



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

[REDACTED]
Aaron L.,¹
Complainant,

v.

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

Appeal No. 2023000498

Hearing No. 560-2021-00123X

Agency No. 200J-0769-2020104686

DECISION

Complainant filed a timely appeal, pursuant to 29 C.F.R. § 1614.403, from the Agency's October 6, 2022 final order concerning an 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 final order.

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Program Support Assistant, GS-0303-7, at the National Cemetery Scheduling Office in Saint Louis, Missouri.

On September 23, 2020, Complainant filed an EEO complaint alleging that the Agency subjected him to discrimination and a hostile work environment created by the Agency, based on his race (African-American) and age (59 years old) when: (a) on May 29, 2020, he was referred for a position but then not interviewed; (b) on or about July 7, 2020, he discovered his advance leave request had not yet been processed; (c) on July 7, 2020, he was not selected for the position of

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.

Program Analyst RP-20-LS-10811753- 769-BU; and (d) on July 13, 2020, he was charged eight hours of Leave Without Pay.

On May 6, 2020, the Agency posted a vacancy announcement for the position of GS-9/10 Program Analyst, under Vacancy Announcement No. RP-20-LS-10811753-769-BU. Complainant was informed of the posting and applied. Between the opening and closing dates of the vacancy announcement, the Agency received approval to add an additional Program Analyst position and a Lead Program Analyst position, which allowed the selection of three individuals. Thirty-seven applicants applied and Human Resources found 20 candidates to be qualified. Complainant was referred for further consideration. A three-person review panel reviewed and scored the applications. Agency management determined that applicants with scores from the review panel of 56 or higher would be interviewed as 56 points represented the lowest score among the top 10 scorers. Complainant received a score of 49 and was not referred for an interview.

Regarding claims (b) and (d), Complainant acknowledged that his advance leave request was approved on time. Further, the record reveals that on July 13, 2020, Complainant requested eight hours of Leave Without Pay (LWOP) to attend two medical appointments. This leave request was approved.²

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant timely requested a hearing. The AJ issued a summary judgment decision in favor of the Agency. The Agency issued its final order fully adopting the AJ's decision. The instant appeal followed.

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. (as revised, August 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*).

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.

² Complainant appeared to withdraw these claims during the investigation stating "N/A (This is not my complaint). My leave was approved in a timely manner" regarding claim (b) and "I did not make a claim on this issue" regarding claim (c).

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 factfinder could not find in Complainant's favor. Complainant failed to demonstrate that the Agency officials in this matter harbored discriminatory animus or that the legitimate, nondiscriminatory reasons provided by the officials were pretext for unlawful discrimination. A resume review panel reviewed and scored applications of all qualified applicants and the 10 highest-scoring applicants were selected for interviews. Complainant received a score below the cutoff and was not interviewed. Those who were referred for interviews included three African-American candidates and four candidates over the age of 40. Regarding his advance leave request, notwithstanding his apparent withdrawal of this claim, Complainant acknowledged that his request was approved effective February 11, 2020. Likewise, Complainant requested and was approved for LWOP on July 13, 2020.

Complainant has presented no evidence demonstrating that his qualifications were plainly superior or that the Agency's reasons for its actions were pretextual.

Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was subjected to discrimination or a hostile work environment as alleged. Accordingly, we AFFIRM the Agency's final order adopting the AJ's 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

January 29, 2024

Date