



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

[REDACTED]
Erich B.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 0120170537

Hearing Nos. 480-2013-00304X,
480-2014-00536X,
480-2015-00188X,
480-2015-00199X

Agency Nos. 200P-0691-2012103518,
200P-0691-2013102922,
200P-0600-2014102978,
200P-0691-2014103660

DECISION

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 October 28, 2016, final order concerning his 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 Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission **AFFIRMS** the Agency's final order.

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.

ISSUES PRESENTED

The issue presented is whether the EEOC Administrative Judge (AJ) properly issued a decision without a hearing, and whether the AJ properly found that Complainant did not prove he was subjected to unlawful discrimination.

BACKGROUND

At the time of events giving rise to this consolidated complaint, Complainant worked as a Physician at the Agency's Medical Center in Long Beach, California.

Complainant filed EEO complaints in which he alleged that the Agency discriminated against him on the bases of national origin (India), religion (Hindu), age (born in 1968) and in reprisal for prior protected EEO activity when:

1. On May 30, 2012, he was informed of his nonselection for the position of Hospitalist Physician;
2. On March 27, 2013, he learned he was not selected for the position of Hospitalist, Vacancy #837053;
3. On April 10, 2014, Complainant was notified of his nonselection for the position of Chief of General Medicine (Hospitalist) under Vacancy # VR-957229 T38-13-71 PP; and
4. On May 20, 2014, he was notified that he did not qualify for the position of Physician (Hospitalist) advertised under Vacancy #1100998.

In an investigative statement, regarding claim 1, Complainant stated that he believed that he was more qualified for the Hospitalist Physician position because none of the other candidates had experience as a Hospitalist and were board-certified in Hospital medicine. Regarding claim 2, Complainant stated that he believed he was more qualified for this position because no one in the Hospital Division is board-certified in Hospital Medicine. Complainant also stated that he has experience in working day and night and long hours; he worked directly with the Chief of Staff and the Resident's Program Director; he has committee experience and leadership training; and he was served in multiple roles as Primary Care Physician (PCP) and Hospitalist.

Regarding claim 3, Complainant stated that the Agency originally planned to advertise the position as Chief Hospitalist, but it was later changed to Chief of General Medicine to exclude him. He further stated that the selection panelists were physicians who were completely unaware of what a hospital position entails, and they were selected as "yes men" for management. Complainant also stated that he felt that he should have been selected for the position because he was the only board-certified candidate in Hospital Medicine, and he had 12 years of Agency Physician/Hospitalist experience.

Complainant did not provide a requested affidavit response for claim 4, but during counseling and on his formal complaint, Complainant stated that he was notified that he did not qualify for this position. He stated that he believed that a Fellowship requirement was added to the position to eliminate him from consideration.

After each investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing in each complaint. In each complaint, the Agency moved for summary judgment in its favor, to which Complainant responded in opposition. On June 21, 2016, Complainant motioned for sanctions against the Agency because it had not provided requested interview notes for the nonselection in Agency Number 200P-0600-2014102978.

On September 28, 2016, the AJ issued a decision in which he sanctioned the Agency for failing to keep the interview notes for one of the nonselections, which the AJ concluded violated the 29 C.F.R. § 1602.4 requirement that the Agency retain records pertaining to promotions and hiring for at least two years after the personnel action. The AJ found that the appropriate sanction in this case was to preclude the Agency from using the interview performance of the candidates as evidence for the relevant nonselection.² Additionally, the AJ issued summary judgment in favor of the Agency on all claims, finding that Complainant had not presented any persuasive evidence of unlawful discrimination for any of the matters. The Agency subsequently issued a final order fully adopting the AJ's findings.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the AJ erred in finding that there was insufficient evidence to support his claims. Complainant also argues that that he had superior qualifications for the four positions compared to those the selectees possessed. The Agency requests that we affirm its final order.

ANALYSIS AND FINDINGS

We must first determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

² Neither party contests the AJ's decision with regarding to sanctions. Therefore, we will not review this aspect of the AJ's decision on appeal.

In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Defense, EEOC Appeal No. 01A24206 (July 11, 2003). According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." Anderson, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an administrative judge could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

After a careful review of the record we find that there was no genuine issue of material fact or credibility that warrants a hearing. The AJ found that the undisputed record, including the complaints, sworn testimony, Reports of Investigation, and all submissions of the parties, was comprehensive, complete, impartial, and constituted an appropriate basis upon which to render a decision without a hearing in favor of the Agency. We agree, and therefore find that a decision without a hearing was appropriate.

Disparate Treatment

In order to prevail in a disparate treatment claim such as this one, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993).

Upon review, we assume *arguendo* that Complainant established a *prima facie* case of discrimination on his claimed bases. Nevertheless, we find that the Agency provided legitimate, non-discriminatory reasons for its actions. Specifically, for claim 1, the Agency stated that Complainant was not selected for this position because he was not an effective communicator during his interview and did not express himself clearly. One panelist stated that she asked Complainant about his specific area of interest in medicine, but he did not identify one. The Agency further stated that the two selectees were chosen for this position because they were highly recommended, had been in the Agency's training programs, had established interest in particular areas in medicine, had already been involved in research projects, and had some publications in the works. The Agency stated that the selectees had a more academic and scholarly background than Complainant, which was the focus for this Hospitalist position.

Regarding claim 2, the Agency stated that Complainant was not selected because he was unable to communicate his interview responses effectively and concisely and was "not a critical thinker." The Agency further stated that Complainant had a difficult time tying in past experiences. Regarding claim 3, the Agency stated that although the selectee was not a Hospitalist, he had better overall understanding of the program and had a better understanding of the need for growth in clinical and teaching services. The Agency further stated that Complainant did not have the depth of understanding in these areas that the selectee did. Additionally, the Agency stated that the selectee demonstrated more enthusiasm, passion for teaching, working with others, and a willingness to work clinically than did Complainant. Further, a panelist stated that the selectee and Complainant had similar qualifications, but the selectee had been at the facility longer and was more professional, committed, collegial, and exhibited stronger passion for teaching.

Regarding claim 4, the Agency stated that Complainant was disqualified because the position required a Fellowship because they involved research funding. The Agency further stated that the Fellowship requirement was not added to the position qualifications as a way to eliminate Complainant from consideration, and candidates had to have appropriate training to be successful in conducting health service research and obtaining research funding.

In an effort to prove pretext, Complainant maintains that he has superior qualifications for the positions at issue. However, upon review, we find that, although Complainant has impressive qualifications for the positions, he is not observably superior in qualifications to the selectees. Additionally, we note that for at least one of the positions, Complainant's interview performance was a major factor in his nonselection. Specifically, we note that interview notes for the position at issue in claim 2 reveal that interview panelists reported that Complainant often interrupted others, did not seem to understand the questions asked to him, "rambled excessively," and dressed casually to the interview. We find that Complainant did not provide any evidence from which a reasonable fact-finder could conclude that the Agency's nondiscriminatory explanations are pretext for unlawful discrimination. Therefore, we find that the AJ properly found that Complainant did not prove he was subjected to unlawful discrimination.

CONCLUSION

Accordingly, 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 for the reasons set forth in this decision.

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.**

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 16, 2018

Date