



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

[REDACTED]
Adrian W.,¹
Complainant,

v.

Richard V. Spencer,
Secretary,
Department of the Navy,
Agency.

Appeal No. 0120181588

Hearing No. 430-2017-00366X

Agency No. DON166146303831

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated March 8, 2018, dismissing his 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. For the following reasons, the Commission REVERSES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Precinct Commander, GS-0083-09, Naval Weapons Station located in Yorktown, Virginia.

On November 2, 2016, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of race (Black) 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.

Complainant was assigned the duties of Precinct Commander, GS-11/12, from 2012 through 2016, but was denied position re-classification and compensation commensurate with his assigned duties.²

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing and the case was assigned to an AJ. The Agency filed its Agency's Motion to Dismiss Complaint for Untimeliness. The Agency noted on February 9, 2016, Complainant received the Agency's final determination that, according to the desk audit conducted by Human Resources, Complainant's position was properly classified as a GS-09 and, thus, not eligible for a position re-classification. The Agency stated Complainant did not contact an EEO Counselor until August 1, 2016, which was beyond the applicable limitations period. Complainant filed his Complainant's Answer in Response to Agency's Motion to Dismiss stating he "was performing the duties of his Caucasian counterparts to the same level and title" and that he was not receiving the same compensation as his Caucasian male peers. On February 26, 2018, the AJ granted the Agency's motion and issued an Order Dismissing Complaint for Untimeliness.

On March 8, 2018, the Agency issued a final order. The Agency's final order fully implemented the AJ's decision dismissing Complainant's complaint.

Complainant appealed the Agency's final order. On appeal Complainant requests the Commission overturn the Agency's final order and make a determination in his favor, properly compensating him for his position.

In response to Complainant's appeal, the Agency argues Complainant's complaint was properly dismissed due to untimeliness. The Agency requests Complainant's appeal be denied.

ANALYSIS AND FINDINGS

Upon review, we find that the crux of Complainant's formal complaint is that he is being subjected to unlawful compensation discrimination and is seeking back pay. The dismissal on the grounds of untimely EEO Counselor contact is improper. The President signed the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 ("the Act") on January 29, 2009. The Act applies to all claims of discrimination in compensation, pending on or after May 28, 2007, under Title VII, the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., Title I and Section 503 of the Americans with Disabilities Act of 1990, and Sections 501 and 504 of the Rehabilitation Act of 1973. With respect to Title VII claims, Section 3 of the Act provides that:

² Complainant also alleged discrimination in reprisal for an email dated June 9, 2015. The Agency determined Complainant did not allege any prior protected activity and dismissed this for failure to state a claim. Complainant is not challenging dismissal of the reprisal claim on appeal and therefore we shall not consider this issue.

...an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or part from such a decision or other practice.

Section 3 of the Act also provides that back pay is recoverable for Title VII violations up to two years preceding the “filing of the charge,” or the filing of a complaint in the federal sector, where the pay discrimination outside the filing period is similar or related to pay discrimination within the filing period.

In the instant matter, we find that Complainant was affected by the application of an allegedly discriminatory compensation decision or practice each time he received a paycheck and thus timely contacted an EEO Counselor within 45 days of receiving a paycheck.

CONCLUSION

Accordingly, we REVERSE the Agency’s final order dismissing Complainant’s complaint and we REMAND this matter for further processing in accordance with the ORDER herein.

ORDER

The Agency shall submit a copy of its complaint file to the Hearings Unit of the Charlotte District Office within 30 days from the date this decision is issued. The Agency shall provide written notification to the Compliance Officer at the address set forth herein that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110. A copy of the Agency’s request for a hearing and a copy of the Agency’s new decision must be sent to the Compliance Officer referenced herein.

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 CFR § 1614.503(f) for enforcement by that agency.

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).

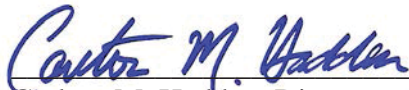
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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:

A handwritten signature in blue ink, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

July 12, 2019
Date