



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

[REDACTED]
James S.,¹
Complainant,

v.

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

Appeal No. 0120171997

Agency No. 20DR01AL2016103352

DECISION

On May 17, 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 April 25, 2017, final decision concerning his 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 of 1963 (EPA), 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 the Executive Director, Center for Acquisition Innovation (CAI) at VA Central Office (VACO) in Washington, D.C.

On August 8, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (male) and age (over 40) when his December 2015 request to have his pay level increased to SES pay band level 2 for the period of Fiscal Year (FY) 2010 through FY2016 was denied on April 18, 2016.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment

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.

Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

The Agency found that Complainant failed to establish a prima facie case of discrimination under the EPA because he did not demonstrate that he received less pay than an individual of the opposite sex who was performing equal work under similar working conditions. In issuing the decision, the Agency acknowledged that Complainant presented a comparator employee in support of his prima facie case; however, the Agency found that Complainant earned more pay than the comparator and was not officially appointed to his position, unlike the comparator. As for his allegation of disparate treatment discrimination on the bases of sex and age, the Agency found that management had legitimate, nondiscriminatory reasons for denying his request, namely that the Office of the Secretary postponed plans to reorganize the Office of Acquisitions Logistics, and Construction (OALC) and made no interim changes to the position descriptions and pay bands of SES employees in that office. The Agency concluded that Complainant could not demonstrate pretext or show that management's actions were motivated by discriminatory animus.

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").

On appeal, Complainant challenges the Agency's assertion that he was not officially appointed to the position of Associate Deputy Assistant Secretary, Procurement Policies Systems Oversight (ADASPPSO). Complainant contends that he officially became the ADASPPSO in March 2011, in accordance with the Agency's reorganization plans. He asserts that the Agency's failure to allow him to negotiate a salary constitutes discrimination because the Agency allowed a female SES employee to negotiate her salary upon her appointment as the Chancellor of the VA Acquisition Academy (VAAA).

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.

After careful review of the evidence of record, we find that Complainant cannot demonstrate a prima facie case of discrimination under the EPA. In so finding, we acknowledge that Complainant identified a female comparator employee, whom he alleged was afforded the opportunity to negotiate her pay; however, the record reflects that this employee received less pay than Complainant between FY2010 and FY2016 and had substantially different job duties.²

We need not address whether the Agency provided adequate justification for the differential in pay because we find that Complainant failed to identify an individual of the opposite sex who was performing equal work under similar working conditions.

As for his allegations of disparate treatment under Title VII and the ADEA, we assume arguendo that Complainant established a prima facie case of discrimination on the alleged bases. The record reflects that the Agency articulated legitimate, nondiscriminatory reasons for its decision to deny his request to retroactively increase his pay level to SES pay band level 2 for the period of FY2010 through FY2016. As reflected in the investigative record, the Agency initially planned to reorganize OALC; however, none of these changes took place because of a hold that was placed on the reorganization. The Agency further explained that all senior executive pay band changes are at the discretion of the Office of the Secretary, and, while OALC management led the effort to review position descriptions and pay bands for senior executives, the Office of the Secretary made no changes to the position descriptions and pay bands for any of the senior executives in OALC.

Complainant has failed to show that the Agency's articulated reasons were pretext for discrimination. Though we acknowledge Complainant's contention that under the Agency's proposed reorganizational plans, his position as the ADASPPSO, was initially developed as a level 2 on the SES pay band, we note that the Agency put its reorganization plans on hold. Complainant has not shown that the Agency had any discriminatory motive in postponing its reorganization plans or retaining the ADASPPSO position as a level 3 position on the SES pay band. Moreover, we find that Complainant has not shown that he was treated less favorably than other similarly-situated employees, as the record clearly reflects that the Agency failed to provide updated position descriptions and pay bands for all of the SES employees in OALC, not just Complainant. Consequently, Complainant cannot demonstrate that he was subjected to discrimination as alleged.

² In his role as the Associate Deputy Assistant Secretary in the Office of Procurement Policy, Systems and Oversight, Complainant's duties included formulating VA-wide procurement doctrine and policy, developing and implementing acquisition and risk management, quality assurance and compliance activities, and conducting the Contracting Officer Warranting Program. In contrast, the female comparator employee, who received a lateral reassignment into the position of Chancellor of the VA Acquisition Academy, had entirely different job duties, to include leading the design, development and delivery of competency-based training for VA's acquisition workforce, and developing/implementing VA-wide acquisition workforce training policies, programs, and practices for employees.

CONCLUSION

We AFFIRM the Agency's decision finding no discrimination.

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)

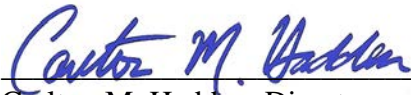
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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 5, 2019

Date