



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

[REDACTED]
Joan S.,¹
Complainant,

v.

Chad F. Wolf,
Acting Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 2019001284

Hearing No. 451-2015-00188X

Agency No. HS-TSA-01740-2014

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 October 16, 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 (EPA) of 1963, as amended, 29 U.S.C. § 206(d) *et seq.* For the following reasons, the Commission AFFIRMS the Agency's final order finding no discrimination.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Transportation Security Officer, E Band, at the Austin Bergstrom International Airport in Austin, Texas. On November 5, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of her sex (female) when on July 11, 2014, she became aware that she was being paid a lower salary than her male counterparts.

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). Complainant requested a hearing. The AJ found that, after viewing the evidence in a light most favorable to Complainant, a decision without a hearing was appropriate as there were no genuine issues of material fact in dispute. The AJ issued a decision without a hearing on September 11, 2018, finding no discrimination. 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. On appeal, Complainant reiterates her contention that she was subjected to unlawful sex discrimination and raises numerous other claims that are outside the scope of the accepted issues in the instant complaint.

ANALYSIS AND FINDINGS

As an initial matter we note that, as this is an appeal from a final 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). 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 102, 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, it is not appropriate for an AJ to issue a decision without a hearing. In the context of an administrative proceeding, an AJ may properly issue a decision without a hearing only upon a determination that the record has been adequately developed for summary disposition. Petty v. Defense Security Service, EEOC Appeal No. 01A24206 (July 11, 2003); Murphy v. Dept. of the Army, EEOC Appeal No. 01A04099 (July 11, 2003).

After a careful review of the record, the Commission finds that a decision without a hearing was appropriate, as no genuine dispute of material fact exists. Next, 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 (May 7, 2007), 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 paid less for performing work involving similar skill sets and job responsibilities as her male coworkers. Assuming, arguendo, Complainant established a prima facie case of discrimination under the EPA, we concur with the AJ's finding that the Agency has shown that any pay differential was based on a factor other than sex. Specifically, the record shows that the Agency operates under a pay band system that sets the salary range for each position. The TSO position is a D and E pay band position, and at the time Complainant entered into service she was at the bottom of the D pay band. The record shows that TSO's, like Complainant, receive increases to their salary that are either approved Agency wide by the Administrator, or through within-band increases under the Agency's pay-for-performance system which is tied to annual performance ratings. These salary increases are determined by headquarters officials, applied nationwide, and the criteria is subject to change on an annual basis. The record shows that Complainant was promoted from the D pay band to the E pay band after two years of service, which was in accordance with Agency policy at that time.

The Agency's policy subsequently changed on June 15, 2014, when the time for promotion from the D pay band to the E pay band was lowered from two years to one year of service.

In her complaint, Complainant identifies four male comparator TSOs that she claims were being paid more for the same work. A review of the record shows that coworker 1 (CW1), like Complainant, entered into service at the bottom of the D pay band. The record also shows that both Complainant and CW1 were promoted to the E pay band after two years of service, however because CW1 entered into service two months prior to Complainant, he was promoted two months before she was. Further, on March 13, 2011, CW1 was promoted to the position of Lead TSO, which is an F pay band position, and resulted in him receiving a higher salary than Complainant. He later took a voluntary demotion out of the Lead TSO position, but in accordance with Agency policy, he returned to the TSO position with a salary that was five percent higher than his former annual pay (ultimately incentivizing taking a promotion by dropping anyone who takes a demotion into the highest level of the pay band below). As such, the Agency has shown that the difference in pay between Complainant and CW1 was based on a factor other than sex, namely CW1's promotion and subsequent voluntary demotion.

As to coworker 2 (CW2), the record shows that Complainant earned a higher annual basic salary, and therefore, we do not find that CW2 is a suitable comparator. We also find that co-worker 3 (CW3) is not a suitable comparator for the purposes of an EPA analysis because, like CW2, he earned a lower base salary than Complainant.

With respect to coworker 4 (CW4), the record shows that he entered into service at the bottom of the D pay band more than two years before Complainant was hired. During the period at issue, both CW4 and Complainant received the same Agency-wide annual salary increases, and both received several performance-based pay increases. When the new salary policy was implemented, both Complainant and CW4 received a 1.5% pay increase which resulted in CW4 earning an annual salary \$1,592.00 higher than Complainant. Accordingly, because Agency-wide salary increases were percentage based, and CW4 entered into service and received his promotion to the E pay band before Complainant, his salary has consistently been higher than Complainant's. We concur with the AJ's finding that the Agency established that the Agency-wide salary increases and the performance-based salary increase system are gender-neutral factors, applied consistently, and explain any compensation disparity between Complainant and her male coworkers.

Finally, we address Complainant's claim 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 concur with the AJ's finding that assuming, arguendo, Complainant established a prima facie case of sex discrimination, the Agency nonetheless articulated legitimate, nondiscriminatory reasons for its actions. For the reasons mentioned above, we that Complainant failed to show that any salary differences at issue were motivated by sex discrimination.

CONCLUSION

We find that viewing the record evidence in a light most favorable to Complainant, there are no genuine issues of material fact. We further find that the AJ appropriately issued a decision without a hearing finding no discrimination. Therefore, we discern no basis to disturb the AJ's decision and the Agency's final order 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).

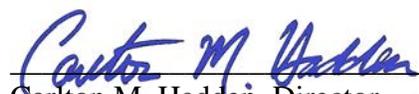
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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

August 4, 2020

Date