



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

[REDACTED]
Ashlea P.,¹
Complainant,

v.

Kevin McAleenan,
Acting Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 0120182299
Agency No. HSCBP019572017

DECISION

On June 29, 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 Agency's June 4, 2018, final decision 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 MODIFIES the Agency's final decision.

ISSUES PRESENTED

Whether the Agency properly found that Complainant was not subjected to discrimination on the bases of national origin (Hispanic), sex (female), and reprisal for prior EEO activity when:

1. On May 22, 2017, Complainant learned that the Agency did not select her for the position of Supervisory Border Patrol Agent, GS-1896-15, assigned to the National Frontline Recruitment Command (NFRC), advertised under Job Opportunity Announcement (JOA) Number MHCBPMP-1733020-ERB (ERB), located in Washington, D.C.; and
2. On July 7, 2017, Complainant learned that the Agency did not select her for the position of Patrol Agent in Charge, GS-1896-15, advertised under JOA MHCBP-1923889-MCM (MCM), located in El Paso, Texas.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Patrol Agent in Charge at the Agency's Alamogordo Station in Alamogordo, New Mexico. The Agency's FAD clearly articulates the facts pertaining to Complainant's employment and the selection process for the Supervisory Border Patrol Agency (Associate Chief) and Patrol Agent in Charge positions. This decision incorporates them by reference and will not reiterate them.

On September 25, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her as articulated in the statement of Issue Presented above. 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 Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The instant appeal followed.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (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").

ANALYSIS AND FINDINGS

Disparate Treatment

In the absence of direct evidence of discrimination, the allocation of burdens and order of presentation of proof in a Title VII case alleging discrimination is a three-step process. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973). First, Complainant must 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. Next, the Agency must articulate a legitimate, nondiscriminatory reason(s) for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, then Complainant must prove, by a preponderance of the evidence, that the legitimate reason(s) proffered by the agency was a pretext for discrimination. Id. at 256.

ERB Position

The record indicates that Complainant was included on the Certificate of Eligibles (COE) for this position. The Assistant Commissioner (female; national origin and reprisal unspecified) was the Selecting Official (SO-1). Selectee-1 (Native American; male; no prior EEO activity) was selected for the position.

According to the Agency, SO-1 stated that she did not consider Complainant for the position because she had not been recommended. The record shows that seven of the 23 candidates on the COE were selected for an interview based on Agency's Minneapolis Hiring Center's (MHC) review of the candidates' application materials.

The MHC ranks applicants based on their responses to an occupational questionnaire. The MHC then generates the COE based on the candidates' application responses which is issued to the selecting official. The MHC noted that the hiring official within the hiring office has the discretion to choose who will be interviewed for the open position. Moreover, the Agency's Merit Promotion Plan (MPP) states that: "At their discretion, selecting officials (or their designees) may interview any or all applicants referred as best qualified."

As indicated above, there were seven applicants who were interviewed for the position. They were:

Selectee-1 (Native American; male; no prior EEO activity)
Interviewee-2 (Hispanic; male; no prior EEO activity)
Interviewee-3 (Caucasian; male; no prior EEO activity)
Interviewee-4 (African American; female; no prior EEO activity)
Interviewee-5 (Caucasian; male; no prior EEO activity)
Interviewee-6 (Caucasian; male; no prior EEO activity)
Interviewee-7 (Caucasian; male; no prior EEO activity)

The Agency acknowledged that "[t]he record shows that neither the agency nor the witnesses could identify who chose the seven interviewees."

The interview panel for this position consisted of A-1, the Deputy Executive Director, A-2, the Acting Assistant Commissioner, A-3, the Assistant Director, and A-4, the Deputy Director. A-1 and A-3 noted that they had no input into who was selected for an interview nor was Complainant's sex, national origin, or prior EEO activity considered during the review process as she was not interviewed for the position. Ultimately, the interview panel recommended Selectee-1 for the position.

We find that Complainant did not establish a prima facie case of discrimination based on national origin and sex because Interviewee – 2 and Interviewee - 4 are members of her protected groups regarding their national origin and sex

Complainant may establish a prima facie case of reprisal by showing that: (1) she engaged in a protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). The record indicates that Complainant had engaged in prior EEO activity when she previously filed an EEO formal complaint against the Agency, which was pending under Agency Case No. HS-CBP-25626-2016. During the investigation, A-1 was asked if she had knowledge of Complainant's previous EEO activity, which also involved a claim of discriminatory non-selection, prior to the current investigation. A-1 indicated that she was aware of Complainant's prior EEO activity. She was also asked how and when she became aware but did not respond to those specific questions. Given that all seven of the individuals who were selected to be interviewed had no prior EEO activity, and that A-1 had prior knowledge of Complainant's EEO activity and did not specify when or how she had obtained said knowledge, we find that Complainant has established a prima facie case of reprisal.

Because Complainant established a prima facie case of reprisal discrimination, the Agency now has the burden of producing a legitimate, non-discriminatory explanation for not selecting Complainant. While we note that an agency's burden of production is not onerous, it must provide a specific, clear, and individualized explanation for its selection decision. This is required in order for a complainant to have the opportunity to prove that the asserted reason was a pretext for discriminatory animus. See Stewart v. Dep't of Homeland Security (TSA), EEOC Request No. 0520070121 (Nov. 14, 2011) (agency failed to meet its burden of production by simply explaining the general mechanics of the selection process, but failed to provide an individualized explanation for Complainant's specific score) (citing Boston v. U.S. Postal Serv., EEOC Appeal No. 0120042074 (May 26, 2004))

We find that the evidence presented by the Agency is not sufficient to provide a specific, clear, and individualized explanation as to why Complainant was not selected for the position for which she was deemed qualified. The Agency explained the general mechanics of the selection process but failed to provide an individualized explanation for Complainant's specific situation. See, e.g., Koudry v. Dep't of Educ., Request No. 0520100196 (Apr. 13, 2010) (discrimination found where agency merely explained the mechanics of selection process, provided list of candidates deemed best qualified, and summarized applications of selectee and complainant, but failed to provide statements from selecting officials explaining how complainant's qualifications were evaluated compared to selectee's qualifications). The record simply does not indicate how the Agency determined which seven candidates would be interviewed, or why Complainant was not one of the seven. Merely indicating that the selecting official, or their designees, have the discretion to interview any or all applicants referred as best qualified is not enough – especially in a case where all of the interviewees, unlike Complainant, had never engaged in protected EEO activity. As was noted above, the Agency acknowledged that the record did not establish who chose the seven interviewees. We would further add that the record also does not identify why they were chosen.²

² On appeal, the Agency's representative, among other things, sought to provide some clarity to the selection process involving this position by providing affidavits from two people not

Therefore, the Commission finds that the Agency failed to overcome Complainant's prima facie case of reprisal discrimination, and Complainant prevails without having to prove pretext. Chhe v. Dep't of Housing and Urban Dev., EEOC Request No. 0720090008 (Aug. 6, 2010) (the consequence of an agency's failure to meet its burden of production under McDonnell Douglas is that the complainant, having established a prima facie case, prevails without having to make any demonstration of pretext), request for recon. den. EEOC Request No. 0520100584 (Jan. 27, 2011). As a result of the Agency's failure to meet its burden of production, we find that Complainant has established that she was subjected to discrimination on the basis of reprisal for prior EEO activity when she was not selected for an interview, and therefore not selected for the ERB position.

MCM Position

With respect to the MCM position, SO-2 stated that Selectee-2 was the best-qualified candidate for the position. He explained that Selectee-2's experience, skill sets, and leadership abilities exceeded those of Complainant, and the other applicants. Selectee-2 was a stronger, more resourceful, and far more proven leader at a variety of levels and locations. Lastly, his field and headquarters experience exceeded Complainant's. Out of the 20 applicants, 10 were interviewed. They were presented with the same five questions and ranked according to their cumulative scores out of 100 points. Selectee-2 received a 99.5 while Complainant received a 96. All members of the interview panel agreed that Selectee-2 performed better than Complainant.

While Complainant argues that she was better qualified, the record does not support this argument. Complainant did not present evidence of qualifications superior to that Selectee-2. In sum, Selectee-2 was deemed to be the best fit for the position in light of his previous work history and experience. The Commission has long held that an Agency has broad discretion to set policies and carry out personnel decisions and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259; Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (January 16, 1997). Accordingly, we find there is no persuasive evidence of unlawful motivation in the instant matter.

CONCLUSION

Based on a thorough review of the record, we find that the FAD properly held that Complainant did not establish that she was discriminated against on the bases of national origin, or sex, with respect to her non-selection for the Supervisory Border Patrol Agent position.

interviewed during the investigation. As a general rule, no new evidence will be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available prior to or during the investigation. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Ch. 9, § VI.A.3 (Aug. 5, 2015). Here, the Agency did not make such a showing regarding these affidavits. Accordingly, we decline to consider them on appeal.

We do find that she was subjected to discrimination based on reprisal for engaging in prior EEO activity with respect to this position. With regard to the Patrol Agent-in-Charge position we find that the Agency correctly found no discrimination based on national origin, sex or reprisal with respect to this matter. Accordingly, we MODIFY the Agency's FAD and REMANDED the complaint for proceedings consistent with this decision and the ORDER below.

ORDER

The Agency is ORDERED to take the following remedial action, within one hundred and twenty (120) calendar days of the date this decision is issued:

1. The Agency will place Complainant in the position of Supervisory Border Patrol Agent, GS-1896-15, assigned to the National Frontline Recruitment Command (NFRC), advertised under Job Opportunity Announcement (JOA) Number MHCBPMP-1733020-ERB, located in Washington, D.C.
2. The Agency shall pay Complainant back pay with interest from May 22, 2017, or the date on which it is determined Complainant would have started in the Supervisory Border Patrol Agent position. The Agency will ensure that all tax consequences are taken into account.
3. The Agency will conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford her an opportunity to establish a causal relationship between the Agency's retaliation and his pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages and will provide all relevant information requested by the Agency. The Agency will issue a final decision on the issue of compensatory damages. 29 C.F.R. § 1614.110. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein.
4. The Agency shall provide at least eight hours of in-person EEO training to responsible managers, including the Selecting Official, SO-1, regarding their responsibilities under Title VII, with special emphasis on the duty of managers to avoid retaliating against employees.
5. The Agency shall consider taking appropriate disciplinary action against the responsible managers, including SO-1. The Agency shall report its decision to the Compliance Officer referenced herein. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the identified management officials have left the Agency's employment, the Agency shall furnish documentation of the departure date(s).

POSTING ORDER (G0617)

The Agency is ordered to post at its Customs and Border Protection, National Frontline Recruitment Command office in Washington, DC copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408.

A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for

continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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

May 29, 2019

Date