

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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MICHAEL C. RYAN, )  
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 ) Plaintiff, )  
 ) Civil Action No. 99-4128 (JWB)  
 )  
 ) vs. )  
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 ) FEDERAL AVIATION ADMINISTRATION, )  
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 )  
 ) Defendant. )  
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CONSENT ORDER

Whereas the Complaint of Michael C. Ryan (“Plaintiff” or “Ryan”) was tried before this Court beginning on April 28, 2004, such trial having adjourned on June 16, 2004; and

Whereas Plaintiff alleged he suffered unlawful discrimination under Title VII when he was not selected for a series of promotions at the Federal Aviation Administration (“Defendant” or “FAA”) from 1995 to 1997; and

Whereas Plaintiff challenged the constitutionality of Defendant’s affirmative action program as established beginning in 1992 and alleged that Defendant thereafter unlawfully maintained such program and pursued illegal employment practices pursuant to such program; and

Whereas Plaintiff sought declaratory and injunctive relief to remedy the alleged constitutional violations; and

Whereas Defendant denied Plaintiff’s allegations; and

Whereas the United States District Court for the District of New Jersey (“Court”) has rendered several prior decisions in this matter and denied Defendant’s motion for summary judgment on Plaintiff’s constitutional claim; and

Whereas the Court has dismissed the Plaintiff’s claim for compensatory damages; and

Whereas the Court has previously urged Ryan and the FAA (the Parties) to settle this matter to avoid final judgment by the Court on the merits of the allegations; and

Whereas following mediation by this Court, with the Hon. Harold A. Ackerman, U.S.D.J. acting as mediator, the Parties have requested that the Court enter the following Order so as to conclusively resolve any and all causes of action, claims, complaints, grievances, appeals, and any other matters relating to the legality of Defendant's affirmative action program that Plaintiff has brought or could have brought in any administrative, judicial, or other forum against the Department of Transportation (DOT) and/or FAA, its employees, officers, or agents, in their individual and official capacities, including the constitutional allegations raised in the complaint filed in the United States District Court for the District of New Jersey captioned Ryan v. Mineta, Civil Action No. 99-4128 (JWB);

IT IS HEREBY ORDERED that:

1. No later than the date this Order is entered by the Court ("Entry Date"), the FAA shall initiate a comprehensive review of its programs, practices and policies with respect to the hiring, promotion or selection of career FAA employees ("FAA Personnel Decision-Making") to ensure that they comply with relevant law concerning affirmative action and Equal Employment Opportunity (EEO), including the law set forth in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) and EEOC Management Directive 715 and its implementing instructions. (For avoidance of doubt, FAA Personnel Decision-Making shall not include recruitment of candidates for employment, subject, however, to the specific limitations set forth in paragraph 4, below.)
  - a. This review shall be conducted jointly by the Office of the Chief Counsel, the Office of Human Resource Management and the Office of Civil Rights under the direction of the Deputy Administrator. The review shall be completed within two years from the Entry Date.
  - b. Legal Obligations relating to the review imposed by this Order shall be monitored by the Deputy Chief Counsel for Operations within the Office of the Chief Counsel of the FAA (the "FAA Monitoring Official").
  - c. To facilitate the FAA's conduct of such review and to avoid further disputes, within 60 days from the Entry Date, counsel for the Plaintiff shall propose to counsel for FAA a non-exclusive list identifying specific programs, practices and policies to be included in the review. A status report on the review shall be provided to the Plaintiff by the FAA Monitoring Official at the following intervals: six months from the Entry Date; one year from the Entry Date; and two years from the Entry Date.
  - d. As part of this review the FAA shall at a minimum:

- i. Ensure that MD 715 is followed with respect to the development of any workforce analysis, Model EEO program, self-assessment or barrier analysis conducted by the agency.
    - ii. Ensure that references in agency program or policy statements regarding underrepresentation, diversity and affirmative action are legally sufficient.
    - iii. Review any and all goals, objectives, targets or other indicators in performance standards, organizational goals or strategic plans that encourage the use of race, national origin or sex in FAA Personnel Decision-Making.
    - iv. Ensure that publication of staffing data by race, national origin or sex includes a statement approved by the FAA Monitoring Official on the legally appropriate use of such data.
    - v. Review FAA training materials relating to affirmative action, EEO and diversity.
    - vi. Determine to what extent the FAA Office of Civil Rights may directly participate in FAA Personnel Decision-Making.
    - vii. Provide written notice to all FAA Executives, Managers and Supervisors, as provided for in EEOC Management Directive 715, that all FAA Personnel Decision-Making must be made free of discrimination on the basis of race, national origin or sex, among other bases, to help ensure equal employment opportunity of all FAA employees and job applicants; and within 180 days of the Entry Date, incorporate such notice and other relevant provisions of this Order as identified by the FAA Monitoring Official into routine and relevant training for supervisors, and for staff of the FAA Human Resources and Civil Rights offices.
  - e. In addition to the list to be provided by the Plaintiff under Paragraph 1c. above, nothing in this Order shall prevent the Plaintiff, during the term of this Order, from identifying FAA programs or policies relating to FAA Personnel Decision-Making that he believes violate applicable law. Such identification shall be made in writing to the FAA Monitoring Official.
2. Where FAA programs, practices or policies reviewed in accordance with Paragraph 1 would in the judgment of the FAA Monitoring Official result in FAA Personnel Decision-Making that is contrary to law, they will be expanded, rescinded or otherwise modified to ensure compliance with law.

3. The FAA shall not implement any program or policy using race, national origin, or sex as factors in FAA Personnel Decision-Making unless such program or policy is first reviewed for legal compliance and approved in writing by the FAA Monitoring Official.
4. Nothing in this Order shall preclude the FAA from attempting to eliminate barriers to equal employment opportunity through legally acceptable efforts, including but not limited to expanding the pool of qualified applicants by outreach and recruitment but with no numerical hiring, promotion targets, or training goals nor commitments to candidates based on race, national origin or sex.
5. Nothing in this Order requires the FAA to rescind or modify any personnel decision or action, except for the actions identified in Paragraphs 1, 2 and 3 of the Settlement Agreement entered into between Plaintiff and the FAA.
6. Notwithstanding any other provision of this Order, nothing in this Order shall permit Plaintiff, or anyone acting on his behalf, to challenge under this Order, or its dispute resolution provisions, the FAA's non-systematic use of race, national origin, or sex in FAA Personnel Decision-Making. For example, and without limitation, neither Plaintiff nor anyone acting on his behalf shall use this Order, or its dispute resolution provisions, to challenge an individual FAA Manager's alleged misconduct in an individual FAA personnel matter.
7. By consenting to the entry of this Order, each of the Parties and their respective counsel further agree and acknowledge:
  - a. That this Order has been reached without final judgment on the merits of the allegations and shall in no way constitute an admission of liability, wrongdoing, or discrimination by DOT and/or FAA and their employees, officers, and agents, whether acting in their individual and official capacities;
  - b. That this Order shall not be represented as such an admission by either Party;
  - c. That this Order is non-precedential and shall not be cited in any other proceeding or in any forum.
8. The laws of the United States shall govern the interpretation of this Order.
9. The exclusive mechanism for resolving alleged violations of this Order shall be as follows. Any Party alleging a violation of this Order shall, within 30 days of the date such Party knew or should have known of any violation, first contact the other Party setting out in writing the facts and circumstances constituting an alleged violation. For the FAA, the point of contact for allegations of violation of this Order is the FAA Monitoring Official. For the Plaintiff, it shall be Hanan

Isaacs, Esq; plaintiff may designate another point of contact by notifying the FAA in writing of any change. If resolution of the alleged violation has not been reached within 60 days from the date it was raised in writing to the non-moving Party's attorney, and no extension of the 60 day period has been agreed to by the Parties, the Parties shall submit the matter to a Court authorized mediator for attempted resolution. If resolution of the alleged violation has not been reached within 30 days from the date it was raised in writing to the mediator, and no extension of the 30 day period has been agreed to by the Parties, the Parties shall enter into binding arbitration to resolve the matter in accordance with the following procedures.

- a. The Parties shall obtain lists of nationally certified arbitrators with expertise in employment discrimination issues from the Federal Mediation and Conciliation Service (FMCS). From lists provided by the FMCS, the Parties shall create a panel of seven (7) mutually acceptable arbitrators. When an alleged violation of the Order is being presented for arbitration, the Parties may either select a mutually acceptable arbitrator from the panel of seven or, by alternately striking names until one (1) remains. Either Party may unilaterally remove an arbitrator from the list of seven and another arbitrator shall be mutually selected to fill the vacancy.
- b. The arbitrator shall conduct the arbitration hearing as promptly as practicable on a date and at a site mutually agreeable to the Parties. At least seven (7) days prior to the hearing the Parties shall exchange witness lists with brief explanations of the testimony to be provided along with copies of all documents to be introduced at the hearing. There shall be no other discovery except as approved in advance by the arbitrator at his or her sole discretion. The arbitrator shall approve discovery requests only if such discovery is shown to be both relevant and essential to prove or disprove a claim or defense.
- c. Each party shall bear its own costs related to the mediation and arbitration, including but not limited to any witness costs, except that the costs of services provided by the mediator shall be borne 90% by the FAA and 10% by the Plaintiff, and the costs of the services provided by the arbitrator, including the cost of one transcript of the hearing to be provided to the arbitrator, shall be borne 75% by the FAA and 25% by the Plaintiff.
- d. The arbitrator shall submit his/her report to the Parties as soon as possible, but in no event later than 30 days following the close of the record, unless the Parties agree otherwise. The sole authority granted to the arbitrator by this Order is to decide whether the alleged violation has occurred and to direct compliance if a violation is found. The arbitrator also may award attorney's fees to the prevailing party in an amount not to exceed 75% of such fees. Before an award of attorney's fees shall be made, a certified summary of such fees shall be provided to the arbitrator. Except for the

authority to award attorney's fees, the arbitrator shall have no power to issue any monetary award or penalty with respect to any Party. The decision of the arbitrator shall be considered final and binding without right of appeal except as would be allowed if the Federal Arbitration Act (9 U.S.C. Sections 1-9) were applicable to this Agreement.

10. This Order shall expire three years from the Entry Date.

  
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Chief Judge John W. Bissell

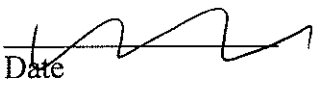
  
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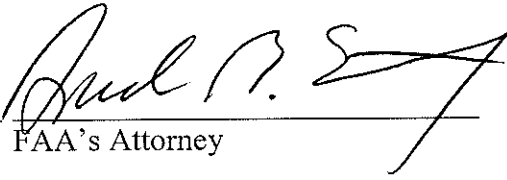
For the Plaintiff:

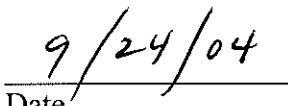
  
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Plaintiff's Attorney

  
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Date

For the Federal Aviation Administration:

FAA Chief Counsel  
By:   
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Date

  
\_\_\_\_\_  
FAA's Attorney

  
\_\_\_\_\_  
Date

For the United States, Department of Justice:

CHRISTOPHER J. CHRISTIE  
United States Attorney

  
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By: PAMELA R. PERRON  
Assistant U.S. Attorney

  
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Date