



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

████████████████████
Bertie T.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 0120182196

Hearing No. 570-2017-00406X

Agency No. 200400062016103235

DECISION

On June 20, 2018, 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 May 21, 2018 final order 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 (EPA), as amended, 29 U.S.C. § 206(d) et seq. For the following reasons, the Commission VACATES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Chief Field Operation/Program Manager,² GS-0340-14/Step 5, at the Agency's Central Office, Veterans Employment Services in Washington, D.C. On June 29, 2016, Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination and a hostile work environment based on sex (female) when: (1) from April 2012 to present, management failed to revise Complainant's position description (PD); (2) in April 2015, the Deputy Director, GS-15 (S1),

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.

² Complainant is also referred to as the Recruitment Chief.

Veteran Employment Services Office (VESO) increasingly micromanaged and scrutinized Complainant's work; (3) in April 2015, the Director of VESO, GS-15 (S2), chastised and berated Complainant, because of the manner Complainant's staff member (VES1) managed the recruitment of a veteran; (4) on April 14, 2015, S1 and S2 disrespected Complainant during a joint weekly call meeting with contractors; (5) in August 2015, S2, denied Complainant's request for an additional supervisor for the mid-west section; (6) in August 2015, S1 mandated to Complainant the area of consideration for the District Manager supervisory position, vacancy announcement; (7) from August through September 2015, S1 told Complainant, her education and experience was not necessary to be successful in her current position; (8) from August through December 2015, S1 and S2, denied Complainant's travel requests to visit/meet with her virtual staff and new hires; (9) in September 2015, S2 chastised Complainant regarding her handling of two employee matters and demanded Complainant deal with the issue immediately; (10) from October to November 2015, S1 granted the Data Management Cell access to the Federal Case Management System, which included access to case notes and workload data on Complainant's staff; (11) on November 18, 2015, S1 accused Complainant of not following his instruction for a variety of work-related processes and issues; (12) in February 2016, S2 was irate with Complainant when she requested the instruction in writing to transfer retention data to the Data Management Cell; (13) on February 1, 2016, S1, removed Complainant as supervisor of the Retention, Field Operation; (14) on March 15, 2016, S2 challenged Complainant and her staff regarding their interactions with veterans; (15) on May 10, 2016, the Data Management Chief (JB), circulated an email amongst Agency officials which alleged unethical or illegal behavior on the part of Complainant and her employees; (16) on May 17, 2016, S1 held Complainant to different disciplinary standards than JB when submitting work products; and (17) from May 23, 2016 to present, JB and S1 prevented Complainant from instructing her staff on the usage of the PAID/HR Smart reports.

In addition to the harassment allegation set forth above, the allegation that Complainant was removed as supervisor of the Retention, Field Operations (Claim 13) was also accepted and treated as an independently actionable claim of discrimination. Complainant also raised an EPA claim which was treated as an independent claim of discrimination.

After 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 EEOC Administrative Judge (AJ). Complainant timely requested a hearing. The AJ assigned to the case determined, *sua sponte*, that the complaint did not warrant a hearing and over Complainant's objections, issued a summary judgment decision on May 14, 2018. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

FACTUAL BACKGROUND

S1 was Complainant's first-line supervisor and S2 was her second-line supervisor. At all times relevant herein both S1 and S2 were aware of Complainant's sex. On or about March 17, 2016, Complainant filed an informal EEO complaint pertaining to the allegations herein.

On or about June 29, 2016, Complainant filed a formal EEO complaint, alleging that the Agency, through S1 (male), S2 (male), and Chief, Resources and Data Management, GS-15 (JB)³ (male), subjected Complainant to discrimination and a hostile work environment.

Event 1 - April 2012 to Present, Failure to Revise Complainant's Position Description (PD)

Complainant's Assertions

Complainant claimed that from September 2011 through December 2012, she performed GS-15 duties previously assigned to S1 (a GS-15 employee) without modifying her PD or her pay grade. The record shows that Complainant “became in charge of field operation, which encompassed recruitment, retention, outreach.” Complainant also had responsibilities concerning the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, et seq. As a result, Complainant, who previously supervised 12 employees, later supervised approximately 32 employees. Complainant asserted that she was not compensated at the level of the work she performed, which created a hostile work environment where she was unfairly paid less than JB (male) who she asserts was a similarly situated comparator employee.

Agency's Response

S1 stated that Complainant was originally hired in 2008, as a GS-11 Regional Veteran Employment Coordinator with the Veteran Employment Coordination Service (VECS). According to S1, at that time, VECS had 10 positions; a Director and eight Regional Veteran Employment Coordinators. Complainant was promoted in 2011, after the office was reconstituted as the VESO.⁴ On December 17, 2012, Complainant was promoted to the position of GS-14 Program Manager, Recruitment Chief (i.e., her current position). There is only one Recruitment Chief within VESO. There are three additional section chief positions within VESO, namely the Resources Management Chief position (which JB occupies), the HR Services Chief position (which VESO1 occupies), and the Strategic Communication Chief position (which VESO7 occupies). The record further shows that each section had different processes and procedures.

S1 explained that the operations of VESO (i.e., the first and largest Veteran Employment Office in the federal government), evolved since its inception and resulted in slight changes along the way to improve effectiveness and efficiency. S1 asserted that while there have been subtle shifts in responsibilities across VESO since 2012; the “vast majority” of Complainant's PD remains relevant and accurate to her present job requirements. S1 also noted that the GS-14 essential functions of Complainant's position have not changed.

³ JB is also referred to as the Data Management Chief, the Resources Management Chief, and the Resource and Data Management Chief.

⁴ S1 believes that Complainant was promoted to a GS-13 at that time.

S1 stated that Complainant talked to him about her PD needing to be revised, but he believed that it did not warrant GS-15 classification. S1 noted that he may have discussed Complainant's PD with S2 but did not discuss it with any HR officials. He further stated that Complainant did not tell him that she felt she was being treated unfairly or being harassed with respect to this event. S1 added that there was a period when she mentioned that she felt she was in a hostile work environment based on her interaction with JB, but that had nothing to do with her PD.

Event 2 - April 2015, S1 Increasingly Micromanaged and Scrutinized Complainant's Work

Complainant's Assertions

Complainant asserted that beginning in April 2015, she was increasingly micromanaged and scrutinized by her supervisors requiring that her reports be shared with peers who were permitted to question and discuss her work. Complainant asserts that the other section chiefs' work product was not subjected to the same treatment. Complainant stated that she repeatedly voiced her concerns of a hostile work environment to her supervisors per Agency policy. When there were no changes in 2015 and into 2016, Complainant was referred to Employee Labor Relations (ELR). Learning from Complainant that the work environment had not improved, ELR recommended Complainant pursue a formal process. Complainant named members of VESO, including the Chief of Human Resources Services (VESO1) (female), the Staff Assistant to S2 (VESO2) (female) and two other VESO employees (VESO3 and VESO4)⁵ (both female) who allegedly witnessed the micromanagement. No statements of these witnesses or the referenced emails were included in the ROI.

Agency Response

S1 asserted he performed normal supervisory oversight of Complainant's work. He attributes Complainant feeling micromanaged during the relevant timeframe to the fact that at the time S2 was new to the department and would ask a lot of questions because he was not familiar with VESO. S1 explained that the majority of S2's questions fell to Complainant because the bulk of veterans' outreach fell under her section. S1 further stated that he too, had questions about the process, the procedures, the performance of her and her team (i.e., the daily business of the team). S1 stated that he believed Complainant came to him with concerns and frustrations about all the questions she was getting from S2. S1 affirmed that he assured Complainant that he respected and valued her work and the work of her team. S1 further asserted that he discussed Complainant's concerns with S2. According to S1, S2 (and S1) agreed that the information being requested from Complainant was relevant to ensuring they got maximum performance out of people. S1 stated that Complainant did not tell him that she felt harassed.

⁵ The record does not indicate the positions held by VESO3 and VESO4.

*Events 3 & 4 - April 2015, Chastised, Berated and Disrespected*Complainant's Assertions

Complainant alleged that S2 chastised her because he said that one of her Veteran Employment Specialists (VES1) did not give guidance over the phone to a veteran (VET1), who was a friend of S2. Complainant explained that VES1 sent VET1 a standard template that said: "Dear Veteran." VES1 did not black out the word "Veteran" and replace it with VET1's name. Complainant further explained that S2 felt that was unprofessional and something that should not happen. He stated he wanted to see everything that VES1 was involved in. S2 wanted Complainant to call VET1 immediately and for Complainant to have VES1 to follow up with her. Complainant felt S2's response was a bit over the top and noted that the guidance and other information in the actual email was intact. Complainant stated that she had to personally call VET1 and attempt to work with her. Complainant noted that when she met VET1 at a job fair, she (VET1) apologized to VES1 for not following his guidance and assistance, and she noted that VES1 had, indeed, sent her job postings. Complainant further noted that S2 did not apologize to her or VES1. She told S2 that he was not being fair. S2 responded that Complainant was making excuses. Complainant asserted that she discussed this event with S1 who stated to her to do what she could to squash the situation and to contact VET1 as quickly as possible because this person had a personal relationship with S2.

Complainant also asserted that her section was singled out in an open forum (joint call) staff meeting, where her team's work performance was criticized, yet the performance of other section chiefs was not addressed by her supervisors. Complainant also claimed she was subjected to disrespect in the presence of her colleagues. Complainant explained that the joint call meeting concerned the actions of an HR Specialist (HR1) (male).⁶ Complainant stated that HR1 came on a call but had to be asked to leave the call by JB because he was rude and irate with her and because contractors were also on the call. Specifically, Complainant explained that while on the call, HR1 indicated that he was going to tell her what to do and that he did not have to listen to her. Complainant stated that she reported this to S2 on multiple occasions. According to Complainant, this environment of disrespect impacted her efforts to concentrate on her primary duties and responsibilities where she, instead, became focused on avoiding the hostility and ridicule allowed by the Agency.

Agency Response

S1 stated that they have a weekly meeting with individuals who handle the federal case management tool, and his participation in those meetings was not routine. S1 believed he sat in on one meeting where there was some confusion as to who should communicate with the contractor on VESO's behalf. S1 believed he helped to clarify the confusion. The Resources and Data Management team, led by JB, and Complainant's team both had interactions with the contractor. S1 believed he clarified for the contractor that JB's team spoke for VESO.

⁶ HR1 works under JB in the Resources Management Section.

S1 also believed Complainant may have felt disrespected by that comment but explained that he did not want to give contractors conflicting information. Complainant never came to him to say she felt he disrespected her during this meeting or that she felt she was being treated unfairly. He did not discuss this situation with any HR officials.

S2 denied chastising or berating Complainant in the situation with VES1 since doing that would be out of character for him and that is not the way he does business. S2 further stated that he has seen VES1 work at least twice, and he questioned the way he was handling customers/veterans. S2 also noted that he received a complaint from a veteran saying that VES1 was supposed to help in finding a job and the only follow-up they had with him was to be asked if he, the veteran, had read VES1's email. S2 stated that he has also received other similar complaints. He affirmed that he informed Complainant that he had observed VES1 being short with veterans, and that people do not come to job fairs for him to refer them to the website. S2 further stated that he spoke with S1 and Complainant about this. He told her that all veterans deserve our attention and not to be referred to a website. Complainant told S2 she had discussions about this with S1 and that she would talk to VES1.

S2 also denied disrespecting Complainant during a joint weekly call meeting and did not recall the specific event alleged. By way of background, S2 explained that Complainant works in Field Operations and JB, works in Data Management. S2 stated that when Data Management has a question about the information that was entered in the system, Complainant was required to provide the information needed. Yet, Complainant did not want to give JB the information he needed to validate the information. JB decided there should be a meeting to figure out what was going on. S2 stated that he did not routinely attend the joint weekly meetings unless there were differences that he needed to hear about. He stated that he did not discuss this event with Complainant since she never came to him about her concerns.

Event 5 - August 2015, S2 denied Complainant's Request for an Additional Supervisor

Complainant's Assertion

Complainant asserted that she was denied an additional supervisor needed to accomplish the workload placed on the mid-west section, despite a legitimate and reasonable business need supporting her request. Complainant reported and discussed the burden and undue pressure resulting from this denial to both S1 and S2.⁷ Complainant also claimed that the hostile work environment was exacerbated with this additional workload in the absence of support from Complainant's supervisors causing additional anxiety with feelings of being overwhelmed resulting in a negative impact on Complainant's work environment and completion of tasks.

⁷ Complainant claimed "[u]pon information and belief, discovery of additional facts from the Agency would further establish that persons similarly situated to Complainant received such support when requested (i.e., JB), unlike Complainant.

Complainant added that S1 and S2's response to her requests to minimize the impact of this extreme workload was simply, "just work it out."

Agency Response

S2 stated that neither he nor S1 have the authority to deny an additional supervisor. S2 explained that during the relevant timeframe, VESO was being aligned to the "My VA" districts. VESO had a certain number of positions and they were presenting this information to the Assistant Secretary for approval. S2 stated that Complainant went from having one official supervisor between her and her employees to having two official supervisors between her and her employees. This event pertained to a third supervisor that she requested but was not approved. According to S2, the Assistant Secretary provided this information to the Secretary when he was going over his "My VA" initiatives to realign the five "My VA" districts. S2 noted that Complainant never came to him about her concerns.

Event 6 - August 2015, S1 mandated the Area of Consideration for the Vacant District Manager Supervisory Position

Complainant's Assertion:

Complainant alleged that S1 required the District Manager position to be located within the VA Central Office, thus open to current VACO employees only. Complainant asserted that she could have leveraged the position at several different locations in which the position's location may have been in a different geographic area where the staff would be working. Complainant also claimed that having an employee in Washington meant she had a bigger hurdle to overcome to train a new supervisor which meant that her workload would increase. Complainant believed that this should have been her decision to make. She explained this to S1, but his response was that the vacancy announcement was going to read VACO employees only. S2 concurred with S1 and wanted the position in D.C.

Agency Response:

S1 explained that there were two open supervisory positions in VESO. The initial area of consideration was current VESO employees to give those people the opportunity for a promotion before opening it up to others outside the organization. There was one case where it did result in a promotion, and he thinks the other individual selected was a lateral reassignment. He believed he discussed this event with Complainant, but she did not state that her ability to obtain the best talent was limited. He believed she felt there might have been other people qualified outside VESO, but if the internal candidates were not found qualified, then the positions would have been open to all.

Event 7 - August through September 2015, Education and Experience Not Necessary for Success

Complainant Assertions:

Complainant alleged that S1 further aggravated Complainant's work environment by discrediting her education and clinical experience, stating it was unimportant and irrelevant to the position as it had evolved, all in the context of avoiding the long-standing request to revise her position description. Additionally, in the context of requesting travel to continue utilizing Complainant's professional licensing and experience with presentations to external agencies, S1 dismissively replied that the Agency had evolved, and her education and experience were no longer relevant or needed for her to do the job.⁸

Agency Response:

S1 stated that he could not imagine saying that Complainant's education and experience were not important. He explained that her experience as a recruiter and her experience with VBA before she joined VESO was what was pertinent to her being able to successfully do what she was asked to do in VESO. During this timeframe, the department was realigning their functions to try to account for the "My VA" initiative, adding on folks with district responsibilities and adding district managers. S1 stated that he believed S2 may have contacted HR during this initiative since there was internal realigning.

Event 8 - August through December 2015, S1 and S2 Denied Complainant's Travel Requests

Complainant's Assertions:

Complainant alleged that S1 and S2 were consistently undermining her authority to determine the best way to train, manage, grow and supervise her team and refused Complainant's reasonable request to continue her procedures of personally training persons hired for the virtual work force. Complainant explained to her supervisors the site visit for training and demonstrations was essential to productivity but her practical experience was dismissed, and her travel requests denied. Complainant also asserted that this denial impacted her overall performance and success in her position.

Agency Response:

S1 stated that Complainant's travel request was denied due to budget concerns and restrictions. S1 did not feel that permitting travel just to meet work staff hired to perform work virtually was a good use of the limited budget.

⁸ Complainant asserted "[u]pon information and belief, discovery of Agency records would reveal that other male employees within the Agency were granted travel privileges such as those requested by Complainant while she was subjected to the condescending, hostile work environment existing under her supervisors [S1 and S2]".

S1 noted that before the budget was limited, it was not unusual for Complainant to visit people hired virtually at some point during the year. S1 added that people were hired to perform work in a virtual environment with the understanding that they could do that work without day-to-day, over-the-shoulder type of oversight. S1 stated that Complainant understood his rationale but did not necessarily agree with it. S1 also asserted that this decision had no effect on Complainant's career. S1 noted that Complainant did not advise him that she felt his decision was harassing.

Event 9 - September 2015, S2 Chastised & Micromanaged Complainant's Discipline of Staff

Complainant's Assertion:

Complainant contended that S1 and S2 insisted that she not follow proper procedure to utilize the advice and services of ELR, but immediately fire off an email counseling two of her subordinates (VES2 and VES3) for emails sent to S2. The two employees had written S2 an email where they expressed discomfort or displeasure with how the organization was being run. In the middle of an event in New York, Complainant was able to confer with an ELR representative, explaining that she was being harassed and pressured to send Letters of Counseling to two members of her staff. The ELR representative (ELR1) advised Complainant to go through the proper channels to obtain guidance and proper language for the counseling letter.⁹ With the assistance of ELR, in response to the insistence of immediate action by S1 and S2, Complainant was able to have the Letter of Counseling approved and issued to the two employees. Complainant asserted that this event contributed to the hostile work environment because S1 and S2 undermined her leadership and ability to follow proper protocol and procedures within the Agency related to disciplinary action.

Agency Response:

S2 denied chastising Complainant and takes exception to that word. He did talk to S1 who said there was an incident in which VES1 had a credit card issue, and it took five or six weeks for an investigation to figure out why he did not pay his bill. S2 explained that usually when a supervisor is disciplining an employee, he or she needs to do it close in time to the incident. S2 asserted that he felt Complainant needed to conclude the issue with VES1 by issuing some sort of discipline since enough time had passed. S2 further stated that he wanted Complainant to counsel VES1, but she was giving S1 reasons why she still needed more time to keep looking into the credit bill and how the voucher system was messed up at that time. He took up this situation with his leadership asking if he was misreading the situation. His leadership determined that there was no way an employee could overlook \$5,000 worth of credit card bills, not pay them, and that be an oversight.

With respect to VES2 and VES3, S2 explained that he wanted to discipline these employees with a written counseling to tell them that their behavior was not acceptable. Complainant said she had not done it before because of VES3. Even though Complainant stated she wanted to contact ELR to make sure she was doing the process correctly, S2 contended that Complainant had time to do that, but that time was passing, and she had not followed through.

⁹ Complainant noted that ELR1 was not interviewed during the EEO investigation.

S2 explained that he had been in VESO for about six months at that time and saw a pattern where Complainant's subordinates are permitted to do whatever they wanted. S2 asserted that these situations needed to be documented and he did not feel they were. He does not know how long it took her to handle this situation with VES2 and VES3. Complainant never told him that she felt these events were creating a hostile work environment for her or subjecting her to harassment.

Event 10 - October to November 2015, Access to Federal Case Management System

Complainant's Assertions:

Complainant states that the Data Management Cell, headed by JB, was intended to take aggregate data relating specifically to veterans to prepare reports. S1, however, granted JB access to Complainant's entire data system; which she asserts enabled JB to monitor the workload and read the case notes of Complainant's team. According to Complainant, JB basically wanted to be able to go in the system and monitor the workload of her subordinates and read their case notes and other items. Complainant also asserts that her staff expressed concerns over this change in the system as it was feared to be used as a weapon against them rather than a tool in support of them.¹⁰ Complainant further asserts that when she voiced her concerns and the concerns of her staff, S2 "became irate." Complainant asserts that she voiced her concerns to Human Resources (HR) because Complainant and her staff's efforts to work with S2 grew increasingly hostile and "was not working anymore." Complainant asserts that this was another event authorized by S2 to undermine and disparage her.

Agency Response:

S1 asserts that he granted the Data Management Cell access to the Federal Case Management System so that staff could perform their duties, which includes helping veterans get jobs and showing management a return on their investment by reporting back the actual number of veterans that were assisted through the VESO. It was important to management to prove that VESO helped a specific number of veterans get jobs at the VA. S1 explains that the entire genesis of having the Federal Case Management tool was to collect and input data from Complainant's front-line staff so that the Resource and Data Management teams (i.e., JB's team) can utilize the collected data on an aggregate basis and prepare reports to share with upper management.

S1 believes he failed to effectively communicate to everyone that they are all on the same team. It is not upper management looking at "their" data, but VESO looking at VESO data. S1 states that he explained this to Complainant, but she felt there was some sort of privacy concerns that overrode the need to collect the data. S1 also asserts that no one from Complainant's staff came to him with such concerns and Complainant did not tell him that she felt that she was being harassed by this event.

¹⁰ Complainant complains that none of her staff was interviewed by the EEO investigator.

Event 11 - November 18, 2015 S1 Accused Complainant of not following His Instruction

Complainant's Assertions:

Complainant claimed that S1 accused her of instructing her team to find lists of veterans from various HR offices and then identifying them as hired through their efforts even though they were people that they had not visited or assisted. Complainant stated that such accusations were false, and she believed that they were initiated by JB. Complainant further asserted that S1's false accusations were not investigated but merely stated to her to further create "an air of hostility, and an air of distrust, and an air of anxiety."

Agency Response:

S1 denied this allegation. He noted that he and Complainant had a conversation regarding some employees that she was disciplining at the time, and he was encouraging her to move forward with the discipline and in a timely manner. The corrective action she was going to take was getting further and further away from the actual event, which would lack the impact that they wanted to make.

Event 12 - February 2016 Complainant Requests Transfer of the Retention Function in Writing

Complainant's Assertions:

Complainant explained that the retention function belonged under her and her team's purview. She noted that it is the same function JB had years ago but removed by S1 and a former director. Complainant also asserted that there was a group of four people that took only a portion of the retention function but were permitted to call themselves the Retention Group. Complainant asserted that this group was considered the go-to people for retention issues even though her group was doing the bulk of the work. When she asked S2 for information in writing that this change was going to occur, he became irate and told her that she did not need to have this in writing. Complainant asserted that this event was unacceptable and would impact her career by having a negative impact on her staff. If her staff was officially going to lose the retention aspect of their position description, then that put them at risk of a downgrade because that was a key component of their duties and responsibilities.

Agency Response:

S2 stated that this event involved a strategic and operational retention functions. S2 explained that when the department decided to add the number of veterans *retained* at the Agency to the task of tracking the number of veteran employees they have *onboard*, they created a veterans' retention working group which they put under JB's purview. S2 explained that while Complainant's group handled retention, JB's retention group was different because it was tasked to put a plan together for the entire department to follow.

S2 explained that there was no transfer of retention functions that Complainant's team had been tasked with completing. Rather, JB's retention group was responsible for a wholly new strategic initiative.

S2 asserted that he contacted HR to assist him in the process in asking employees to volunteer to work for this initiative. S2 explained that HR helped him draft an email to inform employees that VESO was starting up a strategic retention initiative and that it was seeking volunteers to work in this new group. S2 asserted that Complainant did not ask him for this information in writing, but she may have asked S1. He did recall a time when S1 asked Complainant to share information and sometimes she would say she was not going to do it unless he put it in writing. S2 did not believe it to be appropriate to expect your supervisor to put an assignment or instruction in writing. S2 stated that he did inform S1 that he was not going to stop what he was doing to write some elaborate email requesting information from someone on his team. S2 also asserted that Complainant did not tell him that she felt harassed.

Event 13 - February 1, 2016, S2, Removed Complainant as Supervisor of the Retention, Field Operation

Complainant's Assertions:

Complainant asserted that she received an email that announced certain individuals on her team were selected to be part of a new retention working group that was going to be managed by the Data Management Cell under JB. Even though she was still the supervisor of the rest of her team, she stated that a key component of her team was being moved to this new section. Complainant stated that she continued to supervise between 28 to 30 employees after the new group formed. She affirmed that there were about four people taken from her team and moved over to JB's team. Complainant asserted that this change disrupted her group's processes because she had to reassign the workload of the four employees who left her team to other employees that already had a substantial workload.

Agency's Response:

S1 stated that Complainant was not removed as a supervisor of Retention, Field Operations. S1 explained that during the relevant time-frame Agency leadership had just completed a veterans' retention working group, and this working group had made some recommendations. The department was acting on their recommendations on how the Agency could retain its veteran workforce. Part of those recommendations included setting up a type of strategic retention cell to look at the bigger picture of veteran retention.

On February 5, 2016, S2 sent an email to the entire VESO team explaining what management was doing, in response to the Agency's leadership's retention and working group. S2 asked for volunteers to come and join the new strategic retention efforts. S1 stated that three individuals volunteered.

S1 also stated that he discussed with Complainant the new team's purpose before it started and reassured her that the operational day-to-day retention effort would remain with her and her team. He explained to Complainant that these employees were looking at retention from a strategic level, looking at programs that could be implemented across the Agency, and not necessarily the day-to-day engagement with current veteran employees who may be looking for other opportunities within the Agency. S1 asserted that the new group did not take away any of Complainant's duties or responsibilities. HR was consulted regarding the realignment of the three volunteers. S1 asserted that such realignment would have no impact on Complainant's career.

Event 14 – March 15, 2016 S2 Challenged Complainant and Staff Regarding Veteran Interactions

Complainant's Assertions:

Complainant claimed that S2 challenged her and her staff when he asked her to explain the process of how her group assists individuals. S2 wanted her group to set up a list-serv. S2 heard that some people on her team were sending out email blasts regarding jobs, and he wanted to know what the process was and her thoughts on this. After she shared her thoughts with him, S2 began to berate her by stating her response was a textbook answer and he did not see how people would be helped by sending them to a website. Complainant claimed that everyone on her staff found this response offensive. Complainant asserted that this was not an isolated incident of being chastised and ridiculed. Complainant also stated that the negative impact of S2's conduct and instructions undermined her authority and created a negative, anxiety driven team atmosphere.

Agency Response:

S2 stated that his response to Complainant's report on her Field Operations was that she did a pretty good job, and her team did a good job capturing that interaction with customers. Since there was no funding for travel, then they could spend their time fostering relationships with hiring managers and HR professionals. The only individual on the email was Complainant, S1, and his Executive Assistant. S2 did not see how the email was in any way disrespectful or hostile. He did not recall Complainant telling him that she felt challenged. S2 asserted that he was surprised that Complainant characterized this event as part of a hostile work environment. He acknowledged that they had to work through some situations where there was some natural tension between Complainant and JB and believed that there will be tension when there is one person performing one task and the other person is collecting data on that task. S2 noted that since coming to this job in January 2015, the whole human capital investment plan, funding, and VESO has been under scrutiny.

Event 15 - May 10, 2016, JB Circulated Email Alleging Unethical Behavior by Complainant

Complainant's Assertions:

Complainant claimed that JB's email provided sensitive data and private information relating only to her team and her supervisors did nothing to stop it.

Specifically, Complainant asserted that an email to Agency officials contained a chart with her employees' workloads on it and there was a subsequent meeting where comments were made regarding what staff members either did or did not do and why their numbers were low. Complainant found this event extremely humiliating to sit through. The individuals making such comments had never met the individuals named on the list.

Agency Response:

S2 stated that Complainant did mention to him that she felt JB was harassing her. S2 met with JB and Complainant telephonically. He wanted to hash it out and communicate to each of them that he would not tolerate any type of harassment. JB was adamant that he was not harassing her. S2 believed from Complainant's standpoint, with her being the only section chief not physically located in the Washington D.C. area and with there being a lot of meetings where she would be the only section chief not in the room physically, may have led to some of the misconceptions on her part, but there was never any harassment. S2 believed Complainant felt harassed because JB was reporting the data which could be unfavorable depending on one's perspective. For example, one of Complainant's employees, a Veteran Employment Specialist, has been with VESO for five years, but was responsible for only two veteran hires which JB reported. Complainant took exception to the fact that they were reporting such numbers. JB did not say anything negative about Complainant or her team, other than reporting data.

JB denied that sending his email was unethical or illegal behavior. JB also denied any discriminatory motives. JB explained that S1 directed him to send this email to S1, S2, and to senior leaders on the VESO staff. JB discussed the content of the email with S1 on May 10, 2016, who provided the guidance on the final content of the document. This document pertained to the results of the analyzed data and the information S1 wanted to send to the VESO leadership team. He discussed this information with S1, S2 and S2's staff assistant.¹¹

Events 16 &17 - Different Disciplinary Standards and JB and Prevented from Instructing Staff on the Usage of the PAID/HR Smart Reports

Complainant's Assertions:

Complainant alleged that S1 held her to a different disciplinary standard than JB when it came to the submission of work products. She would have to send her work products over to JB, but he did not have to send work products over to her, prior to sending them to S1.

¹¹ JB also noted that two of his management analysts (VESO5 and VESO6) also participated in some of the meetings. They were responsible for extracting and analyzing data for VESO. The subject of their discussions was the quality of data; how the information from the field was being analyzed and the results; how to present the information in a standardized format; and how to deliver accurate data sets.

She discussed this event with S1 and how she felt it was disparity of treatment between JB and herself. S1 replied in what she felt was a flippant comment about just get along.

Complainant also claimed that JB prevented her from instructing her staff on the PAID/HR Smart Reports. These reports were used to match up the individuals they had assisted with getting hired by the Agency. The report comes from another entity within the Agency, and rather than give her team the direct report that comes from the Agency's Data Center, they were forced to get a filtered and formulated report from JB. Her group found several errors in the reports that they received. Complainant stated that she told S1 that the information being provided by the Data Management Cell was inaccurate. Complainant also stated that S1 denied her requests to get the unformulated and unfiltered report directly from the data source. Complainant's team would only receive what S1 and JB chose to give her team in terms of names and left many hires that her team could have probably taken credit for but went uncounted because they could not validate the report.¹²

Agency Response:

S1 denied holding Complainant to different standards. S1 also stated that during the relevant time-frame, VESO was deeply involved in their efforts to sustain their office of 57 employees. They were getting increased scrutiny from the leadership about whether VESO needed that many people and what they were doing. As a result, VESO put together a goals and strategies template for each of the teams to outline goals for the coming year. Since each team had different processes and procedures, Complainant's goals were necessarily different than the goals of other teams or section chiefs. This situation was not a question of disciplinary standards, but a question of performance standards based on the goals of each section. The performance standards for Complainant's group involve recruiting and outreach. JB's group involved retention goals. He and Complainant discussed the goals for her team and worked to come up with realistic goals based on past performance. S1 asserted that Complainant agreed with these goals and did not state to him that she felt she was being treated differently than JB or that she had concerns. S1 also stated that Complainant was concerned about whether management had realistic goals for her team, but he does not think they ever discussed another section chief's goals.

S1 explained that the PAID/HR Smart Reports involve PAID, which was basically the HR legacy system for the Agency while the new system is called HR Smart. Each month the Resource and Data Management team received a report from the HR Information Service for all the new Agency hires. This team and Complainant's team provided a tracking spreadsheet of all the veterans that she and her team engaged over the period. The new hire list from HR Information Service and the tracking list from Complainant was cross-checked to see how many individuals Complainant's team helped to get jobs with the VA. For some reason, Complainant insisted that JB give that list back to Complainant for her team to verify. She seemed convinced that there was some other list that they received that they were not sharing with her; however, that was not the case.

¹² Complainant asserted that had she the benefit of discovery, she could obtain emails which would show that JB, with S1's support, insisted that Complainant could not have the raw data directly from the VA Data Center which related to her and her team.

No one was keeping information from her or her team. S1 discussed this event with Complainant, but she did not state that she felt harassed over this incident. S1 stated that he and JB showed her that there was no incentive for them to undercount the number of veterans hired that her team assisted.

STANDARD OF REVIEW

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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").

ANALYSIS AND FINDINGS

We must determine whether it was appropriate for the AJ to have issued a summary judgment decision on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate.

In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." Anderson, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an AJ could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrenner, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." Pedersen v. Dep't of Justice, EEOC Request No. 05940339 (Feb. 24, 1995).

We find that the record is not sufficiently developed to justify issuing a summary judgment decision without a hearing with respect to the EPA claim, at the very least. 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 (Sept. 12, 2000), req. for recon. den'd EEOC Request No. 05A10076 (August 12, 2003). The requirement of "equal work" does not mean that the jobs must be identical, but only that they must be "substantially equal." Laffey v. Northwest Airlines, 567 F.2d 429, 449 (D.C. Cir. 1976). The terms skill, effort, and responsibility, "constitute separate tests, each of which must be met in order for the equal pay standard to apply." 29 C.F.R. § 1620.14(a). The factors of skill, effort, and responsibility used to measure the equality of jobs are not precisely definable. Id. Skill includes such things as "experience, training, education, and ability." 29 C.F.R. § 1620.15(a). Effort addresses the amount of "physical or mental exertion needed for the performance of a job." 29 C.F.R. § 1620.16(a). Responsibility concerns "the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation." 29 C.F.R. § 1620.17(a).

Throughout every phase of her complaint, Complainant asserts that JB is a similarly-situated employee who was treated substantially better than she has been treated. The record shows that there are four section chiefs (CP – a GS-14 Recruitment Chief; JB (male) – a GS-15 Resources Management Chief, an HR Services Chief (female, grade unknown), and a Strategic Communication Chief (female, grade unknown)). All four section chiefs directly report to S1 and S2. The record does not contain a PD for JB or the other section chiefs. The record contains an organizational chart which indicates that the Recruitment Chief position is a GS-15 slot.

There is no explanation in the record for Complainant graded at the GS-14 level while filling a position that seemingly is graded at the GS-15 level. In addition, none of the Agency witnesses address Complainant's or JB's level of skill, effort, and responsibility. There is no testimony on this subject at all.

In finding no EPA violation, the AJ had to make the determination that Complainant's skill, effort, and responsibility were not substantially equal to JB. While the record indicates each section had different processes and procedures and that Complainant's goals were necessarily different than the goals of other teams or section chiefs, there is insufficient evidence upon which the AJ could have determined that Complainant and JB's positions were not substantially equal.

We note that the hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 7-1 (Aug. 5, 2015); see also 29 C.F.R. § 1614.109(e). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims." Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (Mar. 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (Oct. 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995). We find that given the lack of evidence addressing critical elements of an EPA claim, and the AJ's failure to permit discovery¹³ respect to such critical elements, judgement as a matter of law should not have been granted.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission VACATES the Agency's final order and remands the matter to the Agency for further processing in accordance with this decision and the Order below.¹⁴

¹³ The undisputed record indicates that discovery did not commence prior to the summary judgment decision.

¹⁴ To avoid fragmentation of the complaint, we will not address the merits of the remaining claims. See Complainant v. Dep't of the Treasury, EEOC Appeal No. 0520130425 (Oct. 29, 2013).

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. 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. Thereafter, the Administrative Judge shall hold a hearing and 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.

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

February 11, 2020
Date