



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

[REDACTED]
Mui P.,¹
Complainant,

v.

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

Request No. 0520180494

Appeal No. 0120181261

Agency No. 200407022017104621

DECISION ON REQUEST FOR RECONSIDERATION

Complainant requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 0120181261 (May 31, 2018). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Program Analyst, GS-11, at the Agency's Member Services facility in Topeka, Kansas.

Complainant contacted an EEO Counselor (EEO Counselor 1) on August 16, 2017. According to the EEO Counselor's report, Complainant alleged she was subjected to discrimination based on sex and age regarding: (1) pay and allowances - Equal Pay Act violation when on July 10, 2016, she discovered she was paid less than Comparative 1, who was hired as a GS-12; (2) assignment

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.

of duties when in March 2017, the Practice Improvement Manager began removing Complainant's duties; (3) training when in January 2017, the Process Improvement Manager denied Complainant's request for Lean Six Black Belt Training; (4) promotion/nonselection for the GS-12 Process Improvement Coordinator position; and (5) lack of position description when Complainant was on the incorrect position description beginning in late April 2016.

Subsequently, Complainant filed a formal complaint on December 5, 2017, alleging that the Agency subjected her to discrimination on the bases of sex (female) and age when: since July 10, 2016, to the present day, "[Complainant] and a young male coworker have the exact same job duties and performance standards. However he is a GS 12. I have been told they would get it fixed since August 2016. A desk audit was performed and the conclusion was that because I was not a black belt I didn't qualify as a 12. However the coworker has a lower level belt than I do." Among the relief request for her complaint, Complainant requested a grade increase back to July 10, 2016, and back pay to that date.

After receiving her formal complaint, the EEO Counselor assigned to her complaint (EEO Counselor 2) contacted Complainant regarding the timeliness of her complaint. In a response dated December 15, 2017, Complainant indicated that she was withdrawing her claim regarding the assignment of duties and the claim regarding promotion/nonselection. Regarding the timeliness of her Equal Pay Act violation, Complainant stated that since the time Comparative 1 was hired on July 10, 2016, and forward, she has been doing work at a higher level, has the same assignments as Comparative 1, and had a higher belt then he does; however, she was paid less than him. Complainant stated she was giving the Agency time to resolve this issue. Regarding the timeliness of her claim about training, Complainant stated that she did not realize this was a separate issue from the Equal Pay Act violation. She explained that she was again giving the Agency time to correct. Regarding the timeliness of her position description claim, Complainant stated, "Again this is part of the equal pay act violation."

The Agency issued a final decision on Complainant's complaint on February 5, 2018. The Agency defined Complainant's complaint as alleging that the Agency subjected her to discrimination on the bases of sex (female) and age when: (1) beginning in April 2016, the Practice Improvement Manager failed to provide Complainant a position description when Complainant was reassigned to the Process Improvement Office; (2) beginning on August 15, 2016, the Practice Improvement Manager and the Director failed to compensate and/or promote Complainant to the GS-12 level, as her similarly situated male coworker (Comparative 1); and (3) on January 16, 2017, the Practice Improvement Manager denied Complainant's request to attend "Lean Six Black Belt Training."²

The Agency dismissed the complaint pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely EEO Counselor contact.

² The Agency noted that during the initial counseling process, Complainant raised two additional claims regarding assignment of duties and promotion/nonselection, which she subsequently withdrew.

The Agency determined the most recent alleged discrimination occurred on January 16, 2017, when the Practice Improvement Manager denied Complainant's request for training. The Agency noted Complainant contacted an EEO Counselor approximately seven months after that date. The Agency noted Complainant had filed three previous EEO complaints and thus had actual knowledge of the time requirement for timely initiating EEO Counselor contact.

The Agency also dismissed claim (2) on alternative grounds. The Agency noted that Complainant filed a prior informal EEO complaint on April 27, 2017, raising a claim that on May 5, 2017, the Director violated the Equal Pay Act when Complainant was denied the same compensation and/or a promotion to the GS-12 level, as a similarly situated male coworker, Comparative 1. The Agency noted that in an email to the EEO Counselor on May 15, 2017, Complainant requested to withdraw the stated "complaint in full." The Agency determined that based upon Complainant's request to withdraw the informal complaint in full, on May 15, 2017, the office closed the informal complaint. The Agency found the claim raised in Complainant's complaint was the same claim raised in her prior informal complaint, under Case No. 2003-0702-2017102942. The Agency noted that a complainant who receives counseling on an allegation, but does not go forward with a formal complaint, is deemed to have abandoned the claim and consequently, cannot raise it in another complaint. Thus, the Agency dismissed claim (2).

Complainant appealed the Agency's decision to the Commission. On appeal, Complainant noted that her prior informal complaint was dismissed based on guidance from EEO Counselor 1 who was assigned to the case. Complainant stated that during counseling, the Director offered to have a desk audit performed and he was confident that this would rectify the situation. Complainant noted that EEO Counselor 1 advised that she could refile the claim if actions were not taken. Complainant explained the desk audit determined she did not qualify for a GS-12 position. Complainant noted that Comparative 1 had been in a GS-12 position since July 10, 2016. She noted that they were both employed on the continuous process improvement office; however, Comparative 1 was a GS-12 while she was a GS-11. Complainant stated their jobs were identical and their duties were the same, while she had greater responsibility than Comparative 1 due to her higher-level Lean Six Sigma belt level.

In our previous decision, the Commission affirmed the Agency's dismissal of Complainant's complaint for untimely EEO Counselor contact. The Commission noted the last alleged discriminatory event occurred on January 17, 2017, but Complainant did not initiate contact with an EEO Counselor until August 16, 2017, which is beyond the 45-day limitation period. The decision found Complainant did not present persuasive arguments or evidence warranting an extension of the time limit for initiating EEO Counselor contact.

Thereafter, Complainant filed the instant request for reconsideration. Complainant contends that the discrimination she has suffered has been ongoing since July 2016, and will continue with every paycheck she receives. Complainant notes that the requirements for her position and the position held by Comparative 1 are identical and that she is held to higher expectations and repeatedly performs work at a higher level than Comparative 1.

Complainant notes that she, Coworker A (female)³, and Comparative 1 perform the same duties; however, Comparative 1 is paid at a substantially higher rate than they are paid. Complainant notes that she continually advised management about the equal pay violation. Complainant acknowledges that she filed an informal EEO complaint regarding the equal pay violation and was assigned EEO Counselor 1. Complainant notes that the Director offered to perform a desk audit of her position and EEO Counselor 1 told her she thought he was sincere. Complainant states that EEO Counselor 1 advised she could reopen the case if the matter did not get resolved. Complainant notes the desk audit did not come back in her favor and she then refiled her EEO claim. She notes thereafter EEO Counselor 2 was assigned to her complaint. Complainant reiterates that her complaint involves ongoing discrimination and occurs every pay day. She states EEO Counselor 2 fragmented her timeline of events and tried to make them separate issues.

In response to Complainant's request for reconsideration, the Agency argues the Commission properly affirmed its dismissal for untimely EEO Counselor contact. The Agency states that granting Complainant's request would place an undue burden on the Agency, regarding investigating her claims from April 2016, August 2016, and January 2017. The Agency argues that Complainant's complaint does not meet the standards of timeliness to be considered. The Agency notes, however, "considering the seriousness and duration of the allegations within [Complainant's] complaint, the Agency does encourage [Complainant] to file a timely formal complaint with an EEO Counselor if [she] believes herself to be currently subject to illegal discrimination or for any instance of illegal discrimination of which she is aware, having occur[ed] within the preceding 45 days."

ANALYSIS

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 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 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 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.

Upon review, we find Complainant failed to show that our prior decision affirming the dismissal of claims (1) and (3) for untimely EEO Counselor contact was clearly erroneous. However, regarding claim (2), we find that Complainant's EEO Counselor contact was timely under the Lilly

³ We take judicial notice that Coworker A has also filed an EEO complaint under Case No. 200I-0702-2017105372 alleging, among other claims, that she was subjected to discrimination based on race and sex when since March 2016 and continuing she was paid at a lower rate than Comparative 1, Program Analyst, GS-12 and since March 2016 and continuing she has been performing the standards of a Program Analyst, GS-12. The Agency accepted Coworker A's claim and the case is currently pending a hearing before an EEOC Administrative Judge.

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 in claim (2), Complainant alleged that she continued to be affected by the application of the discriminatory compensation decision when since July 10, 2016, Complainant was paid at a lower rate than a similarly situated younger male employee. Therefore, she asserts that she was still receiving allegedly discriminatory paychecks during that period up to and including the 45-day period prior to her EEO Counselor contact on August 16, 2017. Moreover, we note that to the extent claims (1) and (3) constitute background information surrounding Complainant’s compensation claim they should be considered accordingly. Thus, we find that Complainant’s counselor contact concerning the compensation claim was timely made and the Agency’s dismissal of it is reversed.

Moreover, we reverse the Agency’s dismissal of claim (2) as having stated the same claim that was raised in a prior EEO complaint. The record reveals that Complainant filed a prior informal EEO complaint on April 27, 2017, raising a claim that on May 5, 2017, the Director violated the Equal Pay Act when Complainant was denied the same compensation and/or a promotion to the GS-12 level, as a similarly situated male coworker, Comparative 1. The Agency explained that based upon Complainant’s request to withdraw the informal complaint in full, on May 15, 2017, the office closed the informal complaint. The Agency found the claim raised in Complainant’s present complaint was the same claim raised in her prior informal complaint. The Agency noted that a complainant who receives counseling on an allegation, but does not go forward with a formal complaint, is deemed to have abandoned the claim and consequently, cannot raise it in another complaint. Thus, the Agency dismissed claim (2).

In past cases, the Commission has found that where a complainant knowingly and voluntarily withdraws her complaint, the Commission considers the matter to have been abandoned. See Complainant v. Dep’t of Commerce, EEOC Appeal No. 0120092893 (Sep. 28, 2011) (citing Complainant v. Dep’t of Transp., EEOC Request No. 05930805 (Feb. 25, 1994)). Further, Complainant may not request reinstatement of an informal complaint.

See id. (citing Allen v. Dep't of Defense, EEOC Request No. 05940168 (May 25, 1995)). Once a complainant has withdrawn an informal complaint, absent a showing of coercion, a complainant may not reactivate the EEO process by filing a complaint on the same issue. Id.

On appeal, Complainant stated that Case No. 2003-0702-201402381 was withdrawn based on guidance from EEO Counselor 1 who was assigned to the case. Specifically, Complainant noted that EEO Counselor 1 advised that she could refile the claim if actions were not taken in accordance with the desk audit of her position. We note the record contains a September 13, 2017 email from Complainant to EEO Counselor 1 in which Complainant noted "When I chose to withdraw the complaint it was because [the Director] said that he was working on it. I asked you specifically if I could refile the claim if they didn't get it fixed and you informed me I could." Complainant stated she was now being told the complaint would be dismissed and requested clarification from EEO Counselor 1. In response, by email dated September 13, 2017, EEO Counselor 1 told Complainant to give her a call. We note in response to Complainant's appeal, the Agency did not refute Complainant's contention that EEO Counselor 1 misled her into withdrawing her informal complaint. Furthermore, there is no statement in the record from EEO Counselor 1 refuting Complainant's assertions that she was misled. Thus, we find Complainant did not knowingly and voluntarily withdraw her prior informal complaint. As a result, we determine the Agency improperly dismissed claim (2) on the grounds it stated the same claim that was raised in a prior EEO complaint.

CONCLUSION

After reviewing the previous decision and the entire record, the Commission finds the decision in EEOC Appeal No. 0120181261 is MODIFIED. The Agency's final decision dismissing claims (1) and (3) is AFFIRMED and the decision dismissing claim (2) is REVERSED. There is no further right of administrative appeal on the decision of the Commission on this request.

ORDER (E0618)

The Agency is ordered to process the remanded claims 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 final agency decision, 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.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (Q0610)

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 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:

A handwritten signature in blue ink that reads "Carlton M. Hadden". The signature is written in a cursive style and is positioned above a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

December 20, 2018

Date