

Cynthia Bower
EEOC No. 551-2009-00074X
Re: Violation of Settlement Agreement by USDA ARS

This material is part of a collection that documents the harassment, discrimination, and retaliation perpetrated against Alaska's women research scientists by their supervisor, with full knowledge (and arguably, "tacit approval") of their federal employer, the USDA Agricultural Research Service (ARS)

Exhibit A

Settlement Agreement (EEOC No. 551-2009-00074X)

This document is confidential and therefore cannot be included here

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Exhibit B

Notification of Noncompliance Sent to USDA

This material is part of a collection that documents the harassment, discrimination, and retaliation perpetrated against Alaska's women research scientists by their supervisor, with full knowledge (and arguably, "tacit approval") of their federal employer, the USDA Agricultural Research Service (ARS)

United States Department of Agriculture
OGC-Civil Rights Litigation Division
1400 Independence Ave, SW
South Building, Room 3312
Washington D.C. 20250

August 2, 2011

Dear USDA Representative,

It has come to my attention that the U.S. Department of Agriculture (USDA) has violated the Settlement Agreement that we negotiated with the assistance of an Equal Employment Opportunity Commission (EEOC) mediator on August 19th, 2010. A copy of the Settlement Agreement has been attached as Exhibit 1.

According to Paragraph 2 of the Settlement Agreement:

*Content removed due to confidentiality requirements
associated with USDA Settlement Agreements*

The Agency failed to abide by the terms of the Settlement Agreement when it refused to "report this amount to the IRS", despite my efforts to enlist their cooperation (Exhibit 2), supplemented with direct requests from the Internal Revenue Service (IRS) (Exhibit 3).

In addition to violating the terms of the Settlement Agreement, the USDA Agricultural Research Service (ARS) is also in violation of U.S. law (26 U.S.C. 6051), which requires an employer to furnish information returns (including annual W-2 Forms). Alternate tax documentation (such as a 1099 Form) is not appropriate for my Settlement income, since my EEOC case stemmed from wage-based complaints, which automatically require a W-2 Form (Exhibit 4).

Paragraph 13 of the Settlement Agreement stipulates:

*Content removed due to confidentiality requirements
associated with USDA Settlement Agreements*

In Summary

1. The Agency failed to comply with terms of the Settlement Agreement by refusing to report my settlement income to the IRS (in accordance with Paragraph 2 of the Settlement Agreement AND as required by U.S. law).
2. I am providing written notice of the alleged noncompliance to both the USDA OGC-Civil Rights Litigation Division, and the USDA Director of the Office of Adjudication, as specified in Paragraph 13 of the Settlement Agreement.
3. This notice is timely (i.e. within 30 days of the date on which Complainant knew or should have known of the alleged noncompliance), since I first learned of the IRS's inability to enforce U.S. tax laws when I contacted their Tax Law Department on August 1st, 2011.

Therefore, pursuant to the Settlement Agreement, I am hereby requesting that the Agency immediately provide me with a W-2 Form to document the settlement income I received from the USDA in 2010, (an amount for which I was legally obligated to pay an additional \$ _____ to the IRS in April 2011).

I have abided by all terms of the Settlement Agreement and therefore I have an expectation that the Agency will likewise honor the terms of our Agreement. Thank you for your cooperation in this matter.

Sincerely,

Cindy Bower
PO Box 1383
Kodiak, AK 99615

Enclosures

- Exhibit 1: Settlement Agreement
- Exhibit 2: Timeline for Requesting a W-2 Form
- Exhibit 3: IRS Request for W-2
- Exhibit 4: U.S. Law Requires a W-2 not a 1099

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing Notice within five (5) calendar days after the date it was sent via first class mail or immediately upon e-mail delivery or confirmation of receipt by facsimile.

I certify that on 02 August 2011 the foregoing notice of Violation of Settlement Agreement by USDA was sent via First Class Mail to the following:

United States Department of Agriculture
OGC-Civil Rights Litigation Division
1400 Independence Ave, SW
South Building, Room 3312
Washington D.C. 20250

Director
Office of Adjudication
U.S. Department of Agriculture
Whitten Building
Washington D.C. 20250

Cindy Bower
PO Box 1383
Kodiak, AK 99615

Cynthia Bower
EEOC No. 551-2009-00074X
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Exhibit C

Wage-Based EEOC Complaint

EXHIBIT C
The Wage-Based Nature of My EEOC Complaint

I am seeking a corrected W-2 Form from my 2010 federal employer, the USDA Agricultural Research Service (PO Box 60000, New Orleans, LA, 70160, ID# 72-0564834) so that my EEOC-mediated settlement award can be documented as income for retirement purposes.

Receipt of a W-2 Form is appropriate due to the wage-based nature of my EEOC complaint. The following information cites U.S. laws and regulations supporting the issuance of a W-2 form.

1) USDA Awarded Taxable Settlement Money to Me

- In August 2010, during an EEOC-mediated negotiation, I signed a settlement agreement with the USDA Agricultural Research Service (ARS) that listed the monetary award as “payment of all of pecuniary, non-pecuniary and/or compensatory damages based on allegations raised in EEOC 551-2009-00074X”.

2) Tax Documentation was Not Furnished by USDA

- The USDA ARS did not provide tax forms to document my Settlement Award, in violation of:
 - U.S. Code Title 26 (section 6051), which requires an employer to furnish information returns (Form W-2, Wage and Tax Statement) to employees.
 - Entry #2 of the Settlement Agreement (negotiated between the USDA ARS and myself), which specified that “Taxes will not be taken from the amount being paid to Complainant, but the Agency will report this amount to the IRS.”
- The USDA ARS also ignored a March 18th request from the IRS (Letter Number LTR0062C, for inquiry #0143075196), thereby forcing me to file Form 4852 (Substitute W-2) with my 2010 Tax Return, instead of the correct tax documentation.

3) The USDA Award Settled a Wage-Based Complaint

- The out-of-court settlement agreement, which I negotiated with the USDA Agricultural Research Service (ARS) on August 19th 2010, failed to list the particular claims that were being settled (unfair hiring, promotion, and retention practices), nor did they allocate percentages of the award for back pay and front pay.

Re: Violation of Settlement Agreement by USDA ARS

- The written settlement agreement listed the payment as remedying "pecuniary, non-pecuniary, and/or compensatory damages based on allegations raised in EEOC 551-2009-00074x", without specifically identifying the rights that were compromised by the Agency. In *Alexander v. Internal Revenue Service*, (72 F.3d 938, 942, 1st Cir. 1995), the court recognized the importance of determining which issues resulted in a monetary award.
- My EEOC complaint (#551-2009-00074X) stemmed from six wage-based grievances and two EEO complaints lodged against the agency.
 - **I was offered my job at lower GS and salary levels than the advertised position.** Unfair hiring practices due to gender discrimination constitute legal grounds for a plaintiff to receive back pay, (Title VII of the Civil Rights Act; The Equal Pay Act of 1963; Title 29 U.S. Code, Section 206 d).
 - **I was denied a promotion without being evaluated by objective, measurable criteria.** Settlement compensation for denial of promotion due to disparate treatment (employment discrimination) are considered to be wages, eligible for back pay, (Title VII of the Civil Rights Act; IRS Revenue Ruling 96-65).
 - **I was required to “voluntarily” resign as a condition of the Settlement Agreement despite no wrongdoing on my part.** When I met with the USDA representatives and EEOC mediator on August 19th 2010, I had no intention of losing my job that day; however, my “voluntary resignation” was written into the settlement agreement by the USDA, which suggests that a component of the settlement award represents front pay. The USDA provided no other options for me to escape the harassment, discrimination, and retaliation being perpetrated against me by my ARS supervisor, a man who had been named as a Respondent by every woman research scientist working for ARS in Alaska since he became a supervisor in 2003. I was not allowed to prepare for the separation or to mitigate the impact of sudden unemployment (at a time when the U.S. unemployment rate was 9.6%). It is now September 2011, and I am still unemployed.
 - **The entire settlement award should be considered W-2 wages from back pay and front pay.** The Lilly Ledbetter Fair Pay Act of 2009 allows back pay due to discrimination to be collected beyond three years.

Re: Violation of Settlement Agreement by USDA ARS

- Back Pay: GS 13 for six years, (a minimum of \$64,000, plus over \$11,000 in lost pay from the local Cost Of Living Adjustment).
- Front Pay: I was a permanent USDA employee, with Superior annual performance ratings and an “h-index” (which measures scientific impact) over twice that of my GS-15 supervisor. I would likely have received an annual salary until my retirement, had it not been for the unlawful activities of my ARS supervisor, with tacit approval by ARS administrators and agency civil rights personnel.

4.) Wage-based Settlements are Reported on a W-2 Form, (not a 1099)

- Settlements resulting from wage-based claims (e.g. back pay and front pay) are reportable by the employer to the employee (and to the Social Security Administration) on a Form W-2.
 - The nature of my Back Pay claim is USDA’s violation of:
 - Back Pay Act (5 U.S.C. § 5596(b)(1))
 - Equal Pay Act of 1963. (29 U.S.C. § 206(d))
 - Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended by the Civil Rights Act of 1991
 - The nature of my Front Pay claim is USDA’s violation of:
 - Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended by the Civil Rights Act of 1991
 - Equal Pay Act of 1963 (29 U.S.C. § 206(d)).

5.) W-2 Wages are Subject to Tax Withholding

- U.S. Code Title 26 (section 6051) requires an employer to furnish information returns (Form W-2, Wage and Tax Statement) to the Social Security Administration, [according to Treas. Reg. §31.6051-2(a)].
- Federal Insurance Contributions Act (FICA) tax is owed on all remuneration paid by an employer to its employees, (See IRC §§ 3101; 3111).
- Back pay is considered wages for FICA, since individuals could not be made whole unless they received social security credit and any retirement benefits that would have resulted, [according to Internal Revenue Code § 3402(a)(1); Hemelt v. United States (supra 122 F.3d at 204); and Dotson v. United States (87 F.3d 682, 5th Cir. 1996)].
- The Social Security Administration is a benefits agency and must rely on the Federal Tax Authorities of the Internal Revenue Service to enforce penalties against employers who inaccurately report wages.

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Exhibit D

Letter from USDA

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U.S. DEPARTMENT OF AGRICULTURE
OFFICE OF ADJUDICATION AND COMPLIANCE

CYNTHIA BOWER,

Complainant,

v.

TOM VILSACK,
SECRETARY, U.S. DEPARTMENT
OF AGRICULTURE,

Agency

On 19 Sept 2011, I received this undated (and unreadable) letter from the USDA. The letter was also untimely (i.e. postmarked AFTER the 35 days allowed by law). The proper headings (e.g. complaint numbers, etc...) were also missing. They wrote that they had received my August 2nd letter on Sept 6th, although they admit (on the Certificate of Service page) that they didn't send this letter until at least Sept 16th. Since the letter was not sent by certified mail, perhaps the USDA was hoping that there would be no record of their untimeliness.

**AGENCY'S RESPONSE TO CYNTHIA BOWER'S ALLEGATIONS
OF NON-COMPLIANCE WITH SETTLEMENT AGREEMENT**

The United States Department of Agriculture's ("USDA") Agricultural Research Service ("ARS"), by and through its undersigned representatives, hereby timely responds to the Office of Adjudication's ("OA") inquiry, received by ARS on September 6, 2011, into Complainant Cynthia Bower's ("Complainant") allegations of non-compliance with a settlement agreement entered into by the Parties on August 19, 2010 (the "Settlement Agreement").

Complainant's non-compliance allegation, contained in her August 2, 2011, letter (the "August 2, 2011 Letter") is that the Agency "refused to report [Complainant's] settlement income to the IRS (in accordance with Paragraph 2 of the Settlement Agreement AND as required by U.S. law)." See August 2, 2011 Letter at pg. 2.

At this point in time, it appears that ARS accidentally did not report Complainant's settlement payment of [redacted] herein the "Settlement Payment") to the IRS after paying Complainant the Settlement Payment. However, Complainant is incorrect when she states that ARS "**refused**" to report her Settlement Payment to the IRS. Conversely, Complainant admits that ARS did make efforts to report Complainant's Settlement Payment to the IRS. Specifically, at Exhibit 2 of her August 2, 2011 Letter, Complainant states that on March 2, 2011, Complainant received an email from Ms. Kim Parks, of the ARS Fiscal Operations Branch, where Ms. Parks admits to contacting the National Finance Center regarding the issuance of a IRS 1099 tax form to Complainant in conjunction with the Settlement Payment. Specifically, in the timeline at Exhibit 2 of her August 2, 2011 Letter, Complainant states:

2 March 2011

Kim Parks (Kim.Parks@ars.usda.gov) emailed that she had left a message for the 1099 help desk at the National Finance Center regarding the issuance of a [IRS]

1099 form...

Unfortunately, however, it would appear Complainant's Settlement Payment was accidentally never reported to the IRS. **Most significantly**, Complainant has not incurred any loss or damages as a result of the Settlement Payment not being reported to the IRS. Further, ARS is currently taking action to remedy this accidental oversight and is reporting the Settlement Payment to the IRS.

In her August 2, 2011 Letter, Complainant also appears to request that the Agency issue to her an IRS W-2 form rather than an IRS 1099 form in conjunction with the Settlement Payment.

The relevant provision of the Settlement Agreement, reproduced in its entirety directly below, does not prescribe what tax form Complainant is supposed to receive:

Paragraph removed in accordance with USDA confidentiality requirements

Nor does the Settlement Agreement set forth whether the Settlement Payment is for lost wages or for other non-wage related compensatory damages. As such, the Agency is not required, by the terms of the Settlement Agreement, to provide Complainant a W-2 for lost wages. Complainant's request for a W-2 is outside the terms of the Settlement Agreement.

However, in conjunction with reporting Complainant's Settlement Payment to the IRS, the Agency is also ensuring all appropriate tax forms are being issued to Complainant. If a W-2 is deemed the appropriate tax form, Complainant will be issued a W-2.

Respectfully submitted,

Brooks Liswell HT
BROOKS LISWELL
Agency Representative
U.S. Department of Agriculture
Office of the General Counsel

Civil Rights Litigation Division
1400 Independence Ave., SW
South Building, Room 3324C
Washington, DC 20250-1400
202-720-5326 (voice)
202-720-4089 (fax)
brooks.liswell@ogc.usda.gov

CERTIFICATE OF SERVICE

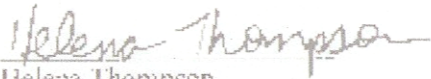
I hereby certify that a copy of the foregoing Agency's Response to Allegations of Non-Compliance of Settlement Agreement has been sent by the following methods this the 16th day of September 2011 to the following:

U.S. Department of Agriculture
Office of Adjudication
1400 Independence Ave., S.W.
Washington, DC 20250-9410
202-690-2345 (fax)

VIA ELECTRONIC MAIL

Cindy Bower
PO Box 1383
Kodiak, Alaska
99615

VIA FIRST CLASS MAIL


Helena Thompson
Equal Employment Opportunity Specialist

266-4220-2011 5209 1410

Brooks Liswell
U.S. Department of Agriculture
1400 Independence Ave., SW
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Washington, DC
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RCvd
19 Sep
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