



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

[REDACTED]

Isidro A.,¹
Complainant,

v.

Kirstjen M. Nielsen,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 0720170026

Hearing No. 570-2013-00564X

Agency No. HSTSA228212012

DECISION

At the time the Agency issued its February 28, 2017 final order, it filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. §1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of 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. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. Specifically, the Agency argues the AJ improperly ordered attorney's fees and erroneously ordered the Agency to calculate back pay beginning two years prior to the date Complainant sought EEO Counseling, rather than two years prior to the date on which Complainant filed his formal complaint. For the following reasons, the Commission REVERSES the Agency's final order.

BACKGROUND

The Transportation Security Administration (TSA) was created pursuant to the Aviation and Transportation Security Act (ATSA) following the terrorist attacks of September 11, 2011, to strengthen the nation's transportation systems. Pursuant to ATSA, the Agency adopted a pay

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.

band system of the Federal Aviation Administration which is outside of the Federal Government's General Schedule. The pay band system uses letters instead of numbers, and, is a pay for performance system. The TSA system does not have within-grade increases (WIGIs) but instead provides percentage increases known as In-Position-Increases based on an employee's performance, or promotions to new pay bands based on the job series pay band range.

Immediately prior to his retirement from the Federal Government effective July 29, 2016, Complainant served as an H-Band Program Analyst in the Crew Vetting Program Liaison Group (CVP-LG), Secure Flight and Crew Vetting Branch, Program Management. H-Band Program Analysts in CVP-LG work with air carriers across the country and around the world to ensure that their required master crew lists and crew information are current and complete.

Complainant alleged that TSA has paid him less than at least one female colleague who performed substantially the same work at equal skill level, effort, responsibility, and working conditions since he assumed the H-Band Program Analyst role in the crew-vetting area in February 2008.

After his promotion to the H-Band Program Analyst position in February 2008, Complainant worked with a female H-Band Program Analyst, Comparative 1, who performed substantially the same work at equal skill level, responsibility, effort, and working conditions. The Agency paid Comparative 1 more than Complainant for performing the same duties, but the Agency argued this was due to career track and salary differences set forth in the salary analysis spreadsheet in the Joint Stipulated Hearing Exhibit 1. Complainant no longer performed the same duties as Comparative 1 as of April 2014, when Comparative 1 was detailed to the Secure Flight team.

On November 11, 2011, TSA promoted female employee Comparative 2 to the same H-Band Program Analyst position as Complainant and Comparative 1. After her promotion, Comparative 2 performed the same work at equal skill, level, responsibility, effort, and working conditions as Complainant. The Agency paid female Comparative 2 more than Complainant for performing the same duties, but the Agency argued this was due to career track and salary differences set forth in the salary analysis spreadsheet contained in the Joint Stipulated Hearing Exhibit 1.

On July 18, 2012, Complainant initiated EEO counseling. On October 26, 2012, Complainant filed an EEO complaint alleging that he was discriminated against in his compensation on the basis of sex in violation of Title VII of the Civil Rights Act and the Equal Pay Act.

The parties submitted a Joint Stipulated Statement of Facts. The stipulated facts regarding the compensation of Complainant and the named comparatives are set forth herein.

Joint Stipulated Facts

A. Complainant's Compensation

In March 2002, Complainant began working with TSA as a Supervisory Transportation Security Screener (STSS), G-Band, at BWI Thurgood Marshall International Airport. Complainant's starting basic salary was \$38,152.

On October 20, 2002, Complainant was temporarily promoted to the position of Transportation Screening Manager (TSM), H-Band.² His basic salary was increased to \$44,000.

On April 4, 2004, Complainant was promoted to TSM, I-Band. His basic salary was increased to \$54,100.

On May 15, 2005, Complainant was demoted to Supervisory Transportation Security Screener, G-Band, due to misconduct.³ As a result of the demotion, Complainant's basic salary was decreased to \$43,874, a 21% cut in pay.

On February 17, 2008, Complainant was promoted to Program Analyst, H-Band. Complainant's basic salary was increased to \$48,097.

On October 10, 2010, Complainant received an in-position-increase of 5% while serving in his position of H-Band Program Analyst. His salary increased to \$52,746.

On October 7, 2012, Complainant received an additional 3% in-position-increase, while serving in his current position of H-Band Program Analyst. Complainant's basic salary was increased to \$54,328.

B. Comparative 1's Compensation

Comparative 1 began her employment with TSA on May 19, 2002, as an STSS, G-Band, in the same position and duty station as Complainant. Comparative 1's starting basic salary was \$36,400, which was \$1,752 less than Complainant's starting salary in the position of STSS, G-Band.

On November 2, 2003, Comparative 1 was promoted to TSM, H-Band and her basic salary increased to \$44,000. Comparative 1's basic salary upon her promotion to TSM, H-Band was identical to Complainant's basic salary at the time of his promotion to TSM, H-Band.

² This position is also referred to as Transportation Security Manager.

³ This position is also referred to as Transportation Security Specialist.

On November 1, 2004, Comparative 1 was promoted to TSM, I-Band and her basic salary was increased to \$54,100. Comparative 1's salary upon her promotion to TSM, I-Band, was identical to Complainant's basic salary at the time of his promotion to a TSM, I-Band in April 2004.

On January 9, 2005, Comparative 1 was competitively reassigned to TSS, I-Band, and her basic salary was increased to \$59,625. This was the same year in which Complainant was demoted for misconduct to TSS, G-Band. Thus, Comparative 1 and Complainant were no longer working in the same pay band.

On March 18, 2007, Comparative 1 competed for and accepted a position in a lower band as a Program Analyst, G-Band, in the former Office of Transportation Threat Assessment and Credentialing (TTAC) Vetting Operations in Fort Meade, Maryland, and her basic salary was reduced to \$56,400.

On December 23, 2007, Comparative 1 was promoted to Program Analyst, H-Band and her salary was increased 3% to \$58,092. At the time, Complainant was a Supervisory Transportation Security Officer (STSO), G-Band. Comparative 1 and Complainant were not serving in the same position or the same pay band at this time.

On October 10, 2010, Comparative 1 received an in-position-increase of 4% bringing her basic salary to \$64,678.

On October 7, 2012, Comparative 1 received an in-position-increase of 2%, while serving in her current position of H-Band Program Analyst. Comparative 1's basic salary was increased to \$65,972.

Effective April 23, 2014, Comparative 1 was detailed to an I-Band Airline Implementation Manager position. Complainant remained in his H-Band Program Analyst position at this time.

As of April 23, 2014, Comparative 1 and Complainant were no longer performing the same duties.

Between April 2014, and August 2014, Comparative 1 was assigned to the Secure Flight team reporting to the Acting Section Chief for Industry Performance and Analysis (IPA). Complainant, Comparative 2, and Comparative 3 remained on the Crew Vetting Program Liaison Team.

Effective August 28, 2014, the Acting Section Chief made changes to the roles and responsibilities of the Airline Implementation Managers (including Comparative 1) assigned to the Secure Flight group. Comparative 1 was assigned Aircraft Operator (AO) Liaison and Problem Resolution Specialist duties. Complainant remained in his position as H-Band Program Analyst on the CVP Liaison team.

Comparative 1's OPF indicates that she was never demoted for misconduct during her tenure at TSA.

C. Comparative 2's Compensation

Comparative 2 began her employment with TSA on February 9, 2003, as a Program Assistant, E-Band, in the Office of Communications and Public Information at TSA Headquarters in Arlington, Virginia. Her starting basic salary was \$31,941.

On June 13, 2004, Comparative 2 was promoted to Program Assistant, F-Band, in the Office of Administrator, Chief of Staff, TSA Headquarters, and her basic salary was increased by 15% to \$40,562.

On September 5, 2004, Comparative 2 was reassigned and received a 5% in-position-increase, bringing her basic salary to \$42,590.

On February 6, 2005, Comparative 2 was promoted to Executive Assistant, G-Band. Her basic salary was increased by 20% to \$56,040.

On November 13, 2005, Comparative 2 was reassigned as a Secure Flight Administrative Specialist, G-Band, but her salary remained the same at \$56,040.

On November 20, 2011, Comparative 2 was promoted to Program Analyst, H-Band, and her basic salary was increased 5% to \$63,397.

Comparative 2's Official Personnel Folder (OPF) indicates that she was never demoted for misconduct during her tenure with TSA.

D. Comparative 3's Compensation

Comparative 3 began her employment with TSA on August 25, 2002, as a Screener, D-Band, at Norfolk International Airport. Her starting basic salary was \$23,600.

On June 12, 2005, Comparative 3 was promoted to Program Analyst, G-Band, in the Office of National Risk Assessment in Fort Meade, Maryland. Comparative 3's basic salary increased to \$36,400 (minimum of the new pay band).

On December 23, 2007, Comparative 3 was promoted to Program Analyst, H-Band, in TTAC, and her basic salary was increased by 15% to \$44,844 (minimum of new pay band).

On October 10, 2010, Comparative 3 received an in-position-increase of 5% and her salary was increased to \$50,407.

On August 14, 2011, Comparative 3 was promoted to Lead Program Analyst, I-Band, and her basic salary was increased to \$58,495, the minimum of the new pay band. Complainant remained in his position as Program Analyst, H-Band, at that time. Thus, Comparative 3 and Complainant were no longer serving in the same position performing equal work, requiring equal skill, effort, responsibility, under similar working conditions.

For the period from December 2007 until August 2011, when both Comparative 3 and Complainant served as H-Band Program Analysts in the same division, Complainant received greater compensation than Comparative 3.

Comparative 3's OPF indicates that she was never demoted for misconduct during her tenure as TSA.

Other facts as found by the AJ

On May 13, 2005, the Agency demoted Complainant from the position of Screening Manager in Pay Band I with a basic salary of \$55,724 to the position of Supervisory Transportation Security Screener, Pay Band G with a basic salary of \$43,874. This amounted to a 21% reduction in pay. Complainant was found to have failed to timely react to and report an improper decision of another employee that resulted in a security breach. Complainant had previously been suspended for five days for inattention to duty and received a letter of warning for approving a subordinates' improper Time and Labor Reports. Complainant had been rated unsatisfactory in several critical areas in the six months before the demotion.

The AJ noted that prior to his demotion, Complainant's place in Pay Band I was just 6% above the bottom of the Pay Band, \$54,100. The salary for the I-Band ranged from \$54,100 to \$83,500. The Agency demoted Complainant two pay bands to Pay Band G where the salary ranged from \$36,000 to \$56,400. The reduction in salary due to demotion placed Complainant 37% above the bottom of the G-Band. The policy for involuntary demotions for performance and conduct that was in place at the time of Complainant's demotion stated that:

Generally, pay will be reduced to a rate no higher than the comparable point in the lower pay band. (For example, if an employee was paid 30 percent into the current pay band, pay would be reduced to a level no higher than 30 percent into the lower pay band). However, when the pay reduction would be in excess of 10%, the manager may provide written justification to set pay higher than for the relative position in the lower pay band, but no less than a 10% reduction.

The Agency had the discretion to reduce Complainant's salary to just 6% above the bottom of Pay Band G. However, it set his salary at 37% within Pay Band G. The language on reducing salary higher but no less than 10% is within the discretion of the Agency official imposing the demotion. The Agency's actions favored Complainant by reducing his salary to 37% into Pay Band G when the Agency could have reduced his salary to just 6% in the Pay Band.

Comparative 1's March 2007 demotion was a voluntary demotion as she competed for and was selected for a lower graded position. The Agency policy for a voluntary demotion was that:

Pay may be set within the new pay band up to the employee's highest previous rate. The new pay rate may not exceed the pay band maximum.

Comparative 1's salary was set at the top of the G Pay Band at \$56,400.

The AJ noted that Comparative 2's 15% and 20% pay increases were made on the basis of merit and in accordance with pay setting policy. The 15% increase was a promotion to a new position and was based on a significant change in responsibility and complexity of the work and in order to make her pay comparable to her new peers. Similarly, the 20% increase was also a promotion and based on similar criteria. The policy in effect at the time for setting pay for promotions provided that the criteria for the amount of promotion increases in pay are based on: (1) the employee's past performance versus job expectations and in comparison to the new peer group; (2) the employee's current pay relative to the new pay band in comparison to pay for other employees in the new peer group; (3) the importance of the job's skills and responsibilities to the organization's objectives; (4) the employee's skill level relative to that desired for the new position and in comparison to the skill of other employees performing the same or highly similar work; and (5) the degree of change in job complexity, duties and responsibilities and potential impact on the achievement of objectives. The AJ noted the approving officials followed this criteria in terms of rating Comparative 2 high on the degree of change in role, criticality of skills, level of impact and responsibility, performance versus job expectation, and performance relative to the new peer group. The AJ recognized that the Pay Increase Policy provided for increases on promotion of up to 15% and even then individual organizations were given "latitude...to supplement the guidance in this document to ensure that the program affords appointing authorities flexibility to manage their own promotion programs." The AJ found it was well within the Agency's authority to provide Comparative 2 15% and 20% pay raises upon promotion. The AJ found no evidence that the individuals who approved Comparative 2's 15% and 20% pay increases were ever in Complainant's chain-of-command.

The AJ noted that during the period Complainant performed substantially the same work at equal skill level, responsibility, effort, and working conditions in this position of Program Analyst as Comparative 1 and Comparative 2, their supervisors could have but did not perform a pay assessment for any of them to raise their pay more than 5% at a time.

The AJ stated that although Complainant's demotion resulted in a 21% reduction in salary, as a Band H Program Analyst performing the same work as Comparative 1 and Comparative 2, his salary was never at any time more than 21% smaller than their salaries. In February 2008, when Complainant was first promoted to a Program Analyst, his basic salary was 81% of Comparative 1's basic salary (\$48,097 for Complainant; \$59,544 for Comparative 1). That percentage remained until October 2010, when Complainant's percentage of basic salary as compared to Comparative 1 increased to 81.6% (\$52,746 for Complainant; \$64,678 for Comparative 1). Then

in October 2012, Complainant's percentage of basic salary as compared to Comparative 1 again increased slightly to 82.4% of her salary (\$54,328 for Complainant; \$65,972 for Comparative 1).

The AJ noted that upon Comparative 2 becoming a Band-H Program Analyst like Complainant in November 2011, Complainant's basic salary was 84% of Comparative 2's salary (\$52,746 for Complainant; \$63,397 for Comparative 2). Then, in October 2012, after a salary increase, Complainant's salary went up to 86% of Comparative 2's salary (\$54,328 for Complainant; \$63,397 for Comparative 2). The AJ noted Complainant's salary was always significantly more than 21% less than Comparative 2's salary (the 21% being the pay reduction from the demotion).

AJ's Decision on Liability and Damages

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 AJ. Complainant requested a hearing and the AJ held a hearing on July 28, 2015, and issued a decision finding discrimination on September 13, 2016. The Agency subsequently issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected him to discrimination as alleged.

In his decision, the AJ determined Complainant established a prima facie case under Title VII. Specifically, the AJ found that Complainant had been performing equal work to that of Comparative 1 and Comparative 2 and was paid less than them.

The AJ noted the Agency presented Complainant's demotion as the legitimate, nondiscriminatory reason for the pay differential.

The AJ found Complainant offered no evidence of pretext regarding his involuntary demotion. He failed to offer any evidence that the demotion was improper and failed to offer any comparative evidence that females were treated more favorably with regard to involuntary demotions and how pay increases were awarded. The AJ noted that although Comparative 1 was demoted, her circumstances were not the same as Complainant since she applied and was selected for a lower grade. Comparative 1's pay could be and was set at the top of the pay band for her new job. In Complainant's case, the salary could have been set at the sixth percentile of the same pay band, Pay Band H. Instead, Complainant's decision maker reduced this pay to 37% into Pay Band H. The AJ noted the Agency had discretion to make a smaller reduction in salary, up to just a 10% reduction, but Complainant failed to show that this discretion was exercised in a discriminatory way, such as showing that the same decision maker reduced pay less for females he also demoted under similar circumstances. The AJ stated Complainant also failed to present evidence that his demotion was treated in an intentionally disparate manner when considering future pay increases and promotions that Complainant received. The AJ found there was no proof the Agency took the demotion into account in an intentionally discriminatory manner in keeping Complainant's pay significantly below that of Comparative 1 and Comparative 2. The AJ also noted that Complainant did not identify anyone involuntarily

demoted who his supervisors treated better regarding pay increases under similar circumstances. Thus, the AJ concluded Complainant did not prove intentional discrimination.

The AJ determined Complainant established a prima facie case under the Equal Pay Act. The AJ noted the Agency admitted that during the time Complainant was a Band-H Program Analyst, there were times when he was performing work which was equal in terms of skill, effort, and responsibility to that of Comparatives 1, 2, and 3. Complainant also showed that he was paid significantly less than Comparative 1 and 2 but was paid more than Comparative 3. Thus, Complainant established a prima facie case of sex discrimination under the EPA with respect to Comparative 1 and Comparative 2. The AJ found Complainant and Comparative 1 were performing equal work requiring equal skill, effort, and responsibility from February 2008 to April 2014. Complainant and Comparative 2 were performing such equal work from November 2011 to the present.

The AJ noted the affirmative defense the Agency advanced was that the pay differential was attributable solely to factors other than sex. The AJ noted that the Agency claimed that Complainant's demotion completely accounted for the pay differentials. The AJ noted the demotion was a 21% reduction in pay for Complainant and moved him two pay bands lower than his previous position to the 37th percentile of the lower pay band. The AJ found the Agency showed that the demotion was implemented fairly and within the policy in effect at the time.

The AJ found that the pay differential was not fully explained by the demotion. The AJ noted that in one sense the Agency had shown that the pay differential was attributable to the demotion in that Complainant's pay as compared to Comparative 1 and Comparative 2 has always been higher than the 21% gap the demotion caused. Further, the AJ noted Complainant made progress through merit increases to narrow the gap several percentage points. However, the AJ noted the Agency failed to offer any evidence it treated female employees who were involuntarily demoted in a manner consistent with how they treated males who were involuntarily demoted. Specifically, the AJ stated, "The Agency failed to offer any comparative evidence that it continued to impose the pay gap caused by an involuntary demotion when considering the size of pay increases. No evidence was offered to show that the Agency did not in whole or in part then mitigate that gap." The AJ stated such evidence could have been provided concerning the Agency's treatment of other employees regardless of whether the managers involved were decision makers in this case since there is no need to establish intentional discrimination. The AJ noted that "[n]either [Comparative 1] nor [Comparative 2] are adequate comparators in this regard because neither of them were involuntarily demoted." The AJ noted that "The Agency did not present evidence that female employees who were involuntarily demoted were treated the same way as Complainant with regard to pay increases after the demotion. The Agency failed to offer any evidence of consistently applied policies after a demotion as to whether it considered mitigating the effects of demotions when considering pay increase within positions and for promotions." Thus, the AJ concluded the Agency failed to establish that the pay differential attributed to Complainant's demotion actually explained the pay disparity. The AJ noted that a violation of the EPA is also a violation of Title VII.

As relief for the finding of discrimination, the AJ ordered the Agency to pay Complainant at Comparative 2's rate of pay from entry of judgment into the future as long as they are performing equal work unless a factor other than sex intervenes. Complainant was awarded back pay with interest for two years prior to Complainant first seeking EEO counseling on July 18, 2012. Complainant was awarded an equal amount in liquidated damages. The AJ determined Complainant did not show that the Agency acted with knowledge of or reckless disregard that it was violating the EPA. Thus, the AJ did not extend the statute of limitations for payment of back pay to three years before seeking EEO counseling due to willfulness. The AJ noted Complainant was not seeking compensatory damages in this case.

AJ's Decision on Attorney's Fees and Costs

The AJ noted that in Complainant's Opposition to the Agency's Motion for Summary Judgment and in his Reply to the Agency's Opposition to Complainant's Motion for Summary Judgment, Complainant stated he was not pursuing his Title VII claims. The AJ noted at the hearing, the Agency moved to dismiss the Title VII claims. In response, Complainant's attorney stated that the supposed abandonment of his Title VII claims was an inadvertent misstatement of his client's position. Instead, Complainant meant to state that he was not seeking to prove intentional discrimination under Title VII and was not seeking compensatory damages. The AJ stated that since pursuant to 29 C.F.R. § 1620.27, a violation of the EPA was also automatically a violation of Title VII, the AJ ruled the matter was moot. Nonetheless, the AJ decided to accept Complainant's explanation of his intent, found that no prejudice to the Agency has occurred due to the similarity of proof of liability, and further, denied the Agency's motion to dismiss the Title VII claim. The AJ noted the importance of this ruling since sovereign immunity regarding the payment of attorney's fees has not been waived with respect to the EPA in federal sector administrative cases.

The AJ determined Complainant's attorney was entitled to attorney's fees for 143 hours of time at the rate of \$568 per hour totaling \$81,224. The AJ declined to grant the Agency's argument that there should be a substantial reduction in fees for unsuccessful claims. The AJ noted the Agency argued that fees should be reduced because Complainant was not successful in extending the statute of limitations from two years to three by proving willfulness. The AJ found in this case that the evidence used to prove the EPA violation and right to liquidated damages was the same. The AJ noted there was a common core of facts and similar theories of recovery. The AJ recognized the standard for extending the statute of limitations was different than proving liability and entitlement to liquidated damages. However, the AJ noted willfulness was just one element in proving a violation of the EPA and merely related to increasing the statute of limitations by one year. The AJ also found that since Complainant's success under Title VII was substantially predicated on his success under the Equal Pay Act, it was not wholly distinct from that claim. The AJ found that a different standard does not make proving willfulness a distinct claim. Rather, the AJ found Complainant was highly successful on almost all aspects of his case. The AJ determined there was no basis for any across-the-board reduction. The AJ awarded Complainant \$81,224 in attorney's fees and \$16.75 in costs.

Arguments on Appeal

On appeal, the Agency argues that the AJ erroneously assumed that Complainant's 2005 demotion was the sole reason for the salary differences. The Agency states it has consistently maintained that Complainant's pay was different than the Comparatives due to numerous career track changes and salary changes, as reflected in Stipulated Hearing Exhibit 1. The Agency notes that while it acknowledged that the existing salary difference is based significantly on Complainant's 2005 demotion, at no time during the hearing did the Agency take the position that the salary differences were solely the result of Complainant's demotion.

The Agency also argues that the AJ improperly penalized it for failing to offer evidence that it processed involuntary demotions consistently, as compared to female employees, regardless of whether such females were named comparatives. The Agency claims that nothing in the Equal Pay Act requires that all employees be paid the same, regardless of their disciplinary history. The Agency claims there is substantial evidence in the record that the Agency continued to apply existing pay setting policy to Comparative 1, who sustained a demotion and reduction in salary during the period in question.

The Agency also argues that the AJ erred by awarding back pay beginning two years prior to the date Complainant sought EEO counseling (July 18, 2012), rather than two years prior to the date on which Complainant filed his formal EEO complaint (October 26, 2012).

The Agency states the AJ's decision also failed to factor in Complainant's retirement on July 29, 2016, after the hearing was held. The Agency notes that in his Liability Decision, the AJ ordered the Agency to pay Complainant at Comparative 2's rate of pay from entry of judgment (December 2016) into the future, as long as they are performing equal work, unless a factor other than sex intervenes. The Agency states that as Complainant had already retired by the time the AJ entered judgment, any back pay award should be limited to October 26, 2010 – July 29, 2016. The Agency notes Complainant never notified the AJ or Agency Counsel that he retired following the hearing. The Agency states that when the AJ issued his Liability Decision, he likely was not aware of Complainant's retirement.

Finally, the Agency argues that the AJ misapplied the law awarding attorney's fees. The Agency notes that a complainant who prevails on a claim under the EPA is not entitled to attorney's fees at the administrative level as the federal government has not waived its sovereign immunity with respect to attorney's fees in the federal sector process for EPA cases. The Agency argues that in the present case, the record demonstrates that all of the work performed by Complainant's counsel following the filing of the formal complaint was dedicated exclusively to Complainant's EPA claim. The Agency claims Complainant expressly withdrew his Title VII disparate treatment claim during the hearing process. The Agency argues that given the AJ's finding that Complainant failed to establish intentional discrimination, Complainant is not entitled to attorney's fees in this proceeding. The Agency argues that the AJ incorrectly determined that Complainant is entitled to attorney's fees pursuant to 29 C.F.R. § 1620.27 on the basis that a violation of the EPA is automatically deemed a violation of Title VII.

Complainant filed a brief in opposition to the Agency's appeal. Complainant states other than to prove that the Agency paid Comparative 1 more than Complainant, an issue which was not in dispute, Comparative 1's pay progression did little to explain the reasons for these pay differences. Complainant also claims the AJ did not err in finding that the Agency did not produce evidence that females who were demoted like Complainant were subject to the same pay disparities later in their careers after their promotions.

Complainant claims the AJ correctly assessed back pay from July 18, 2010, when he first initiated the EEO complaint process. Complainant argues that Section 255(a) of the Fair Labor Standards Act, containing the limitations period applicable to the Equal Pay Act, provides that "every such action shall be forever barred unless commenced within two years after the cause of action accrued." Complainant notes that Title VII 42 U.S.C. § 2000e-5e(2)(b) and (g)(1) provides that back pay liability shall not accrue from a date more than two years prior to the filing of a charge. Complainant states the only way he could "commence" his action or "file his charge" was to initiate pre-complaint processing. Complainant argues that filing a charge could mean commencement of the complaint process, which under EEOC rules is initiation of the pre-complaint process.

Finally, Complainant argues that the AJ correctly awarded him attorney's fees. Complainant notes that EEOC's regulations provide that a violation of the EPA is also a violation of Title VII's prohibition against discrimination in pay. 29 U.S.C. § 1620.27(a). Complainant claims that in as much as the AJ found a violation of Title VII based on the Agency's unequal pay, as well as an EPA violation, he was a prevailing party on both claims. Complainant states that given the nature of his claims, he could not prevail on the Title VII claim without prevailing on his EPA claim. He argues the time spent on the latter was necessary to prevail on the former.

Complainant also filed an appeal from the Agency's final order. In his appeal to the Commission, Complainant states he only appeals from the AJ's finding that the Agency did not disparately treat the two female comparatives, Comparative 1 and Comparative 2, who performed the same work as him but who received higher pay.

The Agency filed a brief in opposition to Complainant's appeal. The Agency argues that the Commission should find that Complainant withdrew his Title VII disparate treatment claim prior to and at the outset of the hearing. Alternatively, the Agency argues the Commission should conclude that Complainant failed to establish intentional discrimination.

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 the Agency's contention that Complainant withdrew his Title VII claim. We find the Agency did not show that the AJ abused his discretion by denying the Agency's motion to dismiss Complainant's Title VII claim.

Title VII

Generally, claims of disparate treatment are examined under the tripartite analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found, for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978).

Once a complainant has established a prima facie case, the burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Com. Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983).

In the present case, substantial evidence supports the AJ's determination that the Agency articulated legitimate, nondiscriminatory reasons for its actions, Complainant's demotion. We find Complainant failed to establish by a preponderance of the evidence that the Agency's articulated reason was a pretext for discrimination. Moreover, Complainant did not identify anyone demoted by his supervisors who was treated better regarding pay increases under similar circumstances.

Equal Pay Act

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).

All forms of pay are covered by the EPA, including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits. See EEOC Compliance Manual, Number 915.003, Section 10: Compensation Discrimination (December 5, 2000); 29 C.F.R. § 1620.10.

Once a complainant has met the burden of establishing a prima facie case, 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. We note that the EPA is limited to certain sex-based differentials in wages. The EPA does not prohibit discrimination in other aspects of employment, even those that have compensation-related consequences, such as hiring, firing, promotion, transfer, or other issues. Wiley v. Department of the Treasury, EEOC Appeal No. 01972118 (June 27, 2001) (citing Schnellbaecher v. Basking Clothing Co., 887 F.2d 124, 130 (7th Cir. 1989) (a claim of discriminatory promotions is beyond the scope of the EPA but actionable under Title VII)).

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, at 10-IV (December 5, 2000). The Agency must also show that the factor is related to job requirements and used reasonably in light of the employer's stated business purpose as well as its other practices. Id.

In the present case, the Agency has admitted that during the time Complainant was a Band H Program Analyst, there were times when he received less pay than Comparative 1 and Comparative 2 for equal work, requiring equal skill, effort, and responsibility, under similar working conditions within the same establishment. The record supports the AJ's finding that Complainant and Comparative 1 were performing equal work from February 2008 to April 2014, and that Complainant and Comparative 2 were performing equal work from November 2011 to July 29, 2016. Thus, Complainant established a prima facie case of an EPA violation for Comparative 1 and 2.

Upon review, we find substantial evidence supports the AJ's determination that the Agency did not sufficiently establish its affirmative defense that the pay differential between Complainant

and Comparative 1 and Comparative 2 was based solely on a factor other than sex. The Agency had ample notice that it had to prove that all of its rules were consistently applied in order to be successful on its affirmative defense. However, the Agency failed to show that it applied consistent pay practices for females subject to demotion like Complainant.

Relief

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 Chapter 10: Compensation Discrimination, No. 915.003, at 10-VI (Dec. 5, 2000) (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.

At the outset, we note that on appeal the Agency did not challenge the AJ’s determination that it did not act in good faith in the present case and thus, that Complainant was entitled to liquidated damages, equal to double his lost wages under the Equal Pay act. Additionally, we note that Complainant did not challenge the AJ’s determination that the Agency did not commit a willful violation of the EPA. Thus, we find the AJ correctly determined that Complainant is entitled to back pay for two years. However, we note that that calculation of the back pay period begins on October 26, 2012, the date Complainant filed his formal complaint (rather than the date he sought EEO counseling). 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 filed; Terrie M. v. Dep’t Air Force, EEOC Appeal No. 0120152627 (June 16, 2016); Gabrielle G. v. Dep’t of Homeland Security, 0120141757 (May 13, 2016).

The AJ also ordered the Agency pay Complainant at Comparative 2’s rate of pay from entry of judgment (December 2016) into the future, as long as they are performing equal work, unless a factor other than sex intervenes. The record reveals that Complainant retired from the Agency on July 29, 2016, which was after the hearing, but prior to the entry of the AJ’s decision. Thus, we find the Agency is not required to raise Complainant’s salary as Complainant no longer worked for the Agency as of July 29, 2016.⁴

Attorney’s Fees

⁴ The Agency notes that Complainant never notified the AJ or Agency Counsel that he retired following the hearing.

EEOC Regulation 29 C.F.R. § 1614.501 provides for an award of attorney's fees and costs to a successful Title VII litigant in accordance with existing case law and regulatory standards. The starting point for determining the amount of an award of reasonable attorney's fees is the number of hours reasonably expended multiplied by a reasonable hourly rate. See 29 C.F.R. § 1614.501; Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983). Additional consideration, however, may lead to an adjustment of the fee award upward or downward, "including the important factor of the 'results obtained.'" Hensley, 461 U.S. at 434 (citations omitted). In cases involving "a common core of facts" or based on related legal theories, much of an attorney's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Hensley, 461 U.S. at 435. In such cases, the focus should be on the significance of the overall relief obtained in relation to the hours reasonably expended. Id.

Upon review, we reject the Agency's argument that the AJ misapplied the law by awarding attorney's fees. The Agency is correct that a complainant who prevails on a claim under the EPA is not entitled to attorney's fees at the administrative level. However, in the present case, Complainant also filed a Title VII claim which he pursued at the hearing which contained overlapping issues with his successful EPA claim. We agree with the AJ that since pursuant to 29 C.F.R. § 1620.27, a violation of the EPA is also automatically a violation of Title VII, Complainant may recover attorney's fees. Nevertheless, as our review of the record shows that significant periods of effort were expended by Complainant's counsel on more uniquely EPA issues, we exercise our own discretion to apply a 25% across-the-board reduction to the fees awarded by the AJ. See Jacobsen, et al. v. Navy, EEOC Appeal Nos. 0720100046, 07201400047 (September 7, 2012), request for reconsideration denied, EEOC Request Nos. 0520130063 and 0520130075 (May 1, 2014).

CONCLUSION

Accordingly, the Agency's final order finding no discrimination is REVERSED. The matter is REMANDED to the Agency for compliance with the Order herein.

ORDER

To the extent it has not already done so, 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, and other appropriate benefits that Complainant would have been entitled to but for the discrimination. The back pay shall be calculated from October 26, 2010 (which is two years prior to the date on which the complaint was filed) until July 29, 2016 (the date Complainant retired from the Agency). 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.
2. Within 60 days of the date this decision is issued, pay Complainant \$60,918 in attorney's fees and \$16.75 in costs.

3. Within 90 days of the date this decision is issued, the Agency shall provide a minimum of eight hours in-person or interactive training to the Agency officials responsible for the discrimination with regard to the prohibitions against sex discrimination under the Equal Pay Act and Title VII.
4. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against the Agency officials responsible for discriminating against Complainant. 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 evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Ft. Meade, Maryland facility 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 (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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

February 6, 2018

Date