



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

[REDACTED]
Lidia B.,¹
Complainant,

v.

Ryan D. McCarthy,
Secretary,
Department of the Army,
Agency.

Appeal No. 0120182047

Agency No. ARCESAC16JAN00259

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 April 10, 2018, final decision 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 of 1963, as amended, 29 U.S.C. § 206(d) *et seq.* For the following reasons, the Commission AFFIRMS the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Project Management Specialist, GS-0301-11, at the Agency's facility in Sacramento, California. On February 22, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of her sex (female) when:

1. On December 16, 2015, her first-line supervisor (S1) issued her 2015 annual performance evaluation, including an overall performance rating of "3" (success); and
2. Since May 17, 2011, she has been performing work involving similar skill sets and job responsibilities as GS-12 male employees, however her pay is set at the GS-11 level.

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.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her 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 her to discrimination as alleged.

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, 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").

First, we address Complainant's contention that the Agency violated the EPA. 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).

Once a complainant has met this burden, 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.

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, (EEOC Compliance Manual) at 10-IV (December 5, 2000). The Agency must also show that the factor is related to job requirements or otherwise is beneficial to the Agency's business and used reasonably in light of the Agency's stated business purpose as well as its other practices. Id.; Complainant v. Dep't of Homeland Security, EEOC Appeal No. 0720040139, req. for recons. den., 0520070616 (July 25, 2007).

"Employers can offer higher compensation to applicants and employees who have greater education, experience, training, or ability where the qualification is related to job performance or otherwise benefits the employer's business." EEOC Compliance Manual at 10-IV.

The Commission has noted that such a qualification would not justify higher compensation if the employer was not aware of it when it set the compensation, or if the employer does not consistently rely on such a qualification. Id. Furthermore, the difference in education, experience, training, or ability must correspond to the compensation disparity. Id. The Commission has recognized that continued reliance on pre-hiring qualifications is less reasonable the longer the lower paid employee has performed at a level substantially equal to, or greater than, his or her counterpart. Id.

Here, Complainant claims that she was performing work involving similar skill sets and job responsibilities as two male employees (CW1 and CW2), outside of her organization, who were being paid at the GS-12 level, while her position was set at the GS-11 level. The record shows that at the relevant time, Complainant was employed as a Project Management Specialist, with her primary job duty being to complete award Compact Discs (CDs). This duty required Complainant to take the files for a construction contract that had been recently awarded, including all technical specifications, drawings, and administrative documents, and compile them for distribution to the contractor, construction office, and project management team. Complainant's other duties included facilitating meetings, preparing minutes, and assisting in the training of new project managers. In contrast, CW1 was working as a General Engineer, with the primary duty of Preliminary Front-End coordination, ensuring that all military design specifications meet construction regulations and meet the requirements of the contracting proposal before being sent to the contractor. CW1 states that, with respect to the duty of award CDs, he would gather the relevant information which he then passed on to a Technician, GS-7, who would produce the actual award CD. The record also shows that CW2 was working as an Architect until his retirement in 2011, and that, like CW1, his primary job duties related to technical specifications and not the creation of the award CDs. Further, the record shows that both the Engineer and Architect positions required specialized degrees, while Complainant's position did not. CW1 and CW2 also reported to a different supervisor (S2) than Complainant. S2 stated that the Engineer and Architect positions at issue "had more to do with specification and design effort" than Complainant's position, and that the creation of award CDs were considered "other duties as assigned" and were not primary job functions.

As such, we find that Complainant has failed to establish a prima facie case of discrimination under the Equal Pay Act. Although Complainant has established that she was being paid less than CW1 and CW2, she has not established that she was being paid less for equal work, requiring equal skill, effort, and responsibility. The record reflects that while Complainant and the comparators all worked on the award CDs, the remainder of their duties were not equivalent. In so finding, we note that in her affidavit, Complainant acknowledges that "[her] function is totally different than anyone else in [the] organization" and that "nobody else does what [she] does." Accordingly, Complainant has not established that she was performing equal work.

Next, we address Complainant's claims that she was subjected to disparate treatment based on her sex. 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).

Complainant must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13. The burden then shifts to the Agency to articulate a legitimate, non-discriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

Here, we find that assuming, arguendo, Complainant established a prima facie case of sex discrimination, the Agency nonetheless articulated legitimate, nondiscriminatory reasons for its actions. With respect to claim (1), the record shows that although Complainant received a lower annual performance rating for fiscal year 2015 than she had for the previous two years, S1 was not her rating supervisor for these prior rating periods. Specifically, S1 did not become Complainant's rater until February of the annual rating period at issue. Further, despite requesting that all of his employees submit a written self-assessment in order to aid in his evaluating their performance, Complainant was the only employee who refused to do so, despite repeated requests. S1 states that, as a result of Complainant's refusal to complete a self-assessment, he was only able to rate her as level 3 "success" as he did not have enough information to give her a higher rating. We find that Complainant failed to show that the Agency's articulated reasons for her rating were a pretext for unlawful discrimination. Finally, with respect to claim (2), as discussed above, Complainant failed to show that the Agency's articulated reasons for its actions, namely that she was not performing duties at the GS-12 level, were a pretext for unlawful sex discrimination.

CONCLUSION

Accordingly, the Agency's final decision finding no discrimination is **AFFIRMED**.

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 (S0610)

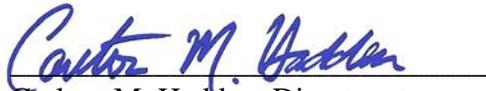
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by 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. 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:



Carlton M. Hadden, Director
Office of Federal Operations

January 28, 2020

Date