



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[REDACTED]
Dollie T.,¹
Complainant,

v.

Betsy DeVos,
Secretary,
Department of Education,
Agency.

Appeal No. 0120160474

Agency No. ED-2015-OM-0001

DECISION

On November 13, 2015, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 12, 2015, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission VACATES and REMANDS the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Program Specialist, GS-0301-12, assigned to the Agency's Office of Management (OM), Human Capital and Client Services (HCCS)², HCPPA located in Atlanta, Georgia. On December 29, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of disability (migraine headaches) and reprisal (prior protected EEO activity) when: (1) beginning December 2011, she was repeatedly assigned additional duties that were originally assigned to employees in positions two grades higher, management refused to reclassify her position at a higher grade due to the increase of duties, or

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

² The Executive Resources Division (ER), Talent, Recruitment and Hiring Division (TRH), Learning and Development Division (LD), Workforce Relations Division (WR), and Human Capital Policy and Accountability Division (HCPPA) fall under HCCS.

provide her with any assistance as was given to the higher graded employees, which made it difficult for her to perform effectively; (2) she was referred as one of the best qualified for the Human Capital Policy Specialist (HCPS) position, GS-201-13/14, advertised under vacancy announcement OM-2014-0074, and was later notified she had not been selected, but instead reassigned to a division outside her expertise; and (3) on October 28, 2014, management instructed her to complete her accomplishments for her Fiscal Year (FY) 2014 performance period, but one month later determined she would not receive an evaluation and her prior performance plan would be extended for an unspecified amount of time.

After the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

Complainant argues on appeal that she raised an additional claim alleging a violation of the Equal Pay Act of 1963 (EPA)³ during the EEO investigation that was not addressed in the Agency's final decision. Upon review of the record we agree with Complainant that on May 21, 2015, she emailed the EEO investigator stating as follows in pertinent part:

I would like to add that I am filing due to equal work/pay. Myself (gs12) and [a male employee (RS)] (gs14) are doing similar work, however I am paid less. We are both doing strategic planning for the Department of Education. Also, they fly [RS] into DC monthly to every other month to meet with principal offices, however, I have to meet with principal offices only via conference call.... Please add this as an addendum and contact me if needed.

The record shows that Complainant referenced this new claim in two subsequent emails to the EEO investigator in early June 2015, prior to the completion of the EEO investigation in August 2015. However, the EEO investigator failed to respond or take any action with respect to Complainant's emails.

³ See 29 U.S.C. § 206(d) et seq.

At any time prior to the agency's mailing of the notice required by 29 C.F.R. § 1614.108(f) at the conclusion of the investigation, 29 C.F.R. § 1614.106(d) permits a complainant to amend a pending EEO complaint to add claims that are like or related to those claim(s) raised in the pending complaint. There is no requirement that the complainant seek counseling on these new claims. See Braxton v. U.S. Postal Service, EEOC Appeal No. 0120102410 (Oct. 29, 2010); EEO MD-110, Chapter 5 Agency Processing of Formal Complaints (Aug. 5, 2015).

We find that Complainant properly requested that her complaint be amended to include a claim that is like or related to her existing claims. Complainant essentially claims that she was doing GS-14-level work the same as RS was doing, but was paid less. We find that Complainant raised an EPA claim as she specifically noted this in her email to the EEO investigator. However, a fair reading of her amended claim would include a Title VII allegation of disparate treatment based on her sex as well.

As the fragmentation of EEO claims should be prevented at all levels of the complaint process and Complainant's amended claim(s) appear intertwined with her original claims, we refrain from addressing the merits of the Agency's decision with respect to those claims. See Cobb v. Dep't. of the Treasury, EEOC Request No. 05270077 (Mar. 13, 1997); Toole v. EEOC, EEOC Appeal No. 01964702 (May 22, 1997). As ordered below, a supplemental investigation is necessary to address the amended claim(s) which may produce evidence also relevant to Complainant's original claims. Accordingly, we remand this matter for further processing in accordance with our order below.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the Agency's final decision and REMAND this complaint to the Agency for a supplemental investigation with respect to Complainant's amended claims as set forth in the order below.

ORDER TO SUPPLEMENT RECORD

The Agency shall acknowledge to Complainant that it has received the remanded and amended complaint within thirty (30) calendar days of the date this decision was issued. The Agency shall amend this complaint to include the following claim: Whether in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et. seq. and the Equal Pay Act of 1963 (EPA), as amended, 29 U.S.C. § 206(d) et seq., the Agency subjected Complainant to disparate treatment and/or violated the EPA, based on her sex (female) when, in or about May 2015, she was paid less than a Senior Advisor, Office of Human Resources (RS) (male) even though she was performing the same or similar work. The Agency shall obtain more information from Complainant to determine a more accurate description of her claim. For example, it is unclear what time-frame Complainant alleges and whether RS is the only comparator.

Within one hundred twenty (120) calendar days of the date this decision was issued, the Agency shall process the new claim(s) and original claims in accordance with 29 C.F.R. § 1614.108.

This shall include, but is not limited to, issuing Complainant a notice of acceptance of said amended claim(s), providing Complainant with an opportunity to review the accuracy of the Agency's characterization of said claim(s), supplementing the investigation with respect to the amended claim(s), providing Complainant with a copy of the report of investigation and notice to request a hearing or Final Agency Decision.

The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights within one hundred twenty (120) calendar days of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision within sixty (60) days of receipt of Complainant's request.

A copy of the Agency's letter of acknowledgment to Complainant, letter of acceptance of the remanded complaint, copy of the notice that transmits the investigative file and notice of rights, and a copy of the final agency decision, if requested, must be sent to the Compliance Officer as referenced below.

In accordance with Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § IX.E (Aug. 5, 2015), the Agency shall give priority to this remanded case in order to comply with the time frames contained in this Order. The Office of Federal Operations will issue sanctions against agencies when it determines that agencies are not making reasonable efforts to comply with a Commission order to investigate a complaint.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

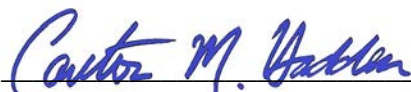
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title.

Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant’s Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

A handwritten signature in blue ink that reads "Carlton M. Hadden". The signature is written in a cursive style and is positioned above a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

April 12, 2018

Date