



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

[REDACTED]
Elda S.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2022005109

Hearing No. 530-2021-00543X

Agency No. 200H-0646-2021100865

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 final action concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of 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 action.

ISSUES PRESENTED

The issues presented are: (1) 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; and (2) whether the Agency's final

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.

action properly found that Complainant was not subjected to discrimination based on age (over 40) when she was denied a retention incentive in late 2020.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Certified Registered Nurse Practitioner (CRNP) at the VA Medical Center (VAMC) in Pittsburgh, Pennsylvania.

On February 12, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of age (over 40) when on October 6, 2020, she was informed by her second level supervisor, the Nurse Manager, that her application for a grant award from the Education Debt Reward Program (EDRP) was denied. ROI at 64.

The investigation into the complaint revealed that management was unaware of Complainant's exact age but perceived that she was over the age of 40. See Report of Investigation (ROI) at 72, 74, 77, 79.

Complainant began working for the Agency as a Clinical Nurse Specialist (CNS) in 1992. In 2018, she enrolled in a Certified Registered Nurse Practitioner (CRNP) program. Complainant received her certification, and in December 2019 she was placed in a CRNP position at the Agency. ROI at 64, 123-124.

On August 5, 2020, Complainant applied for loan assistance through the Agency's EDRP.² Since she had been in her position for less than a year at the time of her application, she was only eligible for EDRP assistance under its retention provision. The retention provision allowed an "incentive [to] be authorized, if without one, VHA would likely lose, for any reason, an employee whose retention is essential."

² The EDRP is a program managed by the VHA Healthcare Talent Management Office. EDRP enhances the recruitment and retention of health care professionals that are required to meet the staffing needs of the VHA. It provides education loan repayments to health care professionals in occupations for which a medical center has determined hard to recruit and retain. In addition to position requirements, the health care professional must have a qualifying loan for the training which qualified them for the position they hold. ROI at 229, 233-265.

A retention incentive could only be given if the "employee would be likely to leave VHA employment in the absence of the retention incentive." ROI at 120-122, 212-213.

In her application, Complainant explained that she met the qualifications because she was a full-time employee with a performance rating of "fully successful," had no unfilled recruitment, retention, relocation, or scholarship incentive service obligations, and her CRNP position was on the VAPHS's hard to recruit and retain list in fiscal year 2020. ROI at 116, 362-366. She asserted that she would likely seek employment outside of the Agency without the grant but did not detail her job search or prospects. ROI at 120-122.

On October 6, 2020, Complainant learned that her grant application was denied. Complainant alleged the Agency did not cite any policy or procedure to support its denial, only that the Nurse Manager stated, "there was no money" and "all of the slots were gone." ROI at 65-66.

Complainant claimed that management subjected her to age discrimination by denying her grant award. She believed management's justification that "there was no money" for her award was pretextual as 16 employees had been awarded grants which exceeded the \$60,000.00 limit and depleted the available funds for other employees. Complainant compared herself to four CRNPs in her department who received EDRP funding for the prior 2019 cycle and were 20 years her junior. Complainant stated that she was more qualified than these co-workers, as two of the individuals were new CRNPs, and all had less experience and time at the VAMC. ROI at 67-68. Complainant also identified a cardiologist and interventional cardiologist within her department as recipients of grant awards during that year. ROI at 206-207.

The Nurse Manager clarified that the four individuals identified by Complainant received funding as part of their selection/recruitment for the position of CRNP, which, at the time of their hiring in 2019, had been identified as hard to recruit and retain. ROI at 81-82. The cardiologists also received recruitment awards during the same fiscal cycle. ROI at 206-207. The Nurse Manager explained Complainant did not meet the necessary prerequisites for the grant since she applied for the award after graduating from the CRNP program and was already in an CRNP position at VAPHS. ROI at 78.

According to the VP of the Medicine Service Line, there were no funds to reimburse Complainant for completing training which was not requested or mandated by the VA, and had no effect on her current job duties.

As a result, he deferred Complainant's application to the Nursing Service Leadership for adjudication and her candidacy did not proceed. ROI at 73.

The Chief of Compensation stated the hard to recruit/retain list was established for each facility and updated based on the recruitment/retention needs of the facility. The number of recipients and awarded grants were based on the facility's budget. The Chief of Compensation was unaware of the 16 individuals Complainant referenced as receiving grants which exceeded the \$60,000.00 limit, but indicated the National EDRP was the approval authority for grants exceeding \$60,000.00. The Compensation unit did not keep age data on award recipients and was unaware of Complainant's age or the individuals Complainant identified. ROI at 92.

Complainant's response included a spreadsheet which chronicled her job applications. Between March 31, 2020 to May 27, 2021, she applied to seven positions within the Agency. Six positions were at the Pittsburgh VA facility, and one was in Aspinwall, Pennsylvania. Complainant was offered a position in Aspinwall, but she declined. Complainant also applied to less advanced nursing positions outside the Agency, two in 2019 and one in 2020. Complainant received an interview for the 2020 position, but ultimately did not receive an offer. ROI at 367.

The recruitment and retention incentive programs fundamentally differed in scope, criteria and decision makers. Namely, the recruitment program was more expansive than the retention program and had limited funding for applicants likely to forgo VHA employment if no incentive was offered. The Vice President of the respective Service Line authorized retention incentives whereas, recruitment decisions regarding the amount of awards, based on availability of funds, was made by the National EDRP Manager. ROI at 213, 217, 229.

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). Complainant timely requested a hearing. On August 2, 2022, the AJ notified the parties of his intent to issue a decision without a hearing, as the probative record failed to persuasively show that the Agency subjected Complainant to discrimination.

In her opposition, Complainant argued that she was eligible for the recruitment incentive and asserted that she would have resigned from the Agency if she did not receive an incentive. In so arguing, Complainant noted that during the relevant period, she applied for three outside positions, and seven positions within the Agency. Complainant argued that the Agency discriminatorily denied her an incentive and emphasized that the Agency provided incentives to at least four younger comparators.

In response, the Agency argued that Complainant misunderstood the distinction between retention and recruitment incentives and emphasized that none of the individuals whom Complainant named as comparators received retention incentives. Rather, they received recruitment bonuses at the time of their hiring in 2019. The Agency urged the AJ to rule in its favor, as Complainant presented no persuasive evidence of discrimination.

Over Complainant's objections, the AJ issued a decision without a hearing in favor of the Agency on August 29, 2022. When the Agency failed to issue a final order within 40 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). The instant appeal followed on October 27, 2022.

CONTENTIONS ON APPEAL

On appeal, Complainant argues the investigation was insufficient and additional information is needed. Complainant argues the AJ issued a decision without a hearing and the Complainant does not feel she received due process. Complainant stated she submitted new evidence to support her claim during the hearing process and the Agency and AJ did not take this new evidence into consideration.

The Agency did not provide an appellate brief in opposition to Complainant's appeal.

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

Summary Judgment

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

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation 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. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

In order to establish a prima facie case of discrimination based on 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) that 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 Dep't of Cmty. 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.

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Burdine, 450 U.S. at 253. 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. Hicks, 509 U.S. at 507.

While we find that Complainant is a member of protected class by virtue of her class, and suffered an adverse employment action when she was denied the requested retention incentive, we find that Complainant cannot establish a prima facie case of discrimination because she failed to persuasively establish a causal nexus between her protected class and the adverse employment action at issue.

Furthermore, we find that the Agency articulated legitimate, nondiscriminatory reasons for its actions. According to the Nurse Manager, the eligibility criteria for recruitment and retention incentives were not the same and involved different processes and emphasized that Complainant did not meet the necessary prerequisites for the grant. The Nurse Manager added that the four individuals identified by Complainant, who received funding, received the incentive in 2019, as part of their selection/recruitment for the position of CRNP. The Nurse Manager emphasized that these individuals did not receive any retention incentives during the relevant period.

Without proof of a demonstrably discriminatory motive, the Commission will not generally second-guess the Agency's personnel decisions, such as disciplinary actions. 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 ultimately find no evidence that Complainant's protected class was a factor. 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 based on discriminatory animus. While Complainant alleges that she qualified for the retention incentive and should have received it, we find that probative record shows that she did not meet all the qualifications. Indeed, we note that the retention incentive was intended for employees whom the Agency deemed would be likely to leave the Agency unless they were awarded a retention incentive. The fact that Complainant applied to only three jobs outside the Agency, but seven jobs within the Agency, undermines her assertion that she was likely to leave the Agency without an incentive. Further, we find that she was not similarly situated to her comparators, who received recruitment incentives, as they applied through an entirely different program than Complainant. Aside from conclusory statements, Complainant has not provided any evidence connecting the alleged discrimination with her protected class. Based on the record, we conclude that Complainant has not met her burden of proving that she was discriminated against as alleged.

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 action.

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