



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

[REDACTED]
Janiece H.,
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service,
Agency.

Appeal No. 0120143201

Hearing No. 450-2013-00227X

Agency No. 1G-756-0011-13

DECISION

Complainant filed an appeal from the Agency's August 19, 2014 final order concerning her equal employment opportunity (EEO) complaint 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. For the following reasons, the Commission AFFIRMS the Agency's final order.

BACKGROUND

Complainant worked as a Distribution Operations Supervisor (DOS), EAS-17, at the Agency's Network Distribution Center in Dallas, Texas. On February 1, 2013, she filed an EEO complaint in which she alleged that a Supervisory Operations Support Specialist, in her capacity as a Selecting Official (SO) discriminated against her on the bases of sex (female) and reprisal (previous EEO activity) by not selecting her for the position of EAS-18 Operations Support Specialist (OSS-18) on December 18, 2012. She also alleged that, since January 18, 2013, the Plant Manager (PM) and the EAS 22 Lead Distribution Operations Manager (LDOM) refused to allow her to cover an EAS-19 Distribution Operations Manager (DOM-19) position.

With regard to the nonselection, the SO averred that as a result of a reorganization, two OSS-17 positions were eliminated and three OSS-18 positions were created. She also averred that the

¹This 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.

two displaced employees could not be promoted automatically and would have to compete for those positions. The SO interviewed Complainant and seven other applicants for the three positions. She reviewed the applications and conducted the interviews herself, asking each applicant the same set of eighteen questions. At the conclusion of the interview phase, the SO assessed the applicants against the seven ranking factors for the OSS-18 position. Out of a possible score of 21 points, the highest-scoring selectee received a score of 19 and the other two selectees received scores of 16. Complainant received a score of 14. The SO testified that Complainant did not perform as well as the selectees during her interview and that the Selectees had stronger background in mail processing and delivery operations. Investigative Report (IR) 176-79, 319, 335.

As to the alleged denial of coverage opportunities for the DOM-19 position, the LDOM averred that, effective January 2013, three DOM-19 out of four were eliminated in accordance with a reduction-in-force. The Agency had a policy in place pursuant to which DOSs could serve as acting DOMs on a rotating basis only when the incumbents were on their scheduled off days or on leave. The LDOM and two DOMs, one of whom was Complainant's supervisor, averred that when Complainant was offered the opportunity to rotate as an Acting DOM-19, she declined and insisted on being detailed into the position on an everyday basis. The DOMs had explained to Complainant that such a detail would require an authorization that the facility did not have. IR 201, 209-10, 221. The PM averred that he was not involved in selecting DOSs to cover DOM positions, and that this decision was usually left to the Lead DOM. IR 194-95.

At the conclusion of the investigation, the Agency notified Complainant of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Although Complainant timely requested a hearing, the AJ assigned to the case granted the Agency's September 27, 2013, motion for summary judgment and issued a decision on June 30, 2014, without holding a hearing. 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.

ANALYSIS AND FINDINGS

The Commission cannot second-guess an Agency's personnel decisions involving promotions or assignments unless there is evidence of a discriminatory motivation on the part of the officials responsible for making those decisions. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981). Therefore, in order to warrant a hearing on her disparate treatment claim, Complainant would have to present enough evidence to raise a genuine issue of material fact as to whether the SO or the LDOM were motivated by unlawful considerations of her gender or previous EEO complaint in connection with her not being promoted to OSS-18 or not covering the MDO position. See 29 C.F.R. § 1614.109(g); Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000).

Complainant may do so in circumstantial evidence cases such as this by presenting documents or sworn testimony showing that the reasons articulated by the SO and the LDOM for their actions

are pretextual, i.e., not the real reason but rather a cover for sex discrimination or reprisal. St. Mary's Honor Society v. Hicks, 509 U.S. 502, 515 (1993) citing Burdine, 450 U.S. at 253. When the issue is nonselection, evidence of pretext can take the form of a showing that Complainant's qualifications for the position were plainly superior to those of the selectee. Hung P. v. Department of Veterans Affairs, EEOC Appeal No. 0120141721 (December 3, 2015). Other indicators of pretext include discriminatory statements or past personal treatment attributable to the SO or the SMDO, comparative or statistical data revealing differences in treatment across gender-related lines, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. Mellissa F. v. United States Postal Service, EEOC Appeal No. 0120141697 (November 12, 2015).

When asked by the investigator why she believed that her sex and previous EEO complaint were factors in her nonselection, Complainant maintained that she was more qualified for the position than the selectees. IR 92. The Commission has long held that an employer has discretion to choose among equally qualified candidates as long as the selection is not based on unlawful criteria, in this case gender and prior EEO activity. Complainant v. Department of Homeland Security, EEOC Appeal No. 0120141478 (July 31, 2015). Beyond her own assertions, she has not presented any documents or sworn statements that undermine the SO's assessment of the applicants' qualifications.

When asked the same questions regarding coverage of the DOM-19 position, Complainant replied that she was the only female DOS and that the LDOM and the PM had been named in her prior EEO complaint. IR 96. The laws the Commission enforces cannot prevent an employer from making decisions that its employees disagree with unless those decisions are rooted in a statutorily proscribed motivation. Erick K. v. United States Postal Service, EEOC Appeal No. 0120142888 (January 14, 2016). And on this crucial issue, Complainant did not provide evidence of any of the indicators of pretext described above. She has not submitted any sworn statements from other witnesses or documents that contradict the explanation provided by the LDOM and the PM, or which call the veracity of these officials into question. Complainant herself acknowledged that she had asked the LDOM if she could be detailed into the DOM-19 position on a full-time basis, and that the LDOM had told her no. IR 96.

On the basis of the foregoing, we find, as did the AJ, that no genuine issue of material fact exists with respect to motivation of the SO, the LDOM, or the PM in connection with either of the incidents set forth in the instant complaint.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we AFFIRM the Agency's final order.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0815)

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 or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. 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, P.O. Box 77960, Washington, DC 20013. 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 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).

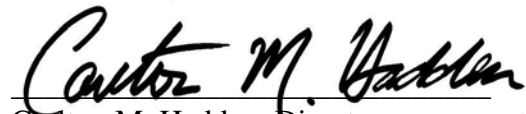
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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.**

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 black ink that reads "Carlton M. Hadden". The signature is written in a cursive style and is positioned above a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

February 25, 2016

Date