



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

[REDACTED]  
Clemente M.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 2023001152

Agency No. 200I-516-2022-144221

**DECISION**

On December 13, 2022, 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 November 14, 2022, final decision concerning his 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. For the following reasons, the Commission AFFIRMS the Agency's final decision.

**ISSUE PRESENTED**

The issue presented on appeal is whether the preponderance of the evidence in the record establishes that Complainant was subjected to discrimination or harassment based on national origin.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a GS-0649-8 Medical Instrument Technician (MIT) – Echocardiography (Echo) at the Agency's VA Healthcare System facility in Bay Pines, Florida. Report of Investigation (ROI) at 57-58, 118. Complainant's national origin is Asian. ROI at 58.

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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.

Complainant stated that he was hired on February 3, 2019, at the GS-8, step 6 rate. ROI at 58. Complainant received a step increase to GS-8, step 7 after two years of service. ROI at 127. According to Complainant, on April 5, 2021, he learned that he had been hired at the GS-8 level while a coworker (Comparator-1) who performed the same job was compensated as a GS-9, step 10. ROI at 58. Effective January 5, 2020, Complainant's salary was \$55,882 as a GS-8, step 6, while Comparator-1's salary was \$81,263 as a GS-9, step 10 with a special rate under 5 U.S.C. § 5305. ROI at 118, 122. Effective January 3, 2021, Complainant's salary was \$56,442 as a GS-8, step 6, while Comparator-1's salary was \$82,073 as a GS-9, step 10 with a special rate. ROI at 119, 123.

Complainant stated that he sent a letter to the Nurse Manager requesting to be paid at the same GS-9, step 10 rate as Comparator-1. ROI at 58. The record contains an April 9, 2021, letter signed by Complainant and three Echo MITs, requesting that the position be upgraded from GS-8 to GS-9 to correspond with the pay of other ultrasound technicians at the facility and in the community. ROI at 125. The letter noted that one of the five technicians in their department was already paid as a GS-9 despite performing identical duties. ROI at 125. Complainant averred that the Nurse Manager told him that she "would work on it" but that it might take a long time. ROI at 58. Complainant alleged that management would have acted more quickly to address his concerns and provided him more updates about the process if he were white. ROI at 60, 63. Effective December 6, 2021, Complainant was promoted to a GS-0649-9 MIT – Echo position, which resulted in his pay increasing from \$58,055 as a GS-8, step 7 to \$62,338 as a GS-9, step 6. ROI at 128. Effective January 2, 2022, Complainant's salary was \$63,848 as a GS-9, step 6, while Comparator-1's salary as a GS-9, step 10 with a special rate was \$83,881. ROI at 120, 124.

Complainant stated that, on February 1, 2022, he learned that Comparator-1 received an ultrasound specialty rate in addition. ROI at 59. According to Complainant, he asked the Nurse Manager to be compensated as a GS-9, step 10 with the ultrasound specialty pay. ROI at 59. The record contains Complainant's February 3, 2022, email to the Nurse Manager regarding pay disparities, alleging that, although Comparator-1 was supposedly at GS-9, step 10, public records reflected that her salary was \$81,263 in 2020. ROI at 127-28. On February 7, 2022, the Nurse Manager responded that she forwarded his email to Human Resources and would escalate the matter if she did not receive a prompt response. ROI at 127.

Complainant alleged that he was told that, although he could not be moved from a GS-9, step 6 to a GS-9, step 10, he found public records reflecting that, in 2017, Comparator-1 and a former Bay Pines employee (Comparator-2)<sup>2</sup> were both moved from GS-9, step 6 to GS-9, step 10, resulting in a pay increase of \$8,525. ROI at 59, 62-66. Complainant stated that both Comparator-1 and Comparator-2 were both white. ROI at 62. Complainant averred that, although he was a board-certified registered cardiac sonographer with 17 years of experience, which was

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<sup>2</sup> The Agency indicated that it no longer had access to SF-50s with salary-related information for Comparator-2 because her eOPF was transferred. ROI at 115. The records cited by Complainant from FedsDataCenter.com were last updated on January 11, 2022, and do not contain any salary information for Comparator-2 at Bay Pines after FY 2017. ROI at 71.

similar to Comparator-1's experience, he was paid \$25,000 less than Comparator-1 for performing the same type of work with the same responsibilities. ROI at 61. According to Complainant, because he is Asian, he did not question management and worked hard, so it was unfair that he was paid less than Comparator-1. ROI at 61.

Complainant initiated contact with an EEO counselor on February 9, 2022. On April 26, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of national origin (Asian) when:

1. From April 27, 2020, and ongoing to present, Complainant was paid less than others;
2. On December 1, 2021, management denied Complainant's requests for an upgrade to GS-9, step 10, with an Ultrasound classification instead of Echo; and
3. On February 3, 2022, management denied Complainant's requests for an upgrade to GS-9, step 10, with an Ultrasound classification instead of Echo.

Complainant alleged that the pay disparity at issue in claim (1) began on February 3, 2019. However, the Agency applied the doctrine of laches and Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chapter 11, § III.A (Aug. 5, 2015) and dismissed any matters occurring more than two years before Complainant filed his EEO complaint pursuant to 29 C.F.R. § 1614.107(a)(2) for failing to comply with a regulatory time limit. The Agency dismissed claim (2) as an untimely raised independently actionable claim but accepted it as part of an overall hostile work environment claim.

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 Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

The instant appeal followed.

### 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 Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chapter 9, § VI.A. (Aug. 5, 2015) (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").

As a preliminary matter, we address the Agency's framing of claim (1). We disagree with the Agency's determination that claim (1) is partially barred by the doctrine of laches or subject to partial dismissal pursuant to 29 C.F.R. § 1614.107(a)(2). Applying the Lilly Ledbetter Fair Pay Act of 2009 (Ledbetter Act), Pub. L. No. 111-2, 123 Stat. 5, the Commission has found that a complainant has timely initiated EEO counselor contact pertaining to a claim of ongoing compensation discrimination when contact is made within 45 days of receiving a paycheck. See Complainant v. Dep't of Veterans Affs., EEOC Appeal No. 0720130025 (Mar. 20, 2015); Williams v. U.S. Postal Serv., EEOC Appeal No. 0120100794 (May 4, 2010). Accordingly, we find Complainant's EEO counselor contact was timely for his ongoing pay discrimination claim. The portion of EEO MD-110 cited by the Agency is from the chapter on Remedies.<sup>3</sup> The Agency is correct that backpay for a complainant who prevailed on a Title VII pay discrimination claim would be limited to two years prior to the date the discrimination complaint was filed. However, this does not mean that matters that occurred more than two years before the date the EEO complaint was filed are subject to partial dismissal pursuant to 29 C.F.R. § 1614.107(a)(2) for failing to comply with a regulatory time limit. Accordingly, the Agency erred in partially dismissing claim (1). However, because the record is sufficiently developed regarding Complainant's pay disparity claim beginning on February 3, 2019, we find that the Agency's error was harmless.

#### *Discrimination and Harassment Based on National Origin*

Complainant alleged that he was subjected to discrimination and harassment based on national origin. To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). He must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep't of Veterans Affs., EEOC Request No. 05950842 (Nov. 13, 1997). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, supra; Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995).

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<sup>3</sup> Section 706(g)(1) of Title VII, 42 U.S.C. 2000e-5(g)(1), provides, in relevant part: "Back pay liability shall not accrue from a date prior to the filing of a charge with the Commission." The two-year limitation on backpay liability applies to complaints of employment discrimination by federal agencies under Section 717(d) of Title VII, 42 U.S.C. § 2000e-16(d). See 29 C.F.R. §§ 1614.501(b)(3) and 1614.501(c)(1).

To establish a claim of harassment a complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant’s] employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser’s conduct should be evaluated from the objective viewpoint of a reasonable person in the victim’s circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

The Agency’s legitimate, nondiscriminatory explanation for Comparator-1 receiving higher pay than Complainant was that Comparator-1 was a long-time employee who had been grandfathered into a higher special pay rate because she encumbered a Diagnostic Ultrasound MIT position. ROI at 81, 85-86, 104-05. After Complainant and other Echo MITs complained about the pay disparity, the Agency conducted a market survey, determined that community data supported a grade increase for all Echo MITs, and implemented a special salary rate that resulted in a raise for all Echo MITs, including Complainant. ROI at 81-82, 85-86, 96, 107-08. In December 2021, Complainant was promoted from GS-8, step 7 to GS-9, step 6, which resulted in a salary increase from \$58,055 to \$62,338. ROI at 128. According to a Supervisory HR Specialist (HR-1), the implementation of the special salary rate would increase Complainant’s salary by approximately \$10,000 per year. ROI at 108.

As evidence of pretext for discrimination based on national origin, Complainant stated that, although he trusted that the Agency would fairly compensate him under the strict rules for pay for federal employees, he subsequently learned that, while he had been hired as a GS-8, step 6, Comparator-1 was compensated as a GS-9, step 10 and received ultrasound specialty pay. ROI at 58-59. According to Complainant, because he was Asian, he worked hard and did not question management, yet Comparator-1 was paid \$25,000 more per year for the same work despite having similar experience. ROI at 61. However, this is insufficient to show that he was paid less than Comparator-1 because of his national origin. Moreover, once Complainant and the Echo MITs raised the issue in April 2021, the Agency conducted a survey, upgraded the positions to GS-9, and implemented a special salary rate. Complainant contends on appeal that the Agency should not have needed to conduct a salary survey because Comparator-1 was already receiving a special salary rate. However, Comparator-1 was grandfathered into the special salary rate because she held a Diagnostic Ultrasound MIT position, whereas Complainant and the other MITs were in the separate Echo MIT position. Complainant generally alleged that, if he were white,<sup>4</sup> management likely would have been more responsive to his concerns about the pay disparity. ROI at 60-62.

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<sup>4</sup> While Complainant stated that Comparator-1 and Comparator-2 were white, he did not identify the national origin of the other three Echo MITs who signed the April 9, 2021, letter.

Other than his own speculation, Complainant provides no evidence showing that the Agency's legitimate, nondiscriminatory explanation was pretextual. Complainant has not established pretext for discrimination based on national origin by the preponderance of the evidence in the record.

The Agency provided legitimate, nondiscriminatory reasons for denying Complainant's December 2021 and February 2022 requests to be reclassified as an Ultrasound MIT, paid at the GS-9, step 10 rate, and receive retroactive backpay, which were that federal pay policy prohibited granting Complainant multiple step increases at one time or granting him a step increase solely because another employee was at a higher step or was paid at a special salary rate. ROI at 105, 107-08. HR-1 stated that, after Complainant alleged that he was being paid incorrectly in March 2022, Human Resources researched the matter and determined that Complainant's pay was not incorrect based on his personnel history. ROI at 104-06. The Director subsequently approved the creation of the new special salary rate table for the Echo MITs that was equivalent to the special salary rate for the Diagnostic Ultrasound MIT position. ROI at 108. According to HR-1, he informed Complainant that, even with the creation of a special pay scale for Echo MITs, there would be no way to make the special pay retroactive to when Complainant began working for the Agency. ROI at 105, 107-08.

Complainant stated that, although management and HR told him they could not move him from GS-9, step 6 to GS-9, step 10, he found records indicating that Comparator-1 and Comparator-2 received pay increases of \$8,525 in 2017, which Complainant speculated reflected an adjustment from GS-9, step 6 to GS-9, step 10. ROI at 62-65. The record contains printouts from FedsDataCenter.com, which reflect that, from FY 2016 to FY 2017, the salaries of both Comparator-1 and Comparator-2 increased from \$68,509 to \$77,034 as GS-9 MITs at Bay Pines.<sup>5</sup> ROI at 69, 71. On appeal, Complainant provides additional documents, including tables that appear to show that \$68,509 was the GS-9, step 9 special rate salary for Bay Pines in 2016 and that \$77,034 was the GS-9, step 10 special rate salary in 2017, which contradicts Complainant's assertion that Comparator-1 and Comparator-2 received multiple step increases from FY 2016 to FY 2017. As further evidence of pretext, Complainant cited the lack of updates and delay in the process of implementing specialty pay for the Echo MITs. ROI at 63-66. We find that Complainant has not established by preponderant evidence that the Agency's legitimate, nondiscriminatory reasons were a pretext for discrimination based on national origin.

We note that we are precluded from finding harassment with respect to these claims based on our finding that Complainant failed to establish that these actions were motivated by discriminatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Accordingly, Complainant has not established that he was subjected to discrimination or harassment based on national origin.

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<sup>5</sup> We note that these records do not include the associated step.

## CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision finding no discrimination.

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 their 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. If you file a request to reconsider and also file a civil action, **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:



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Carlton M. Hadden, Director  
Office of Federal Operations

January 25, 2024  
Date