

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	
)	Civil Action No. 5:15-cv-05079-JLV
THE SOUTH DAKOTA)	
DEPARTMENT OF SOCIAL)	
SERVICES,)	
)	
Defendant.)	
)	

SETTLEMENT AGREEMENT

1. The United States brought this action against the South Dakota Department of Social Services (“DSS”) (collectively, “the Parties”) under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (“Title VII”).
2. In its amended complaint, the United States alleged that DSS had: (1) discriminated against a specific applicant, Cedric Goodman, and similarly situated Native American applicants, and (2) engaged in a pattern or practice of disparate treatment against Native American applicants when hiring Specialists at its Pine Ridge Office between 2007 and 2013.
3. DSS denied the allegations and maintains that it has not discriminated against any Native American applicants for employment in violation of Title VII nor engaged in a pattern or practice of disparate treatment against Native American applicants when hiring Specialists at its Pine Ridge Office between 2007 and 2013. Nothing in this Agreement shall be construed as an admission by DSS of any liability or wrongdoing.
4. The Parties have reached this Agreement to settle the action without the burden of protracted litigation.
5. The Parties agree to the jurisdiction of this Court over the Parties and to the Court’s subject matter jurisdiction.

6. The Parties will move the Court to enter this Agreement on the grounds that its terms are fair, reasonable, and adequate.
7. It is the intent of the Parties that this Agreement be a final and binding resolution of all claims brought by the United States in this matter or that could have been brought by the United States in this matter. In exchange for the covenants and provisions contained in this Agreement, the United States releases and discharges DSS and the State of South Dakota, their agencies, departments, divisions, officers, directors, employees, agents, and successors, and assigns from any and all liability that arises from the allegations made in the United States' Amended Complaint.

I. Definitions

8. "Applicant-flow and hiring data" includes:
 - a. By Specialist position:
 - i. The position title (*i.e.*, Economic Assistance Benefits Specialist, Employment Specialist, or Adult Services and Aging Specialist);
 - ii. The total number of requisitions for that Specialist position, including requisitions that were canceled without a hire;
 - iii. The number of requisitions for that Specialist position that were canceled without a hire;
 - iv. The aggregate number of applicants to requisitions for that Specialist position, by self-identified race (if provided), including the requisitions canceled without a hire;
 - v. The number of offers extended to applicants, by self-identified race (if provided);
 - vi. The number of offers accepted by applicants, by self-identified race (if provided); and
 - vii. For each applicant, the name of the applicant, the requisition(s) to which he/she applied, the status disposition of the applicant for each requisition to which he/she applied, and the applicant's self-identified race (if provided).
 - b. The requisitions that were canceled without a hire, as described in Paragraph 8(a)(ii)-(iv), do not include requisitions that DSS cancelled because it ceased to hire into that position title permanently. For example, if DSS cancelled an Adult Services and Aging Specialist requisition because it decided to no longer hire any

Adult Services and Aging Specialists at Pine Ridge, that requisition should not be included in Paragraph 8(a)(ii)-(iv).

- c. To calculate the aggregate number of applicants in Paragraph 8(a)(iv), above:
 - i. An “applicant” refers to a person who submitted an application to a requisition for a Specialist position who ultimately received one of the following individual status disposition codes: AA (accepted appointment) or HIRE (hired), DA (declined appointment), NA (not extended an appointment/interviewed (not appointed)), or NS (not selected for interview).
 - ii. If a person submitted multiple applications to a single requisition for a Specialist position, he or she will count as a single applicant based on the application that reflects the furthest progress in the hiring process.
 - iii. A person who applied to multiple requisitions for the same Specialist position will count as an applicant for each requisition to which he or she applied. For example, a person who applied to three distinct requisitions will count as three applicants in the aggregate number of applicants.
 - d. To the extent Paragraph 8(c)(ii)-(iii), above, do not fully describe how DSS has treated duplicate applicants, DSS will provide a further written explanation.
9. “Close date” refers to the date that DSS stopped accepting new applicants to a requisition.
 10. “Date of entry” refers to the date on which the Court enters this Agreement.
 11. “Relevant requisitions” refer to the requisitions, announced to the general public, for a Specialist position at DSS’s Pine Ridge Office from 2007 through 2013, listed in Appendix A.
 12. “Specialist position” refers to one of the three Specialist positions at issue in this lawsuit: Economic Assistance Benefits Specialist, Employment Specialist, or Adult Services and Aging Specialist.

II. Non-Monetary Relief

A. Prohibitions

13. DSS will comply with Title VII as it pertains to employment hiring practices of Specialists at DSS’s Pine Ridge Office. DSS will comply with Title VII as it pertains to any individual who participated in this case, complained about or opposed DSS’s hiring practices, or received relief or otherwise benefitted from this case.

B. Records Retention

14. DSS, through the South Dakota Bureau of Human Resources (“BHR”), will maintain records of all applicant-flow and hiring data, as defined in Paragraph 8 above, regarding each and every Specialist vacancy advertised to the general public at Pine Ridge for six months from the date of entry.
15. DSS will keep records of any complaint alleging discrimination based on race in the hiring of Specialists at Pine Ridge that any DSS supervisor, manager, or official receives for six months from the date of entry.

C. Provision of Records to the United States

16. No later than sixty days after the date of entry, DSS will provide counsel for the United States with (1) all applicant-flow and hiring data, as defined in Paragraph 8 above, regarding Specialist positions announced to the general public at the DSS Pine Ridge Office from August 11, 2015, through the date of entry in an Excel spreadsheet, as well as a description of how the data were prepared, and (2) all complaints alleging discrimination based on race in the hiring of Specialists at Pine Ridge that any DSS supervisor, manager, or official has received that DSS now has in its possession.
17. Six months after the date of entry, DSS will provide counsel for the United States with (1) all applicant-flow and hiring data regarding Specialist vacancies advertised to the general public at the DSS Pine Ridge Office since the date of entry, as well as a description of how the data were prepared, and (2) all complaints alleging discrimination based on race in the hiring of Specialists at Pine Ridge that any DSS supervisor, manager, or official has received since sixty days after the date of entry.

III. Monetary Relief

18. DSS will pay \$350,000 to the United States consistent with instructions generated and provided by the United States. The United States will pay \$340,000 in back pay to qualified Native American interviewees, described in Section III-A, and \$10,000 as a monetary award to the estate of Mr. Cedric Goodman, described in Section III-B, pursuant to the claims process described in Section III-C.

A. For Qualified Native American Interviewees

19. The only individuals eligible for back pay relief under this Agreement are those Native American applicants who DSS interviewed but did not select for a relevant requisition for a Specialist position at DSS’s Pine Ridge Office from 2007 through 2013. Based on the data provided by DSS on Specialist applicants and hiring for the relevant requisitions, which were utilized by the United States’ expert, sixty Native American applicants unsuccessfully interviewed for a Specialist position from 2007 through 2013. These individuals (“eligible interviewees”) are listed in Appendix B, filed under seal. Should other interviewees be deemed eligible pursuant to the provisions of Section III-D, below, those individuals will also be eligible for back pay relief under this Agreement.

20. Back pay will be distributed on a pro rata basis to the eligible interviewees who file a claim (“claimants”), pursuant to the process described in Section III-C. The pro rata amount due to each claimant will be calculated based on the number of claimants who submit Acceptance-of-Relief forms and the close date of the first requisition for which each claimant interviewed.

B. For Cedric Goodman

21. In settlement of Goodman’s EEOC charge, the United States agrees to pay \$10,000 to Goodman’s estate, upon the execution of an Acceptance-of-Relief form by Goodman’s estate, as described in Section III-C.
22. This amount, in consideration of the release of any claims arising from Goodman’s EEOC charge, is separate and distinct from any back pay relief due to Goodman as one of the eligible interviewees.

C. Claims Process

23. The United States will send letters (“relief letters”), on behalf of the Parties, in substantially the same form as Appendix C, to the sixty eligible interviewees listed in Appendix B (including Cedric Goodman). The relief letters will inform the eligible interviewees about the settlement of this case, their eligibility for monetary relief, an estimated pro rata amount based on the date of their first interview, and information on how to contact a representative of the United States. Included with the relief letters will be Acceptance-of-Relief forms to accept monetary relief and release claims, in substantially the same form as Appendix D.
24. The United States will send letters (“notice letters”), on behalf of the United States, in substantially the same form as Appendix E, to all non-eligible applicants (*i.e.*, those individuals who, according to data provided by DSS on Specialist applicants and hiring, applied for a Specialist position at DSS’s Pine Ridge Office from 2007 through 2013 but did not identify as Native American in their application and/or did not interview for a relevant Specialist position) who were not hired. The notice letters will inform the non-eligible applicants about the settlement of this case, the reason(s) for their non-eligibility for relief, and will include information on how to contact a representative of the United States.
25. In sending the relief and notice letters via U.S. Mail, the United States will use the mailing addresses last known by the United States. The United States will also send the letters to any e-mail addresses the United States has used to communicate with eligible interviewees and non-eligible applicants. The United States may also use other means to locate and contact these applicants and provide the relief and notice letters.
26. Claimants will be asked to return their Acceptance-of-Relief forms to the United States within thirty days after the letters are sent pursuant to Paragraph 23, but the United States will accept late forms at its sole discretion. The United States will forward all signed forms to DSS after issuing monetary relief payments. DSS agrees to accept reasonable facsimiles of signed forms in place of the originals.

27. After receiving the signed Acceptance-of-Relief forms, the United States will issue each claimant's monetary relief payment for the pro rata amount due to that claimant.
28. If any claimant decides not to accept relief after a payment is made, or if any claimants do not cash a relief check prior to the "void-by" date, the United States will determine whether to reallocate any remaining funds among the other claimants in a manner designed to preserve the relative proportions of the claimants' pro rata shares. If the remaining funds are *de minimis* based on the United States' determination, they will revert back to DSS.
29. Claims may be paid on behalf of deceased persons through representatives of their estate or next of kin if appropriate documentation (*i.e.*, a completed W-9 Form and letters testamentary/letters of administration or the equivalent) is provided to the United States. Any claims paid on behalf of deceased persons shall be made payable to the deceased person's estate. In the event that a dispute arises about the identity of the lawful personal representative of any deceased claimant, the United States will hold the funds allocated for that individual so long as at least one of the disputed representatives executes a timely Acceptance-of-Relief form. Such funds will be distributed pursuant to this Agreement once the dispute is resolved by applicable state or tribal law.

D. Appeals Process

30. Within thirty days of the date of mailing the relief letters as set forth in Paragraph 23 and the notice letters as set forth in Paragraph 24, claimants or non-eligible applicants may submit an appeal by letter or e-mail to the United States regarding any factual determinations made regarding their eligibility for relief or the amount of their proposed relief.
31. If good cause exists, as determined by the United States, the United States may accept an appeal submitted after the thirty-day deadline.
32. Appellants must include with their appeals evidence of the factual error underlying their appeal as follows:
 - a. Non-eligible applicants seeking to appeal must provide evidence of the factual error underlying their ineligibility for relief. If they were deemed ineligible for failing to identify as Native American, they must provide evidence of membership in any federally recognized Native American Tribe. If they were deemed ineligible for failing to interview, they must provide evidence that they interviewed for one of the relevant requisitions.
 - b. Claimants seeking to appeal the amount of their proposed relief must provide evidence that they interviewed for an earlier relevant requisition.
33. The United States will consider and attempt to resolve each appeal in good faith and may undertake any additional investigation it deems necessary to reach resolution. To resolve appeals, the United States will either determine that the appellant is eligible for back pay

relief under this Agreement or provide appellants with an opportunity to withdraw their appeals.

34. If the United States is unable to resolve an appeal, the United States will notify DSS and the Court.
35. The United States will ask the Court to decide any unresolved factual disputes by a preponderance of the evidence, either through briefing or with a hearing if the Court so orders.

IV. Duration of Agreement

36. This Agreement shall expire when one year has passed. The Agreement may be extended by order of the Court if DSS has not provided records to the United States as required by Section II-C, provided the Agreement is extended only for the uncompleted obligation, and provided the extension applies only to the uncompleted matter.
37. At the conclusion of the Agreement's duration, the United States will move the Court to dismiss the case with prejudice.

V. Miscellaneous Provisions

A. Costs and Fees

38. The United States and DSS shall bear their own costs, attorney's fees, and other expenses incurred in this action.

B. Retention of Jurisdiction

39. The Court shall retain jurisdiction over this Agreement for the purposes of implementing the relief provided herein, and resolving any disputes or entering any orders that may be necessary to implement the relief provided herein. Administrative closure of this case on the Court's docket will not affect this, or any, provision of this Agreement.

C. Dispute Resolution

40. The Parties shall attempt in good faith to resolve informally any disputes concerning DSS's compliance with this Agreement. Upon request by any party, the Parties, through their counsel, will make themselves available for a telephone conference to discuss any such dispute within ten days of such a request. If the Parties are unable to reach agreement after informally seeking to resolve the dispute, either party may move the Court to enforce this Agreement and may seek a ruling that enforces this Agreement, provided the moving party gives at least thirty days' written advance notice to the nonmoving party.
41. If, after receipt of the records as described in Section II-C, the United States maintains that DSS has not complied with the Agreement or the dispute still exists, within ten days after the United States communicates that to DSS, the United States may interview or

depose any witness with knowledge regarding the matter in dispute. Under no circumstances may DSS interview or depose any officials, agents, or employees of the U.S. Department of Justice in this process in the absence of further Court order for good cause shown.

D. Termination of Litigation Holds

42. The Parties agree that, as of the date of entry, litigation is not reasonably foreseeable in this matter such that the litigation holds applicable to this case terminate. This provision does not permit the destruction of any documents that must be retained and produced under Section II.

E. Contact Information

43. Materials referenced in this Agreement should be sent to counsel for the United States at the following address via overnight delivery service:

Jennifer Swedish / 202-305-4069
U.S. Department of Justice
Employment Litigation Section / Civil Rights Division
4 Constitution Square
150 M Street, NE / Room Number 9.1134
Washington, DC 20002
Jennifer.Swedish@usdoj.gov

44. Materials referenced in this Agreement should be sent to counsel for DSS at the following address:

Gary Thimsen
Woods, Fuller, Shultz & Smith P.C.
300 S. Phillips Avenue, Suite 300
Sioux Falls, SD 57103
Gary.Thimsen@woodsfuller.com

45. Any party may update recipients as well as mailing or electronic addresses set forth in this Section to the other party without requiring any changes to this Agreement.

F. Severability

46. If any provision of this Agreement is found to be unlawful, only the specific provision in question shall be affected, and the other provisions will remain in full force and effect.

G. General Provisions

47. To the extent there is any conflict between this Agreement and the requirements of any state or local law or regulation, the terms of this Agreement shall control.

48. If any deadline referenced in this Agreement falls on a weekend or federal holiday, the deadline shall be moved to the next business day.
49. The submission date of any document by potential claimants shall be the date on which the document was e-mailed to the United States, as determined by the e-mail date stamp, or the date on which the document was mailed to the United States, as determined by the postmark. In the event the postmark is missing or illegible, the Parties shall determine whether the submission is timely by examining other documents received by the United States and comparing the postmark dates of those documents and the document with the missing or illegible postmark.

It is so ORDERED, this _____ day of _____, 2020.


JEFFREY L. VIKEN
CHIEF JUDGE

AGREED AND CONSENTED TO BY:

FOR PLAINTIFF UNITED STATES OF AMERICA:

ERIC S. DREIBAND
Assistant Attorney General
Civil Rights Division

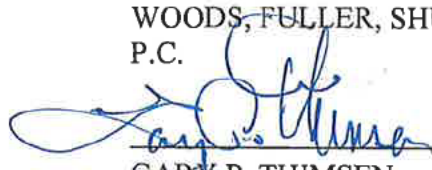
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