

DECISION



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

FILE: B-213604

DATE: May 15, 1984

MATTER OF: Francis J. Pinkney, III - Backpay Computa-
tion - Discrimination - Annual and Sick
Leave

DIGEST:

A U.S. District Court found that an employee had been removed from his position with the Defense Mapping Agency (DMA) in violation of the Equal Employment Opportunity Act of 1972. The court ordered the DMA to reinstate the employee with backpay. We hold that the employee is entitled to restoration of the annual leave and the sick leave he would have earned during the period of his discriminatory separation as an element of backpay.

R. W. Paquette, Accounting and Finance Officer for the Defense Mapping Agency (DMA), requests an advance decision as to whether sick and annual leave, which an employee would have earned during the period of his discriminatory separation, may be restored as an element of backpay which was awarded by a U.S. District Court.

We hold that the employee is entitled to the sick and annual leave which he would have earned during the period of wrongful separation. Such restoration would achieve the make-whole purposes of the Equal Employment Opportunity Act. In addition, such restoration is consistent with the regulations implementing the Act as set forth in 29 C.F.R. § 1613.271 (1983).

FACTS

On March 30, 1983, the United States District Court for the District of Columbia found that Mr. Francis J. Pinkney, III, had been removed from his position with the Defense Mapping Agency in violation of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. The court concluded that the DMA unlawfully discriminated and retaliated against Mr. Pinkney because of his race. Pinkney v. Weinberger, Civil Action No. 81-1150 (March 30, 1983). The court ordered that Mr. Pinkney be reinstated with backpay

together with a retroactive promotion, receive backpay for two earlier suspensions, and receive costs and attorneys' fees. The court also ordered the DMA to expunge discriminatory records from Mr. Pinkney's personnel file. The court order awarding backpay did not specify the dollar amount to be paid nor whether backpay was to include any other benefits of employment.

The DMA reinstated Mr. Pinkney on July 18, 1983, reversed the earlier suspensions, and expunged the discriminatory records. On September 27, 1983, Mr. Pinkney received \$57,087.31 in full settlement of the backpay award, without waiving any right to restoration of annual and sick leave. Mr. Pinkney requested that the sick and annual leave, which he would have earned during the period of his discriminatory separation, be restored. According to the DMA, this amounts to 436 hours of sick leave and 872 hours of annual leave. Because the court order does not specifically provide for restoration of leave, or language of similar effect, the agency requests our advance decision as to whether restoration is appropriate.

LEGAL ANALYSIS
AND CONCLUSION

The Equal Employment Opportunity Act of 1972 provides make-whole remedies, including backpay, for an employee of the Federal Government who is found to have undergone a discriminatory personnel action based on race, color, religion, sex or national origin. The Equal Employment Opportunity Act of 1972, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1976), was intended to end discrimination in the Federal Government and to make the victim of discrimination whole by restoring him to the position he would have occupied had the discrimination not occurred. See Brown v. General Services Administration, 425 U.S. 820 (1976), and Hackley v. Roudebush, 520 F.2d 108, 136 (D.C. Cir. 1975).

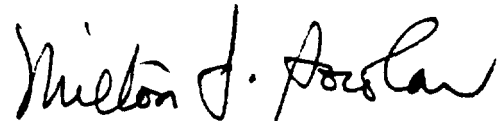
In keeping with the foregoing principles, the courts in private sector cases have held that a backpay award made to private sector employees upon a finding that an employer is guilty of employment discrimination would encompass fringe benefits such as vacation and sick pay. Pettway v. American Cast Iron Pipe Company, 494 F.2d 211, 263 (5th Cir. 1974), rehearing denied 494 F.2d 1296 (5th Cir. 1974); Meyers v. I.T.T. Diversified Credit Corp.,

527 F. Supp. 1064 (E.D. Mo. 1981). Congress clearly intended to give public employees the same substantive rights and remedies in an employment discrimination action that is provided for employers in the private sector. Douglas v. Hampton, 512 F.2d 976, 981 (D.C. Cir. 1975).

Moreover, the regulations implementing the Equal Employment Opportunity Act of 1972 for Federal Government employees provide for computation of backpay in the same manner as if awarded pursuant to the Back Pay Act of 1966, as amended, 5 U.S.C. § 5596 (1982) and its implementing regulations, when an agency or the Equal Employment Opportunity Commission makes a finding of discrimination. 29 C.F.R. § 1613.271 (1983). These regulations, however, do not expressly apply when a court makes a finding of discrimination and awards backpay. However, to achieve consistency in the manner in which backpay is computed upon a finding of discrimination, we conclude that an agency should also use these regulations as guidance in computing backpay under a court order.

Under the Back Pay Act, annual and sick leave which accrued during a period an employee loses leave as a result of an unwarranted or unjustified personnel action shall be restored. See B-180021, March 20, 1975. According to the regulations implementing the Back Pay Act, the employee is deemed to have performed service for the agency during this period. Further, the agency is to compute the pay, allowances and differentials the employee would have received if the unjustified or unwarranted action had not occurred. 5 C.F.R. § 550.805(a) (1984). Annual leave in excess of the employee's annual leave ceiling shall be credited to a separate leave account. 5 U.S.C. § 5596(b)(1)(B)(i). See Ernest E. Sargent, 57 Comp. Gen. 464 (1978).

Therefore, we conclude that Mr. Pinkney is entitled to restoration of annual and sick leave which he would have earned during the period of his discriminatory separation.



Acting Comptroller General
of the United States