

**Compensation Claim Decision**  
**Under section 3702 of title 31, United States Code**

**Claimant:** [name]

**Organization:** [agency component]  
Federal Deposit Insurance Corporation  
Washington, DC

**Claim:** “Request for Unpaid Claim Wages”-  
Age Discrimination in Employment  
Act

**Agency decision:** N/A

**OPM decision:** Denied; Lack of Jurisdiction

**OPM contact:** Robert D. Hendler

**OPM file number:** 07-0009

/s/ for

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Robert D. Hendler  
Classification and Pay Claims  
Program Manager  
Center for Merit System Accountability

11/8/2006

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Date

The claimant was formerly employed in a [position] in the [agency component], Federal Deposit Insurance Corporation (FDIC), in Washington, DC. We received her initial claim on July 5, 2006, requesting the Office of Personnel Management (OPM) provide her "immediate compensation of **\$34, 186.00** of unpaid wages." She based her request on language in the Age Discrimination in Employment Act (ADEA), codified at 29 U.S.C. § 626(b), under Fair Labor Standards Act (FLSA) procedures because "violations of the ADEA generally are to be treated as violations of the FLSA." Our letter of July 28, 2006, rejected her request for lack of jurisdiction under our established FLSA claims procedures. She resubmitted her request on August 30, 2006, which we are accepting as a compensation claim under the ADEA rather than an FLSA claim so that we may issue a formal and final decision on this matter. For the reasons discussed herein, we do not have jurisdiction to consider this claim.

The claimant's application of and reliance on the ADEA as a basis to file a claim with us is unsupported. It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (internal quotation marks omitted); see *United States v. Menasche*, 348 U.S. 528, 538-539, 75 S.Ct. 513, 99 L.Ed. 615 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883))). "[W]ere we to adopt [Andrews'] construction of the statute," the express exception would be rendered "insignificant, if not wholly superfluous." *Duncan*, 533 U.S., at 174, 121 S.Ct. 2120. We are "reluctant to treat statutory terms as surplusage in any setting," *ibid.* (internal alteration and quotation marks omitted), and we decline to do so here.

The claimant's reliance on reference to the FLSA in 29 U.S.C. § 626(b) as giving jurisdiction to OPM on the matter at hand violates this principle in that she would have us ignore the remainder of 29 U.S.C., chapter 14. 29 U.S.C. § 626(b) and (c), in discussing enforcement of the Act, clearly state in pertinent part:

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under

this section, *the Equal Employment Opportunity Commission* (emphasis added) shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the *Equal Employment Opportunity Commission* [emphasis added] to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Reading all subsections of 29 U.S.C. § 626 harmoniously makes clear the U.S. Equal Employment Opportunity Commission (EEOC) administratively enforces the ADEA. This is also made clear on the EEOC Web site at <http://www.eeoc.gov/policy/laws.html>. The claimant further misapplies the ADEA with regard to Federal employees since Section 633a, rather than Section 626, applies to Federal Government employees and does not rely on or refer to FLSA remedies:

the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section *through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section.*[emphasis added]. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

Therefore, we find the claimant's application of and reliance on the ADEA as a basis to file a claim with us under FLSA or 31 U.S.C. § 3702 administrative claim procedures unsupported.

The claimant also states:

....NTEU Union representatives confirmed that the Federal Deposit Insurance Corporation (FDIC) provided you with false information regarding my membership with the NTEU.

...I was not covered by position, status, under and/or subject to a negotiated grievance procedure (NGP), a collective bargaining agreement (CBA) between the FDIC and the NTEU at the time I was involuntary separated on January 21, 2005 through March 31, 2006, as the FDIC contends.

...[bargaining unit official] stated during our conversation that it's ludicrous and virtually impossible to have occupied a bargain [sic] unit position if I was not employed with the FDIC, covered, or subject to coverage by the NTEU on June 27, 2006. Moreover, the FDIC effectuated a 2<sup>nd</sup> removal of my sustained outstanding civil services on March 31, 2006 by which coverage under the NTEU was null and void by confirmation from [two bargaining unit officials] on August 15, 2006.

The claimant's refers to language in OPM's July 28, 2006, letter to her in which we used the term "occupy" rather than "occupied," implying she was currently employed by FDIC.

Again, the claimant misconstrues controlling case law. As we stated in our July 28, 2006, letter:

OPM cannot take jurisdiction FLSA claims of Federal employees that are or were subject to a negotiated grievance procedure (NGP) under a collective bargaining agreement (CBA) between the employee's agency and labor union for any time during the claim period, unless that matter is or was specifically excluded from the agreement's NGP. The Federal courts have found that Congress intended that such a grievance procedure is to be the exclusive administrative remedy for matters not excluded from the grievance process. *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990) (en banc), *cert. denied*, *Carter v. Goldberg*, 498 U.S. 811 (1990); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002). Section 7121 (a)(1) of title 5, United States Code (U.S.C.) mandates that the grievance procedures in negotiated CBAs be the exclusive administrative procedures for resolving matters covered by the agreements. *Accord, Paul D. Bills, et al.*, B-260475 (June 13, 1995); *Cecil E. Riggs, et al.*, 71 Comp. Gen. 374 (1992).

The information provided by the FDIC at our request, a copy of which the claimant asks for in her August 30, 2006, letter to us, is already in her possession or is available from the bargaining unit representatives she contacted on this matter. The information includes a copy of a Notification of Personnel Action (SF-50) removing her from her [position] with the FDIC effective March 31, 2006, and Article 47, Grievance Procedure, from the FDIC CBA with the National Treasury Employees Union. The SF-50 confirms she was in a bargaining unit position during her employment with FDIC, her removal from which gave rise to the claim before us.

As is clear in *Muniz v. United States*, 972 F.2d 1304 (Fed. Cir. 1992), the fact the claimant is no longer employed by FDIC does not remove the Civil Service Reform Act's jurisdictional bar for claims covered by CBA arbitration and grievance procedures that arose during and from her employment with the FDIC. In this regard, her claim for her "back pay salary" she asserts was "MSPB Court ordered dated November 14, 2005. Former position occupied as Information

Specialist” arose from her employment with FDIC and, therefore, whether raised under the FLSA or 31 U.S.C. § 3702 compensation and leave claim procedures, is excluded from our jurisdiction as discussed in our July 28, 2006, letter and in this decision. Therefore, OPM is barred by controlling case law from considering this claim under either FLSA or 31 U.S.C. § 3702 administrative claim procedures.

The claimant’s statements indicate the Merit System Protection Board (MSPB) has decided the matter she wishes OPM to adjudicate. In her June 27, 2006, letter, the claimant stated:

RE: Federal Deposit Insurance Corporation (FDIC) willful violations of the ADEA Older Worker Benefits Act (OWBA) by its unlawful deduction of **\$34,186.00** from the claimants [sic] back pay salary wages awarded by the Merit System [sic] Protection Board (MSPB)  
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Honorable Judge Ben-Ami’s order **did not instruct, authorize, or direct** the Federal Deposit Insurance Corporation (FDIC) to: (1) deduct, (2) recoup, (3) offset, or (4) collect consideration (“buyout”) payment of well over **\$34,000** dollars from my salary.

As discussed in *Stearn v. Department of the Navy*, 280 F.3d 1376 (Fed. Cir 2002):

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 69 L. Ed. 2d 103, 101 S. Ct. 2423 (1981)....The doctrine serves to “relieve parties of the cost and vexation of multiple law suits, conserve judicial resources, and...encourage reliance on adjudication.” *Allen v. McCurry*, 449 U.S. 90, 94, 66 L.Ed. 2d308, 101 S.Ct. 411 (1980).

In the instant case, the MSPB rendered a judgment on the merits of the \$34,186 at issue which arose out the Administrative Judge’s (AJ) Raphael Ben-Ami’s November 14, 2005, reversal of the FDIC’s constructive removal of the claimant [decision number]. As discussed in AJ Ben Ami’s May 16, 2006, decision on the claimant’s second petition for enforcement of his November 14, 2005, decision [number]:

In my initial decision reversing the appellant’s constructive removal, I ordered the agency to cancel the appellant’s resignation and reinstate her to her [position], effective January 21, 2005. *See [claimant] v. Federal Deposit Insurance Corporation*, MSPB Docket Number [decision number] (Initial Decision, Nov. 14, 2005). I ordered the agency to pay the appellant the appropriate amount of back pay, with interest, and to adjust the appellant’s benefits with appropriate credits and deductions in accordance with the Office of Personnel Management’s regulations no late than 60 calendar days after my initial decision became final. My initial decision became the final decision of the Board on December 16, 2005.

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The appellant also disputes the validity of the agency's deduction from her back pay award of the gross amount of the buyout payment of \$34, 186.00 she received under the terms of a January 14, 2005, settlement agreement entered into with the agency. However, the appellant canceled that settlement agreement on April 25, 2005, pursuant to her rights under the Age Discrimination in Employment Act and the Older Workers' Benefit Protection Act of 1990. That cancellation effectively returned the parties to the status quo ante, thereby requiring the appellant's return of the full buyout payment to the agency. *See Thompson v. National Aeronautics & Space Administration*, 68 M.S.P.R. 135, 138 (1995) (a settlement agreement is not cancelled unless all parties are returned to the status quo ante, *aff'd*, 78 F.3d 604 (Fed. Cir.) (Table), *cert. denied*, 117 S. Ct 173(1996); *Diehl v. U.S. Postal Service*, 82 M.S.P.R. 620, 627 (1999) (where an appellant cancels a settlement agreement, she must return all money she received under the terms of the agreement). The appellant has identified no law or regulations which would permit her under these circumstances to retain the compensation she received pursuant to the now-cancelled settlement agreement. I find that the agency therefore properly deducted the buyout amount from the appellant's back pay award.

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In sum, the record shows that the agency granted the appellant the correct amount of back pay, interest on back pay, and other benefits in accordance with the Board's order. The appellant's petition for enforcement therefore must be denied.

Therefore, the claim before us is also barred by res judicata.

Although we have no claims settlement jurisdiction in this case, we are concerned by what we conclude is the claimant's mischaracterization of AJ Ben-Ami's decision on the matter of the \$34,186 at issue in this case. The assertion in her June 27, 2006, claim request that AJ Ben-Ami "**did not instruct, authorize, or direct** the Federal Deposit Insurance Corporation (FDIC) to: (1) deduct, (2) recoup, (3) offset, or (4) collect consideration ("buyout") payment of well over **\$34,000** dollars from my salary," is contradicted by the clear and unambiguous language in AJ Ben-Ami's May 16, 2006, second petition for enforcement decision, quoted previously, finding she was not entitled to the \$34, 186 at issue.

This OPM settlement of the claim is final. No further administrative review is available within OPM. Nothing in this settlement limits the employee's right to bring an action in an appropriate United States court.