



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



Larraine D.,¹
Denese G.,
Kerrie F.,
Complainants,

v.

Samantha Power,
Administrator,
Agency for International Development,
Agency.

Appeal Nos. 2020003744, 2020003745, 2020003746

Hearing Nos. 570-2019-00111X, 570-2019-00109X, 570-2019-00110X

Agency Nos. OCRD-005-17-F, OCRD-006-17-F, OCRD-007-17-F

DECISION

Complainants filed three appeals with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from three final decisions dated May 12, 2020, concerning equal employment opportunity (EEO) complaints alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d) et seq.

As a threshold matter, EEOC regulations allow the Commission to consolidate two or more complaints filed by two or more complainants consisting of substantially similar allegations of discrimination or relating to the same matter. 29 C.F.R. § 1614.606. Accordingly, for the sake of clarity and administrative efficiency, we exercise our discretion and consolidate the above-referenced appeals. For the following reasons, the Commission VACATES the Agency's final decisions.

¹ This case has been randomly assigned pseudonyms which will replace Complainants' names when the decision is published to non-parties and the Commission's website.

BACKGROUND

Complainants joined the Foreign Service at the Agency between 1989 and 1993. At varying times in their careers Complainants advanced from working as Foreign Service (FS) Officers to Senior Foreign Service (SFS) Officers. The SFS contains the three classes of Office Counselor, Minister Counselor, and Career Minister, with Career Minister being the most senior class.

At the time of the events giving rise to this complaint, Complainant 1, who retired in 2017, had achieved the SFS class of Career Minister. Complainant 2, who retired in 2019, had achieved rank of Career Minister in the SFS. Complainant 3 had achieved the rank of Career Minister in the SFS.

On January 19, 2017, Complainants each filed an EEO complaint alleging that the Agency continuously paid them a salary less than that paid to similarly-situated men performing jobs requiring substantially equal skill, effort, and responsibility under similar working conditions.² As the complaints contained class implications, the Agency forwarded the matter to the EEOC for a determination on class certification. On June 19, 2018, an Equal Employment Opportunity Commission EEOC Administrative Judge (AJ1) issued an Order dismissing the class complaint and ordering the Agency to continue processing the individual complaints of Complainant 1, Complainant 2, and Complainant 3. The Agency was also ordered to conduct an expedited consolidated investigation of the matter within 90 calendar days.

At the conclusion of the expedited investigation, the Agency provided Complainants with a copy of the report of investigation and notice of the right to request a hearing before an AJ. Complainants timely requested hearings but subsequently withdrew their requests. On February 13, 2020, AJ2 issued an Order dismissing the hearing requests and directing the Agency to issue a final decision in each Complainant's case. Consequently, the Agency issued three separate final decisions pursuant to 29 C.F.R. § 1614.110(b). The decisions concluded that Complainants failed to prove that the Agency subjected them to discrimination as alleged.

Complainants appealed the Agency's final decisions finding no discrimination. On appeal, Complainants claim the Agency's final decisions "appear to be the product of the Agency's Office of General Counsel rather than the Agency's EEO office." They note that despite the fact that the decisions are signed by the Agency's EEO Deputy Director, the metadata³ for each decision identifies the Agency's Attorney Representative in this matter as the author of the decisions. Complainants attach screenshots of the metadata from the decisions in support of their position. Complainants argue there is no reason for the Agency's Attorney Representative to have "fingerprints" on any aspect of the authorship of the decisions. They claim the likely scenario is that Agency Counsel was involved in the drafting of the decisions.

² A fourth Complainant also filed a complaint which was included for consideration in the class; however, that Complainant did not pursue the matter on appeal.

³ Metadata, in this context, is data in a Word document that reveals information about that document such as who the author of the document is and when the document was created.

Complainants contend that if the Commission finds the Agency's Office of General Counsel was impermissibly involved with the decisions, the Agency should be sanctioned.

In response, the Agency states regarding a document's metadata, "the document's 'author' refers to the original creator of the document and will continue to appear regardless of any person later making edits to the document." Further, the Agency notes that on February 12, 2020, the night before the Agency's first scheduled deposition, Complainants filed a Motion Supplementing the Record and then a Withdrawal of Request for Hearing. The AJ issued an Order of Dismissal on February 13, 2020. The Agency states once Complainants withdrew their hearing requests, its Office of Civil Rights and Diversity (OCRD) became responsible for "a Herculean task"- to, within 30 days (later extended to 60 days), review thousands of pages of new discovery and issue four decisions, explaining the Agency's obscure pay systems; setting forth the lengthy pay histories of Complainants and the three cited comparatives for each Complainant; and setting forth the relevant law and applying it to the extensive facts of these cases. The Agency explains that at that point, "given the short deadline for the four [decisions] and tremendous volume and complexity of material involved, and as GC [Office of General Counsel] had already spent fourteen months reviewing and analyzing over 15,000 pages of discovery, GC agreed to provide, and OCRD agreed to accept, GC's work product in the case (including facts, law, and analysis) for review." The Agency maintains OCRD staff reviewed GC's work product independently, including reviewing the record, checking facts for accuracy, and checking for proper legal support. The Agency argues that "OCRD appropriately reviewed GC's work product in issuing independent [final agency decisions] that it-OCRD-found to support the conclusions." The Agency provided several declarations in support of its brief.

The Acting Director, OCRD, (Acting Director) noted in his declaration that in this situation, as with any final decision OCRD must issue, the Chief, Complaints and Resolution Team, (Chief) and her team were responsible for preparing the decisions for the three Complainants. The Acting Director noted that the EEO Compliance Officer assisted the Chief with the decisions. The Acting Director explained that he had learned that GC had performed substantial work on the cases during litigation, and he "agreed that GC could provide its work to OCRD." The Acting Director stated that the Chief and the Compliance Officer received GC's work and reviewed and checked the work. He stated that after the Chief and Compliance Officer completed the decisions, they provided the decisions for him to review and sign. The Acting Director stated that he reviewed the decisions in their entirety to determine there was sufficient evidence to support the conclusions reached. He noted after his review of the decisions, he had questions which resulted in discussion with the Chief and the Compliance Officer. He stated that after his questions were answered, he reviewed the decisions again and was comfortable that the evidence supported the conclusions. Thus, he signed the decisions for issuance.

In his declaration, the EEO Compliance Officer stated that in addition to other roles, he is "responsible for writing Final Agency Decisions 'from scratch'." The Compliance Officer explained he had played an extensive role early in these cases and had compiled the four reports of investigation for the then-four Complainants.

The Compliance Officer noted that on February 12, 2020, Complainants filed a motion supplementing the record with 785 pages and on March 20, 2020, the Agency submitted a supplement to their case, containing 5,599 pages. The Compliance Officer stated that by February 20, 2020, the Agency Representative from GC had drafted a motion for summary judgment. He stated that in April and May 2020, the Agency Representative provided her work product to OCRD. He noted the “GC work product contained an assessment of the case, including facts, legal citations, and a legal analysis.” The Compliance Officer explained that he and the Chief reviewed the GC work product. He stated they each initially reviewed the work product in full and “then more narrowly focused on drafting and/or revising the different sections that would appear in the [final decision].” The Compliance Officer averred that he examined the work product inquiring whether the facts were accurately stated; reviewed the legal analysis for accuracy; considered counterpoints; and examined whether the conclusion was correct. He said that in helping draft OCRD’s decisions, he took notes, exchanged comments and sections he had drafted with the Chief. He stated that both he and the Chief made changes to the GC work product. He contended that the “GC work product was a means of saving OCRD some of the heavy workload in drafting four [decisions] in a complex matter and avoiding the duplication of work.” The Compliance Officer noted that after he completed his review, the Acting Director, in consultation with the Chief, made the final decision on the content of the final decisions.

In her declaration, the Chief noted in February or March 2020, the Agency Representative informed the Acting Director and the Chief that she (the Agency Representative) had compiled extensive information on the cases and could provide what she had to OCRD. The Chief stated that as OCRD was short-staffed at the time and given the cases were complicated, the Acting Director told the Agency Representative that she could provide her work. The Chief averred the Compliance Officer remained responsible for the primary review of the decision and as such, he “was primarily responsible for the editing and final draft.” The Chief explained her role was to conduct a secondary review of the decisions. She stated in April and May 2020, the Agency Representative sent her the work she had performed which contained the facts and a legal analysis of each Complainant’s claims. The Chief stated that after she received the Agency Representative’s work product, she shared it with the Compliance Officer. The Chief maintained she reviewed the record, the case law, and inserted missing information. The Chief stated she had discussions with the Compliance Officer “regarding the GC analysis, the law, and the facts at issue.” The Chief also stated that she and the Compliance Officer met with the Acting Director to present alternative viewpoints and to answer questions from the Acting Director.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of

record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

In Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chapter 1, IV, "Avoiding Conflicts of Interest" the Commission has recognized that in the federal sector process Agency heads must manage the dual obligations of carrying out fair and impartial investigations of complaints that result in final agency decisions as to whether discrimination has occurred and defending the agency against claims of employment discrimination. The Commission maintains that a clear separation between the agency's EEO complaint program and the agency's defensive function is thus the essential underpinning of a fair and impartial investigation, enhancing the credibility of the EEO office and the integrity of the EEO complaints process. Id. at § IV.C. In Junior M. v. Central Intelligence Agency, EEOC Request No. 2019003175 (September 26, 2019), the Commission stated that an effective EEO program must be impartial, both in appearance and in existence and reflect EEOC's endeavor to keep the advocacy function out of federal sector EEO offices due to their unique obligations and responsibilities.

Upon review, we find the Agency's OCRD failed to maintain its impartiality in drafting the final decisions in Complainants' cases. The OCRD acknowledged that after the complaints were returned to the Agency for issuance of final decisions, it accepted the work product of the Agency's GC which contained facts, legal citations, and a legal analysis. In his declaration, the Acting Director admitted that he agreed that GC could provide its work product to OCRD. The record is clear that the Chief and the Compliance Officer received GC's work product, reviewed it, and relied upon it in drafting the final decisions at issue. We find the actions by the OCRD in accepting the work product of its GC as a starting point for issuing its final decision to impinge the integrity of the EEO decision-making process. Because impartiality and the appearance of impartiality is paramount to the credibility of the equal employment program, we find the actions by the OCRD in this case improper.⁴

Also relevant here, is the interference principle which is addressed in MD-110, Chapter 1, IV, "Avoiding Conflicts of Interest" and encompasses two important concepts. First, agency heads must not permit agency defense counsel to interfere with the investigation and deliberations of the EEO Office. Second, there should be separation or distance between an agency's EEO function and its defensive function to "enhanc[e] the credibility of the [agency's] EEO Office and the integrity of the EEO complaints process." Id. at § IV.D

⁴ This is not to say that every contact between GC and the OCRD at the decision-writing stage is improper. For instance, the Agency noted that Complainant had submitted additional discovery prior to the AJ's dismissal of the hearing request; while the Agency did not have the opportunity to do so. The Agency noted that after dismissal of the hearing request, it submitted a Motion to Reopen Case for Limited Purpose of Supplementing the Record to OCRD. We find nothing improper by OCRD in accepting the motion and the additional supplement submitted by the Agency as such actions do not reflect an actual or perceived conflict of interest.

The Commission has recognized the interference principle is of critical concern in the federal sector EEO complaint process because Agency heads must fulfill two potentially conflicting obligations regarding the handling of employment discrimination claims. Annalee D. v. General Services Administration, EEOC Request No. 2019000778 (November 27, 2019). Agency heads, on the one hand, have a duty to eliminate prohibited employment discrimination within their respective agencies. On the other hand, agency heads also have an obligation to defend their agencies against legal challenges, including charges of discrimination. Pursuant to the federal anti-discrimination laws, the agency head is the defendant in all employment discrimination lawsuits in the federal courts. These competing principles come into play in the dual roles the agency head performs through the EEO Office and agency defense counsel. The EEO Office carries out the agency head's statutory obligation to investigate complaints, determine their validity following an investigation or hearing, and order corrective action when appropriate. The role of agency defense counsel is to carry out the agency head's obligation to defend the agency against legal challenges, including EEO complaints. MD-110 at § IV.

In recognizing the disparate yet vital responsibilities of the EEO Office and agency defense counsel, MD-110 recognizes that these entities will inevitably interact with each other. MD-110 sets out the parameters for these interactions and seeks to ensure that neither entity inappropriately interferes with the functions of the other. One purpose of the interference principle is to ensure that agency defense counsels do not exercise any functions that are committed to the EEO Office. For example, as stated in Chapter 1, § IV.D of MD-110, “the agency representative ... may not conduct legal sufficiency reviews of EEO matters... such as acceptance/dismissal of complaints, legal theories utilized by the EEO Office during investigations, and legal determinations made in final agency actions...” Agency defense counsels also may not direct, control, interfere with, or overrule the activities of the EEO Office.

Under the circumstances of how the EEO Office issued their decisions, which was not from deliberation and work independent of the defensive function of the GC, we shall vacate the Agency’s decisions so the Agency’s EEO Office can issue new, independently created decisions. Furthermore, we will notify Federal Sector Programs which monitors the federal agencies' EEO programs of the Agency’s failure to maintain an independent EEO Office.

CONCLUSION

The Agency’s final decisions are VACATED and the complaints are REMANDED to the Agency for further processing in accordance with the Order herein.

ORDER

Within 60 days of the date this decision is issued, the Agency shall issue three new final decisions by a fair, impartial, and objective official with no interference from the Agency’s Office of General Counsel.

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.**

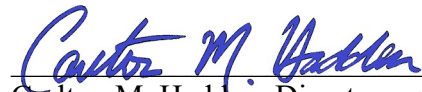
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION-EQUAL PAY ACT (Y0408)

You are authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. § 216(b)) to file a civil action in a court of competent jurisdiction **within two years** or, if the violation is willful, **three years** of the date of the alleged violation of the **Equal Pay Act** regardless of whether you have pursued any administrative complaint processing. The filing of the 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

November 9, 2021
Date