



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, DC 20507**

[REDACTED]  
Serita B.,<sup>1</sup>  
Complainant,

v.

Steven T. Mnuchin,  
Secretary,  
Department of the Treasury  
(Internal Revenue Service),  
Agency.

Request No. 0520150006

Appeal No. 0720140033

Hearing No. 470-2008-00147X

Agency No. EEO-DFS-071108F

**DECISION ON RECONSIDERATION**

Both Complainant and the Agency timely requested reconsideration of the decision in EEOC Appeal No. 0720140033 (July 30, 2017). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

In our previous decision, the Commission determined that an EEOC Administrative Judge (AJ) properly found that the Agency violated EEO recordkeeping regulations. The Commission **GRANTS** the Agency's request for reconsideration herein because we find that our previous decision erred in concluding that the Agency violated EEO recordkeeping regulations. The Commission **DENIES** Complainant's request for reconsideration because it does not meet the prerequisites for reconsideration.

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

### ISSUE PRESENTED

The issue presented is whether our previous decision clearly erred when it found that notes made by applicants during a job interview were “records” that the Agency were required to preserve under the Age Discrimination Employment Act’s (ADEA) recordkeeping requirements found at 29 C.F.R. § 1627.3(b)(1).

### BACKGROUND

On November 6, 2007, Complainant filed a formal EEO complaint in which she alleged that the Agency subjected her to age discrimination when it did not select her for the position of Revenue Officer and considered her interview scores for reapplication for one year after her interview for the position. As part of the selection process for this position, an Agency interview panel presented applicants with various hypothetical scenarios and evaluated their verbal responses. The Agency gave interviewees sheets of paper to take notes and make scribblings about the scenarios, but after the interview, the Agency collected the notes to prevent interviewees from sharing the scenarios with others. The Agency had a practice of collecting and destroying the applicants’ notes, and an interview panelist destroyed Complainant’s interview notes after collecting them.

In our previous decision, the Commission affirmed an Equal Employment Opportunity Commission (EEOC) Administrative Judge’s (AJ) finding that Complainant did not prove that she was subjected to unlawful age discrimination. However, our previous decision also affirmed the AJ’s finding that the Agency violated the EEOC’s recordkeeping requirements when it destroyed the interviewees’ notes from the selection process.

Our previous decision noted that although the AJ concluded that the Agency violated the recordkeeping requirements of 29 C.F.R. § 1602.14 under Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA), it was more appropriate to analyze this case under the ADEA’s recordkeeping regulations at 29 C.F.R. § 1627. Specifically, the Commission determined that U.S.C. § 636, or Section 7 of the Age Discrimination in Employment Act (ADEA), empowers the Commission to require employers to keep records necessary or appropriate for the Act’s administration. The Commission further noted that 29 C.F.R. § 1627.3(b)(1)(i) provides that an employer who, in the regular course of business, makes, obtains, or uses job applications, resumes, or some other form of employment inquiry submitted in response to job advertisements must keep the advertisements and responses for one year from the date of the personnel action. The Commission noted that this requirement also applies to “records pertaining to the failure or refusal to hire any individual.”

The previous decision also noted that, in this case, the Agency provided interviewees with extra paper and the means for contemporaneously recording their thought processes during interviews, but subsequently confiscated and destroyed these notes and scribblings. The Commission reasoned that “[w]hen parties or witnesses make notes, prepare memoranda, or otherwise make a written record of past events, these records of past events are important in the investigations and especially in preparation for hearings, which may not occur until years after the event.”

The Commission further noted that interview notes may become evidence in situations wherein an individual may not recall events, and the notes themselves become evidence of the event they describe. Additionally, the previous decision noted that the notes were within the Agency's control to authorize, collect, and destroy. Therefore, the previous decision concluded that the interviewees' notes constituted "records pertaining to the failure or refusal to hire" under the ADEA's recordkeeping requirements, and the Agency failed to properly preserve them.

Additionally, the previous decision found that the AJ did not abuse his discretion in declining to draw an adverse inference against the Agency for its recordkeeping violation or by ordering the Agency to communicate with and train its managers and supervisors who participate in selections to henceforth retain all interview notes because of its recordkeeping violation. The previous decision also ordered the Agency to instruct all managers and supervisors who participate in selections of the requirement to retain notes in accordance with 29 C.F.R. § 1627; to consider taking disciplinary actions against the Agency officials who destroyed the interviewee notes during the selection process; to post a notice of the recordkeeping violation at its Louisville facility; and to provide attorney's fees incurred in the processing of the complaint.

#### RECONSIDERATION CONTENTIONS

In its request for reconsideration, the Agency argues that our previous decision is clearly erroneous because the Agency was not required to retain the notes because they were not personnel or employment records. The Agency also argues that our previous decision clearly erred because the Agency is not an "employer" as defined under the ADEA by 29 C.F.R. § 1627 and 29 U.S.C. § 630 (b) because federal departments and agencies are excluded from the ADEA's recordkeeping requirements by 29 U.S.C. § 633a(a)(f). The Agency further argues that our previous decision's award of attorney's fees is erroneous because attorney's fees are not available for ADEA claims in federal sector administrative process. The Agency also requests that we deny Complainant's request for reconsideration regarding the finding that she did not prove that she was subjected to age discrimination.

In her request for reconsideration, Complainant argues that our previous decision erred in finding that she did not prove that she was subjected to unlawful discrimination. Complainant maintains that the Agency's assertion that she was not selected because she rambled and "thought out loud" during the interview for the position was undermined by the AJ's determination that portions of the interviewers' testimony was disingenuous. Complainant further contends that the Agency did not provide data on how many qualified individuals over the age of 40 were not selected for positions; instead, it only provided data regarding the ages of applicants of individuals who were hired.

Additionally, regarding the recordkeeping violation, Complainant maintains that the Commission has the authority to take actions to enforce the ADEA in the federal sector, which means that agencies must preserve records accordingly.

Complainant further maintains that the Agency's failure to preserve the interview notes of applicants was an attempt to hide its misconduct in her nonselection; therefore, the Commission should order the Agency to make an unconditional offer of employment to Complainant for the GS-9 Revenue Officer position and to pay her back pay and benefits, as well as attorney's fees and costs.

### ANALYSIS AND FINDINGS

As the Commission noted in our decision in EEOC Appeal No. 0720140033, 29 C.F.R. § 1627.3(b)(1) provides that, under the ADEA, employers must retain "records pertaining to the failure or refusal to hire any individual" for one year from the date of a personnel action. Upon review, the recordkeeping provision of the ADEA at 29 C.F.R. § 1627 adopts the definition of "employer" from section 11 of the ADEA. 29 C.F.R. § 1627.1(a). The definition of "employer" in section 11 of the ADEA includes certain private sector business and state and local government, but section 11 specifically excludes the "United States, or a corporation wholly owned by the Government of the United States" from the definition. 29 U.S.C. § 630(b). Further, in the ADEA recordkeeping provision, there is no reference to section 15, the section of the ADEA that prohibits discrimination based on age in the federal sector. 29 C.F.R. § 633a. As such, we find that our previous decision clearly erred when it found that EEO record retention regulations required the federal government to maintain ADEA records in the same manner as private sector business and state and local government employers were required to maintain records.

Although the ADEA recordkeeping provision at 29 C.F.R. § 1627.3(b) does not apply to the federal sector EEO process, an AJ nonetheless has the authority to draw adverse inferences and apply sanctions in the case of record destruction that results in an inadequate record. EEOC Regulation 29 C.F.R. § 1614.108(b) requires, inter alia, that the agency develop an impartial and appropriate factual record upon which to make findings on the claims raised in the complaint. One purpose of an investigation is to gather facts upon which a reasonable fact-finder may draw conclusions as to whether a violation of the discrimination statutes has occurred. Id.; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) (Aug. 5, 2015), at Chap. 6, § IV.B. An investigation must include "a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the Complainant's group as compared with the treatment of similarly situated employees . . . and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant." Id. at § IV.C. Also, an investigator must identify and obtain "all relevant evidence from all sources regardless of how it may affect the outcome." Id. at § VI.D.

EEOC regulations provide that the Agency and any employee of a Federal agency shall produce such evidence as the investigator deems necessary. 29 C.F.R. 1614.108(c)(1). The regulations further provide that when the Agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for, inter alia, documents, records, or comparative data, the investigator may note in the investigative record:

[T]he decisionmaker should, or the Commission on appeal, may in appropriate circumstances: (i) draw an adverse inference that the requested information, or the testimony of the requested witness would have reflected unfavorably on the party refusing to provide the requested information; (ii) consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party; (iii) exclude other evidence offered by the party failing to produce the requested information or witness; (iv) issue a decision fully or partially in favor of the opposing party; or (v) take such other actions as it deems appropriate. 29 C.F.R. § 1614.108(c)(3).

As we noted in our previous decision, the AJ did not abuse his discretion in declining to draw an adverse inference or otherwise sanction the Agency. Our previous decision cited Grimes v. General Services Administration, EEOC Request No. 05900374 (July 16, 1990). In Grimes, the Commission took an adverse action against the Agency for failing to produce a selectee's application for the investigative record, but nevertheless found that the complainant was not subjected to unlawful discrimination. However, the adverse inference in Grimes was attributable to the missing selectee application, not applicants' interview notes. In a nonselection case, a selectee's job application will generally be essential for a factfinder to draw conclusions as to whether discrimination occurred. In the instant case, because the applicant interview notes and scribblings were destroyed after the interview and were not relied on in the selection process, the absence of the documents does not warrant an adverse inference.

Regarding Complainant's request for reconsideration, Complainant reiterates arguments she raised on appeal, and argues that our previous decision improperly found that she did not prove she was subjected to age discrimination. The Commission emphasizes that a request for reconsideration is not a second appeal to the Commission. EEO MD-110 at 9-18; see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. Complainant has not done so here.

### CONCLUSION

In summary, we find that our previous decision clearly erred in finding that the AJ properly found that the Agency violated EEO recordkeeping regulations. Thus, the Commission finds that the Agency's request for reconsideration meets the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to GRANT the Agency's request. Accordingly, all remedial action ordered by our previous decision is hereby VACATED. Further, the Commission finds that our previous decision did not err with respect to its finding that Complainant did not prove that she was subjected to age discrimination. Therefore, we DENY Complainant's request for reconsideration. There is no further right of administrative appeal on the decision of the Commission on this request.

**COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)**

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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.

**RIGHT TO REQUEST COUNSEL (Z0815)**

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

/S/ Bernadette B. Wilson

Bernadette B. Wilson  
Executive Officer  
Executive Secretariat

August 12, 2020

Date