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

[redacted]
Lidia B.,[1]
Complainant,

v.

Eugene Scalia,
Secretary,
Department of Labor
(Occupational Safety & Health Administration),
Agency.

Appeal No. 0120182004
Hearing No. 450-2015-00204X
Agency No. 14060104

DECISION

On May 31, 2018, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Equal Employment Opportunity Commission's Administrative Judge's (AJ) decision finding no discrimination, which became the Agency's 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.

ISSUE PRESENTED

The issue presented in this case is whether the AJ erred in issuing a decision without a hearing which found that Complainant did not demonstrate that she was subjected to discrimination when she was not selected for a Labor Liaison, GS-13, position.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Compliance Officer/Safety Specialist, GS-12 at the Agency's Occupational Safety and Health Administration (OSHA) facility in Richardson, Texas. On August 15, 2014, Complainant filed a complaint

[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.

alleging discrimination based on her color (brown), sex (Hispanic female), national origin (Mexican); and reprisal when: 1. on June 18, 2014, she learned that she was not selected for the Labor Liaison position advertised under Vacancy Announcement No. MS-14-DAL-OSHA-184; 2. on approximately September 28, 2014, she learned that she was not selected for a Supervisory Safety and Occupational Health position advertised under Vacancy Announcement No. MS-14-DAL-OSHA-358; and 3. on October 10, 2014, she learned that she was not selected for a Program Analyst position advertised under Vacancy Announcement No. MS-14-DAL-OSHA-390.

With respect to claim 1, the Labor Liaison position, the record indicates that each applicant was ranked, and seven applicants were selected for the best qualified list. Complainant was given a ranking of 98.87, while the selectee, C1, was given a ranking of 97.90, which was second to the last of the seven candidates. The applicants were invited for an interview and were interviewed by a three-person panel. All of the applicants were asked the same questions and scored based on their response. The interview panel identified C1 as the highest scoring individual. The selecting official (SO) reviewed the applicants' resumes and their interview responses. The SO agreed that C1 should be selected.

The SO maintained that C1 had more years of service with OSHA. She also had extensive experience working with labor group representatives as compared to other applicants. In comparison to Complainant, the SO indicated that Complainant's resume showed no experience working with labor organizations, although she had extensive experience conducting safety inspections. The SO thought that C1 was the most qualified candidate.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Administrative Judge. Complainant timely requested a hearing. Subsequently, the AJ notified the parties of his intent to issue a decision without a hearing. After reviewing the parties responses, the AJ granted summary judgment in the Agency's favor on April 13, 2018. 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 her to discrimination as alleged became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i).

CONTENTIONS ON APPEAL

On appeal, Complainant indicates, among other things, that she only wants to appeal the determination regarding claim 1, i.e., the Labor Liaison position. She maintains that her qualifications and experience were demonstrably superior to C1. Complainant explained that she was given a best qualified ranking of 98.87, while C1 was ranked at 97.90, which was the second from the last of the seven candidates.

Complainant also maintains that the region has a pattern of not promoting minority women. She contends that three minorities were ranked higher than the selectee but still were not selected.

Further, Complainant argues that the SO created the questions for the interview and they were biased. She also contends that she was told that she was not selected because it was against Agency policy for her to work with the same supervisor as her husband.

In response, the Agency contends, among other things, that Complainant's arguments are based on supposition and belief and not on actual evidence. The Agency maintains that the SO was not aware of the best qualified list scores. He knew that seven people had been selected for an interview, and he reviewed the rankings by the three-person interview panel. The Agency maintains that while the SO did write the twelve questions asked during the interview, all of the applicants were asked the same questions. Finally, the SO explained that C1 was chosen because she had extensive experience working with labor group representatives which was apart of the Labor Liaison duties.

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").

We must 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 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, Complainant argues that material facts are at issue because she was ranked higher than C1 on the best qualified list. We find that this fact, by itself, does not create a dispute because the ultimate selection decision was not based solely on the rankings. Accordingly, we find that the issuance of a decision without a hearing was appropriate.

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). Once Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to the Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 1993); U.S. Postal Service v. Aikens, 460 U.S. 711, 715-716 (1983).

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that assuming, arguendo, Complainant established a prima facie case of discrimination with regard to all of her bases, the Agency articulated legitimate nondiscriminatory reasons for its actions. Specifically, management explained that C1 was selected for the Labor Liaison position because she was on the best qualified list, she interviewed well, and she had extensive experience working with labor group representatives, which was directly related to the Labor Liaison position.

To show pretext, Complainant argued that she was better qualified for the position than the selectee. She pointed to the fact that she was ranked higher than the selectee on the best qualified ranking list. The Commission, however, has long held that an employer has the discretion to choose among equally qualified candidates. See Canham v. Oberlin College, 666 F.2d 1057, 1061 (6th Cir. 1981). Absent proof of a demonstrably discriminatory motive, the EEOC will not second-guess an agency's personnel decision. See Burdine, 450 U.S. at 259. The EEOC simply has neither the authority nor the capacity to stand as the super-personnel department for an agency.

Only personnel decisions that are idiosyncratic or suspect are subject to heightened scrutiny because deviations from standard procedures without explanation or justification are sufficient to support an inference of pretext. See Andre v. Dep't of Defense, EEOC Appeal No. 01994562 (Feb. 22, 2002); Hovey v. Dep't of Housing & Urban Dev., EEOC Appeal No. 01973965 (Aug. 31, 2000). However, we see no such suspect action here. Accordingly, we find that Complainant did not demonstrate that the Agency's actions were pretext for discrimination or that discriminatory animus was involved with the Agency's selection.

With respect to Complainant's contentions on appeal, we find that other than her conclusory and speculative statements she has not provided any evidence which supports her claim that she was subjected to discrimination. For example, we note her contention that SO wrote the interview questions in a biased manner, that he must have been aware of her initial best qualified list score and chose not to select her, or that the region has a pattern of not promoting minority women. In addressing an Administrative Judge's issuance of a decision without a hearing, a complainant's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for a hearing. See Celotex, 477 U.S. at 324.

CONCLUSION

Accordingly, we AFFIRM the Agency's final order which found that Complainant did not demonstrate that she was subjected to discrimination.

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 11, 2019
Date