



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

[REDACTED]  
Jenna P.,<sup>1</sup>  
Complainant,

v.

Kirstjen M. Nielsen,  
Secretary,  
Department of Homeland Security  
(Headquarters),  
Agency.

Appeal No. 0120180917

Hearing No. 560-2015-00555X

Agency No. HS-HQ-01066-2014

**DECISION**

On January 8, 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 December 11, 2017, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d) et seq. For the following reasons, the Commission **AFFIRMS** the Agency's final order.

**ISSUE PRESENTED**

The issue presented is whether substantial evidence in the record supports the Equal Employment Opportunity Commission Administrative Judge's (AJ's) conclusion that Complainant failed to establish by the preponderance of the evidence in the record that she performed equal work as her male coworker.

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<sup>1</sup> 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.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Program Analyst, 0343, GS-14, in the Agency's Domestic Nuclear Detection Office (DNDO), Architecture and Plans Directorate (APD), in Washington, D.C. In October 2013, Complainant's first-line acting supervisor was the GS-15 Director of the Planning and Reporting Division (S1, male), her second-line supervisor was the Senior Executive Service (SES) Acting Director of APD (S2, male), and her third-line supervisor was the SES Director of DNDO (S3, female). Complainant stated that in APD there were two other federal employees, a GS-15 employee (C1, male) and a GS-13 employee (C2, male), as well as several contractors. According to Complainant, other than the contract employees, she was the only female working in APD between October 2013 and April 2014.

Complainant alleged that, by October 2013, she was performing GS-15 level work because her work required significant accountability and expertise and because she interacted with management and senior-level officials, including National Security Council staff and congressional staff. Complainant averred that the tasks she worked on had been completed by GS-15 employees in the past and that she took the lead on a number of these projects. Complainant stated that on one project she shared responsibilities with a GS-15 Interior Programs Department Branch Chief (C3, male).

C3 stated that he considered Complainant to be a peer because of her skills, performance, and expertise and that her work was on par with other GS-15 employees' work. According to C3, he has developed systems engineering tools, is responsible for a team as Branch Chief, and manages contracts and a million-dollar budget. C3 stated that he is a subject-matter expert for the Agency regarding Federal Emergency Management Agency (FEMA) grants. C3 averred that, while he is not a supervisor, he oversees other employees' work and completes performance evaluations for two or three employees. C3 stated that about 12.5 percent of his work is spent developing international guidance, planning, and organization for the International Atomic Energy Administration (IAEA). C3 averred that Complainant completes similar international work, but he stated that C2, who is a GS-13 employee, performs similar international work as well. C2 stated that the international work performed by Complainant is more complex than his work. According to C3, he has authority to make decisions on behalf of the federal government, while Complainant does not. S2 and S3 both testified that C3 performed more advanced, technical work than Complainant and that C3 had significant budgetary authority and was a subject-matter expert on FEMA grants.

S1 stated that approximately 80 percent of Complainant's work was GS-15 level work. However, S1 averred that, as a GS-15 supervisor, he has additional authority that Complainant does not, such as adding or rejecting team members, supervising employees, managing budgets, and approving travel. On January 13, 2014, S1 created a memorandum for S2 to justify promoting Complainant to GS-15, which stated that Complainant, if promoted, "will continue to perform at the GS-15 level." Complainant Hearing Exhibit 7. On February 3, 2014, S2 submitted a modified promotion justification to S3, which stated that Complainant "demonstrates the knowledge, skills, and abilities to perform the duties commensurate with a GS-15." Agency Hearing Exhibit 23.

According to S2, although he recommended Complainant for a promotion, he did not think that she was already performing GS-15 work.

S3 rejected the request to promote Complainant. According to Complainant, S3 told her that there was a reluctance in DNDO to promote employees to the GS-15 level because the Agency was very top-heavy, with more higher-level employees than lower-level employees. According to S3, Complainant's position is properly classified as GS-14 because she is a generalist who does not supervise employees or manage a budget. S3 stated that although some projects Complainant worked on had previously been completed by GS-15 employees, the GS-15 employees had been creating work product for the first time, whereas Complainant had the benefit of previous work products to use as a model.

On September 16, 2014, the Deputy Chief of Staff (S4, female) requested a desk audit of Complainant's position. The auditor, a Human Resource Specialist (HR1, female), concluded that Complainant's position was correctly designated as a GS-14 position. According to HR1, she reviewed the position description, input from Complainant and S1, and samples of Complainant's work, and compared the information from these sources to Office of Personnel Management (OPM) classification guidelines. HR1 did not compare Complainant's work to the work of her coworkers. HR1 stated that Complainant could have appealed the desk audit to OPM but that she did not. HR1 averred that, on appeal, OPM would have compared Complainant's position with other positions.

### *Procedural Background*

On July 31, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of sex (female) when, beginning in October 2013, management required her to perform GS-15 work but denied her requests for promotion to the GS-15 level.

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 EEOC AJ. Complainant timely requested a hearing. During the hearing stage, Complainant voluntarily withdrew her claim of discrimination based on sex in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., electing to proceed only under the Equal Pay Act (EPA). The AJ held a hearing on July 19, 2017, and issued a decision on November 16, 2017.

In her decision, the AJ found that Complainant failed to establish a prima facie case of discrimination under the EPA. The AJ concluded that Complainant failed to establish that her work was substantially equal to the work of GS-15 employees at the Agency. According to the AJ's decision, although Complainant worked on projects with GS-15 employees or on projects that had previously been handled by GS-15 employees, she did not have the same responsibilities as those GS-15 employees because she was not a supervisor, she did not have budget authority, she did not speak for the Agency the way higher-level employees did, and she did not have the technical expertise of higher-level employees.

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. The instant appeal followed.

### CONTENTIONS ON APPEAL

On appeal, Complainant contends that she established by the preponderance of the evidence that she performed work requiring substantially equal skill, effort, and responsibility as the work performed by her GS-15 male coworkers. According to Complainant, the AJ erred in concluding that she was not performing budgetary duties. Further, Complainant contends that there is no requirement that GS-15 employees be supervisors or have budgetary duties. Complainant also argues that the AJ overlooked C2's testimony that Complainant performed more complex work than he did. Complainant requests that the Commission reverse the AJ's finding that the Agency did not violate the Equal Pay Act.

The Agency makes no contentions in response to Complainant's appeal.

### STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

### ANALYSIS AND FINDINGS

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. We note that the EPA is limited to certain sex-based differentials in wages. The EPA does not prohibit discrimination in other aspects of employment, even those that have compensation-related consequences, such as hiring, firing, promotion, transfer, or other issues.

Wiley v. Dep't of the Treasury, EEOC Appeal No. 01972118 (June 27, 2001) (citing Schnellbaeher v. Basking Clothing Co., 887 F.2d 124, 130 (7th Cir. 1989) (a claim of discriminatory promotions is beyond the scope of the EPA but actionable under Title VII)).

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).

Here, we find that substantial evidence in the record supports the AJ’s finding that Complainant was not performing equal work requiring equal skill, effort, and responsibility as her identified male GS-15 comparator, C3. Substantial evidence in the record establishes that C3 was a subject-matter expert on FEMA grants, that he had significant budgetary authority, and that he had supervisory-like responsibilities. Although Complainant is correct that there is no requirement that GS-15 employees have supervisory or budgetary responsibilities, she has not identified a male GS-15 comparator without these supervisory and budgetary responsibilities who performed work requiring equal skill, effort, and responsibility as Complainant. We therefore agree with the AJ that Complainant has failed to establish a prima facie case of an Equal Pay Act violation.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency’s final order because substantial evidence in the record supports the AJ’s conclusion that the preponderance of the evidence in the record does not establish that the Agency violated the Equal Pay Act.

### 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.**

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

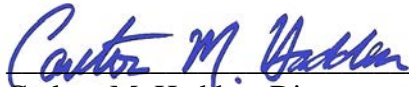
You are authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. § 216(b)) to file a civil action in a court of competent jurisdiction **within two years** or, if the violation is willful, **three years** of the date of the alleged violation of the **Equal Pay Act** regardless of whether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

October 17, 2018  
Date