



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lillian B. Crosier - Backpay Award

File: B-230368

Date: September 1, 1989

DIGEST

Employee who was denied a promotion because of age discrimination is entitled to be credited with the amount of compensatory time earned by the incumbent of the position she was denied for all periods during which she would have been ready, willing, and able to perform the duties of the position. Since the employee now is retired, she may receive overtime pay for these compensatory hours as part of her backpay award.

DECISION

An official of the Department of the Navy asks whether Ms. Lillian B. Crosier, who was denied a promotion because of age discrimination, may be credited with the hours of compensatory time earned by the incumbent in the position she was denied. Ms. Crosier may be credited with the total hours of compensatory time earned by the incumbent for the period in which she was ready, willing and able to perform the duties of the position. Since she retired without returning to duty, she may be paid for these hours at the rate for which she would have been paid overtime for the hours.

BACKGROUND

Ms. Crosier, a civilian employee of the Department of the Navy, applied for a higher graded position, Budget Officer, grade GS-12, with the Navy. Following her nonselection she filed a complaint with the Navy alleging, among other things, that she was denied the position because of discrimination based upon her age. The Secretary of the Navy found that she had been discriminated against on the basis of age and was therefore entitled to a retroactive promotion with backpay. Since she had retired by the time of the decision, the Navy correctly awarded her backpay for all periods that

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she was ready, willing, and able to perform the duties of the Budget Officer, GS-12 position.

Ms. Crosier seeks to be credited with 151.7 hours of compensatory time as part of her relief. This is the amount of compensatory time earned by the incumbent in the Budget Officer position for the period for which Ms. Crosier is entitled to receive backpay. Since she is now retired, she asks to be paid for these hours as part of her backpay award.

OPINION

The basis of Ms. Crosier's action was the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. (1982). We have held that when an employee is successful in an age discrimination action, an appropriate remedy is a retroactive promotion and backpay consistent with the Back Pay Act, 5 U.S.C. § 5596 (1982). See Francis J. Pinkney III, B-213604, May 15, 1984. See also Albert D. Parker, 64 Comp. Gen. 349 (1987); 62 Comp. Gen. 239 (1982).

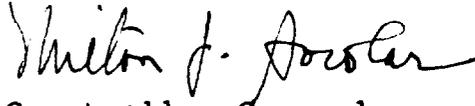
In computing Ms. Crosier's backpay, she is entitled to receive all pay and allowances she would have received had she initially been given the promotion. See Harold Darefsky, B-223670, May 4, 1987. If she had returned to duty, then we would authorize adjustment of her leave accounts to reflect 151.7 hours of compensatory time for her use. See generally Francis J. Pickney III, B-213604, supra. Likewise, had the incumbent of the position Ms. Crosier sought been paid overtime, we would approve overtime pay as part of her backpay award. See Ronald J. Ranier, et al., B-207997, Aug. 23, 1983. Here, however, while Ms. Crosier's leave account would reflect 151.7 hours of compensatory time as a result of the backpay correction, since she is now retired we must decide whether she can be paid for unused compensatory time.

Generally, an employee who retires without using compensatory time does not get paid for these hours but must forfeit them. Henry J. Bender, B-202026, Aug. 18, 1981. If, however, an employee did not use her compensatory time for reasons beyond her control, such as the exigencies of the service or the failure of the agency to approve her request for time off, then she may receive overtime pay for unused compensatory time. See 31 Comp. Gen. 245 (1952); Charles E. Jarvi, B-217937, Nov. 26, 1985.

In the present situation, we consider Ms. Crosier to be entitled to receive payment for the 151.7 hours of compensatory time at overtime compensation rates. Since she retired

before the backpay award, she could never use the compensatory time that she would have accrued but for the discriminatory action. Therefore, she should be paid for the compensatory time which she did not use for reasons beyond her control. See generally 31 Comp. Gen. 245, supra, citing 26 Comp. Gen. 750 (1947).

Accordingly, Ms. Crosier's backpay award may include payment of 151.7 hours of compensatory time at the overtime rate applicable to these hours when they would have been accrued.



Acting Comptroller General
of the United States