



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

[REDACTED]
Tu D,¹
Complainant,

v.

Pete Buttigieg,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 2020004970

Agency No. 202028770FAA03

DECISION

Complainant timely appealed with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's August 5, 2020 dismissal of her complaint of unlawful 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. 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (“ADEA”), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Air Traffic Assistant, Level F, and served as the National Association of Government Employees (“NAGE”) Facility Representative, at the Agency’s Combined En-Route Radar Approach Control (“CERAP”) in San Juan, Puerto Rico.

On June 28, 2020, Complainant filed a Formal EEO Complaint alleging that the Agency subjected her to discrimination on the bases of sex (female) and age (39) when:

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.

Since November 2019, she did not receive overtime (“OT”) opportunities [November 29, November 30, December 6, December 7, December 13, 2019, December 14, 2019, December 21, 2019, December 28, 2019, January 3, 2020, February 7, February 15, February 22, February 29, 2020, March 13, and March 27 of 2020].

In October and November 2019, Complainant noticed seven overtime shifts had been assigned to male coworkers (“C1,” C2,” and “C3”). Specifically, C1 was scheduled for three OT shifts on November 9, 2019 and December 6 and 13, 2019, C2 for two shifts on November 30, 2019 and December 14, 2019, and C3 for two shifts on December 7 and 21, 2019.

On November 17, 2019, asserting that she was equally qualified for OT, Complainant filed 7 grievances to address each instance where the Agency failed to offer her OT or provide an OT volunteer list pursuant to the Collective Bargaining Agreement (“CBA”) between NAGE and the Agency. The grievances were resolved when the parties entered a settlement agreement on April 30, 2020, at the pre-arbitration stage.²

In her formal complaint, Complainant states that she first suspected discrimination on November 23, 2019, when she learned that despite the grievances, she was bypassed for OT in favor of male coworkers. Complainant filed additional grievances, but explains that the following instances were not among the grievances resolved by the settlement agreement.

1. On November 23, 2019, she became aware that she was bypassed for two OT shifts when she saw that C1 was scheduled for OT on January 3, 2020 and C2 was scheduled for OT on December 28, 2019,³
2. On January 4, 2020, she became aware that she was bypassed for two OT shifts when she saw that C1 was scheduled for OT on February 7 and 15, 2020,⁴
3. On January 18, 2020, she became aware that she was bypassed for two OT shifts when she saw that C1 was scheduled for OT on February 22 and 29, 2020,⁵ and,

² Grievance Nos. GREV201901993, GREV201901994, GREV201901995, GREV201901996, GREV201901997, GREV201901998, GREV201902000.

³ Grievance Nos. GREV201902029 (regarding OT on December 28, 2019) and GREV201902030 (regarding OT on January 3, 2020).

⁴ Grievance Nos. GREV202000156 (regarding OT on February 15, 2020) and GREV202000157 (regarding OT on February 7, 2020).

⁵ Grievance Nos. GREV202000152 (regarding OT on February 22, 2020) GREV202000155 (regarding OT on February 29, 2020).

4. On or about February 1, 2020, she became aware that she was bypassed for two OT shifts when she saw that C1 was scheduled for OT on March 13 and 27, 2020.

The Agency dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim and 29 C.F.R. § 1614.107(a)(4), for raising matters previously raised through a grievance procedure.

ANALYSIS AND FINDINGS

In relevant part, 29 C.F.R. § 1614.107(a)(1) provides that an Agency shall dismiss a complaint that fails to state a claim. An Agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. See Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). If complainant cannot establish that s/he is aggrieved, the agency shall dismiss a complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

As a preliminary matter, Complainant's allegation of age discrimination under the ADEA fails to state a claim because she was under the age of 40 when the alleged discrimination took place. See, e.g. Nunn v. United States Postal Serv., EEOC Appeal No. 0120093722 (Mar. 2, 2010) (allegation of age discrimination failed to state a claim because the complainant was under age 40). Under the ADEA, all personnel actions taken by a federal agency with regard to an employee, who is "at least forty years of age . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a. See also 29 C.F.R. 1614.103(a) (processing of discrimination complaints from aggrieved individuals "at least 40 years of age").

The regulation set forth at 29 C.F.R. § 1614.107(a)(4) provides that an agency may dismiss a complaint where the complainant has raised the matter in a negotiated grievance procedure that permits claims of discrimination. Further, under 29 C.F.R. § 1614.301(a), when a person is employed by an agency subject to § 5 U.S.C. 7121(d) and is covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under this Part 1614 irrespective of whether the agency has informed the individual of the need to elect or whether the grievance has raised an issue of discrimination.

It is the Agency's burden to provide evidence or proof to substantiate its final decision. See Complainant v. Dep't of Commerce, EEOC Appeal No. 0120142525 (Nov. 25, 2014). (reversing the agency's dismissal on the grounds that the complainant already raised the same claims through the grievance process, because the agency failed to provide a copy of the relevant collective bargaining agreement reflecting that claims of discrimination were permitted to be raised in the grievance process) citing Marshall v. Dep't of the Navy, EEOC Request No. 05910685 (Sept. 6, 1991).

Here, the Agency, which is it is subject to § 5 U.S.C. 7121(d), provided a copy of the CBA between the Agency and NAGE, establishing that employees are permitted to raise claims of discrimination in a negotiated grievance procedure. The Agency provided sufficient evidence that Complainant already raised the first seven instances when she was bypassed for OT as grievances by providing the Step 1 forms Complainant filed and the April 30, 2020 Settlement Agreement resolving the matter. The Agency provided copies of the grievance forms for OT on all of the remaining dates Complainant provided in her Formal Complaint, with the exception of March 13 and 27, 2020.

On appeal, Complainant distinguishes the grievances she raised for the first seven OT opportunities from her remaining grievances, explaining that the earlier grievances escalated to Step 2, and concerned a second issue. She clarifies that her complaint was only intended to cover the OT opportunities between December 28, 2019 and March 27, 2020, and that the grievances she raised for these dates were dismissed at Step 1. Notwithstanding that several of the claims within this time frame would be properly dismissed as time barred, the record reflects that all of the grievances provided for the record identify the missed OT opportunities for Complainant specifically, as does the EEO complaint before us.

We find that Complainant states a claim of sex discrimination with respect to the opportunities for OT on March 13, and March 27 of 2020, since the Agency has not met its evidentiary burden to support its dismissal on the grounds that Complainant previously raised these matters in a grievance action.

CONCLUSION

Accordingly, the Agency's dismissal is **AFFIRMED IN PART** with the exception of the Agency's alleged discriminatory actions on March 13 and 27, 2020.

Complainant's allegation of discrimination on the basis of sex (Title VII and Equal Pay Act) when she was denied an opportunity for OT on March 13 and 27, 2020 is hereby **REMANDED** to the Agency for further processing in accordance with the following Order.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued.

The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

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 (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

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

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

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

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

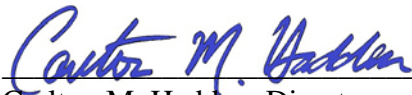
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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

March 8, 2021
Date