



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

████████████████████
Nancy D.,¹
Complainant,

v.

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

Appeal No. 0120180441

Hearing No. 570-2016-00038X

Agency No. 6X-000-0042-14

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's September 21, 2017, notice of final action concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Equal Pay Act (EPA) of 1963, as amended, 29 U.S.C. § 206(d) et seq. For the following reasons, the Commission VACATES the Agency's notice of final action.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Facilities Contract Technician (FCT), EAS-16, with the Agency's Headquarters facility located in Washington, D.C.

The Agency posted a Vacancy Announcement for an FCT, EAS-16, in its Headquarters facility in Washington, D.C. from October 1, 2013 through October 16, 2013. The Vacancy Announcement listed the salary range for the position from \$42,228 through \$71,218.

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.

The Agency's policy to determine an external hire's starting salary for the FCT position included a recruiter reviewing the selectee's application and obtaining their two most recent paystubs, the previous year's IRS Form W-2, and asking the applicant to sign their application. The recruiter then runs a current market analysis based on location, education, and experience. This compares the candidate's relevant skills to other like skilled professionals in the industry and provides the average salary of like skilled professionals. If the applicant is relocating, the recruiter also runs a relocation assessment, which takes into consideration the cost of living difference.

Once all pay documentation is received the recruiter develops a written salary recommendation. The recommendation is reviewed by the recruiter's Team Lead and then goes to the Director of Diversity and Talent Acquisition for review and approval. If the salary recommendation is approved, it is sent to the hiring manager for final approval. If the salary recommendation is above the mid-grade, the hiring manager will send the recommendation to the group's Vice President for additional approval. After all required approvals are obtained, the recruiter will extend a verbal salary offer to the selectee. If the verbal offer is accepted the recruiter will send an offer letter to the selectee for their signature.

Complainant applied for the FCT, EAS-16, position at issue. The position served to support facility acquisition, design, construction, and management activities, through the "preparation and review of technical documentation, procurement and contracting operations relating to design and construction activities, and execution of real estate acquisition and leasing documents." Prior to applying for the position at issue, Complainant worked as a paralegal for a law firm.

On December 6, 2013, a review of the applications for the FCT position was conducted and an evaluation matrix was completed. The matrix shows Complainant was determined to be minimally qualified, receiving a score of "1" in each of the six requirements for the position. Complainant was interviewed by the hiring official in December 2013. The hiring official decided to hire Complainant and her application was sent to talent management for processing.

Recruiter A conducted a market analysis for Complainant. Recruiter A also conducted a cost of living analysis as Complainant would be relocating from North Carolina to Washington, D.C. After reviewing Complainant's application, the market analysis, and the relocation assessment, Recruiter A completed an External Salary Offer Worksheet. Recruiter A recommended a starting salary of \$42,228, which was a 22% salary increase from Complainant's prior position. The Director of Talent and Acquisition concurred with the salary offer worksheet.

In January 2014, Complainant was offered the FCT position. On January 9, 2014, Complainant wrote Recruiter A requesting an increase in the salary offer. The Agency declined. Complainant's starting salary was slightly adjusted due to a change in the salary grade pay scale. Complainant's starting salary was \$43,290.

Complainant began working in the position on January 25, 2014. Complainant resigned on April 3, 2014. Complainant explained her resignation was the result of her disappointment with her starting salary versus the starting salary of others.

On September 20, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Black), sex (female), and color (brown) when, on March 26, 2014, Complainant became aware that she was being paid a salary that was significantly lower than that of coworkers doing the same or similar jobs. Complainant identified 11 comparatives of which 8 were females (7 were white females, 1 was female, race unknown) and 3 males (2 white males and 1 male, race unknown).

The Agency dismissed the complaint for untimely EEO Counselor contact. Complainant appealed the Agency's dismissal to the Commission. In EEOC Appeal No. 0120150458 (April 30, 2015), the Commission reversed the Agency's dismissal and remanded the matter for further processing.

The Agency acknowledged receipt of the remanded complaint and the matter was investigated. At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing. While the case was pending a hearing, the parties engaged in discovery. As part of the discovery process, Complainant served the Agency with her Complainant's First Set of Interrogatories, Requests for Admissions, and Requests for Production of Documents Directed to the Agency on August 8, 2016. Among the information sought was interrogatory:

4. Identify, as defined above, any and all persons hired externally, into the Facilities Contract Technician position, and for each person:
 - a. Describe in detail their hiring date, location, former salary, starting salary, race, color, sex, and any pay policies in place at the time of their hire.
5. Identify, as defined above, any and all persons hired externally by the Agency between 2013 and the present, and for each such person:
 - a. Describe in detail their hiring date, location, former salary, starting salary, race, color, sex, and any pay policies in place at the time of their hire."

The Agency objected to interrogatories 4 and 5. Specifically, with regard to interrogatory 4, the Agency claimed the interrogatory was overly broad and unduly burdensome as it contained no temporal or geographic limitations. Notwithstanding its objection, the Agency referred Complainant to pages 277- 479 of the ROI.

Regarding interrogatory 5, the Agency objected that the request was overly broad and unduly burdensome. The Agency noted "[i]n the timeframe requested, the Agency has hired a multitude of external employees in various positions and regions across the United States." The Agency argues that given the fact that the positions vary greatly from each other, the benefit of the information to Complainant is "negligible."

The record contains a September 6, 2016 email Complainant sent to the Agency attorney. Complainant stated the email served as her good faith attempt to resolve the discovery dispute regarding the Agency's responses to interrogatories 4 and 5. Complainant stated that given her disparate impact claim, the information requested was "highly relevant." Specifically, Complainant alleged that the Agency's method of determining starting salaries had a disparate impact on African Americans and females. She stated the salary determination process in question effects all new hires, not just those entering the FCT position and not just the individuals already identified. Complainant argued that in order to make a "meaningful comparison," she must have access to information on all individuals subjected to this salary determination process.

The record contains an email response from the Agency on the same day. The Agency stated Complainant's request was overly broad and unduly burdensome as she requested information from all new hires across the country for a period of three years. The Agency noted this would include all positions and in all geographical areas; and stated even with this information, Complainant would not be able to make a relevant comparison among the data. The Agency noted these employees would be living in different areas with different costs of living and be in numerous, non-related positions with varying pay scales.

On September 6, 2016, Complainant filed Complainant's Motion to Compel. Complainant noted that interrogatories 4 and 5 requested information concerning her comparatives, "as all external hires are subjected to/should be subject to the same salary determination policy and process." Complainant noted this was a key issue in her disparate impact claim.

On May 31, 2017, the AJ issued an Order Regarding Complainant's Motion to Compel. With regard to interrogatory 4, the AJ noted Complainant sought "any and all persons" hired externally into the FCT position. The AJ found this request overbroad as there are no time frames and/or geographical limitations to Complainant's request. The AJ also found that the Agency provided the requested information for the relevant time period (2013 – 2015) in the ROI. Thus, the AJ found the Agency fully responded to this request.

Regarding interrogatory 5, the AJ stated, "Complainant sought the same information sought in Interrogatory 4 limited to the years 2013-present." The AJ determined the information sought by Complainant (years 2013 – 2015) was already provided to the Agency in its Response to Interrogatory No. 4. The AJ further found that 2013 – 2015 reflects the relevant time period at issue in the instant case. Thus, the AJ found the Agency has responded fully to this request.

Thereafter, the Agency filed a motion for summary judgment. Complainant filed a response to the Agency's opposition to summary judgment. The AJ adopted the Agency's statement of undisputed facts and issued a decision without a hearing on August 31, 2017.

The AJ noted the complaint included the following claims:

1. Complainant alleged discrimination on the bases of race (African-American), color (black), and sex (female) when on March 26, 2014, she became aware that she was

- paid a salary that was significantly lower than that of coworkers performing the same or similar jobs.
2. Complainant alleged the Agency violated the Equal Pay Act (EPA) by paying her a lower salary than her male coworkers who performed the same or similar jobs.
 3. Complainant alleged the Agency's use of salary history of newly hired employees creates a disparate impact on females and African-American.

The AJ found Complainant failed to create a triable issue of fact or credibility and the Agency is entitled to summary judgment as a matter of law. With regard to the EPA claim, the AJ noted that one identified male comparative was Complainant's supervisor who had a higher level position than Complainant and was not a valid comparative; another male comparative was hired in 1994; and the third male comparative had more relevant work experience at the time of hire.

The Agency subsequently issued a notice of final action on September 21, 2017. The Agency's final action fully implemented the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

On appeal, Complainant argued that the record was not fully developed. She stated she requested employment, salary, and application information for all new hires during discovery. She noted the Agency refused to provide it, denying her the opportunity to provide statistically valid support for her disparate impact claim. Complainant noted she filed a motion to compel this information, however her motion was denied which she claimed denied her right to fully develop the record in support of her claim.

In response to Complainant's appeal, the Agency argues the conduct of a hearing, including granting or denying a motion to compel, is within the discretion of the AJ. The Agency states in this instance, the AJ concluded that the Agency provided Complainant sufficient information related to her discovery requests.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See EEOC Management Directive for 29 C.F.R. Part 1614, Chap. 9, § VI.A. (Nov. 9, 1999) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

After a careful review of the record we find that the AJ's issuance of a decision without a hearing was not appropriate, as the record is not sufficiently developed and there are genuine issues of material fact in dispute.

To establish a claim of disparate impact, Complainant must show that an Agency practice or policy, while neutral on its face, disproportionately impacted members of the protected class. This is demonstrated through the presentation of statistical evidence that establishes a statistical disparity that is linked to the challenged practice or policy. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (a complainant must present “statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion”). Specifically, Complainant must: (1) identify the specific practice or practices challenged; (2) show statistical disparities; and (3) show that the disparity is linked to the challenged practice or policy. Id.; Obras v. Dep’t of Justice, EEOC Appeal No. 01A04389 (May 16, 2002). The burden is on the Complainant to show that “the facially neutral standard in question affects those individuals [within the protected group] in a significantly discriminatory pattern.” Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); see also Gaines v. Dep’t of the Navy, EEOC Petition No. 03990119 (Aug. 31, 2000).

After a complainant establishes disparate impact, the burden shifts to the respondent agency to demonstrate that the employment action, such as the use of information obtained in a criminal background check, is job-related for the position and consistent with business necessity. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

In the present case, Complainant alleges the Agency’s policy of using salary history in determining the starting salaries of external hires caused a disparate impact on females and African Americans. The Commission considers the hearing process an extension of the investigatory process. We note that as part of discovery, in interrogatory 5 Complainant requested information on the pay policy in place at the time for all external hires between 2013 and the present as well as information on their former salary, starting salary, and their race, color, and sex at the time of hire. The Agency objected and did not provide Complainant the requested information. Complainant properly filed a Motion to Compel, which the AJ denied. In denying Complainant the discovery she requested, the AJ apparently mistook interrogatory 5 requesting information on all external hires between 2013 – 2015 with interrogatory 4 which requested similar information for external hires to the FCT position. However, we note that interrogatories 4 and 5 requested different information. We find the information requested in interrogatory 5 was relevant to Complainant’s disparate impact claim and that the AJ improperly denied this discovery request.

Specifically, we note Complainant asked the Agency about information on the pay policy in effect during the relevant time for all external hires and the Agency declined to provide that information. We find that the record is not sufficiently developed for us to determine whether there was a disparate impact on females and African Americans by the Agency's pay setting policies or practices. The record must be further developed through additional discovery and a hearing to determine exactly what the Agency's policies and practices are for using salary history in determining the starting salaries of external hires, and the impact those policies and practices have on female and African-American employees.

We note that in similar cases, the Commission has allowed for discovery of relevant information to be gathered to determine if the Agency's policies and practices disproportionately impacted members of the protected class identified. Tarn S. v. Selective Serv. System, EEOC Appeal No. 0120113421 (Nov. 3, 2015); Complainant v. Dep't of the Army, EEOC Appeal No. 01A30650 (Aug. 24, 2006); Complainant v. Dep't of Housing and Urban Development, EEOC Appeal No. 01A13814 (Sept. 9, 2002).

Based on our decision to remand for further development of the record on Complainant's disparate impact claim, we decline to address the remaining two claims at this time.

CONCLUSION

Accordingly, we VACATE the Agency's notice of final action and REMAND the complaint for additional discovery and a new decision by an AJ, in accordance with this decision and the Order herein.

ORDER

The Agency shall submit to the Hearings Unit of the EEOC Washington Field Office the request for a hearing within 30 days of the date this decision is issued. The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within 30 days of the date this decision is issued. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit.

Prior to the hearing the AJ will Order limited discovery on the following items, and any other discovery the AJ deems relevant to the issues in this case:

The Agency shall provide Complainant with the information requested in interrogatory 5. Specifically, the Agency shall provide documentation in response to Complainant's question regarding the pay policy in place at the time for all external hires between 2013 – 2015. The information provided shall clarify whether the same policy and practice in place for determining Complainant's starting salary, which relied in part on prior salary history, was used to determine the starting salary for all external hires.

If the same policy and practice was in effect for all external hires between 2013 - 2015, the Agency shall also provide information on the former salary, starting salary, and the race, color, and sex at the time of hire for all external hires during the relevant time.

Following discovery and a hearing, the AJ shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110. A copy of the Agency's request for a hearing and a copy of the Agency's new decision must be sent to the Compliance Officer referenced herein.

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 CFR § 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

December 13, 2019

Date