



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

Verna Gaddy a/k/a  
Shirley P.,<sup>1</sup>  
Complainant,

v.

Xavier Becerra,  
Secretary,  
Department of Health and Human Services  
(Indian Health Service),  
Agency.

Appeal No. 2023000414

Hearing No. 540-2019-00243X

Agency No. HHS-IHS-0331-2018

**DECISION**

On October 21, 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 September 22, 2022 final order 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 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.

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<sup>1</sup> 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's final order properly found that Complainant was not subjected to discrimination on the basis of race.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for employment in the Agency's Navajo Area Indian Health Service at the Gallup Indian Medical Center (GIMC) in Gallup, New Mexico.

On September 12, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of race (Navajo) when on or around August 2018 she learned she was not selected for the GS 0610-12 Supervisory Clinical Nurse position (Urgent Care Clinic) under Vacancy Announcement No. HIS-18-GA-10163474-DHA.<sup>2</sup>

Complainant applied for the position at issue on April 5, 2018. Complainant was one of three candidates interviewed for the position. All candidates interviewed were Navajo. The interview panel consisted of three women, two Navajo and one Hispanic. Report of Investigation (ROI) at 107, 470, 489, 491 and 506-513. The panel asked each candidate a series of identical questions and then rated their responses. Complainant elected to interview via phone and informed the panel that she was on her lunch break and could not elaborate on her responses because of the time constraint. ROI at 123.

The panel unanimously recommended the selectee (Navajo), whom all three panel members scored much higher on the interview than Complainant. The panel stated that the selectee was "very thorough" in her responses, provided appropriate responses, and seemed motivated. Additionally, the selectee provided ideas on how to improve the clinic program. ROI at 162-163, 179-180, 188-189 and 478.

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). Complainant timely requested a hearing. The AJ issued a summary judgment decision in favor of the Agency.

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<sup>2</sup> The EEOC Administrative Judge assigned to the matter dismissed several additional claims as untimely raised with an EEO Counselor. Complainant raised no challenges to the dismissal of these claims on appeal and the Commission can find no basis to disturb the AJ's dismissal decision.

In the decision, the AJ determined that Complainant was qualified, but she failed to establish a prima facie case of discrimination based on race because the person selected was of the same race. Additionally, two of the three interviewers were also Navajo and all three candidates who were selected for interviews were Navajo. Further, the AJ found that the Agency articulated legitimate, nondiscriminatory reasons for not selecting Complainant. Specifically, Complainant elected to be interviewed via phone because she did not request leave from her employer. During her interview, Complainant notified the interview panel that she was on her lunch break, that she was limited to a short period of time because she did not arrange for coverage. The panelists asked each candidate a series of questions and independently rated the responses. Complainant did not elaborate on her responses, and the panelists perceived that Complainant did not sound interested in the position. Consequently, the panelists concluded that the Complainant had interviewed poorly. By contrast, the panelists believed that the selectee was excited to interview for the position, and she provided the panelists with ideas and feedback on how to improve their then-situation.

The AJ concluded that Complainant failed to show that the Agency's reasons for its actions were pretextual. As a result, the AJ found that Complainant was not subjected to discrimination as alleged.

The Agency issued a final order fully adopting the AJ's decision.

### CONTENTIONS ON APPEAL

On appeal, Complainant states there is a triable issue of whether the action was motivated "in part" because of race because, despite her strong credentials and a multitude of openings at the Agency, she has repeatedly not been hired. Complainant contends that Navajos who were hired were immediately forced out of the positions. Accordingly, Complainant requests that the Commission reverse the final order.

### 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.

#### *Disparate Treatment*

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 she 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).

To establish a prima facie case of discrimination, a complainant must show that: (1) she is a member of a protected group; (2) she suffered an adverse employment action; and (3) the circumstances give rise to an inference of discrimination. We note that, although a complainant bears the burden of establishing a "prima facie" case, Tex. 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.

Here, looking at the evidence in the light most favorable to Complainant, she failed to establish a prima facie case of race discrimination as she did not show that a person outside her race was selected. Both Complainant and the selectee are Navajo. There is no evidence otherwise raising an inference of discrimination.

Notwithstanding, the Commission finds that the Agency articulated a legitimate, nondiscriminatory reason for its actions. The interview panel unanimously recommended the selectee based on her thorough interview responses, enthusiasm for the position, and recommendations to improve the office. Complainant, on the other hand, was restrained in time and could not elaborate on her responses. As a result, the panel believed that Complainant was not interested in the position. Ultimately, the panel recommended the selectee as the best qualified candidate for the position.

Complainant bears the burden of establishing that the Agency's stated reason is merely a pretext for discrimination. 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. at 256.

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. Complainant failed to carry this burden. The Commission finds no persuasive evidence that Complainant's race was a factor in any of the actions at issue.

Aside from Complainant's conclusory allegations and speculations, Complainant has not proffered evidence sufficient to prove that the Agency's reasons for its actions were pretextual to mask unlawful discriminatory animus. As a result, the Commission finds that Complainant has not established that she was subjected to discrimination 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 order.

### 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

December 16, 2024  
Date