



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

[REDACTED]  
Morna H.,<sup>1</sup>  
Complainant,

v.

Elaine L. Chao,  
Secretary,  
Department of Transportation  
(Federal Aviation Administration),  
Agency.

Appeal No. 0120181745

Agency No. 2017-27566-FAA-02

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated March 26, 2018, dismissing her complaint of unlawful 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as an Air Traffic Control Specialist, GS-2152-14, at the Agency's Radar Air Traffic Control Facility (RATCF) Tower in Meridian, Mississippi and as an Operations Manager for Dulles Air Traffic Control Tower in Chantilly, Virginia. On January 19, 2018, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of race (African-American) and sex (female) when she was subjected to a hostile work environment beginning in November 2013. In support of her claim of harassment, Complainant alleged the following:

1. Complainant's District Manager subjected her to verbal threats and intimidating behaviors beginning in November 2013;

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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.

2. In December 2013, Complainant's District Manager requested a Quality Assurance investigation of the facility for which Complainant was the Air Traffic Manager (ATM), but failed to request an investigation of the other facilities in the district;
3. In February 2014, Complainant was displaced from her position by a Caucasian male employee and asked not to return to her facility;
4. Complainant requested to perform duties at the district office, but was told that none were available. Instead, Complainant was encouraged to take time off to search for a new position. Complainant spent four months applying for other positions while another individual was on paid assignment to her position;
5. In July 2015, Complainant's two-year detail assignment ended prematurely and Complainant was instructed to return to her previous facility despite her objections. Upon her return to her prior facility, Complainant's District Manager delegated work to the outgoing ATM;
6. In September 2015, Complainant's District Manager declined to give Complainant an endorsement for a detail, but endorsed a Caucasian male ATM in the district;
7. Complainant was denied training opportunities in October 2015 after her District Manager revoked her enrollment so that new ATMs could participate in the training opportunities;
8. Upon selection to Operations Manager for Dulles Air Traffic Control Tower (ATCT), Complainant's duties were rescinded and she was involuntarily retained from January 2016 through July 2016, when her District Manager delayed her release date until October 2016. During this period, at least two Caucasian males in the district were selected and transferred almost immediately;
9. On July 25, 2016, Complainant's facility was transferred to the U.S. Navy and all Federal Aviation Administration (FAA) personnel were supposed to be reassigned with: (1) choice of duty station; (2) \$10,000.00 incentive pay; and (3) \$27,000.00 in permanent change of station funds. Complainant did not receive a choice of duty station, but instead Complainant received her reassignment to Dulles ATCT. However, five Caucasian males received all three reassignment incentives; and
10. On or about September 18, 2017, Complainant received a Standard Form ("SF") 50 showing a basic salary nearly equivalent to what it should have been upon arriving at Dulles ATCT in July 2016. Further review of her prior SF-50 (effective date July 24, 2016) revealed an Air Traffic transfer rather than a Merit Promotion Program promotional assignment and did not reflect the \$3,000.00 pay increase that Complainant should have received at the time of her July 2016 reassignment.

The Agency dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(2), due to untimely EEO Counselor contact. The Agency noted that Complainant became aware of her reassignment classification and pay discrepancy prior to the receipt of her SF-50 on September 18, 2017. Specifically, the Agency argued that Complainant acknowledged, via email correspondence with the Agency's Equal Employment Specialist, that she received her prior SF-50 in the latter part of September 2016 and informed Human Resources about the errors with her reassignment classification in addition to the failure to receive a \$3,000.00 pay increase.

### ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of an EEO Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within forty-five (45) days of the effective date of the action. The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the forty-five (45) day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

We find that Complainant's EEO Counselor contact was timely under the Lilly Ledbetter Fair Pay Act of 2009. 42 U.S.C. § 2000e-5(e)(3)(A). The Ledbetter Act applies to all claims of discrimination in compensation, pending on or after May 28, 2007, under Title VII, the Rehabilitation Act, and the Age Discrimination in Employment Act. With respect to Title VII claims, Section 3 of the Ledbetter Act provides that:

...an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or part from such a decision or other practice.

Section 3 of the Act also provides that back pay is recoverable for Title VII violations up to two years preceding the "filing of the charge," or the filing of a complaint in the federal sector, where the pay discrimination outside of the filing period is similar or related to pay discrimination within the filing period.

We find that a fair reading of the complaint in this case, as well as the related EEO counseling report and statements on appeal, shows that the Agency improperly defined Complainant's claim. We determine that the essence of Complainant's claim is that she has been discriminatorily denied higher pay and merit system selection since her July 2016 transfer to the Dulles ATCT, for which she now seeks back pay.

Complainant initiated EEO contact on September 28, 2017. Complainant's EEO contact was timely because, as a current Agency employee, it was within 45 days of her receiving a paycheck, the amount of which was the result of an earlier discriminatory act. See Williams vs. U.S. Postal Service, EEOC Appeal No. 0120100794 (May 4, 2010) (contact timely made within 45 days of having received a paycheck). We find that Complainant was affected by the application of an allegedly discriminatory compensation decision or practice each time she received a paycheck. Applying the Ledbetter Fair Pay Act, we find that Complainant timely contacted an EEO Counselor and the Agency improperly dismissed Complainant's claim for untimely EEO Counselor contact.

The Supreme Court has held that a complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (June 10, 2002). The Court further held, however, "that discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Id. Finally, the Court held that such untimely discrete acts may be used as background evidence in support of a timely claim. Id. Because a fair reading of the record reflects that the matters identified in claims (1) through (10) are part of Complainant's harassment claim, we find that the Agency improperly dismissed the complaint on the grounds of untimely EEO Counselor contact. We find Complainant's hostile work environment claim to be timely because at least one of the incidents, the alleged ongoing compensation discrimination, occurred within the 45 days preceding Complainant's September 28, 2017 initial EEO contact.

### CONCLUSION

Accordingly, the Agency's final decision dismissing claims (1) through (10) is REVERSED. Those matters, defined herein as a harassment claim, are hereby REMANDED to the Agency for further processing in accordance with this decision and the Order below.

### ORDER (E0618)

The Agency is ordered to process the remanded claims (1) – (10) in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's

request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

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 (R0610)

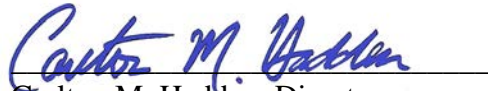
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

#### RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.**

The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

September 13, 2018

Date