



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



Lorraine D.,
Denese G.,
Kerrie F.,¹
Complainants

v.

Jason Gray,
Acting Administrator,
Agency for International Development,
Agency.

Request Nos. 2024000618, 2024000619, 2024000620

Appeal Nos. 2022003818, 2022003679, 2022003687

Hearing Nos. 570201900111X, 570201900109X, 570201900110X

Agency Nos. OCRD00517F, OCRD00617F, OCRD00717F

DECISION ON REQUEST FOR RECONSIDERATION

Complainants timely requested that the Equal Employment Opportunity Commission ("EEOC" or "Commission") reconsider its consolidated decision in Lorraine D., Denese G., & Kerrie F. v. Agency for International Development, EEOC Appeal Nos. 202203818, 2022003679, 2022003687 (September 14, 2023).¹

¹ As with our previous decisions on this matter, the Commission exercises its discretion to consolidate the above referenced requests for the sake of clarity and administrative efficiency. 29 C.F.R. § 1614.606.

ISSUE PRESENTED

Whether Complainant's request for reconsideration of EEOC Appeal Nos. 202203818, 2022003679, 2022003687 meets the criteria detailed in 29 C.F.R. § 1614.405(c).

BACKGROUND

At the time of events giving rise to this complaint, Complainants held the high-ranking position of Career Minister within the Agency's Senior Foreign Service ("SFS"). Each complainant was hired between 1989 and 1993, at the entry-level position of Foreign Service Officer ("FS Officer").

On January 19, 2017, Complainants filed formal EEO complaints² alleging that they were subjected to discrimination on the basis of sex (female) 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 ("EPA"), as amended, 29 U.S.C. § 206(d) et seq. when:

The Agency continuously paid them a salary less than that paid to similarly-situated men performing jobs requiring substantially equal skill, effort, and responsibility under similar working conditions.

Following an investigation by the Agency into the claims, Complainants requested a hearing before an EEOC Administrative Judge ("AJ"). The parties further developed the record through discovery. However, Complainants, when subject to a Motion to Compel, withdrew their hearing requests and asked for a Final Agency Decision ("FAD") instead. The AJ remanded the matter to the Agency, which then issued FADs pursuant to 29 C.F.R. § 1614.110(b).³

² Before conducting an investigation, the Agency forwarded the complaints to an EEOC Administrative Judge ("AJ") to review for class certification. The AJ denied class certification on June 19, 2018 and remanded the complaints (as well as a fourth complaint that was subsequently withdrawn) back to the Agency to be processed individually with an expedited investigation. EEOC Hearing No. 570201800852X (does not meet numerosity requirement).

³ The Commission vacated the Agency's original FADs due to improper interference from the Agency's Office of General Counsel. EEOC Appeal Nos. 2022003744, 2020003745, 202003746 (Nov. 9, 2021) (ordering the Agency

The decisions concluded that Complainants failed to prove that the Agency subjected them to discrimination as alleged. Complainants filed a consolidated appeal brief with the Commission.

The Commission issued a consolidated decision affirming the FADs, concluding that the Agency did not violate the EPA or Title VII because the pay disparity was due to a factor other than sex.⁴ Specifically, the Agency had a consistently applied pay-setting policy where it based the initial pay increase for FS Officers entering the SFS on their FS level at the time of entry. Upon promotion into the SFS, an FS Officer receives a substantial pay increase, typically the lowest Executive Schedule salary exceeding the employee's existing pay by not less than two step increases of the employee's FS-01 salary class, or six percent, whichever is greater. This policy was applied equally to both Complainants and their comparators. Any pay differential reflected the fact that Complainants entered the SFS at a lower FS-01 salary class, or step than their male comparators, which resulted in a lower SFS starting pay. However, all subsequent pay increases in the SFS were performance-based.

When rendering its decision, the Commission noted that during discovery, Complainants were asked if they contended that the Agency's initial base salary upon becoming an FS Officer or SFS Officer violated Title VII or the EPA. Complainants responded that their salary upon entering the SFS violated the EPA but did not claim that their initial FS salary was discriminatory.

CONTENTIONS ON REQUEST

Complainants contend that reconsideration is warranted because the appellate decision, in essence, concludes that the mere existence of a pay setting policy is sufficient to constitute an affirmative defense to EPA Claims.

to issue new, impartial FADs). Complainants filed a Request for Reconsideration on the matter of attorney's fees only. EEOC Request Nos. 2022001084, 2022001085, 2022001086 (Mar. 31, 2022) (denied).

⁴ The record supports that the Complainants established a *prima facie* case of pay discrimination under the EPA only. The appellate decision assumed but did not address the *prima facie* case in light of the Agency's successful affirmative defense.

Complainants contend that this decision will substantially impact Agency policies, practices, or operations because it divests the Agency of its obligation to fix and prevent gender-based pay gaps under the EPA, and it involves a clearly erroneous interpretation of fact or law because it ignores historic inequities for women in FS Officer positions and SFS.

Complainants further contend that the appellate decision involved a clearly erroneous interpretation of law because, among other things, the analysis gave improper weight to a single interrogatory response while ignoring data reflecting a pay gap and underrepresentation of women in FS Officer positions and SFS throughout Complainants' careers; and failed to properly analyze the Agency's proffered "factor other than sex" affirmative defense.

The Agency contends that Complainants' Request should be denied because it merely reiterates arguments Complainants raised on appeal. The Agency further contends that the appellate decision did not involve a clearly erroneous interpretation of fact or law because the Agency established that the pay gap at issue was based on a factor other than sex. Namely, a consistently applied gender-neutral pay system.

STANDARD OF REVIEW

EEOC regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates that: (1) the appellate decision involved a clearly erroneous interpretation of material fact or law; or (2) the appellate decision will have a substantial impact on the policies, practices, or operations of the agency. See 29 C.F.R. § 1614.405(c).

ANALYSIS

A request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9 § VI.A (Aug. 5, 2015); see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. Complainant has not done so here.

The majority of Complainants' Requests reiterate arguments set forth in the underlying appeal. However, some clarification is warranted to the extent that the Complainants assert that the analysis in the appellate decision involved clear errors of law.

The Commission did not commit a legal error by excluding from its EPA analysis Complainant's assertions and data regarding the Agency's historic pay gap and underrepresentation of women in both FS Officer positions and the SFS. A legacy of discriminatory pay policies may be relevant to an EPA claim, but in this case, Complainants did not connect the alleged historic pay gap and underrepresentation to the specific pay disparity at issue, which is limited to pay inequities after their entry into the SFS. For instance, Complainants do not provide evidence to support that compared to their male comparators, they were "fast tracked" to the SFS when they were at a lower FS level, and Complainants provide only generalized statements that they were discouraged from pursuing higher paying FS Officer positions, necessitating an early transition to SFS.

The Commission did not commit a legal error when it accepted the Agency's "factor other than sex" affirmative defense. We clarify for the Agency that the "factor" must be based on the job's requirements or otherwise beneficial to the business. See EEOC Compliance Manual, Ch. 10 FN 65 (addressing the disagreement among federal courts when interpreting "factor other than sex," and stating that the EEOC agrees with the 2nd, 6th, 9th, and 11th Circuits), citing Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520 (2d Cir.), cert. denied, 506 U.S. 965 (1992); EEOC v. J.C. Penney Co., 843 F.2d 249, 252 (6th Cir. 1988), Glenn v. General Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988), Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982); see also EEOC v. Maryland Insurance Admin., 879 F.3d 114 (Jan. 5, 2018) (4th Cir.) and Rizo v. Yovino, 950 F.3d 1217 (9th Cir. 2020). Here, the Agency's "factor other than sex" was a pay system intended to recruit and retain a class of employees. The Agency explained in its prior response to the Complainants' appeal that the SFS is a demanding, strictly pay-for-performance corps, intended to draw the best talent to achieve the Agency's foreign service policy goals. By providing a sizeable pay increase to FS Officers promoted into the SFS, the Agency incentivizes FS Officers to seek promotion into such a demanding role. The Agency also explained that the promotion-related pay increase benefits the Agency for an additional reason—by providing higher promotion pay to SFS promotees who reach higher FS step levels, the Agency encourages FS Officers to develop more experience at the FS level prior to pursuing promotion into the SFS, even if such FS Officers could apply successfully early on.

The Agency thereby gains more seasoned SFS promotees better prepared to succeed against the rigors of the SFS. As retention and recruitment is a business benefit, the Agency need not show that the factor was also based on job requirements.

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal Nos. 202203818, 2022003679, 2022003687 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request.

CONCLUSION

After reviewing the previous decision and the entire record, the Commission finds that Complainants' request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the request.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0124)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. 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.

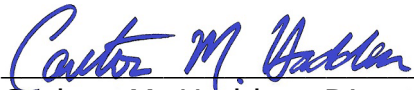
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION-EQUAL PAY ACT (Y0408)

You are authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. § 216(b)) to file a civil action in a court of competent jurisdiction **within two years** or, if the violation is willful, **three years** of the date of the alleged violation of the **Equal Pay Act** regardless of whether you have pursued any administrative complaint processing. The filing of the 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 27, 2025

Date