payment of \$3,000 in B-202552. If it is a lump-sum payment unrelated to backpay or is in the nature of compensatory or punitive damages, the payment would not be proper. On the other hand, even though it is stated not to be backpay, if it was arrived at on a basis consistent with backpay as discussed in this decision, then payment may be made.

We are concerned that EEOC's present regulations on remedial actions in informal settlements without a specific finding of discrimination do not provide sufficient guidance for Federal agencies to carry out their responsibilities under Title VII. We recommend that EEOC review and revise its present regulations to provide such guidance. Until such time, however, agencies may administratively settle Title VII cases in a manner consistent with the guidelines in this decision.

Accordingly, the settlements reached in these four cases may be implemented in accordance with the foregoing under the authority of Title VII and the corresponding EEOC regulations.

Milton J. Fowler
for Comptroller General
of the United States

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