



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Herb E.,¹
Complainant,

v.

Janet Dhillon,
Chair,
Equal Employment Opportunity Commission,²
Agency.

Appeal No. 0120171699

Agency No. 2015-0001

DECISION

On April 12, 2017, 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 March 16, 2017, final order concerning his 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.

ISSUES PRESENTED

The issues presented are: (1) whether the Equal Employment Opportunity Commission Administrative Judge (AJ) properly decided the case without a hearing; and (2) whether the preponderance of the evidence in the record establishes that Complainant was subjected to discrimination based on national origin and/or reprisal when he was not selected for promotion and when he was not selected for training.

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.

² In the present matter, the Equal Employment Opportunity Commission is both the respondent agency and the adjudicatory authority. The Commission's adjudicatory function is housed in an office that is separate and independent from those offices charged with in-house processing and resolution of discrimination complaints. For the purposes of this decision, the term "Commission" or "EEOC" is used when referring to the adjudicatory authority, and the term "Agency" is used when referring to the respondent party to this action.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a GS-12 Bilingual (Spanish) Investigator in the Agency's Raleigh Area Office (RAO) in Raleigh, North Carolina. The RAO is part of the Agency's Charlotte District Office (CDO). Complainant's first-line supervisor was an Enforcement Manager (S1, African-American), his second-line supervisor was the CDO Deputy Director (S2, African-American), and his third-line supervisor was the CDO Director (S3, African-American).

Complainant is Hispanic. Complainant began working for the Agency in 1999, and he was promoted to GS-12 in 2003. Complainant averred that in 2003 or 2004 he applied for a Bilingual (Spanish) Mediator position in the CDO. According to Complainant, the position was never filled. Complainant stated that he filed a union grievance in 2006 or 2007 regarding a performance evaluation that did not allege discrimination and was heard by S3. In 2009 and late 2013, Complainant applied for RAO Enforcement Supervisor positions, but he was not selected. Complainant filed an EEO complaint concerning his nonselection for the 2009 Enforcement Supervisor vacancy. Complainant alleged that at the mediation of his 2009 complaint, he expressed concerns to S2 that there were no Hispanics in upper management in the RAO or in the CDO. S3 stated that since becoming CDO Director in late 1999, he promoted more than 20 Hispanic employees, including at least four promotions to positions at GS-13 or above. In 2013, Complainant provided a witness statement for a coworker's (C1) discrimination complaint, which named S3 as a responsible management official. S3 stated that he was unaware that Complainant had provided a witness statement for C1's complaint.

In May 2014, Complainant applied for a CDO GS-13/14 Program Analyst position. The record contains Complainant's application materials, including his most recent performance appraisal, which noted that Complainant's interviewing interfered with the timely completion of his work products. Report of Investigation (ROI) at 466-67. The position, advertised under vacancy announcement number M14-OFP-1108-690-100-TMD, was open to Agency employees. On June 19, 2014, the Agency's Human Capital Office issued a Certificate of Merit Promotion Eligibles, which contained the names of 10 Agency employees, including Complainant. S3 was the selecting official, and he did not conduct interviews. In September 2014, Complainant learned that the selectee for the position was a GS-12 Investigator from the Agency's Detroit Field Office, which is part of the Indianapolis District Office. The selectee is non-Hispanic and African-American. According to S3, he did not know the selectee's race or national origin when he selected him for the Program Analyst position.

S3 stated that he selected the selectee based on a strong recommendation from the Indianapolis District Office Director and based on his experience conducting fee-based training and conducting outreach with diverse advocacy groups and stakeholders. According to S3, he did not select Complainant because he had workload management issues, had limited outreach experience outside of the Hispanic community, and had no experience in fee-based training. Complainant denied having workload management issues and stated that his outreach reached communities other than the Hispanic community. Complainant stated that in the CDO, fee-based

training was only done by the Program Analyst or other managerial employees, so he had no opportunity to gain experience in this area.

The Agency conducted two sessions of a training at its Washington, D.C. Headquarters entitled the DNA of Leadership in September 2015. S1 nominated Complainant and three of her other subordinates to attend. S2 stated that when he read S1's recommendation for Complainant, he asked S1 why she had nominated Complainant because the recommendation portrayed Complainant in a negative light. The record contains an August 27, 2015, email from S1 to S2, which states, in relevant part:

I wish to nominate [Complainant] who is an investigator in my unit because he portrays leadership qualities. [Complainant] challenges eternal problems within the agency, often sees the glass half empty in [h]is approach and has to be encouraged to see the sun is still shining. . . . This training [will] open [Complainant] up to what is actual[ly] required of a real leader in dealing with conflict management and interpersonal skills.

ROI at 170. S2 averred that space was limited in the two sessions of the DNA of Leadership Training, so he selected six CDO employees who had received positive recommendations from their supervisors for the training. S2 stated that, in addition to S1's lukewarm recommendation, he did not select Complainant for the training because he had been counseled regarding multiple verbal outbursts with coworkers and supervisors.

On October 8, 2014, Complainant initiated contact with an EEO Counselor. On November 23, 2014, Complainant filed an EEO complaint, which he subsequently amended, alleging that the Agency discriminated against him on the bases of national origin (Hispanic) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. He was not selected for the Bilingual (Spanish) Mediator position;
2. He was not selected on two occasions for the RAO Enforcement Supervisor position;
3. He was not selected for the GS-13/14 Program Analyst in the Charlotte District, vacancy announcement number M14-OFP-1108-690-100-TMD; and
4. He was not selected for the September 14, 2015, to September 16, 2015, DNA of Leadership Training.³

The Agency dismissed claim 1 pursuant to 29 C.F.R. § 1614.107(a)(2) for raising a matter that had not been brought to the attention of an EEO Counselor and was not like or related to a matter that had been brought to the attention of an EEO Counselor. The Agency dismissed claim 2 pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO Counselor contact, noting that the selections had been made in or around 1998 and late 2013. At the end of the investigation, the

³ Complainant alleged that he was subjected to discrimination based on reprisal only with respect to claim 4.

Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an AJ. Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's October 11, 2016, motion for a decision without a hearing and issued a decision without a hearing on December 1, 2016.

The AJ found that the parties had participated in discovery, that the record was adequately developed for summary disposition, and that there was no genuine issue of material fact. In his decision, the AJ found that the Agency properly dismissed claims 1 and 2 pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO Counselor contact.

The AJ found that Complainant failed to establish a prima facie case of discrimination based on reprisal for his nonselection claim because his grievance and EEO complaint were too far removed in time from the nonselection and because S3 was unaware that Complainant provided a statement for C1's complaint. While the AJ found that Complainant established a prima facie case of national origin discrimination with respect to his nonselection for the Program Analyst position, the AJ determined that the Agency's legitimate, nondiscriminatory reason for selecting the selectee was that he was the best qualified candidate. The AJ noted that S3 was unaware of the selectee's race or national origin and that, as Director of the CDO, S3 had hired or accepted as transfers 20 Hispanic employees and had promoted four Hispanic employees to management positions. The AJ concluded that Complainant failed to establish that the Agency's proffered reason was pretextual.

The AJ found that Complainant established a prima facie case of discrimination based on reprisal with respect to the DNA of Leadership Training. The AJ found that the Agency's legitimate, nondiscriminatory reasons for not selecting Complainant for the training were Complainant's issues managing his caseload and that Complainant had been counseled for a workplace argument with a coworker. The AJ concluded that Complainant failed to establish by a preponderance of the evidence that the Agency's legitimate, nondiscriminatory reasons were a pretext for retaliation.

When the Agency failed to issue a final order within forty days of receipt of the AJ's decision, the AJ's decision finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i). The Agency subsequently issued a final order fully implementing the AJ's decision on March 16, 2017.

CONTENTIONS ON APPEAL

Complainant's Contentions on Appeal

On appeal, Complainant contends that the AJ's decision was based on misleading and/or false information provided by the Agency. Complainant argues that the AJ's decision casts doubt on the integrity of the EEO process because it was based on this misleading or false information. For example, Complainant contends that S3 has only promoted two Hispanic employees to

managerial positions, rather than the four cited in the AJ's decision. Complainant also contends that S3's claim that he was unaware of the selectee's race is disingenuous because the "vast majority" of Agency Field Office employees are African-American and because S3 spoke with the selectee's supervisor. Complainant argues that he was never aware of any issues or counseled regarding his caseload. Complainant also maintains that there was no workplace argument or "exchange of words," stating that he made a general statement about office morale to S2 during a staff meeting and that a coworker (C2) objected to Complainant's statement. Finally, Complainant states that it is "very well known" within the CDO that both S2 and S3 retaliate. Complainant requests that the matter be remanded for a hearing on the merits.

Agency's Contentions on Appeal

In response to Complainant's appeal, the Agency contends that Complainant has failed to meet his burden of proof and that Complainant's contentions on appeal are without merit. According to the Agency, Complainant's argument that S3 only promoted two Hispanic employees to managerial positions is immaterial to the question of whether he was subjected to discrimination. Regarding Complainant's arguments about the Agency's legitimate, nondiscriminatory reasons for not selecting him for the DNA of Leadership Training, the Agency maintains that Complainant had an opportunity to raise these arguments before the AJ yet failed to do so. The Agency requests that its final action be affirmed.

ANALYSIS AND FINDINGS

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

As a preliminary matter, we address the procedural dismissal of claims 1 and 2. EEOC Regulation 29 C.F.R. §1614.107(a)(2) states that the Agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in

§1614.105, §1614.106 and §1614.204(c), unless the Agency extends the time limits in accordance with §1614.604(c).

EEOC Regulation 29 C.F.R. §1614.105(a)(1) provides that an aggrieved person must initiate contact with an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. EEOC Regulation 29 C.F.R. §1614.105(a)(2) allows the Agency or the Commission to extend the time limit if the complainant can establish that Complainant was not aware of the time limit, that Complainant did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence Complainant was prevented by circumstances beyond her control from contacting the EEO Counselor within the time limit, or for other reasons considered sufficient by the Agency or Commission. Here, we find that Complainant failed to contact an EEO Counselor within 45 days of his nonselections for the Bilingual (Spanish) Mediator position and the Enforcement Supervisor positions. Accordingly, we AFFIRM the dismissal of these claims pursuant to 29 C.F.R. § 1614.107(a)(2).

Decision without a Hearing

We first determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for 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 "material" fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We have carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute.

Here, we find that the issuance of a decision without a hearing was appropriate because no genuine issue of material fact exists. On appeal, Complainant contends that the AJ erred in finding that S3 promoted at least four Hispanic employees to management positions during his tenure because two of the employees transferred into the CDO. However, we find that this is not a genuine issue of material fact because the issue of whether S3 promoted two or four Hispanic employees to management positions does not affect the ultimate issue of whether Complainant

was discriminated against. With respect to Complainant's assertion that S3 was aware of the selectee's race, we find that, other than Complainant's unsupported assertions, there is no evidence in the record that S3 was aware of the selectee's race or national origin prior to selecting him for the position.

Disparate Treatment

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). He must generally 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 Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep't of Veterans Affairs, EEOC Request No. 05950842 (Nov. 13, 1997). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, supra; Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995). In a selection case, a complainant can attempt to prove pretext by showing that his qualifications are "plainly superior" to those of the selectee. See Patterson v. Dep't of the Treasury, EEOC Request No. 05950156 (May 9, 1996).

Complainant alleged that he was subjected to discrimination based on national origin and in reprisal for his prior protected activity when he was not selected for the GS-13 Program Analyst position. The Agency has provided legitimate, nondiscriminatory reasons for selecting the selectee over Complainant. Specifically, the selectee had experience with fee-based training and was highly recommended by the Indianapolis District Office Director, whereas Complainant had workload management issues, had limited outreach experience outside of the Hispanic community, and had no experience in fee-based training. Complainant stated that fee-based training was reserved for GS-13 and above employees in the CDO, but this does not refute the Agency's reason for choosing the selectee, who had such experience, over Complainant, who did not. Complainant contends that he had no workload management issues. While there is no evidence in the record of Complainant being formally counseled regarding his caseload, the record does contain Complainant's performance evaluation, in which Complainant was advised that he needed to improve his interviewing techniques in order to improve his processing times. We find that Complainant has failed to establish that the Agency's legitimate, nondiscriminatory reasons for selecting the selectee are pretextual.

Complainant also alleged that he was subjected to discrimination based on reprisal when he was not selected for the DNA of Leadership Training. The Agency has provided reasons for not selecting Complainant for the training. Specifically, the Agency stated that S1's recommendation of Complainant was somewhat lackluster and that Complainant had recently

been involved in workplace disputes with a coworker and with supervisors. On appeal, Complainant states that the “dispute” with C2 was merely a disagreement at a staff meeting. This statement was not part of the record available to the AJ when he was considering the AJ’s motion for a decision without a hearing. As a general rule, no new evidence will be considered on appeal absent an affirmative showing that the evidence was not reasonably available prior to or during the investigation or during the hearing process. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 9, § VI.A.3 (Aug. 5, 2015). Complainant has offered no explanation why this statement was not previously available during the investigative or hearing processes, so this new evidence will not be considered for the first time on appeal. Moreover, we find that Complainant has failed to otherwise establish by a preponderance of the evidence in the record that the Agency’s legitimate, nondiscriminatory reasons were a pretext designed to mask discrimination based on reprisal.

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 action because the case was properly decided without a hearing and the preponderance of the evidence in the record does not establish that discrimination occurred.

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:

/s/ Bernadette B. Wilson
Bernadette B. Wilson
Executive Officer
Executive Secretariat

November 27, 2019
Date