



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Felton A.,¹
Complainant,

v.

Kristi L. Noem,
Secretary,
Department of Homeland Security
(Federal Emergency Management Agency),
Agency.

Appeal No. 2022004130

Hearing No. 570-2019-01215X

Agency No. HS-FEMA-26703-2016

DECISION

On July 28, 2022, 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 July 22, 2022, 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.

ISSUE PRESENTED

The issue is whether the EEOC Administrative Judge (AJ) properly issued a decision without a hearing concluding that Complainant was not subjected to discrimination regarding equal wages and pay based on his race (African American) and color (black).

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 Disaster Assistant Employee (DAE [Reservist]), GS-3 at the Agency's office in Nashville-Davidson, Tennessee. Complainant's position is one of the Agency's categories of Stafford Act Employees. Report of Investigation (ROI) at 124-229. Complainant is a Black African-American. He was hired by the Agency on or about June 14, 2010. Complainant was in the Reservist precursor program.

Reservists work on an intermittent and temporary basis called "deployments" to specific presidentially declared disaster sites (usually within their region). When the needs of the disaster lessen, DAEs/Reservists are demobilized (i.e., sent home from duty) until they are deployed to another disaster. See ROI at 124-229.

On June 23, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American) and color (Black) when, since 2010 and continuing, Complainant has been paid less than similarly situated employees with lesser qualifications.²

The Agency conducted an investigation into the complaint. The investigation revealed that between 2012 and 2016, Complainant received periodic pay increases to his hourly rate from \$26.04 to his final pay of \$26.82 an hour. Complainant alleged that he has been paid less than white Caucasian Project Managers all over the Agency.

Complainant identified three named individuals as the employees who had been paid \$197,000.00, and who he stated were located in Texas, Virginia, and California. Complainant's Supplemental Affidavit at 4. The first identified individual (Individual 1) was a Senior Executive Service (SES) member. The second identified individual (Individual 2) was also a SES member. Individual 2 has been a SES member since April of 2008.

² The ROI includes a claim that on May 21, 2016, Complainant's crew lead falsely reported his status to security, despite Complainant's emails to her repeating his location. The Agency noted in its appeal response Complainant's assertion that this claim was not part of his complaint, and he had no knowledge of it. Complainant requested that the claim be removed. Therefore, the Agency did not investigate that claim, and the AJ did not address it at the hearing stage of this complaint.

The third identified individual (Individual 3) was likewise a SES member. Individual 3 has been in the SES since June of 2010.

Management denied awareness of Complainant being paid less than similarly situated white Caucasian employees with lesser qualifications. According to a Subject Matter Expert (SM Expert), when reservists are deployed, they are deployed as Disaster Assistance (DSA) specialists under different job titles such as specialist, crew lead, and task force leader. He asserted that there is no position title of project manager under reservists. SM Expert also explained that since Complainant had been with the Agency for some time, he was in the category of a higher rate of pay than the newly hired reservists. He also stated that Complainant may not have received promotions or raises because he was already making more than what a newly hired reservist made at the time.

The SF-50 for Individual 1, Regional Administrator of Region 6, reflects that he was a permanent, full-time employee, who held a GS-15 position between 2010 through 2012, and beginning in 2013 he became a SES member. See Agency's Supporting Exhibit 9 (Agency's Ex. 9) at 1-7. Similarly, Individual 2, Executive Administrator at the Mt. Weather EOC, National Continuity Program, Resilience, has been a SES member since 2008. Agency's Ex. 9 at 8-16. Likewise, Individual 3, Regional Administrator of Region 9, has been a SES member since June of 2010. Agency's Ex. 9 at 17-27. Notably, the SF-50s produced by the Agency demonstrate that none of the employees identified by Complainant are intermittent employee Reservists or were Disaster Survivor Assistance Specialists during the alleged timeframe of 2010-2016. See Agency's Ex. 9, generally.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

The AJ assigned to the case observed that the Agency did not assign an investigator to investigate Complainant's complaint until nearly one year after a Notice of Acceptance was issued. It was not until July 24, 2019 that the Agency transmitted the completed ROI to Complainant. See ROI at 28. As such, the Agency issued the ROI 1,127 days after Complainant filed his complaint on June 23, 2016, i.e. the Agency was 947 days late in completing its investigation and issuing its ROI.

On March 17, 2020, an AJ issued an order to show cause. Both the Agency and Complainant timely responded to the order to show cause. On March 7, 2022, the complaint was reassigned to another AJ. On April 26, 2022, the AJ issued an amended order to show cause, which ordered the Agency to show good cause why it should not be sanctioned, up to and including a default judgment in Complainant's favor, for its delay in completing the investigation. The order allowed Complainant to respond to the amended order to show cause, and it also required Complainant to submit an affidavit with specific information regarding his claim, including information about the position he held with the Agency and comparator information. On May 8, 2022, Complainant produced his affidavit. On May 11, 2022, the Agency submitted its response to the amended order to show cause (Agency's Response).

On June 23, 2022, the AJ issued an order of default judgment against the Agency. The AJ sanctioned the Agency for failing to timely complete the EEO investigation. The AJ ordered the Agency to provide eight (8) hours of training on the topic of EEO case processing to its EEO employees and to post a notice alerting employees of their right to the timely processing of EEO complaints.³

The AJ also found that Complainant failed to establish a prima facie case of discrimination. Specifically, the AJ found that Complainant failed to demonstrate that the Agency's determination regarding his pay was related to his race and/or color. Therefore, the AJ found that Complainant had failed to establish his independent right to individual relief. See Jeremy S. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120142917 (Feb. 9, 2017) (after issuance of a default judgment, a complainant is entitled to relief only where there is sufficient evidence to support a prima facie claim).

³ EEOC Regulations state an Agency must provide a complainant with a Report of Investigation "within 180 days from the filing of the complaint, or where a complaint was amended, within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint." See 29 C.F.R. §1614.108(f). In addition, an agency shall develop "an impartial and appropriate factual record" from which a decisionmaker can make findings on the claims raised by a complainant, allowing him or her to draw conclusions as to whether discrimination occurred. See 29 C.F.R. §1614.108(b).

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.⁴

CONTENTIONS ON APPEAL

On appeal, Complainant contests the AJ's decision, asserting that it was in error. According to Complainant, he applied for over 1500 jobs at the Agency but was not hired for any of them because of unlawful discrimination and retaliation. Complainant also asserts that but for the alleged discrimination and retaliation, he would have the same job position as his identified comparison employees, requesting that the Commission compare his education and work experience with the identified individuals.

In response, the Agency expresses with the AJ's determination that Complainant did not establish a prima facie case of discrimination on any of his protected bases. Regarding Complainant's non-selection for 1500 positions to which he applied, the Agency asserts that there is no evidence that Complainant amended his complaint at any time during the investigation to include that claim which, the Agency requests, be dismissed.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, 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").

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g).

⁴ Neither the Agency nor Complainant contested the AJ's ordered default judgment and sanction, or the consequent ordered training and posting notice. Therefore, this matter will not be addressed in this decision.

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. 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*).

ANALYSIS

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant’s favor.

Disparate treatment based on race and color

The Commission has adopted the burden-shifting framework for analyzing claims of discrimination outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) they were treated differently than similarly situated employees outside their protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nanette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (March 20, 2019); McCreary v. Dep’t of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep’t of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

Once Complainant has established a prima facie case, the burden of production 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). If the Agency is successful, the burden is onto 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 her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks. 509 U.S. 502 (1993).

For the following reasons, we find that Complainant failed to establish a prima facie case of discrimination based on race, and color.

Complainant is a Black African American. However, Complainant did not identify any other similarly situated employees outside of his protected classes who were treated more favorably. Therefore, Complainant has not established a prima facie case of disparate treatment based on any of his protected classes. The Agency has also provided legitimate nondiscriminatory reasons for the challenged management action; and we find no persuasive proof of pretext.

Management denied awareness of Complainant being paid less than similarly situated white Caucasian employees with lesser qualifications. We also note SM Expert's statements that there is no position title of project manager under reservists. SM Expert also explained that Complainant may not have received promotions or raises because he was already making more than what a newly hired reservist made at the time.

We next turn to Complainant to show pretext. The Commission has stated that proof of pretext includes discriminatory statements or past personal treatment attributable to the named managers, unequal application of agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. See Ricardo K. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004809 (Dec. 10, 2020) (citing January B. v. Dep't of the Navy, EEOC Appeal No. 0120142872 (Dec. 18, 2015) (citing Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015))).

Here, Complainant failed to provide any evidence demonstrating that the Agency made any decision regarding his pay based on discriminatory animus due to any of his protected bases.

Complainant asserted that he worked for the Agency as a Program Manager, GS-01. However, Agency records, including Complainant's Appointment Letter and Standard Form ("SF") 50s reflect that Complainant was hired as a Disaster Assistance Employee. See Complainant's Supplemental Affidavit at 3 to compare to Agency's Response at 15-29.

Complainant argued that he was underpaid compared to three named other employees in that he was paid an annual salary of \$20,000, whereas his identified comparison employees. Individuals 1, 2, and 3, were each paid annual salaries of \$197,300. Complainant's Supplemental Affidavit at 3-4. However, Complainant's SF-50s shows that he earned \$26.04 to \$26.82 per hour between 2012 and 2016. See Agency's Response at 16-7.

The record also includes SF 50s reflecting that Individuals 1, 2, and 3 held different jobs from Complainant's, at different locations, and at pay grades different from Complainant's pay grade. Moreover, none of the identified comparators were intermittent employee Reservists or Disaster Survivor Assistance Specialists during the alleged timeframe of 2010-2016. See Hearing File at 20 and 26-52; and Agency's Exh. 9 at 1-27. Therefore, the identified individuals are not proper comparators to Complainant. There is also no evidence that Complainant and the identified employees were in the same supervisory chain of command. See Colene M. v. U.S. Postal Serv., EEOC App. No. 2020000924 (Jun. 14, 2021) ("[C]omparator evidence relating to other employees is considered relevant when they are 'similarly situated.' . . . In other words, all relevant aspects of the employees' work situation are identical or nearly identical, i.e., the employees report to the same supervisor, perform the same job function, work during the same time periods")

As Complainant did not identify any similarly situated reservists who earn his desired pay of \$199,000 per year, his claims fail, and he does not prevail. See Lino L. v. National Aeronautics and Space Administration, EEOC Appeal No. 2019004945 (Dec. 14, 2020) request for recon. denied, EEOC Request No. 2021001445 (Mar. 25, 2021) (citing Aguilar v. U.S. Postal Serv., EEOC Appeal No. 01944167 (Aug. 8, 1995) (asserting that in general, in the absence of direct evidence of discrimination, if the complainant cannot identify any similarly situated comparison employees who were treated more favorably, he or she will not prevail)).

We note Complainant's appeal allegation that he applied for over 1500 jobs with the Agency and was not hired due to unlawful discrimination and retaliation.

We however decline to address that allegation because Complainant's only appealable claim is that he was paid less than similarly situated white employees with lesser qualifications since 2010. See ROI at 16-7, 28, 44, and Hearing File at 15. Pursuant to 29 C.F.R. § 1614.106(d) Complainant could have amended his complaint at any time prior to the conclusion of the investigation or by filing a motion before the AJ after he had submitted his hearing request. However, the record is devoid of any evidence that he did so. Therefore, Complainant cannot use this appeal to raise a new claim that was never investigated or accepted at the investigative or hearing stage.⁵

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the AJ's decision and the Agency's final order adopting it.

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.**

⁵ The Commission has held that it is not appropriate for an appellant to raise new claims for the first time on appeal. Hubbard v. Dep't of Homeland Sec., EEOC Appeal No. 01A40449, (Apr. 22, 2004). When new claims have been brought up on appeals, the Commission has determined it is appropriate to not address them. See Norris C. v. DeJoy, EEOC Appeal No. 2021001755 (Jul. 28, 2021); Clarke v. Small, EEOC Appeal No. 0120064040 (Aug. 6, 2007).

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)

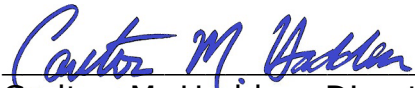
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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

March 4, 2025

Date