



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

████████████████████  
Winford M,<sup>1</sup>  
Complainant,

v.

Megan J. Brennan,  
Postmaster General,  
United States Postal Service  
(Headquarters),  
Agency.

Appeal No. 2019005757

Agency No. 4X-148-0009-19

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated July 8, 2019, dismissing a formal complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

**BACKGROUND**

During the period at issue, Complainant worked for the Agency as a Customer Care Agent in Los Angeles, California.

On June 11, 2019, Complainant filed the instant formal complaint, claiming that the Agency subjected him to discrimination based on disability, age, and in reprisal for prior protected EEO activity.

On July 8, 2019, the Agency issued a final decision. The Agency determined that the formal complaint was comprised of the following claim:

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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.

Between October 19, 2013 and March 30, 2019, [Complainant was] working a flexible and compressed work schedule of four ten-hour days per week and [was] denied overtime for the two hours per day [he] worked more than eight hours and [was] only paid eight hours a day for [his] holidays.

The Agency dismissed the formal complaint for failure to a claim. The Agency reasoned that this was a “matter committed to the jurisdiction of the Department of Labor and to an authoritative interpretation of two national Memoranda of Understanding between the Postal Service and the American Postal Workers Union entitled Modified Work Week Guidelines and Overtime Rules for Non-Traditional Full-Time Duty Assignments...Although these documents...do not support [Complainant’s] contention that [he was] entitled to overtime while in a 10/4 assignment if [he] worked more than eight hours a day, the authority conclusively to rule on [his] overtime claim is the Wage and Hour Division of the Department of Labor which administers and enforces the Fair Labor Standards Act.”

The Agency also dismissed the formal complaint on the alternate grounds of untimely EEO Counselor contact. The Agency reasoned that Complainant has known since October 2013, that he was not eligible for overtime in his compressed schedule and he is now attempting to reach back over the six preceding years.

The instant appeal followed. On appeal, Complainant reiterates that he is being subjected to discrimination regarding his overtime and holiday pay. Complainant also asserts that the Agency improperly dismissed his complaint for untimely EEO Counselor contact. Complainant asserts that his four-day work week changed effective March 30, 2019, and thus, his compensation claim occurred within the 45-days preceding his initial EEO contact date. Complainant states he timely initiated EEO contact under the Lily Ledbetter Fair Pay Act.

### ANALYSIS AND FINDINGS

#### *Dismissal for Failure to State Claim*

The Agency improperly dismissed Complainant’s complaint for failure to state a claim. The only questions for an agency to consider in determining whether a complaint states a claim are: (1) whether complainant is an aggrieved employee; and (2) whether complainant raises employment discrimination on a basis covered by EEO statutes. If these questions are answered in the affirmative, an agency must accept the complaint for processing regardless of its judgment of the merits. See *Odoski v. Dep’t of Energy*, EEOC Appeal No. 01901496 (April 16, 1990). We find that the crux of Complainant’s claim is that he is alleging a discriminatory compensation claim pertaining to overtime and holiday pay based on his protected classes. Thus, he has set forth an actionable claim.<sup>2</sup>

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<sup>2</sup> To the extent that Complainant is alleging that the Agency is violating the collective bargaining agreement or the Fair Labor Standards Act, we concur with the Agency that these matters are not within the jurisdiction of the Commission. However, as set forth above, we find that the crux of

To the extent the Agency asserts that Complainant is being properly paid in accordance with union agreements and the Fair Labor Standards Act, this assertion goes to the merits of complainant's complaint, and is irrelevant to the procedural issue of whether he has stated a justiciable claim. See Osborne v. Dep't of the Treasury, EEOC Request No. 05960111 (July 19, 1996); Lee v. U.S. Postal Serv., EEOC Request No. 05930220 (Aug. 12, 1993); Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642 (Aug. 15, 1991).

*Dismissal for Untimely EEO Counselor Contact*

The Agency also improperly dismissed the formal complaint for untimely EEO Counselor contact. As set forth above, Complainant is alleging a discriminatory compensation claim related to his holiday and overtime pay. The Lilly Ledbetter Fair Pay Act of 2009, Public Law 111-2, 123 Stat. 5 (Jan 29, 2009), applies to all claims of discrimination in compensation under Title VII, the ADEA, and Title I and Section 503 of the Americans with Disabilities Act of 1990 and Sections 501 and 504 of the Rehabilitation Act pending on, or after, the effective date of the Act. It provides:

...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.

In the instant matter, Complainant alleges he was subjected to discriminatory compensation pertaining to his four-day workweek position until his reassignment into a five-day workweek position on March 30, 2019.<sup>3</sup> Thus, Complainant's discriminatory pay claim occurred within the 45-days preceding his initial EEO contact on May 4, 2019.<sup>4</sup>

We REVERSE the Agency's final decision dismissing the formal complaint and we REMAND this matter to the Agency for further processing in accordance with the ORDER below.

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Complainant's complaint is a discriminatory compensation claim which sets forth an actionable claim.

<sup>3</sup> The record contains a Notification of Personnel Action Form for Complainant reflecting that the reassignment was effective March 30, 2019.

<sup>4</sup> According to the EEO Counselor's Report, Complainant initiated EEO contact on May 4, 2019. However, according to the Information for Pre-complaint Counseling Form, Complainant initiated EEO contact on April 23, 2019. Complainant's alleged discriminatory compensation claim is timely under either of these dates.

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 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 (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

### 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)

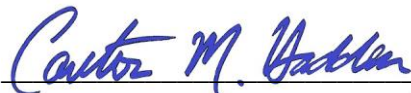
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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

November 5, 2019

Date