



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

████████████████████
Mercedes A.,¹
Complainant,

v.

Sonny Perdue,
Secretary,
Department of Agriculture,
Agency.

Appeal No. 0120170574

Hearing No. 570-2014-00057X

Agency No. CRSD-2012-01033

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 final order 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., the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq., and the Equal Pay Act (EPA) 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 order.

BACKGROUND

In May 2010, Complainant was offered a position with the Agency as an Associate Chief Information Officer (ACIO), Technology Planning, Architecture and E-Government (TPAE), Office of the Chief Information Officer, Departmental Management. Complainant was stationed in Washington, D.C. and her position was in the Senior Executive Service (SES). Complainant's starting salary was \$159,416, which was a 10% increase from her then current SES salary of \$144,492, which she was earning at the Air Force.

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.

During the relevant time there were five other ACIOs within the Office of the Chief Information Officer. Comparative 1, ACIO of International Security Operations Center, and Comparative 2, ACIO of Cyber Policy and Oversight, were stationed in Washington, D.C. The three other ACIOs (Comparative 3, Comparative 4, and Comparative 5) were stationed outside of Washington, D.C.

Complainant's starting salary of \$159,416 was higher than Comparative 1 and Comparative 2's starting salaries. Comparative 1's starting salary as an SES ACIO was \$154,284. Comparative 2's starting salary as an SES ACIO was \$158,824.

Complainant's predecessor in the ACIO TPAE position was Comparative 6. Complainant and Comparative 6's functional statement or positions descriptions indicated that they performed the same duties while occupying the same ACIO position.² At the time of his hire in 2008, the Agency gave Comparative 6 an approximate 4% increase from his prior salary. Comparative 6 was hired at a starting salary of \$172,200 compared to his prior private sector salary of \$165,000 per year, which excluded his private sector compensation bonuses.

Comparative 6 was removed from his SES ACIO position and downgraded in 2009 to a salary of \$162,900. Comparative 6 was an ACIO for less than a year from December 2008 to October 2009.

At the time of Complainant's hire, Person A was the Deputy CIO for Operations. He served as Complainant's first line supervisor.

At the time of Complainant's hire, Person B was the CIO. In January 2012, Person B resigned. The Agency then appointed Person C as CIO. From April 2012 to August 2013, Complainant directly reported to Person C.

Person D, Acting CIO, Rural Development, served as Person C's *de facto* Chief of Staff. Person D had no supervisory authority over Complainant and no input into her performance evaluations.

After coming on board in April 2012, Person C assessed the workload and alignment of resources in the office. In June 2012, Person C approached Person E, Assistant Secretary for Administration, and Person A about her assessment of the office and the need for a realignment.

When Person C approached Person D and Person A about the need for realignment, she spoke about it generally and did not specifically mention taking duties away from Complainant. However, Person C noted the realignment would be "across the board." Person A noticed that Complainant was struggling under her workload.

² While Complainant's case was pending a hearing, the EEOC Administrative Judge (AJ) sanctioned the Agency for discovery violations. The adverse inference was drawn that Comparative 6's functional statement or position description for when he occupied the ACIO for TPAE position indicated that he performed the duties identified in Complainant's functional statement.

Complainant never raised any salary concerns directly with Person C. However, Person E communicated Complainant's salary concerns with Person C within a few days of July 6, 2012. When mentioning pay inequality concerns to Person C in comparison to other ACIOs, Person E did not mention sex as a factor.

A government pay freeze was in effect from 2011 through 2013. This pay freeze did not reduce salaries but locked them into place for a three-year period.

On August 1, 2012, Person C notified Complainant about her intention to realign the ACIO duties. Person C then had a follow-up conversation with Complainant and Comparative 2 during a lunch meeting and had a separate conversation with Comparative 1. Some of Complainant's duties were being reassigned to Comparative 2 and some of her duties were being reassigned to Comparative 1. Comparative 1 expressed concern because he would be performing more duties but would not be receiving any increase in pay.

On August 6, 2012, Person C issued a memorandum documenting the realignment.

On September 12, 2012, Complainant, Comparative 2, and Person A sent a letter to Congressman A, complaining about discriminatory practices at the Agency. Specifically, they complained about the appointment of Person C as CIO, the impending appointment of another Caucasian woman, Person F, and the realignment of functions away from African American senior executives.

The letter to Congressman A contained inaccuracies and failed to mention key facts. Although Complainant and the others identified the race of Person F as Caucasian; Person F is an African American female. The letter also failed to mention that some of Complainant's duties that were being reassigned were given to Comparative 2, an African American. The letter also did not mention that Person A wanted Person C's position but was passed over due to an investigation into alleged Hatch Act violations.

In April 2013, Person F joined the OCIO as a political appointee in the position of Deputy CIO, Policy and Planning.

Person C was the Selecting Official for the Deputy CIO position in conjunction with the White House. Person C also ensured that Comparative 2 continued in his SES position after his probationary period ended.

In May or June 2013, Person G started working for Person C and Person D as an assistant. His desk was located immediately outside Person C's office.

Beginning in August 2014, Complainant began working pursuant to an Intergovernmental Personnel Act (IPA) at Alabama Agricultural and Mechanical University located in Huntsville, Alabama, where she had familial ties. She is listed officially as an ACIO but is no longer performing those function.

On August 3, 2012, Complainant filed an EEO complaint alleging that the Agency subjected her to unlawful employment discrimination. The claims were identified as follows:

1. From August 1, 2012, and continuing through the present, Complainant has been subjected to a hostile work environment on the bases of her sex (female) age (over 40), race (African American), color (brown), and in retaliation for protected EEO activity which includes, but is not limited to:
 - a. On August 1, 2012, Complainant's supervisor, Person C, Chief Information Officer (CIO) took away half of Complainant's functional responsibilities and personnel, reassigned the responsibilities to the only other African American ACIO, and then transferred all of his functions to a White male ACIO.
 - b. As a result of Person C's reorganization, since August 1, 2012, continuing through the present, Complainant has been left with reduced management authority and has been given oversight over only a few responsibilities with significantly less prestige and authority.
 - c. Complainant's supervisor frequently made disparaging comments about Complainant during OCIO staff meetings and in front of OCIO executive staff.
 - d. In and around August 17, 2012, while Complainant was out on leave, Person C denigrated Complainant to other ACIOs and spread accusations that Complainant had failed to respond to Office of Budget and Program Analysis (OBPA) emails, instead of informing OBPA and the ACIOs that Complainant was unable to respond because she was absent.
 - e. Person C undermined Complainant's ability to carry out her work by allowing other CIOs to conduct functions that were under Complainant's areas of responsibility (develop IT policy and governance) and to brief that information during the CIO council meeting.
 - f. Person C continues to assign other, less qualified, Caucasian female and male employees' duties and responsibilities that are under Complainant's functional responsibility.
 - g. Person C repeatedly disregarded Complainant's guidance, instead relying upon advice from Caucasian employees, but would blame Complainant if the guidance she had received from these employees was incorrect.
 - h. In October 2012, Complainant's performance was downgraded from "Outstanding" (her mid-term rating) to "Superior." Continuing through the present, Complainant's supervisor, Person C, is allowing Person D (whom Person C calls her "chief of staff"), to interfere with Complainant's assigned areas of responsibilities and to harass and denigrate Complainant in front of other staff members.
 - i. Continuing through the present, Person D, Deputy CIO, and Person C have repeatedly told other people on staff that Complainant is a "problem."

- j. Person C has repeatedly told other senior staff members that Person D lives to make Complainant miserable and has refused to correct the harassment by Person D.
 - k. Person C has refused to provide Complainant with adequate support following the reorganization, including failing to provide Complainant updated functional statements, and positions descriptions, and Person C has not possessed formal documents reflecting the reorganization nor has she conducted the required civil rights assessment.
2. Whether Complainant was discriminated against based upon sex (female) and race (African American), when on a continuing basis from 2010 to the present, it failed to pay, and continues to fail to pay, Complainant at a level similar to Caucasian and/or male employee performing substantially similar work, in violation of Title VII and the Equal Pay Act.

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). Complainant requested a hearing. The AJ held a hearing on May 24, 25, and 26, 2016. The AJ issued a decision on September 14, 2016, finding Complainant failed to prove that she was subjected to discrimination or retaliation.

When the Agency failed to issue a final order within forty days of receipt of the AJ's decision, the AJ's decision became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i).

On appeal, Complainant requests the Commission sanction the Agency for failure to issue a final decision and failure to provide the Commission with a full and complete copy of the appeal file within 30 days of receipt of a notice of appeal. Complainant also argues the AJ erred in his analysis of her equal pay claim. Complainant claimed the AJ improperly found the Agency did not retaliate against her. Complainant claims the AJ improperly allowed the Agency to undermine Person A's testimony by repeatedly questioning witnesses about unproven allegations against Person A. In addition, Complainant claims the AJ erroneously rejected Complainant's claim of *per se* retaliation. Finally, Complainant claimed the AJ improperly rejected her hostile work environment claim.

In response to Complainant's appeal, the Agency argues Complainant is incorrect in her assertion that the Agency should be sanctioned for failing to provide the full administrative record to the Commission within 30 days of her filing of her appeal on November 22, 2016. Rather, the Agency notes that an Agency must submit a complaint file to the Commission within 30 days of initial notification that a complainant has filed an appeal. The Agency states it received the Commission's request for the file on December 28, 2016. The Agency argues the AJ applied the correct legal standards in determining Complainant failed to establish that she was subjected to discrimination or harassment.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

At the outset, we address Complainant's request to sanction the Agency. We decline to issue sanctions against the Agency for failure to issue a final decision or failure to provide the file to the Commission. In the present case, when the Agency failed to issue a final order within forty days of receipt of the AJ's decision, the AJ's decision became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i). Additionally, we note the Agency has provided the appropriate file to the Commission and that the delay by the Agency in the present case is not sufficient to warrant the issuance of sanctions.

Further, we address Complainant's contention that the AJ improperly allowed the Agency to repeatedly question witnesses about allegations against Person A. We have held that an AJ has wide discretion in the conduct of a hearing, and after a complete review of the record, we find no reversible error in the line of questioning permitted during the hearing.

EPA

Next, 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.

In the present case, Complainant has established a prima facie case under the EPA. Complainant has shown that Comparative 6, her predecessor in the position of ACIO TPAE, was paid more than she was paid while occupying the position. As a result of the AJ's sanction, an adverse inference was drawn that Comparative 6's functional statement or position description for when he occupied the ACIO for TPAE position indicated that he performed the duties identified in Complainant's functional statement. The Agency has not challenged the sanction on appeal. Moreover, based on the testimony at the hearing, a preponderance of evidence reveals that Complainant and Comparative 6 performed substantially equal work while working in the ACIO TPAE position. The record reveals Complainant was offered a starting salary of \$159,416 and Comparative 6 was offered a starting salary of \$172,200, prior to Comparative 6's downgrade and reduction in salary.

The AJ notes that Comparative 1 and Comparative 2, both male, received lower starting salaries than Complainant. However, the Commission has stated, “There is no requirement that the complainant show a pattern of sex-based compensation disparities in a job category. In other words, if a woman is paid less than male employees performing the same work, the lack of other women with low salaries in the job category does not preclude finding an EPA violation as to complainant.” EEOC Compliance Manual at 10-IV. We find the fact that Complainant failed to show that other females were paid less than other males or the fact that other males received lower starting salaries than she did does not defeat her prima facie case.

The AJ notes that Comparative 6 was in the ACIO position during a different period than Complainant and was only in the position less than a year. The record reveals that Comparative 6 was hired as ACIO TPAE in December 2008 while Complainant did not begin until May 2010.

“The comparators need not have held their jobs at the same time. For example, a prima facie violation of the EPA can be established if a male employee is replaced with a lower paid female.” EEOC Compliance Manual at 10-IV. Thus, the fact that Complainant and Comparative 6 held the position during a different time period does not defeat Complainant’s establishment of a prima facie case under the EPA.

The AJ notes that a realignment occurred in August 2012, which Complainant alleged resulted in half of her functional responsibilities and personnel being taken away. While we agree with the AJ that this allegation erodes Complainant’s argument that she was performing equal work as the other ACIOs during the entire period, we note this realignment did not occur until August 2012, and would not have affected the determination of Complainant’s initial starting salary in 2010.

The AJ noted that Comparative 6’s salary was set and he was onboarded under Person H, CIO at the time, while Complainant’s salary was set and she was onboarded under a different CIO, Person B. To the extent that the AJ was suggesting that the intent of the individual setting Complainant’s pay is relevant to an EPA claim, we note that a showing of an intent to discriminate is not a necessary element in an EPA violation. Moreover, we note the Agency did not present testimony by either CIO who appear to have been involved in setting the starting salary for Complainant and Comparative 6.

The AJ found that Comparative 6 had impressive private sector experience prior to his position with the Agency that Complainant did not possess. Comparative 6’s offer was approximately a 4% increase from his existing salary whereas, Complainant’s offer was a 10% increase from her existing salary. While we do not dispute Comparative 6’s private sector experience, we find that the Agency failed to produce evidence or testimony at the hearing regarding the factors considered in setting Comparative 6’s salary. Specifically, the record does not contain any evidence that Comparative 6’s prior experience was actually a factor relied upon to set his pay higher.

The record contains a Request for Decision from the Office of the Chief Information Officer with a salary decision for Complainant, tentative selectee for the ACIO, TPAE position. The salary recommendation noted Complainant was already in an SES position. The recommendation listed the “General Guidelines for Setting SES Pay” including that: the Agency determines the appropriate rate of pay based on the nature and quality of the individual’s experience, qualifications, and accomplishments as they relate to the position; that the SES is a “pay banded” system, with a salary range of \$119,554 to \$179,700; the employee’s pay cannot be less than her current salary; the typical pay increase range is from 6 to 8 percent; however, management has the discretion to set pay above 8 percent. The salary options listed for Complainant were contained in a chart with 6%, 7%, 8% increases and with a hand-written notation of a 10% increase over her current salary of \$144,924. The document dated May 5, 2010, was signed by both Person A and Person B. The document contained a decision “[b]ased on [Complainant’s] experience, qualifications, and accomplishments as they relate to the requirements of the SES position” recommended a total salary of \$159,416.

Complainant notes that Person A initially recommended that her salary be the same as Comparative 6's offered salary. Person A stated he made the initial recommendation because Person B was on travel and he was acting CIO with all the powers of the CIO transferred to him. The record reveals that Person A did not have final authority to set the final offer amount as an additional signature was needed, and with that additional signature the final offer was given to Complainant. However, there is no dispute that Person A was involved in determining Complainant's initial pay recommendation.

We note that Person A was the only witness involved in setting Complainant's pay to testify at the hearing. Person A testified that his recommendation in setting Complainant's pay at \$172,000 was based on span of control, noting the position required Complainant to manage and oversee a \$2.622 billion IT budget that involved 29 CIOs across the Agency. He noted her position involved collaboration with the Office of Management and Budget, collaboration with Agency staffers, collaboration with Congressional Staffers, as well as OIG and GAO. Person A stated in addition to span of control other primary factors he considered were budget authority, Agency impact, and breadth of her leadership skills.

The record does not contain testimony from Person B who signed Complainant's salary recommendation or any other Agency official with knowledge of the pay setting determination for Complainant as to the reason the final salary recommendation for Complainant was \$159,416. Further, while Person A identified some of the factors considered in general, there is no actual explanation of how those factors resulted in the actual pay setting determination.

The record also contains a salary recommendation for Comparative 1 reflecting he was being moved from a GS-15/5 to an SES position. The request listed the "General Guidelines for Setting SES Pay" including that: the Agency determines the appropriate rate of pay based on the nature and quality of the individual's experience, qualifications, and accomplishments as they relate to the position; that the SES is a "pay banded" system, with a salary range of \$119,554 to \$179,700; the employee's pay cannot be less than his current salary; upon conversion from GS to SES, the typical pay increase range is from 6 to 8%; however, management has the discretion to set pay above 8%. The salary options on the chart reflected a 6%, 7%, and 8% increase and contained a hand-written 10% increase over Comparative 1's current salary. The document had the same two signatures as Complainant's recommendation and was dated the same day, May 5, 2010. The decision stated that based on Comparative 1's experience, qualifications, and accomplishments as they relate to the SES position, a recommendation of a total salary of \$154,284.

The record also contains a salary recommendation for Comparative 2 reflecting his conversion from a GS-15/6 to the SES. The request listed the "General Guidelines for Setting SES Pay" including that: the Agency determines the appropriate rate of pay based on the nature and quality of the individual's experience, qualifications, and accomplishments as they relate to the position; that the SES is a "pay banded" system, with a salary range of \$119,554 to \$179,700; the employee's pay cannot be less than his current salary; and upon conversion from GS to SES, the typical pay increase range is in a three tier structure. The salary options presented included a "Proposed Interim Pay Policy" listing three different tier characteristics.

The decision stated that per a phone conversation with Person B, he is recommending a 10% increase in salary which would put Comparative 2 at \$154,824.

The record did not contain a salary recommendation for Comparative 6.

The record reflects that Complainant, Comparative 1, and Comparative 2 all received a salary increase of 10% upon becoming ACIOs. However, we find the Agency failed to establish the existence of an Agency policy regarding pay-setting prior to 2012. Specifically, the Agency only produced a Departmental Regulation dated March 1, 2012, regarding the Senior Executive Pay Setting Policy, which was after Complainant and Comparative 6's salaries were set. We note, the testimony of Person E regarding pay setting applied to 2012 and later. Further, there is evidence that Comparative 1 and Comparative 2 did not have their pay set under the same policy. First, Comparative 2's 10% increase was under a different policy, as evidenced by the "Proposed Interim Pay Policy" and the tier system identified. Also, we note that both Comparative 1 and Comparative 2 were transitioning from the GS to the SES system while Complainant was already in an SES position when she began as an ACIO. Thus, we find the Agency has not established a 10% pay setting policy was in effect at the time Complainant was hired.

The AJ noted that a pay freeze was in effect from 2011 to 2013 that locked salaries into place for a three-year period. However, we note the pay freeze beginning in 2011 would not have affected the initial setting of Complainant's salary in 2010.

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 Comparative 6 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. Thus, we find the AJ's decision finding that the Agency met its affirmative burden of showing that the setting of Complainant's salary was based on a factor other than sex is not supported by substantial evidence. Complainant established that she was subjected to an EPA violation.

Title VII

Next, we address Complainant's claims that she was subjected to pay discrimination under Title VII based on her sex. In situations such as this, where the jurisdictional prerequisites of both the EPA and Title VII are satisfied, any violation of the EPA is also a violation of Title VII. 29 C.F.R. § 1620.27; Guidance at 10-V at footnote 87. In the present case, Complainant established a prima facie case of sex discrimination by showing that she was paid less than Comparative 6, a similarly situated male employee.

As explained earlier in this decision, the Agency has failed to establish an affirmative defense. Thus, we find Complainant established that she was subjected to a Title VII violation.³

Finally, we address the remaining allegations of discrimination and harassment raised in Complainant's complaint. Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that substantial evidence of record supports the AJ's determination that Complainant has not proven discrimination or harassment by the Agency as alleged. We discern no basis to disturb the AJ's findings of no discrimination which were based on a detailed assessment of the credibility of the witnesses.

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, liquidated damages, attorney's fees, and compensatory damages.⁴

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 August 3, 2012, 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

³ Because we find Complainant established she was subjected to pay discrimination under Title VII based on sex, we decline to address her contention that she was subjected to pay discrimination under Title VII based on race.

⁴ We note that initially Complainant requested \$200,000 in compensatory damages. However, in her closing argument following the hearing, Complainant stated that to the extent there is not a finding of a willful violation of the EPA, Complainant seeks compensatory damages in the amount of \$65,000.

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). 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 order finding no discrimination regarding claim (1). We REVERSE the Agency's final order finding no discrimination regarding claim (2). 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 Comparative 6 retroactive to August 3, 2010 (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.

2. 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.
3. 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.

4. 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.
5. 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 Departmental Management facility located in Washington, D.C. 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)

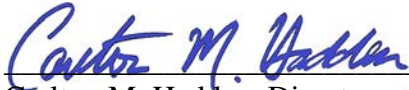
You are authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. § 216(b)) to file a civil action in a court of competent jurisdiction **within two years** or, if the violation is willful, **three years** of the date of the alleged violation of the **Equal Pay Act** regardless of whether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

March 7, 2019
Date