



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

[REDACTED]  
Casandra N.,<sup>1</sup>  
Complainant,

v.

Kirstjen M. Nielsen,  
Secretary,  
Department of Homeland Security,  
Agency.

Appeal No. 0120171485

Hearing No. 570-2015-00936X

Agency No. HSHQ000882015

DECISION

On March 14, 2017, 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 February 18, 2017, 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 the Agency's final decision finding no discrimination.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Criminal Investigator, GS-1811-13 in the Office of the Inspector General (OIG) at the Agency's Headquarters in Washington, D.C.

Complainant stated that since October 21, 2013, she has performed the duties of OIG's Liaison with the Federal Emergency Management Agency (FEMA). She claimed that OIG previously entitled the position as Desk Officer at the GS-14 level but discontinued the position and grade prior to her incumbency as a GS-13 Liaison. Complainant claimed the person who performed

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<sup>1</sup> 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.

OIG's FEMA Liaison duties prior to her was Person A, a male GS-14 Supervisory Criminal Investigator (Assistant Special Agent-in-Charge (ASAC)).

On August 22, 2014, OIG tasked Person B, a male GS-14 Criminal Investigator to serve as a Liaison with Customs and Boarder Protection (CBP) Internal Affairs (IA) and the Joint Intake Center (JIC).

On November 14, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of sex (female) when:

On August 22, 2014, Complainant learned that she was fulfilling the role and duties of a GS-14 Agent but was not receiving the pay of a GS-14 Agent.

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 but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

On appeal, Complainant claims she took over the position from Person A who had been fulfilling the duties of a FEMA Liaison while he was called the ASAC of the Office of Emergency Preparedness. Complainant claims her role as FEMA Liaison has expanded since Person A was in the role. Complainant also argues that Person B was performing the same or similar work and got paid more than she did. She states that Person B was assigned as CBP IA and JIC coverage. Complainant claims here role as liaison is the same as Person B's coverage role as they both provide the same function to an Agency component. Complainant claims she has established discrimination based on sex which was not negated by the Agency's explanations.

### 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").

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.

Complainant stated she became FEMA Liaison on October 21, 2013. She stated that in her Headquarters role, she completed duties for FEMA Liaison and Acting Assistant Special Agent in Charge of the Office of Emergency Preparedness (OEP). She stated that as Acting Assistant SAC she fulfilled some acting supervisor duties to assist Special Agent in Charge (SAC) 2. She stated she assisted with supervisory duties of two employees located in Baton Rouge, Louisiana. Complainant stated that Person A fulfilled the duties of FEMA Liaison while he was called the Acting ASAC of OEP. Complainant stated her role as FEMA Liaison has expanded since Person A was in the role. Complainant's duty station was the Washington Field Office and Person A's duty station was Headquarters. Complainant and Person A did not report to the same first level supervisor. Complainant stated Person A reported to the previous SAC of OEP, SAC 1, and she reported to SAC 2, the current SAC of OEP.

Complainant stated that when she took over, Person A provided her with spreadsheets and information for compiling Hurricane Sandy Statistics, information for the Quarterly report that

was submitted to the Recovery, Accountability and Transparency Board (RATB). Complainant stated that she continued his information spreadsheets. She stated that she expanded Person A's role as he was focused on one disaster for statistical purposes while she works with all disasters and all the complaints OIG received regarding FEMA to include disaster complaints and internal complaints. Complainant stated she assists the field with FEMA complaints and investigations.

Person A stated he never served as or performed duties as OIG's Liaison to FEMA. He explained that such duties were performed by staff he supervised and that he reviewed their work. Person A noted that Special Agent C occupied the position of FEMA Liaison immediately before Complainant. Person A stated that Complainant was hired to replace Special Agent C as the Liaison to FEMA.

Person A explained that while serving as Assistant SAC (ASAC) for Field Operations Division West, as an additional duty, he assisted Special Agent in Charge 1 and Acting Special Agent in Charge 2 in managing OEP from approximately October 2012 to August 2013. He stated his official and primary duties while affiliated with OEP involved the oversight of the Office of Investigations' (INV) western investigative offices. He stated that although he functioned in the capacity of ASAC while helping in OEP, he was never assigned to OEP and was never managed by SAC 1 or SAC 2. On April 1, 2013, SAC 1 was detailed to the Recovery and Accountability Board and Person A assumed the position of Acting Special Agent in Charge of OEP, an additional responsibility to his primary job. Person A noted that on April 11, 2013, SAC 2 assumed the duties of Acting Special Agent in Charge of OEP. Person A stated that he continued to assist OEP while working his assigned duties as the ASAC for Field Operations Division West. Person A stated while assisting Special Agent in Charge 1 and Acting Special Agent in Charge 2 in managing OEP, he directly supervised OEP's five employees in the performance of their duties. Person A noted that one of the employees he supervised occupied the position of FEMA Liaison. Person A noted that Person C served as FEMA Liaison while he was affiliated with OEP. Person A stated many of the duties detailed by Complainant were conducted by the five employees he supervised. Person A explained that as a supervisor, he directed, reviewed, and when necessary, forwarded reports created by OEP staff members to applicable entities.

The Acting Deputy Assistant Inspector General for Investigations (AIGI) became Complainant's second level supervisor on October 4, 2014.<sup>2</sup> The Acting Deputy AIGI noted that Person A served as Acting ASAC in OEP for several months and Acting Special Agent in Charge for a brief time after SAC 1 was detailed to the Recovery and Transparency Board. The Acting Deputy AIGI explained that Person A served as Acting ASAC in OEP while concurrently serving as ASAC-West, Field Operations Division, INV. He stated in this capacity, Person A managed all aspects of the OEP program, to include the immediate supervision of the employees assigned to this group. He stated much of Person A's time was spent overseeing the FEMA complaint intake process and ensuring that the FEMA related complaints were received and inputted into the INV Enterprise Data System (EDS), the case management system. He noted Person A also worked with the field

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<sup>2</sup> On October 4, 2014, the Acting Deputy AIGI became Acting AIGI in addition to serving as Acting Deputy AIGI and Director, Headquarters Operations Division.

office to facilitate the conduct of FEMA related investigations. He stated that Person A supervised all aspects of the program and interfaced with OEP employees and field employees on all FEMA related complaints, not just disaster fraud complaints. He noted Person A was integrally involved in facilitating the investigation of several procurement and grant fraud complaints and allegations. He stated that Person A was integrally involved in the HQ management and oversight of all investigative activities and operations of Western Offices. The Acting Deputy AIG stated Person A served as Acting ASAC of OEP while he considered Complainant the FEMA point of contact.

Person C, Criminal Investigator/Special Agent, GS-13, stated from May 2012 to October 2013, he was assigned to OIG headquarters component, OEP, to serve as a FEMA Liaison. He noted that in October 2013, he returned to his original OIG position. From September 2012 to October 2013, his first level supervisor was Person A. He stated Special Agent in Charge 1 was his second level supervisor from May 2012 to April 2013. Thereafter, Special Agent in Charge 2 became his second level supervisor from April 2013 to October 2013. Person C stated that while Person A was his supervisor, they communicated on a fairly regular basis but that he was very self-sufficient and did not receive much day-to-day guidance.

SAC 2 stated he was Complainant's direct supervisor since she reported in October 2013. SAC 2 stated that the FEMA Liaison position was an assignment/collateral duty in which the Agency would complete the duties under their current position description.

In the present case, Complainant has not established a prima facie case of discrimination under the Equal Pay Act. Specifically, Complainant failed to show that she and Person A performed substantially equal work. Although Complainant claimed that she and Person A both performed the same FEMA Liaison duties, the record does not support Complainant's contention. The record reveals that Person A served as Acting ASAC in OEP and Acting SAC while concurrently serving as ASAC-West, Field Operations Division. Complainant does not claim and there is no indication that she also served in concurrent positions. Further, while Complainant contends that she took over the FEMA Liaison duties and responsibilities of Person A, the record reveals that Person C was the prior FEMA Liaison and that Person A supervised Person C in that role as well and also supervised other employees at the same time.

Complainant also claimed that she completed duties related to the FEMA component that were substantially equal to the duties of Person B, Senior Special Agent, GS-14, Office of Investigations, Headquarters, who handled CBP IA and JIC coverage. Complainant stated that she and Person B work in the same division workspace. She stated her work unit is OEP but that Person B does not have a work unit distinction. Complainant stated they did not have the same first level supervisors.

Complainant stated Person B's coverage duties included improving communications. She stated that as FEMA Liaison she is the point of contact between FEMA and the Agency. She noted that Person B facilitates information flow and she routinely facilitates information flow between FEMA and OIG. She stated Person B quickly addresses questions and issues when they arise. She noted as FEMA Liaison she also addresses questions and issues for the FEMA component. She stated

that Person B's presence is beneficial to OIG agents and work. Complainant averred that as FEMA Liaison, her presence is beneficial to OIT agents and work. Complainant contended there are not any required duties or responsibilities that Person B fulfills for CBP that she does not fulfill for FEMA. Complainant stated that Person B did not supervise anyone.

Person B stated that in August 2014, he was assigned to serve as the GS-14 Senior Special Agent who handles CBP IA and JIC coverage. Person B stated his duties and responsibilities included Liaison to CBP Internal Affairs (IA) and ICE Office of Professional Responsibility (OPR) for investigative referral matters and other investigative matters as they arise. He explained he reviewed allegations from those components in the JICMS system and ensured they were referred appropriately via the OIG hotline. When reviewing the list of duties Complainant presented, Person B stated his duties appear dissimilar as he does not compile any statistics. He stated he worked independently, ensuring that JICMS contains all the appropriate referrals to OIG and directly engages with GS-15s at CBP IA. Person B stated this was a collateral duty that just happens to currently be his full-time job. Person B stated he considered his current component liaison duties to be on par with a GS-9 and believes the duties of coverage do not warrant a GS-14 as they amount to an hour or so of work per day. He stated that he was a GS-14 because in 2010 he applied for an advertised position that entailed internal office and external component and CIGIE inspections, complex or senior level investigations, and desk officer duties and he performed all those roles together.

The AIGI stated that the JIC is a single point of entry for all allegations from CBP and ICE. He noted CBP is the nation's largest federal law enforcement Agency and as such, the level and scope of complaints is more varied than that of FEMA.

The Acting Deputy AIGI explained that Person B was an existing OIG, GS-14, who was sent to the JIC to meet an immediate operational need. Person B was hired as a Senior Special Agent, GS-14, several years ago when the Agency had a Desk Officer. The Acting Deputy AIGI stated that as the OIG representative at JIC, Person B was responsible for overseeing the JIC complaint intake and OIG complaint referral process. He noted that Person B oversaw this referral process and helped ensure that OIG responses met the specific requirements of Agency Management Directive 0810.1. He explained Person B also worked to ensure that complaints, allegations, and investigative activities were appropriately "de-conflicted." He stated that in instances in which the OIG decided to investigate a particular complaint jointly with ICE and/or CBP, Person B would facilitate these efforts. Further, he stated that Person B would also work with JIC employees to ensure that management inquiries from senior OIG, ICE, or CBP officials, or field managers, were responded to appropriately, accurately, and quickly.

The Acting Deputy AIGI stated while Person B and Complainant's positions were similar on some respects, they were substantively different because Person B was working in a more dynamic environment. He stated the complaints, allegations, and investigations Person B routinely dealt with involved more serious allegations, often involving alien smuggling, drug smuggling, employee corruption, and use of force incidents involving serious injury or death. Additionally, Person B was working to coordinate the efforts and information sharing of three separate law

enforcement organizations: the OIG, ICE OPR, and CBP IA. Each of these law enforcement organizations have approximately 200 Criminal Investigators located in numerous offices across the country. The Acting Deputy AIGI stated the nature and number of the JIC complaints/allegations and the potential involvement of multiple law enforcement agencies in the consideration and investigation of these complaints necessarily involved a level of complexity that would not be found in Complainant's position. He noted that Person B would be responsible for responding to more dynamic and time sensitive operational and investigative issues involving employee corruption, drug and alien smuggling, use of force, and other national security issues.

Upon review, we find Complainant failed to show that she performed substantially equal work to Person B. Specifically, the record reveals that Person B's position involved a greater level of complexity than Complainant's position. Thus, we find Complainant failed to establish a prima facie case under the EPA.

Moreover, we find Complainant failed to establish a prima facie case of sex discrimination under Title VII. For the reasons mentioned above, we find Person A and Person B were not similarly situated to Complainant. We find that Complainant failed to show by a preponderance of the evidence that any salary differences at issue were motivated by sex discrimination

### CONCLUSION

Accordingly, the Agency's final decision finding no discrimination is **AFFIRMED**.

### 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).

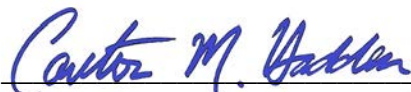
#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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. 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.**

#### 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 14, 2019

Date