



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Michelle C.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Executive Office of the U.S. Attorneys),
Agency.

Appeal No. 2021002104

Agency No. USA-2020-01422

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated January 19, 2021, dismissing her complaint alleging 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 (Equal Pay Act), as amended, 29 U.S.C. § 206(d) et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Assistant United States Attorney, AD-29, at the Agency's Eastern District of Tennessee in Chattanooga, Tennessee.

On September 2, 2020, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination and harassment on the bases of sex (female), parental status, and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 when, on or about April 15, 2020, management officials refused to increase her pay to half of the maximum salary for an Assistant United States Attorney (AUSA).

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.

Complainant also alleged the Agency has refused to give her back pay for additional hours she has worked since 2002, and refused to give her back benefits, including annual and sick leave and retirement plan contributions, which should have accrued based on additional hours worked.

The Agency dismissed the complaint, pursuant to 20 C.F.R. § 1614.107(a)(1), finding that it stated the same claim as one pending before or previously decided by the Agency or the Commission. Complainant timely filed the instant appeal.

By way of history, the record reflects Complainant has worked as an AUSA in the Eastern District of Tennessee since 2000. In approximately 2002, she began working a part-time schedule of 20 hours per week instead of a full-time schedule of 40 hours per week, resulting in being paid one-half her full-time salary. Complainant filed a prior EEO complaint against the Agency on August 4, 2016 (the 2016 claim) alleging violations of Title VII and the Equal Pay Act. Several issues were accepted for investigation, including “[w]hether management subjected complainant to disparate treatment on the bases of sex, parental status, and/or EEO activity, and/or violated the EPA, when, she said, she was not paid ‘a salary equivalent to half of the maximum salaries of the male AUSAs.’” (Agency Brief, p. 91). Complainant also alleged she worked more than 20 hours most weeks and she should have been compensated for that additional time. In a final decision dated December 12, 2017 (2017 FAD), the Agency found the record did not support a claim of disparate treatment on the basis of sex, parental status, or EEO activity, and did not support a finding that the EPA had been violated. Complainant appealed the 2017 FAD, but her appeal was dismissed by the Commission on July 11, 2019, due to untimely filing. Complainant filed a request for reconsideration, which was denied by the Commission on February 20, 2020.

Complainant subsequently filed another EEO claim in 2019 (the 2019 claim) alleging (among other things) that she was not paid the maximum AUSA salary level. The Agency dismissed this claim as being duplicative of her 2016 claim. Complainant requested reinstatement of this claim and a hearing before an EEOC administrative judge. The request for reinstatement was granted and it appears this matter is still pending under a scheduling order entered on February 25, 2021. (Agency Brief, pp. 133-140).

In her instant appeal of the January 19, 2021 Final Agency Decision, Complainant contends the current claim is not the same as the 2016 claim or the 2019 claim because she was assigned a different workload since her prior claims (an increase in her workload after she complained of discrimination), and she received a new pay decision on or about April 15, 2020, subsequent to her prior claims. Complainant further asserts that a new U.S. Attorney made the April 15, 2020 pay decision whereas pay decisions at issue in prior claims were made by other people. Complainant also relies on the Lilly Ledbetter Fair Pay Act of 2009, Public Law 111-2, 123 Stat. 5 (January 29, 2009), for her contention that this is a new pay claim.

In its appeal brief, the Agency contends Complainant is attempting to relitigate her prior claims that she should be paid at the “maximum salaries of male AUSAs,” which was adjudicated in the 2017 FAD, sustained on appeal and on reconsideration.² The Agency alleges, “Complainant is relitigating the same sex-based pay discrimination claim, involving the same parties, while working in the same office, and performing the same job.”

ANALYSIS AND FINDINGS

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that states the same claim that is pending before or has been decided by the Agency or Commission. To be dismissed as the “same claim”, the present and prior complaints must have involved identical matters. It has long been established that “identical” does not mean “similar.” The Commission has consistently held that in order for a complaint to be dismissed as identical, the elements of the complaint must be identical to the elements of the prior complaint in time, place, incident, and parties. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01955890 (April 5, 1996).

While Complainant has previously argued that she should be receiving one-half of the maximum AUSA pay, her current claim specifically states the April 15, 2020 pay decision (which increased her salary but did not increase to half of the maximum AUSA salary) is discriminatory and retaliatory, as is the change in workload she experienced in 2020. These incidents are clearly not identical to matters raised in 2016 and/or 2019 because the 2020 pay raise and change in workload had not yet occurred at the time those complaints were filed. Thus, at the very least, her current claim is not identical in time to her prior claims. This is not “new evidence” in support of an old claim as argued by the Agency, but new incidents of alleged discrimination altogether. Thus, a new potential unlawful employment practice occurred when Complainant was issued the April 15, 2020 pay raise that increased her salary but not to the maximum allegedly paid to similarly situated male AUSAs. Complainant timely contacted an EEO counselor about it and timely filed her formal complaint for consideration by the Agency.

The issues raised in Complainant’s formal complaint are not identical to her prior EEO complaints and therefore this formal complaint does not state the same claim that is pending before, or has been decided by, the Agency or Commission. Therefore, the Agency improperly dismissed the complaint under 29 C.F.R. § 1614.107(a)(1).

CONCLUSION

The Agency's final decision dismissing the formal complaint is **REVERSED** and remanded for further processing as set forth below.

² In its appeal brief, the Agency states the claimant’s 2016 claim “was fully adjudicated and sustained by OFO on appeal, as well as on reconsideration.” However, the Commission in fact dismissed Complainant’s appeal as untimely filed and did not render a decision on the merits of that claim. Dolores J. v. Dep’t of Justice, EEOC Appeal No. 0120180998 (July 11, 2019).

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108 et seq. 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 (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

August 5, 2021
Date