



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

[REDACTED]
Arturo B.,¹
Complainant,

v.

Judith Kaleta,
Acting Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 2022004373

Hearing No. 570-2022-00108X

Agency No. 2019-28963-FAA-04

DECISION

On July 29, 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 June 29, 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.

ISSUES PRESENTED

Whether the AJ's grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.

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.

Whether the Agency properly found that Complainant was not subjected to discrimination based on national origin (Hispanic/Latino), sexual orientation (bisexual), and in reprisal for his prior protected EEO activity when he was not selected for the position of Air Traffic Control Specialist.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Air Traffic Control Specialist, AT 2152/KH at the Agency's Orlando-Central Florida TRACON facility in Orlando, Florida.

On November 25, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of national origin (Hispanic/Latino), sexual orientation (bisexual), and in reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when, in September 2020, Complainant learned he was not selected for the position of Air Traffic Control Specialist, advertised under Vacancy Announcement AGL-AT-19-0012-62051.

The Vacancy Announcement sought to fill multiple vacancies in Elgin, Illinois, at the Agency's C90 TRACON facility. The Agency referred 54 applicants for consideration and selected six candidates.

Complainant attested that he told his supervisors in Orlando that he is bisexual and feels that his supervisors have made judgments regarding his character as a result. Complainant's prior protected EEO activity consists of participating as a witness regarding his wife's EEO complaint in 2006. Complainant believes that the Selecting Official (SO) was aware of his protected bases because managers share information with each other, and the SO would have been told by another manager of Complainant's situation.

After Complainant was not selected, he spoke with the SO. The SO told Complainant that he was not selected based on his experience and references.

Complainant protested that he had sufficient experience and discovered that the selectees had less experience than him. Complainant explained that the C90 TRACON facility is a Level 12 facility, the most difficult rating possible. Complainant said that, in addition to Orlando, a Level 11 facility, he has worked in two Level 12 facilities and a Level 10 facility. Complainant noted that the selectees came from facilities rated between Level 5 and Level 9.

The SO explained that she did not interview any applicant and that it was the facility's normal practice to make selections based on application packages and reference checks. Complainant's experience was good, but she had difficulty reading his application. The SO noted that, while Complainant identified 18 years of air traffic control experience, Complainant did not state that he was a Certified Professional Control (CPC) at each facility where he had worked. His application "included the facility and the level but not whether he was certified at that facility. The way he filled out his package did not lend [the SO] confidence he would be successful."

The SO also obtained references for Complainant and for the selectees. According to the SO, Complainant's supervisor told the SO that he thought Complainant "demonstrated ability to work under all different types of situations at F11. His recommendation was adequate. Recommendations for other applicants were glowing."

The SO reviewed each selectee. Selectee 1 had a "very glowing recommendation that said he was an 'excellent'." Selectee 2 had a "very strong" recommendation and a well-written resume. Selectee 3 "had an excellent recommendation, well-written resume" and was a CPC, a Controller-in-Charge, and had been a trainer. Selectee 4 had an "excellent" recommendation and a well-written bid package. Selectee 5's recommendation was "excellent" with a "very good" bid package. Selectee 6 was local to the district with a "very glowing recommendation." In addition to Selectee 3, SO noted that Selectees 2 and 6 were also trainers of other air traffic controllers. Several selectees had received time off awards. Complainant did not identify that he had received any time off awards.

In response, Complainant disputes the relevancy of time-off awards; they "could be for anything." Complainant also suggests that his resume clearly identifies that he was a CPC at each facility.

An Air Traffic Controller at C90 TRACON (ATC1) testified that he was involved in reviewing the applications for this position. ATC1 said that Complainant was among seven employees that he and SO selected. However, when he learned Complainant was not selected, he consulted with the SO who said that Complainant "ended up coming back with a bad reference."

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

Over Complainant's objections, the AJ assigned to the case granted the Agency's May 17, 2022, motion for a decision without a hearing and issued a decision without a hearing on June 28, 2022.

In her decision, the AJ accepted the SO's explanations as legitimate and nondiscriminatory. The AJ explained:

It is undisputed that Complainant was one of the top ten persons selected for reference checks for these positions, out of a field of fifty-seven. Clearly Complainant was qualified for the position at issue – however he failed to show that his skills and experience made his qualifications significantly better or “plainly superior” than those of the selectees.

The AJ noted that experience, alone, does not render an applicant more qualified than other candidates. Further, Complainant failed to point to any evidence tending to establish that the decision was made for discriminatory reasons.

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.

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant did not submit a statement on appeal.

In its statement on appeal, the Agency argued that the SO's reasons were sufficient to support a finding of no discrimination.

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). 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.

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially 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. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n.14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the Agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't. of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't. of Health and Human Servs., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't. of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

In this case, SO explained that Complainant's resume and reference checks were not impressive, compared to the six selectees. The selectees' resumes were well-written, and they had glowing references while Complainant's reference was adequate. While ATC1's testimony suggests that Complainant was qualified for the position, ATC1 nonetheless corroborates SO's testimony that she did not select Complainant because his references fell short.

Complainant now bears the burden of establishing that the Agency's stated reasons are merely a pretext for discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996). Complainant can do this directly by showing that the Agency's proffered explanation is unworthy of credence. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). 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 or retaliatory animus.

Where, as here, the alleged discriminatory action is non-selection, pretext may be found where the complainant's qualifications are demonstrably superior to those of the selectee. Bauer v. Bailer, 647 F.2d 1037, 1048 (10th Cir. 1981). Otherwise, the Agency may choose among qualified candidates based on its discretion, provided that the decision is not based upon unlawful criteria. See Burdine, 450 U.S. at 259; Vanek v. Dep't of the Treas., EEOC Request No. 05940906 (Jan. 16, 1997).

It is not the function of this Commission to substitute its judgment for that of management officials who are familiar with the needs of their facility, and who are in a better position to make decisions, unless other facts suggest that proscribed considerations of bias entered the decision-making process. See Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996), citing Bauer, 647 F.2d at 1048; see also Allen v. Dep't of the Navy, EEOC Appeal No. 01A52639 (Aug. 10, 2005) (personnel decisions should not be second-guessed by the reviewing authority absent evidence of unlawful motivation).

In this case, Complainant bases his argument that he should have been selected in the fact that he possessed experience that made him observably more superior to the selectees. However, 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 [Complainant]." Complainant v. Social Security 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 his qualities were plainly superior.

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 decision.

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

February 18, 2025

Date