2023 WL 7495425 (D.Hawai'i) (Verdict, Agreement and Settlement)
United States District Court, D. Hawai'i.

UNITED STATES OF AMERICA, Plaintiff,

v.

AMERICAN SAMOA GOVERNMENT, Department of Human and Social Services, Defendant.

No. 23-cv-00209-HG-KJM.

September 12, 2023.

Consent Decree

Jeffrey Morrison, MO Bar No. 44401, United States Department of Justice, Employment Litigation Section, Civil Rights Division, 950 Pennsylvania Avenue NW, Washington, DC 20530, (202) 353-1845, (202) 514-1005 (fax), Jeffrey.Morrison@usdoj.gov, for plaintiff United States of America.

Kristen Clarke, Assistant Attorney General, Civil Rights Division, Karen D. Woodard, Chief, Employment Litigation Section, Civil Rights Division; Valerie L. Meyer, Deputy Chief, Jeffrey G. Morrison (MO Bar No. 44401), Trial Attorney, U.S. Department of Justice, Employment Litigation Section, Civil Rights Division, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530, Telephone: (202) 353-1845, Email: Jeffrey.morrison@usdoj.gov, for plaintiff United States America.

The Honorable Fainu'ulelei Falefatu Ala'ilima-Utu, Attorney General of America Samoa, Roy J.D. Hall, Jr., Deputy Attorney General, Lynne Blankenbeker, Assistant Attorney General, Office of the Attorney General of American Samoa, P.O. Box 7, Pago Pago, AS 96799, Telephone: (684) 633-4163, Facsimile: (684) 633-1838, for defendant American Samoa Government.

I. INTRODUCTION

This action was brought by Plaintiff United States of America against Defendant American Samoa Government (ASG) to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.,* as amended (Title VII), following receipt by the United States from the Equal Employment Opportunity Commission (EEOC) of a charge of discrimination filed by an employee, Simeonica Tuiteleleapaga, against the ASG. This court has jurisdiction over this action under 42 U.S.C. §§ 2000e-5(f), 2000e-6(b) and 28 U.S.C. §§ 1331, 1343(a), and 1345.

1. The complaint filed by the United States alleges that the ASG, via the Department of Human and Social Services (DHSS), discriminated against Tuiteleleapaga in violation of Title VII by allowing the misconduct of the DHSS's former Department Director to create and maintain a work environment hostile to Ms. Tuiteleleapaga because she is a transgender woman.

2. The ASG denies it discriminated or retaliated against Ms. Tuiteleleapaga in violation of Title VII.

3. Nevertheless, the United States and the ASG (collectively, the "Parties"), desiring that this action be settled by an appropriate Consent Decree (Decree), and to avoid the burdens and risks of protracted litigation, agree to the jurisdiction of this Court over the Parties and the subject matter of this action. The Parties also agree that venue is proper in this district for the purposes of this Decree and proceedings related to this Decree only. This Decree, being entered into with the consent of the United States and the ASG, shall in no way constitute an adjudication or finding on the merits of the case, nor be construed as an admission

by the ASG or a finding of wrongdoing or violation of any applicable federal law or regulation. The Parties further agree that all statutory conditions precedent to the institution of the lawsuit, including administrative prerequisites, have been fulfilled.

II. FINDINGS

4. Having examined the terms and provisions of this Decree, the Court finds the following:
(a) The Court has jurisdiction over the subject matter of this action and the Parties to this action.

(b) Venue is proper in this Court for the purposes of this Decree and proceedings related to this Decree.

(c) The Parties waive findings of fact and conclusions of law on the merits of this case, and further agree to entry of this Decree as a final and binding agreement between them in settlement of claims raised in this civil action concerning Ms. Tuiteleleapaga.

In resolution of this action, the Parties hereby AGREE to, and the Court expressly APPROVES, ENTERS and ORDERS the following:

III. EQUITABLE RELIEF

5. The ASG, by and through its officials, agents, employees, and all persons in active concert or participation with the ASG in the performance of employment or personnel functions, shall not engage in any act or practice that (a) discriminates against any employee or applicant on the basis of sex in violation of Title VII or (b) constitutes retaliation in violation of Title VII. Nothing in this Decree shall be interpreted in a manner that relieves the ASG of any obligations it has under Title VII or to permit it to engage in any actions prohibited by Title VII.

6. As designated by the ASG, the Director of the ASG's Office of the Director of Equal Employment Opportunity will serve as the “EEO Officer” for purposes of this Decree.

7. The EEO Officer shall ensure that the ASG implements the relief required by this Decree. The EEO Officer shall also ensure that investigations of prohibited forms of harassment and retaliation are investigated in accordance with the terms of this Decree.
a. The EEO Officer, and any individuals designated to conduct investigations of discrimination or retaliation, must undergo a minimum 32-hour training course that meets the EEOC's training requirements for EEO Investigators as set forth in EEOC Management Directive 110, Ch. 6 § II (https://www.eeoc.gov/federal-sector/management-directive/chapter-6-development-impartial-and-appropriate-factual-records). This training shall be completed within 120 days from the date of entry of this Decree.

b. The EEO Officer, and any individuals designated to conduct investigations of discrimination or retaliation, must undergo a minimum additional 8 hours of training annually that meets the EEOC's training requirements for EEO Investigators, as set forth in EEOC Management Directive 110, Ch. 6 § II.

8. Within sixty (60) days of the entry of this Decree, the ASG shall submit to the United States for review proposed written anti-discrimination and anti-retaliation policies, including its procedures for reporting employee complaints of discrimination and retaliation.

9. The proposed policies shall comply with Title VII and shall include, at a minimum:

General Policy Reforms

i. The ASG shall have policies addressing prohibited forms of harassment and retaliation.

ii. The ASG must have an anti-retaliation policy, which states, among other things, that individuals who complain of prohibited forms of harassment and/or retaliation will not have the terms or conditions of their employment altered in a way that might dissuade a reasonable employee from making a complaint.

Complaint and Investigation Procedures

iii. The ASG's policies must describe the manner in which employees may complain of prohibited forms of harassment and/or retaliation, including but not limited to, (A) multiple options for where to file a complaint including, but not limited to, the employee's direct supervisor; (B) the option to complain to someone outside of an employee's chain of command, including to human resources; (C) options to complain anonymously such as through a telephone number or online portal; (D) the option to complain either in writing or orally; and (E) the option to complain outside of the ASG, including to the EEOC.

iv. Individuals who complain of prohibited forms of harassment and/or retaliation shall not have to confront the individual(s) they complain of harassing and/or retaliating against them.

v. Employees who need to take time away from their normal work duties in order to participate in an investigation of alleged prohibited forms of harassment and/or retaliation shall not lose compensation that they normally would have earned had they been performing their normal work duties and they shall not be required to use leave to participate in the investigation.

vi. All complaints of prohibited forms of harassment and/or retaliation must be documented either by the complainant or, if the complainant decides not to make a written complaint, by the ASG.

vii. Supervisors must promptly report to the ASG's EEO Officer any prohibited forms of harassment and/or retaliation they observe, hear about, or learn about through an employee complaint or otherwise.

viii. Supervisors who fail to appropriately report prohibited forms of harassment and/or retaliation to the EEO Officer will be subject to discipline.

ix. The ASG shall promptly and appropriately respond to all complaints of prohibited forms of harassment and/or retaliation. The ASG's response shall include documenting the complaint, conducting an investigation, interviewing relevant parties, considering all available information relevant to the complaint, drafting an investigative report, and taking appropriate corrective action, including disciplining harassers or retaliators and making victims whole through, for example, monetary relief. If the ASG, after it receives a complaint, does not have sufficient information to enable it to investigate the complaint, it shall explain to the complainant, in writing, what additional information it would need to conduct an investigation, ask the complainant to provide that additional information, and give the complainant a reasonable amount of time to provide additional information. If, after the complainant has had a reasonable amount of time to provide more information, the ASG still does not have sufficient information to enable it to perform an investigation, it shall inform the complainant that it cannot perform an investigation and it will not be able to conduct an investigation unless and until it receives sufficient information.

x. The ASG shall have an investigative process for complaints of prohibited forms of harassment and/or retaliation that includes written procedures for a prompt, thorough, and objective investigation of such complaints. The investigative process shall include determining whether the alleged harasser or retaliator has any prior substantiated harassment and/or retaliation complaints against them from the ASG employees and also attempting to determine whether anyone else, other than the ASG

employees, has made harassment or retaliation complaints against the alleged harasser or retaliator. The written procedures shall also describe the standards and criteria that must be considered when making findings at the conclusion of the investigation.

xi. Individuals who investigate complaints of prohibited forms of harassment and/or retaliation shall not be under the direct or indirect supervision of the alleged harasser or retaliator. Consequently, the ASG may need to retain an outside investigator if a high-level official, like a Department Director, is the alleged harasser or retaliator.

xii. All investigations of complaints of prohibited forms of harassment and/or retaliation must include a written report of how the investigation was conducted, the findings from the investigation, and the steps taken to remedy any harassment or retaliation found during the investigation. The ASG shall store these reports in an electronic manner so they are searchable.

xiii. The ASG must provide written information to individuals who complain of prohibited forms of harassment and/or retaliation about the process the ASG will take to investigate and address the complaint. At the conclusion of the investigation of the complaint, the ASG must inform the complainant, in writing, of its investigative findings along with a summary of the information gathered during the investigation and all actions taken as a result of the investigation. The ASG may withhold certain details related to the investigation from the complainant only if necessary to protect the privacy of individuals. If any detail is withheld, the ASG shall provide the complainant with a description of the information withheld and the specific privacy concern.

xiv. The ASG shall complete investigations of prohibited forms of harassment and/or retaliation within 30 days of the date the investigations commence unless special circumstances warrant a longer period of time. If the ASG requires longer than 30 days to complete an investigation, it must explain, in writing, to the complainant(s) who triggered the investigation, if there were any such complainants, why the investigation will take longer than 30 days to complete.

10. The United States will notify the ASG in writing within thirty (30) days of receipt of the submitted policies whether it has any objection to the policies. Regarding any timely made objections by the United States pursuant to this paragraph, the Parties agree to make a good faith effort to confer prior to initiating the dispute resolution provisions of Paragraph 23.

11. Within thirty (30) days of receiving the United States' notice that it has no objection to the policies, or the resolution of any objection made by the United States pursuant to paragraph 10, whichever is later, the ASG shall adopt those policies as final and shall adhere to them.

12. Within thirty (30) days from the date that the ASG adopts the finalized policies pursuant to Paragraph 11, the ASG shall disseminate the finalized policies among all of its employees, supervisors, and officials.
a. The ASG shall publicize such policies and procedures by, among other things, posting them in all buildings and facilities, by email to all employees, and on any internet or intranet website used for posting notices or policy changes for or concerning policies in effect for the ASG.

b. The ASG shall ensure each new employee hired receives a copy of the policies at the time of the new employee's hire.

c. The ASG shall require all employees, current and new, to acknowledge that they have received and read the policies, and such acknowledgments shall be maintained in the employee's personnel file.

d. Within sixty (60) days from the date that the ASG adopts the finalized policies pursuant to Paragraph 11, the ASG shall provide the United States written verification that the ASG has completed the distribution required in 12(a) and received all of the required employee acknowledgments from that distribution.

13. Within ninety (90) days from the date the ASG adopts the finalized policies pursuant to Paragraph 11, and annually thereafter, the ASG shall provide mandatory, live (in person or virtually), interactive training on prohibited employment practices under Title VII, and on the ASG's anti-discrimination and anti-retaliation policies as developed or revised under this Decree, to all its political officers, Department Directors, supervisory employees and managers.
a. On a limited case by case basis, ASG may provide training via duplicate video recording of the live training session to accommodate staffing needs and special circumstances making live training infeasible or impractical (such as where a person is unavailable due to pre-scheduled leave or work travel).

b. The training shall include, at a minimum, an explanation of ASG's policies and the mechanism for reporting complaints of discrimination or retaliation, including identification of the people to whom complaints of discrimination may be submitted. The training also shall specifically discuss the responsibilities of supervisors to report and investigate discrimination complaints, including retaliation.

14. Within one-hundred and twenty (120) days from date the ASG adopts the finalized policies pursuant to Paragraph 11, and annually thereafter, the ASG shall provide mandatory, live (in person or virtually via the Internet), interactive training on prohibited employment practices under Title VII, and on the ASG's anti-discrimination and anti-retaliation policies as developed or revised under this Decree, to all its employees not already covered under Paragraph 13.
a. On a limited case by case basis, the ASG may provide training via duplicate video recording of the live training session to accommodate staffing needs and special circumstances making live training infeasible or impractical (such as where a person is unavailable due to pre-scheduled leave or work travel).

b. The training shall include, at a minimum, an explanation of the ASG's policies and the mechanism for reporting complaints of discrimination or retaliation, including identification of the people to whom complaints of discrimination may be submitted.

15. At least sixty (60) days before each of the mandatory trainings in Paragraphs 13 and 14 is conducted, the ASG shall submit to the United States for review the training materials to be used. The ASG shall also identify for review the person or persons who will provide the training and provide their credentials.
a. If the United States has any objection to the ASG's proposed training program, including the materials or the proposed trainer, the United States will so notify the ASG in writing within thirty (30) days of receipt of the proposed training program and materials.

b. Regarding any timely made objections by the United States, the Parties agree to make a good faith effort to confer regarding any disagreements concerning the training program, materials, or trainer prior to initiating the dispute resolution provisions of Paragraph 23, and that the training will be delayed until after the dispute is resolved.

16. Within thirty (30) days following the completion of each training required by Paragraphs 13 and 14, the ASG shall provide the United States written verification that the trainings have been completed and that all the ASG employees attended such trainings. The verification shall identify the number of individuals who completed each training via the duplicate recorded video pursuant to Paragraphs 13(a) or (14)a, and the reason they were unable to attend the live session.

17. All persons who undergo the above-described mandatory training shall sign or register electronically an acknowledgment of attendance at the training. The ASG shall keep on file all signed/registered acknowledgments for the term of this Decree and make them available for review by the United States upon request.

18. While the Decree remains in effect, Defendant shall retain necessary records to implement this Decree. The ASG shall permit the United States to review compliance with this Decree at any time. As part of that review, within thirty (30) days of the date of entry of this Decree and every ninety (90) days thereafter during the term of this Decree, the ASG shall provide copies of any documents and information relevant to its compliance with this Decree upon the request of the United States.

19. While the Decree remains in effect, the ASG will retain all records, including any papers, electronic files or writings of any kind, reports, studies, memoranda, letters, notes, charts, tables, rosters, manuals, guidelines, rules, lists, tabulations, press releases, books, articles, treatises, recordings or transcriptions of minutes, electronic files, machine readable format files, computer files, or audio or video recordings, electronic mail, and facsimiles, that come into its possession relating to:
(a) Complaints or charges of discrimination or retaliation made by employees of the ASG: (1) internally; (2) with the EEOC; or (3) through or with any other federal or state agency authorized to receive such complaints. The United States shall not publicly disclose any complaints or charges received under this Paragraph unless it is required for the enforcement of this Decree.

(b) Any resulting investigation or disciplinary action taken related to any complaints of discrimination, harassment or retaliation. This provision applies to any claims that arise from the effective date of this Decree through the term of this Decree as defined in Paragraph 2929 of this Decree. The ASG shall provide, when applicable: the name(s) and title(s) of individual(s) who conducted or are conducting the investigation; an estimate of when the investigation is expected to conclude; the steps taken during the investigation; name(s) of individual(s) interviewed; the findings of the investigation; the date the investigation was concluded; any corrective action or discipline given; and a description of the ASG's efforts to ensure that the accountability measures for supervisors and managers implemented under its policies are carried out.

(c) The ASG will provide the information and documents outlined in (a) and (b) to the United States on a quarterly basis (every three months) after the entry of this Decree. The United States will have the right to request all documents related to such complaints or charges, or disciplinary action taken related to such complaints or charges, upon reasonable notice to the ASG without further order of this Court.

IV. INDIVIDUAL RELIEF FOR MS. TUITELELEAPAGA

20. The ASG agrees to provide Ms. Tuiteleleapaga individual relief as set forth in the paragraphs below.

21. Within fourteen (14) days of the date of entry of this Decree, the United States shall send the proposed release in this matter attached as Appendix A (the “Release”) and a copy of this entered Decree to Ms. Tuiteleleapaga.

22. Ms. Tuiteleleapaga shall have thirty (30) days from the entry of the Decree to execute the Release and return it to the ASG. Within ten (10) days of the ASG's receipt of the Release executed by Ms. Tuiteleleapaga, the ASG shall pay Ms. Tuiteleleapaga a total monetary award of $125,000, which amount is comprised of non-pecuniary compensatory damages under Title VII and the Civil Rights Act of 1991, 42 U.S.C. § 1981 *et seq.*
a. This amount shall be paid to Ms. Tuiteleleapaga in full without any withholdings or deductions, and the ASG shall issue Ms. Tuiteleleapaga an IRS Form 1099 and any other appropriate forms for that amount by January 31, 2024.

b. Payment to Ms. Tuiteleleapaga shall be made by check, and shall be delivered by overnight delivery to her address as identified in Paragraph 27.

c. The ASG shall send counsel for the United States (as identified in paragraph 25) a photocopy of the check sent to Ms. Tuiteleleapaga.

V. DISPUTE RESOLUTION

23. The Parties shall attempt to resolve informally any disputes that may arise under this Decree. The Parties shall engage in good faith efforts to resolve the issue before seeking action by the Court. If the United States and the ASG are unable to reach agreement after informally seeking to resolve a dispute, the issue may be submitted by either party to the Court for resolution upon at least thirty (30) days' written notice to the other party.

VI. CONTACTS FOR THE PARTIES

24. To the extent possible, all documents required to be delivered to the Parties or to Ms. Tuiteleleapaga under this Decree shall be sent via electronic mail.

25. Where such electronic delivery is not possible, all documents required to be delivered under this Decree to the United States shall be sent via overnight delivery to the following address:
Jeffrey Morrison

Trial Attorney

Employment Litigation Section

Civil Rights Division

U.S. Department of Justice

4 Constitution Square

150 M Street, NE, Room 9.1137

Washington, D.C. 20002

Jeffrey.morrison@usdoj.gov

26. Where such electronic delivery is not possible, all documents required to be delivered under this Decree to the ASG shall be sent to the following address:
Fainu'ulelei Falefatu Ala'ilima-Utu

Attorney General

Roy J.D. Hall

Deputy Attorney General

Lynne F. Blankenbeker

Assistant Attorney General

Office of the Attorney General of American Samoa

P.O. Box 7

Pago Pago, AS 96799

Lynne.blankenbeker@la.as.gov

VII. CONTACT FOR THE CHARGING PARTY

27. Where such electronic delivery is not possible, all documents required to be delivered under this Decree to Charging Party shall be sent to the following address:
Ms. Simeonica Tuiteleleapaga

2738 Ka'aha Street, Apt. 304

Honolulu HI 96826.

28. Either the United States, the ASG, or Ms. Tuiteleleapaga may update physical or electronic mailing addresses without requiring any changes to the Consent Decree.

VIII. JURISDICTION OF THE COURT

29. The Court shall retain jurisdiction over this Decree for the purpose of resolving any disputes or entering any orders that may be necessary to implement the relief provided in the Decree. At the end of eighteen months from the date of entry of this Decree, without further order of the Court, this Decree shall be automatically dissolved, and this action shall be dismissed with prejudice.

30. The time limits set forth throughout this Decree for providing any information required by this Decree may be expanded upon mutual consent of the Parties or upon order of the Court following written notice to the other party and the opportunity for the other party to respond.

IX. GENERAL PROVISIONS

31. The Parties shall bear their own costs, expenses, and attorney's fees in this action, except that the Parties shall retain the right to seek costs for any matter which in the future may arise from this Decree and require resolution by this Court.

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

33. This Decree may be executed in multiple counterparts, each of which together shall be considered an original but all of which shall constitute one Decree. The Parties agree to be bound by electronic and facsimile signatures.

It is so ORDERED, this 12 day of September ___, 2023.

<<signature>>

UNITED STATES DISTRICT JUDGE

AGREED AND CONSENTED TO:

For Plaintiff United States of America:

KRISTEN CLARKE

Assistant Attorney General

Civil Rights Division

By:

KAREN D. WOODARD

Chief

Employment Litigation Section

Civil Rights Division

<<signature>>

VALERIE L. MEYER

Deputy Chief

JEFFREY G. MORRISON (MO Bar No. 44401)

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For Defendant American Samoa Government:

<<signature>>

The Honorable Fainu'ulelei Falefatu Ala'ilima-Utu

Attorney General of America Samoa

Roy J.D. Hall, Jr.

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