



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

[REDACTED]
Margeret M.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 0120170362

Agency No. 2003-0575-2015104755

DECISION

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 September 27, 2016, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination 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, as amended, 29 U.S.C. § 206(d) et seq. For the following reasons, the Commission AFFIRMS in part and REVERSES in part the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a General Surgeon, GS-15, Surgical Service, Grand Junction Veterans Affairs Medical Center (VAMC).² Complainant initially began working at Grand Junction in November 2007, as a General Surgeon on a part-time basis. In September 2008, Complainant began working as a full-time General Surgeon. Complainant stated at the time her salary was lower than other general surgeons and she was told this was because they performed thoracic surgery procedures that she did not perform and she "was okay with that."

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 Grand Junction VAMC is one of eight medical facilities comprising the Veterans Integrated Service Network 19 (VISN 19) located in Denver, Colorado.

Complainant stated that in September 2011, the National Surgery Office made the facility a standard facility hospital in which everyone performed the same operations and no one did more complex surgery than she did. Complainant noted Coworker 1 was on staff in 2011, and he made in excess of \$20,000 more per year in salary than she did. Complainant noted that Coworker 2 was hired in December 2013, and received a salary of approximately \$20,000 in excess of her salary.³ Complainant noted her 2015 salary was \$275,923, Coworker 1's salary was \$298,781, and Coworker 2's salary was \$296,970.

Complainant served as Acting Chief of Surgery from November 2014 until March 2015. Complainant applied and was interviewed for the permanent Chief of Surgery position when it was posted. On March 6, 2015, Complainant received a tentative job offer for the full-time Chief of Surgery position. Complainant stated that she immediately accepted the tentative offer. A compensation package in the amount of \$325,000 for the Chief of Surgery position was presented to the pay panel on March 26, 2015, and was signed off on by the Medical Center Director on March 31, 2015. Because the Director did not have authority to approve a salary increase in excess of \$300,000, the compensation package was sent to the VISN for review and approval. The compensation package was not approved.

On November 10, 2015, the Medical Center Director issued a letter to Complainant withdrawing the tentative job offer of the permanent Chief of Surgery position. The letter noted Complainant had been fulfilling the role of Acting Chief, Surgical Service at Grand Junction as of March 8, 2015. The Director noted that Complainant was provided a tentative job offer for the permanent Chief, Surgical Service position pending completion of all requirements. The Director stated not all requirements have been met for permanent appointment. He noted that although correspondence was in the process of being prepared for the physician pay compensation panel, Complainant was not approved or assigned an approved salary rate at the new tier within the pay table. The Director noted the facility was undergoing an extensive review of its Surgery Service. It was noted Complainant had been Acting Chief, Surgical Service and there were still multiple issues regarding the effectiveness of the Surgical program under her management. The Director stated he was withdrawing the tentative job offer and Complainant would continue in her position as a permanent Staff Surgeon at the facility without a change to her current salary rate.

On September 8, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of sex (female) when:

- A. From September 2011 through March 2015, she was paid less than her male counterparts although she performed the same duties.
- B. From March 6, 2015 to the present she was not paid the correct salary approved by the facility's pay panel when she was selected for the permanent Chief of Surgery position.

³ The record contains an SF-50 showing Coworker 2 was hired effective December 29, 2013, with a total salary of \$295,000.

Complainant alleges that she was discriminated against on the bases of her sex (female) and in reprisal for protected EEO activity when:

- C. On November 10, 2015, she was issued a Withdrawal of Tentative Job Offer for her position of Chief of Surgery.

At the conclusion of 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 Equal Employment Opportunity Commission Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In its final decision, regarding her EPA claim, the Agency noted that Complainant claimed that two male staff general surgeons (Coworker 1 and Coworker 2) in the Department of Surgery, Grand Junction VAMC, received higher salaries than she did. The Agency stated Complainant received a salary in the amount of \$275,923.⁴ The total salaried compensation for Coworker 1 was \$298,781 and for Coworker 2 was \$296,970. Coworker 2's salary reflected a recruitment incentive. Complainant, Coworker 1 and Coworker 2 all received within grade pay increases based on time in grade and annual automatic cost of living increases.

The Agency noted that Complainant and Coworker 1 and Coworker 2 all worked at the same physical establishment, there was no difference between her job description and the job descriptions of the two comparatives, and Complainant and her two comparatives all performed the exact same duties, the exact same operations, and neither of her two male comparatives performed more complex surgeries than she performed. They all had identical duties. Thus, the Agency found Complainant established a prima facie case of wage discrimination.

The Agency found management established that the pay differential that existed between Complainant and the two comparatives was based upon factors other than sex. The Human Resources (HR) Officer stated that she conducted a study of the general surgeon compensation within the VISN of which the Grand Junction VAMC was a member. The HR Officer noted that Complainant's compensation fell within the middle range of all staff general surgeons. The HR Officer explained that the two comparatives received higher compensation than Complainant because they had more years of surgical experience. The HR Officer stated that a physician compensation pay panel comprised of Complainant's peers evaluated each physician individually and that individual compensation was determined based upon various factors including years of

⁴In its final decision, the Agency stated Complainant also received performance pay and an award resulting in a higher total monetary compensation. However, the Agency did not indicate a breakdown of the comparatives' pay to include performance pay and awards. In addition, Complainant provided a table of salaries for the Department of Surgery from August 2015, she received from HR listing her salary as \$275,923; Coworker 1's salary as \$298,781; and Coworker 2's salary as 296,970.

experience, specialty skills, board certification, academic record, geographic market, and complexity of work.

The former Chief of Staff stated that he was aware that the pay differential between Complainant and the two comparatives was within the recognized pay table at the time for general surgeons within the network. He stated that one explanation for the pay difference between Complainant and Coworker 1 may have been Coworker 1's length of service and the fact that there may have been a pay freeze in effect at this time.

The Director of the facility explained that when this pay issue arise, he directed HR to conduct an evaluation of salaries for general surgeons within the seven facilities in VISN in order to determine whether there was any disparity in pay. He stated Complainant was in the very middle of the compensation pay scale that applied to her and her male comparatives, and therefore the pay panel recommendations were appropriate. He confirmed that physician compensation is based upon recommendation from the physician compensation pay panel which considered such variables as education, length of practice, relevant market area, board certification, and administrative duties for the position. He stated that he can either approve the panel's pay recommendation or adjust it downward but that he cannot adjust the pay recommendation upwards.

The Chief of Physical Medicine and Rehabilitation (CPMR) was a member of the physician pay panel (PPP) and was aware of the compensation received by Complainant and the two comparatives. He explained that part of the explanation for the pay differential between Complainant and the comparatives was that Complainant had fewer duties when she was first hired as a physician with the Agency. He also stated that Complainant's two comparatives had higher compensation levels based upon the fact that both had greater service experience that Complainant.

Based on the foregoing, the Agency found management established that the pay differential between Complainant and her two male comparatives was based up factors other than sex.

Under Title VII, the Agency assumed Complainant established a prima facie case of sex discrimination. Regarding claim A, management stated the difference in boarding salaries was justified because both of the two male comparatives had more service experience than Complainant. Further, management noted that an independent special pay panel determined the compensation of Complainant and her two comparatives from the same pay table, and that Complainant was in line with other staff general surgeons at the facility and at other medical centers within the VISN. The Agency noted that the HR Officer confirmed this explanation.

Regarding claim B, the Medical Center Director stated that because the pay panel recommendation of \$325,000 exceeded his authority of \$300,000, the compensation package could not be approved by him locally, and was sent to VISN for approval where it was not approved. The former Chief of Staff stated that VISN did not approve the panel pay recommendation because the Chief Medical Officer for VISN was concerned about Complainant's skills as the permanent Chief of Surgery in light of ongoing quality issues regarding surgeries performed by Complainant and her staff during

her tenure as Acting Chief of Surgery. The Agency noted these reasons were confirmed by the HR Officer and the CPMR.

Regarding claim C, the Medical Center Director explained that when VISN denied approving the pay panel's compensation offer for the Chief of Surgery position, the offer was rescinded. The former Chief of Staff and the CPMR stated the decision to withdraw the offer for the Chief of Surgery position was based upon clinical and administrative issues with Complainant's performance involving failures in leadership and poor clinical outcomes, some of which involved Complainant.

The HR Officer stated that the former Chief of Staff advised her that there were administrative, leadership, and clinical issues with Complainant in her role as Acting Chief of Surgery. The HR Officer stated that she prepared the withdrawal memorandum and the reason for the withdrawal of the offer was concern with Complainant's administrative leadership and various clinical issues.

The VISN Chief Medical Officer (CMO) stated that there were numerous issues relating to deficiencies in surgical care competencies with abdominal surgeries, involving Complainant and several other physicians. These issues were so serious that the Agency was required to stop certain surgeries at the facility. The CMO stated that although it was originally thought that Complainant was the right person to fill the Chief of Surgery position, after these developments, it became apparent that Complainant was personally implicated and that she was not appropriate investigating these issues. The CMO stated he felt Complainant did not have the capability to serve as Chief of Surgery because she was one of the surgeons named in these questionable competency cases.

The Agency determined there was no persuasive evidence that management's articulated reasons were unworthy of belief or motivated by unlawful animus. Specifically, Complainant's boarding salary was determined by a special pay panel, as was her salary during her tenure as Acting Chief. Moreover, according to the Agency, relevant pay panel members provided an explanation for each salary determination. The Agency found that management set forth clear reasons for the withdrawal of Complainant's tentative appointment and there was no reason to question the credibility of this evidence. The Agency found that Complainant's general assertions that she was treated differently because of her sex or prior protected EEO activity do not raise any inference of discrimination, and cannot prove pretext.

On appeal, Complainant notes the Agency correctly determined she established a prima facie case of wage discrimination under the Equal Pay Act. Complainant noted that in raising its affirmative defense, the Agency relied solely upon after-the-fact justifications of the HR Officer, who allegedly performed an audit of all similarly situated physicians and concluded Complainant's pay was "satisfactory." Complainant asserts that the actual data utilized by the HR Officer to reach this conclusion was contained at pages 193-194 of the report of investigation and contains no indication that a difference in the years of experience (if any) played any role in the audit conducted by the HR Officer.

Complainant also claims that the Agency did not address her allegation under the EPA that the Agency failed to properly pay her during the time she performed the duties of the Chief of Surgery. Complainant notes she performed the job duties of the Chief of Surgery for an extended period of time, during which time the salary of this position (as received by the comparatives both prior to and after her tenure in this position) were fixed at \$325,000. Complainant claims the Agency did not offer a legal justification to refuse to pay her \$325,000 during the period of time she performed the duties of the job.

Regarding her claim that the Agency did not ultimately place her in the Chief of Surgery position because of her prior EEO activity (regarding her EPA claims), Complainant notes that she was clearly accepted for the permanent Chief of Surgery position, as her performance appraisal demonstrates that her performance as Chief of Surgery was “Fully Successful” and identified no performance deficiencies in her work performance. Thus, she claims the Agency’s stated basis from removing her from the permanent Chief of Surgery position is pretextual.

In response to Complainant’s appeal, the Agency states it met its burden of establishing the pay disparity was based on one of the four affirmative defenses available under the EPA. The Agency claims that seniority and skill-levels are the reasons behind the different pay. The Agency notes Complainant initially came on as a part-time employee. The Agency notes that an employee who starts a position as a part-time employee is not going to receive the same salary as an individual who starts off as a full-time employee, even if the part-time employee eventually transitions to full-time, they will not have as much experience as the already full-time employee. Additionally, the Agency points out that Complainant herself notes that she did not perform all of the surgeries that other surgeons performed during her entire tenure with the Agency. The Agency states this could presumably impact Complainant’s skill and seniority level.

The Agency states Complainant’s potential compensation (if she ever actually worked as Chief of Surgery, rather than in an acting capacity) was never approved because approval had to come from outside the facility for salaries over \$300,000. The Agency notes the salary was never approved, so there is no reason to assume she would be paid that amount of money while her tentative offer was in place and she was Acting. The Agency states there was no evidence in the record that other individuals received a substantially higher salary while they were waiting for a tentative job offer to get approved.

The Agency notes that although Complainant received a “Fully Satisfactory” rating, the testimony of a number of witnesses indicate that after her rating, issues arose involving the competence of her work and her surgical team. Additionally, there were concerns regarding Complainant’s patient interaction, such that she had to sign a behavior contract prior to her EEO complaint. The Agency argues these are legitimate, nondiscriminatory reasons for withdrawing an offer.

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, 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”).

First, we address Complainant’s contention that the Agency violated the EPA. The United States Supreme Court articulated the requirements for establishing a prima facie case of discrimination under the EPA in Corning Glass Works v. Brennan. 417 U.S. 188 (1974). To establish a prima facie case of a violation under the EPA, a complainant must show that she or he received less pay than an individual of the opposite sex for equal work, requiring equal skill, effort, and responsibility, under similar working conditions within the same establishment. Sheppard v. EEOC, EEOC Appeal No. 01A02919 (September 12, 2000), req. for reconsideration denied, EEOC Request No. 05A10076 (August 12, 2003).

Once a complainant has met this burden, an employer may avoid liability only by showing that the difference in pay is justified under one of the four affirmative defenses set forth in the EPA: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production of work (also referred to as an incentive or piecework system); or, (4) a differential based on any factor other than sex. Id.

The EPA permits a compensation differential based on a factor other than sex. In order to establish this defense, an Agency must establish that a gender-neutral factor, applied consistently, in fact explains the compensation disparity. EEOC Compliance Manual, Chapter 10: Compensation Discrimination, No. 915.003, (EEOC Compliance Manual) at 10-IV (December 5, 2000). The Agency must also show that the factor is related to job requirements or otherwise is beneficial to the Agency’s business and used reasonably in light of the Agency’s stated business purpose as well as its other practices. Id.; Complainant v. Dep’t of Homeland Security, EEOC Appeal No. 0720040139, req. for recons. den., 0520070616 (July 25, 2007).

“Employers can offer higher compensation to applicants and employees who have greater education, experience, training, or ability where the qualification is related to job performance or otherwise benefits the employer’s business.” EEOC Compliance Manual at 10-IV. The Commission has noted that such a qualification would not justify higher compensation if the employer was not aware of it when it set the compensation, or if the employer does not consistently rely on such a qualification. Id. Furthermore, the difference in education, experience, training, or ability must correspond to the compensation disparity. Id. The Commission has recognized that continued reliance on pre-hiring qualifications is less reasonable the longer the lower paid employee has performed at a level substantially equal to, or greater than, his or her counterpart. Id.

Claim A

In the present case, the Agency conceded that Complainant established a prima facie case of discrimination under the Equal Pay Act. The Agency claimed the pay differential was based on a factor other than sex.

The Agency states that a physician compensation pay panel evaluated each physician individually and that individual physician compensation was determined based upon various factors including years of experience, specialty skills, board certification, academic record, geographic market, and complexity of work. However, the Agency only provided vague statements to justify the pay differential. The HR Officer claimed that the two comparatives received higher compensation than Complainant because they had more years of surgical experience; however, this is not documented in the record. Specifically, there is no indication how much surgical experience Complainant or the comparatives had and how this translated into determining their respective salaries.

The HR Officer stated after the pay disparity was brought to her attention in 2015, she conducted a study of general surgeon compensation within VISN and that Complainant's salary fell within the middle range of all surgeons. The HR Officer attached two pages of what purports to be the 2015 study; however, there is no indication the date the study was conducted or what time period it covered. Furthermore, the study does not contain the identity of the physicians on the chart, including Complainant or the two comparatives. Moreover, the chart does not contain any information regarding the surgical experience of any of the individuals listed. Complainant alleged she was paid less than male comparatives from 2011 through March 2015, and in her affidavit the HR Officer stated that "if you're going back to 2011, without having looked at the date or having had that brought to my attention in 2011, then no, I wouldn't know" if there was a pay differential between Complainant and her comparatives.

The HR Officer stated that in determining pay the various factors are considered and the panel of peer physicians make a recommendation for setting the pay of each individual physician. The HR Officer stated that there were three components to a physician's pay: base pay based on the number of years that they have worked with the Agency; market pay which has to do with the specialty area; and performance pay. We note the Agency provided no evidence documenting these three components for Complainant or the comparatives during the relevant time frame. In her affidavit, the HR Officer acknowledged that pay panel information would show a more individual breakout of the factors identified by the Agency; however, the Agency did not produce any pay panel information on the pay of Complainant or the two comparatives during the relevant time.

The former Chief of Staff also stated that he was told at one point that Complainant initially began as a part-time doctor and was not being asked "to take call" and that *may* have played a role when Complainant was hired. However, when asked if he had personal knowledge of specifically why Complainant was paid differently than her male counterpart, the former Chief of Staff responded he did not and acknowledged he was not part of the discussion when Complainant's pay was set.

He stated that he was at the “pay table”⁵ in 2014, when there was a pay freeze and when she was considered for the Chief of Surgery position.

In addition, the CPMR stated that he had “institutional” knowledge of the pay disparity which was “passed on verbally” that when Complainant arrived at the facility she served in a different capacity than Comparative 2. He stated that Complainant had fewer duties and that it was his understanding “she may have been serving in sort of a part-time capacity.” The CPMR stated it was his understanding there was a “difference in experience” between Complainant and the comparatives.

Upon review, based on the vague references to possible reasons for the pay disparity and lack of information reflecting how the salary of Complainant or the comparatives was set, the Agency failed to satisfy its burden by a preponderance of the evidence to show that the pay differential was based on a factor other than sex.

The EPA permits a compensation differential based on a seniority system. To the extent the Agency is asserting (which it never explicitly asserted) that experience is a seniority system, it provided no evidence of how its seniority system works or how its employees’ salaries increased over their tenure. Without more information, the Agency’s conclusory assertion that additional years of experience justify a pay disparity does not satisfy its burden of establishing an affirmative defense. Thus, we find Complainant established that she was subjected to an EPA violation.

Next, we address Complainant’s claims that she was subjected to disparate treatment based on her sex. Generally, claims of disparate treatment are examined under the tripartite analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found, for Experimental Biology. Inc., 425 F. Supp. 318, 324 (D. Mass.), aff’d, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978).

Once a complainant has established a prima facie case, the burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep’t of Com. Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency’s reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 509 (1993); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983).

In the present case, Complainant established a prima facie case of sex discrimination by showing that she was paid less than similarly situated male employees. The burden then shifts to the Agency

⁵It is likely the former Chief of Staff meant pay panel.

to articulate legitimate, nondiscriminatory reasons for its actions. We find that the Agency failed to meet this burden. The Agency claims the difference in boarding salaries is justified because both of the two comparatives has more service experience than Complainant. However, the Agency failed to provide any specific indication of the relative experience of Complainant or the comparatives or how it applied experience in determining salaries. Moreover, the Agency has only presented vague, unsupported statements regarding how it established the salaries of Complainant and the two named comparatives. Upon review, we find the Agency has failed to set forth, with sufficient clarity, reasons for the disparity in pay between Complainant and the two named comparatives such that she has been given a full and fair opportunity to demonstrate that those reasons are pretext for discrimination. Therefore, since Complainant has established a prima facie case of sex discrimination we find under the circumstances of this case, she must prevail on her claim of sex discrimination for Claim A without having to make any demonstration of pretext.

Claim B

Complainant claimed she was discriminated against on the basis of sex beginning March 6, 2015, when she did not receive the salary approved by the facility's pay panel for the permanent Chief of Surgery position. The Agency articulated a legitimate, nondiscriminatory reason for its actions. Because the pay panel recommendation of \$325,000 exceeded the authority of the Medical Center Director, it had to be sent to VISN for approval. VISN did not approve the pay panel's recommendation because of unresolved quality issues regarding surgeries performed by Complainant and her staff during her tenure as Acting Chief of Surgery.

On appeal, Complainant claims that the Agency did not address her allegation under the EPA that the Agency failed to properly pay her during the time she performed the duties of the Chief of Surgery. Complainant notes she performed the job duties of the Chief of Surgery for an extended period of time, during which time the salary of this position (as received by the comparatives both prior to and after her tenure in this position) were fixed at \$325,000.

Upon review, we find the Agency met its affirmative defense by showing that the pay disparity between Complainant and the comparatives was based on a "factor other than sex" - namely, that Complainant was not paid a permanent salary for the time she was only acting in the Chief of Surgery position.

Additionally, we find the Agency articulated a legitimate, nondiscriminatory reason for not paying Complainant the salary approved by the facility's pay panel beginning on March 6, 2015. Specifically, the amount of the facility's pay panel recommendation had to be approved by VISN because it exceeded the authority of the Medical Center Director. Thereafter, VISN did not approve the increase because of unresolved quality issues regarding surgeries performed by Complainant and her staff. Complainant failed to prove by a preponderance of evidence that the Agency's actions were based on discriminatory animus based on her sex.

Claim C

The Agency articulated legitimate, nondiscriminatory reason for withdrawing the tentative job offer. The Medical Center Director explained that when the VISN denied approving the pay panel's compensation offer for the Chief of Surgery position, the offer was rescinded. The former Chief of Staff and the CPMR stated that the decision to withdraw the offer for the Chief of Surgery position was based upon clinical and administrative issues with Complainant's performance involving failures in leadership and poor prior clinical outcomes, some of which involved Complainant. The VISN CMO stated there were numerous issues relating to deficiencies in surgical care competencies with abdominal surgeries, involving Complainant and other surgeons.

Complainant argues the fact that she received a "Fully Satisfactory" rating containing no performance deficiencies during the time she was Acting Chief of Surgery, shows the Agency's actions were pretextual. We note that while Complainant received a "Fully Satisfactory" rating during the time she served as Acting Chief of Surgery, a number of witnesses indicated that after her rating, issues arose involving the competence of her work and her surgical team. Thus, we find Complainant failed to prove by a preponderance of evidence that the Agency's actions in withdrawing the tentative offer were pretextual or based on discriminatory or retaliatory animus.

Remedies

An individual may recover under both the EPA and Title VII for the same period of time as long as the same individual does not receive duplicative relief for the same wrong. 29 C.F.R. §1620.27(b). Relief is computed to give an individual the "highest benefit" which either statute would provide. Id. Under Title VII, a complainant may recover back pay for two years prior to the filing of the complaint. EEOC Compliance Manual at 10-VI (citations omitted). Back pay under the EPA dates back to two years prior to the filing of the complaint. Id. In cases of willful violations, the back pay period is three years. Id. The EPA also provides for liquidated damages, at an amount equal to back pay, unless the agency proves that it acted in "good faith" and had reasonable grounds to believe that its actions did not violate the EPA. Id.

We note that as relief for her complaint, Complainant has requested back pay to 2011, a raise to the level that was approved by the pay panel in the amount of \$325,000, attorney's fees, and compensatory damages.

Based on our finding of sex-based wage discrimination, Complainant is entitled to back pay in the amount of the unlawful difference between her salary during the relevant time and the salary of the highest paid comparative. In this case, our Order for relief for the violation of the EPA includes an award of liquidated damages, since the Agency has failed to argue, or show, that this violation was in good faith or that it had reasonable grounds for believing its action was not a violation of the EPA. See 29 U.S.C §§216(b), 260. However, we find the record did not establish that the Agency committed a willful violation of the EPA. Thus, we find Complainant is entitled to back pay for two years. We note that that calculation of the back pay period begins on September 8, 2015, the date Complainant filed her formal complaint. 42 U.S.C. § 2000e-5(e) (3) (B) (back pay

available up to two years preceding the filing of the charge); 29 C.F.R. §1614.501(c)(1) back pay liability under Title VII is limited to two years prior to the date the discrimination complaint was filed. Isidro A. v. Dep't of Homeland Security, 0720170026 (February 6, 2018) (citing Terrie M. v. Dep't Air Force, EEOC Appeal No. 0120152627 (June 16, 2016)), req. for recons. denied, 0520180310 (August 24, 2018); Gabrielle G. v. Dep't of Homeland Security, 0120141757 (May 13, 2016). We note Complainant is not entitled to an increase in her salary to \$325,000 as she did not succeed on her claim (B) or claim (C). The record reveals Complainant was represented by an attorney and thus, we find she is entitled to attorney's fees.

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §2000e et seq., or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this "make whole" relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process.

The Commission has recognized that liquidated damages under the EPA are compensatory in nature. EEOC Compliance Manual at 10-VI. Thus, in sex-based pay cases under both the EPA and Title VII, a complainant cannot recover both liquidated damages under the EPA and compensatory damages under Title VII for the same injury because that would amount to double recovery. Id. Nevertheless, relief should be computed to give complainant the highest benefit entitlement under either statute would provide. See 29 § C.F.R. 1620.27(b). In the present case, because we found discrimination under Title VII and the EPA, Complainant may receive the greater of the liquidated damages available under the EPA or compensatory damages available under Title VII.

CONCLUSION

Accordingly, we AFFIRM the Agency's final decision finding no discrimination regarding claims (B) and (C). We REVERSE the Agency's final decision finding no discrimination regarding claim (A). The Agency shall comply with the relief in the following Order.

ORDER

The Agency shall take the following actions:

1. Within 60 days of the date this decision is issued, the Agency shall pay Complainant back pay, with interest, for the difference between Complainant's salary and that of the highest paid Comparative retroactive to September 8, 2013 (which is two years prior to the date on which the complaint was filed), and other appropriate benefits that Complainant would have been entitled to but for the discrimination. The Agency is

further directed to pay Complainant an additional amount of liquidated damages (equal to the back pay award) for its violation of the EPA.

2. Because we have made a finding of intentional discrimination under Title VII and Complainant has made a claim for compensatory damages, the Agency is ordered to conduct a supplemental investigation concerning the remedy of compensatory damages.

Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages incurred as a result of the Agency's discriminatory actions. The Agency shall allow Complainant to present evidence in support of her compensatory damages claim. See Complainant v. Dep't of the Navy, EEOC Appeal No. 01922369 (January 5, 1993). Complainant shall cooperate with the Agency in this regard.

The Agency shall issue a final decision on compensatory damages no later than 90 days after the date this decision is issued. Because Complainant is not entitled to duplicate relief for the same wrong under the EPA and Title VII, compensatory damages shall only be paid to the extent they exceed the amount of liquidated damages actually paid to Complainant under the EPA pursuant to this Order. To the extent the Agency owes compensatory damages, it shall pay Complainant the compensatory damages as determined by the Agency within 30 days from the date of the Agency's decision on compensatory damages. The Agency shall submit a copy of the final decision on compensatory damages to the Compliance Officer at the address set forth herein.

3. Within 90 days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive training to the responsible management officials regarding the prohibitions against sex discrimination under the Equal Pay Act and Title VII.
4. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against the management officials identified as being responsible for the discrimination perpetrated against Complainant. The Commission does not consider training to be a disciplinary action. The Agency shall report its decision to the Commission and specify what, if any, action was taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Grand Junction Veterans Affairs Medical Center located in Grand Junction, Colorado copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for

continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

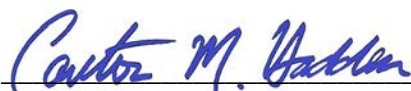
COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION-EQUAL PAY ACT (Y0408)

You are authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. § 216(b)) to file a civil action in a court of competent jurisdiction **within two years** or, if the violation is willful, **three years** of the date of the alleged violation of the **Equal Pay Act** regardless of whether you have pursued any administrative complaint processing. The filing of the 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:



Carlton M. Hadden, Director
Office of Federal Operations

February 21, 2019

Date