



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

[REDACTED]
Mary S.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2022003504

Agency No. 200J-0589-2021104085

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 May 13, 2022, 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, we AFFIRM the Agency's final decision.

ISSUES PRESENTED

The issues presented concern whether the Agency discriminated against Complainant on the bases of sex (female), race (African American), age (over 40), color (black), and in reprisal when she was subjected to various acts of discrimination.

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 Support Clerk at the Agency's Prosthetics Department in Kansas City, Missouri.

On September 21, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African American), sex (female), color (black), age (over 40), and in reprisal for prior protected EEO activity when:

1. on unspecified dates, older, African American employees were not provided with training and African American Medical Support Assistants were not allowed to work from home following the COVID-19 pandemic;
2. the Supervisor disclosed her confidential medical information to individuals in the office;
3. incidents in claims 1 and 2 resulted in Complainant's forced retirement in July 2021 (constructive discharge); and
4. on June 4, 2021, Complainant was not selected for the Purchasing Agent (Prosthetics) position, as advertised under Vacancy Announcement Number 11076810.

Procedural Dismissal – Claims 1 – 3

On November 5, 2021, the Agency's Office of Resolution Management, Diversity, and Inclusion (ORMDI) issued a notice partially accepting and dismissing her claims. The Agency dismissed claims 1, 2, and 3 pursuant to 29 C.F.R 1614.107(a)(2), for failure to raise these issues during EEO counseling. The Agency noted that claims 1, 2, and 3 were also not like or related to claim 4, which was brought to the EEO Counselor's attention. Claim 4 was accepted for investigation.

Investigation – Claim 4

At the time of events, the relevant responsible management official was the Chief of Prosthetics and Sensory Aid Services (Chief) at the Kansas City Medical Center, who was the selecting official for the position at issue.

The Chief created a panel of three employees to review applications. The panel reviewed all the applications, used a matrix to score the resumes and came up with the top 7 applicants for an interview. After each interview, the panel would score the questions based off a rubric. The top two candidates were identified, and ultimately selected for the position. Complainant scored 20 points below the highest candidate and 16 points below the second highest candidate. ROI at 45-47.

Complainant argued that her non-selection was based on discriminatory animus. She asserted that her 18 years of experience and seniority clearly demonstrated her outstanding qualities as a superior candidate. Complainant also noted that she had even previously trained one of the Selectees. ROI at 39.

The panel members asserted that every candidate was asked the same questions and scored on the same rubric. ROI at 53; 60; 69. Complainant's lower score was attributed to the fact that when Complainant was asked performance-based questions, her responses were more generalized or incomplete, whereas the Selectees provided specific examples. ROI at 60.

Post Investigation

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency determined that claims 1, 2, and 3 were appropriately dismissed pursuant to 29 C.F.R. 1614.107(a)(2). Regarding claim 4, the Agency determined that Complainant failed to prove that the Agency subjected her to discrimination when she was not selected for the position.

CONTENTIONS ON APPEAL

Complainant did not provide an appellate brief. The Agency requests that the Commission uphold its final decision.

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 Chap. 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

Procedural Dismissal – Claims 1-3

The regulation set forth at 29 C.F.R § 1614.107(a)(2) states, in pertinent part, that an agency shall dismiss a complaint which raises a matter that has not been brought to the attention of an EEO Counselor and is not like or related to a matter on which the complainant has received counseling. A later claim or complaint is "like or related" to the original complaint if the later claim or complaint adds to or clarifies the original complaint and could have reasonably been expected to grow out of the original complaint during the investigation. Hurlocker v. Dep't of Vet. Affs., EEOC Appeal No. 0120141346 (June 27, 2014); 2023000060 Scher v. U.S. Postal Serv., EEOC Appeal No. 05940702 (May 30, 1995); Calhoun v. U.S. Postal Serv., EEOC Appeal No. 05891068 (Mar. 8, 1990).

The matters raised in her formal complaint involve training and remote work (claim 1), medical disclosure (claim 2), and constructive discharge (claim 3). These matters are not like or related to what was discussed during EEO counseling, which was the non-selection at issue in claim 4. Therefore, we find that the Agency correctly dismissed claims 1, 2, and 3 pursuant to 29 C.F.R § 1614.107(a)(2).

Non-Selection – Claim 4

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

For a complainant to prevail, they 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, n. 13; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

In order to establish a prima facie case of discrimination based on sex, color, race, or age, a complainant must show: (1) they are a member of a protected group; (2) they were subjected to an adverse employment action; and (3) they were treated less favorably than other similarly situated employees outside of their protected groups. We note that, although a complainant bears the burden of establishing a "prima facie" case, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), the requirements are "minimal," St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993), and complainant's burden is "not onerous." Burdine, 450 U.S. at 253.

For a claim of reprisal, a complainant must show that: (1) they were engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, they were 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). A complainant can also establish a prima facie case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Social Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas, 411 U.S. at 802).

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason.

While it is undisputed that Complainant is a member of a protected class by virtue of her sex, color, race, and age, and was subjected to the adverse employment action of non-selection, we find that she failed to show that she was treated less favorably than other similarly situated employees outside of their protected groups. As for her claim of reprisal, we find that Complainant cannot meet her burden because she failed to demonstrate that a nexus exists between her protected activity and the adverse treatment.

Furthermore, we find that the Agency articulated legitimate, nondiscriminatory reasons for not selecting Complainant. The Agency indicated that Complainant did not interview as well as the Selectees. The Agency noted that the Selectees scored 85 and 82, respectively, whereas Complainant placed fifth with a score of 62. ROI at 47. Additionally, when asked performance-based questions, Complainant's responses were more generalized or incomplete, whereas the Selectees provided specific examples. ROI at 60.

Without proof of a demonstrably discriminatory motive, the Commission will not generally second-guess the Agency's personnel decisions. See Chavez v. U.S. Postal Serv., EEOC Appeal No. 0120055246 (Jan. 5, 2007); see also Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1982) (noting that "the question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason [was discriminatory]").

We find no evidence that Complainant's protected classes or EEO activity were factors in the non-selection. At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted on the basis of discriminatory animus. Complainant failed to carry this burden. While we have long held that a complainant can demonstrate pretext in a non-selection case by showing that their qualifications were plainly superior to the Selectees, we find that Complainant failed to do so. The Commission has held that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the [selectee] over [a complainant]." Complainant v. Social Sec. Admin., EEOC Appeal No. 0120082506 (Sept. 10, 2009) (quoting Ash v. Tyson Foods, Inc., 190 Fed. Appx. 924 (11th Cir. 2006), cert. denied, 127 S. Ct. 1154 (Jan. 22, 2007)). Complainant has not shown such disparities in qualifications that would lead the Commission to conclude that her qualities were plainly superior to those of the Selectees.

CONCLUSION

Based on a thorough review of the record, we AFFIRM the Agency's final decision for the reasons set forth herein.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted together with the 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(f).**


COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 their 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

January 15, 2025
Date