



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

[REDACTED]
Damon Q.,¹
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Appeal No. 2023001495

Agency No. IRS-22-0019-F

DECISION

On January 12, 2023, 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 December 29, 2022, final decision 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 decision.

ISSUE PRESENTED

The issue is whether the Agency was correct in finding that Complainant did not establish that he was subjected to disparate treatment based on his race (Black) and color (black).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Information Technology (IT) Specialist (Security), GS-2210-13 at the Agency's Privacy – Governmental Liaison & Disclosure: Safeguards Federal Review Team in New York, New York. Report of Investigation (ROI) Volume 1 (ROI 1) at 179. Complainant is a black African-American.

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.

A Supervisory Management and Program Analyst, Enterprise Case Management, Business Process Modernization (Supervisor 1 [East Indian, dark brown skin tone]) was Complainant's first-level supervisor. Supervisor 1, who was located in Salt Lake City, UT, stated that he never met Complainant in person to know his skin tone, but he knew Complainant is of Jamaican descent and guessed his race is black or African-American. Complainant is not a veteran and not eligible under any special or preference hiring authorities. ROI 1 at 234-39 and 258-63.

Complainant alleged that the Agency took discriminatory actions against him from December 2020 to November 2021. According to Complainant, he was not selected for at least six different positions to which he applied. Complainant did not identify specific management officials who were involved in the selection process for any of the positions to which he had applied. ROI 1 at 66 and 180.

He asserted that the USAJOBS announcement applications collect voluntary race information along with other minority type information which could have easily been shared with selecting officials as part of the candidate's application package. Complainant believed that selecting officials may have learned of his race by viewing his picture on the government discovery directory or via the information collected through USAJOBS announcement applications. ROI 1 at 180.

Complainant stated that many selecting officials answered questions with "unsure," and "unknown," and that many questions were not answered at all. Regarding selecting officials who indicated that their selections involved candidates who were more qualified than Complainant, Complainant responded, "that assumption might not be fair as [he] was not offered an interview opportunity." ROI at 526.

He asserted that most or all of the experiences/qualifications that were supposedly used by the selecting officials to select another candidate were not explicitly indicated on the announcements to which he applied. Complainant also argued that certain selections were based on a "supposed title," which does not necessarily prove experience, e.g., having worked as an "ISSO." According to Complainant, he worked 20 plus years "effectively as an ISSO," but he was given other official titles, i.e., Security Engineer or Analyst. ROI 1 at 526-27.

Complainant also alleged that his within-grade increase (WGI) was delayed because it should have been made effective on the anniversary of the date of his hire, November 12, 2019. ROI 1 at 199.

On January 12, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American) and color (Black) when:

1. Complainant was not selected and his job application status was left pending for the following Vacancy Announcements (VAs):
 - a. IT Specialist (Security), VA No. 21ITN0160-2210-14, which closed on December 14, 2020 (referred as best qualified);
 - b. IT Specialist (6 Month Register), VA No. 21-ITX0372-2210-14, which closed on April

- 7, 2021;
- c. IT Specialist (6 Month Roster), VA No. 21-ITN0440-2210-14, which closed on April 21, 2021;
 - d. IT Specialist (Network Services), VA No. 21PHI-ITX0475-2210-14, which closed on May 4, 2021 (referred for “Category B” list);
 - e. IT Specialist, VA No. 21AUS-ITX0546-2210-14, VA, which closed on June 18, 2021; and
 - f. On February 2, 2022, Complainant was notified of his non-selection for the position of IT Specialist (INFOSEC) (“6 Month Roster”) VA No. 21- 11124878P-ITN-2210-14, which closed on June 9, 2021 (referred as best qualified);
2. On or about November 29, 2021, Complainant’s step increase was delayed.

The Agency noted that in its Acceptance/Partial Dismissal Letter, it dismissed five claims pursuant to 29 CFR § 1614.107(a)(2). According to the Agency, claims numbered 1 and 4 were dismissed for having been raised untimely to a Counselor past the 45-day timeframe; and Claims 2, 3, and 5 were dismissed for not having been raised during Counseling and not being like or related to the matters raised during Counseling. The Agency did not state the dismissed claims; and Complainant did not contest the dismissal. Therefore, this decision will not address that matter. Additionally, in this decision, as did the Agency, the accepted claims are numbered 1a-1f, and 2 for clarity.

The Agency conducted an investigation into the complaint. 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). In accordance with Complainant’s request, on December 29, 2022, the Agency issued a final decision (FAD) pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. This appeal followed.

CONTENTIONS ON APPEAL

On appeal, among other things, Complainant contests the FAD, asserting that he had presented evidence that the Agency’s explanations for his non-selections were pretextual. According to Complainant, the Agency changed vacancy announcements for at least two positions, selecting officials changed qualifications to ensure he was unqualified, and the Agency cherry-picked selecting officials’ responses to fit its narrative.

Complainant also accuses the EEO Investigator of including inaccurate information in the ROI, and of asking questions to which Complainant had no answers about his non-selections thereby demonstrating a lack of experience or familiarity with agency hiring processes.

For example, asserts Complainant, he would have no way of identifying who the management officials were who made the hiring decisions at issue.

According to Complainant, the EEO Investigator and the Agency did not explain why he was not selected for positions, some of which were posted to fill 5, 15, 35, 40 or even 50 vacancies. He also accuses the EEO Investigator of diminishing his GS level regarding a GS-14 position to which he had been reassigned while his complaint was pending the EEO process, and of which he informed the EEO Investigator. According to Complainant, this was done to justify the Agency's non-selection actions. Complainant cites to specific pages in the FAD to support his assertions but presents no supporting documentation or other evidence to show that his race or color played any role. Complainant also asserts that the Agency did not send him a FAD until he followed up with them. However, missing from the record is the date on which Complainant requested a FAD and the date(s) on which he followed up with the Agency regarding that request. Also missing from the record is any evidence that the December 29, 2022, FAD was delayed or that Complainant was prejudiced by it.

In response, the Agency reiterates its stated reasons for the challenged nonselections, requesting that the Commission affirm its FAD.

In a statement in which Complainant responds to the Agency's appeal opposition, Complainant cites to his SF-50, asserting that he was never a GS-13 employee. According to Complainant, for the three years he had been employed with the Agency, almost half of the time (16 months or 64 weeks), he was a GS-2210-14. According to him, he had served a combination of two GS-2210-14 promotional details.

According to Complainant, based on the USAJOBS job application process, candidates would only be privy to managers' names if they receive interviews from said managers. He asserted that he was not offered any interviews to have the opportunity to obtain managers' names, adding that discrimination can be circumstantial and statistical.

Also, according to Complainant, Agency selecting/hiring officials have numerous easy ways of obtaining internal candidates' demographic information, including Agency's communication email and messaging software such as Outlook and Skype/Teams as, Complainant stated, he had always had a photo on these platforms. He added that he had also been told by a manager or two they get PDF files of referred candidates USAJOBS applications.

Complainant asserts that the Agency stated that all selected/hired candidates are veterans. If this is factual, argues Complainant, the Agency should be able to easily provide proof to an impartial Commission investigator. According to Complainant, if all selected/hired candidates are not veterans, the Agency should be able to provide proof candidates were more qualified based on their USAJOBS applications, including qualifications provided.

ANALYSIS AND FINDINGS

Preliminary Matter

We note Complainant's appeal assertion that the Agency did not send him a FAD until he followed up with them. However, missing from the record is the date on which Complainant requested a FAD and the date(s) on which he followed up with the Agency regarding that request. Also missing from the record is any evidence that the December 29, 2022, FAD was delayed or that Complainant was prejudiced by it. Therefore, we are unable to address any concern Complainant may have regarding the allegedly delayed FAD.

The Merits of Complainant's Claims

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), 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").

Disparate Treatment Based on Race and Color

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to prevail, he or she 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. 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. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, 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. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (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 Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Here, regarding Claim 1a, the Associate Director Cybersecurity – Cyber Threat Fusion Center (CTFC) in Memphis, TN (herein Hiring Manager 1) stated that for VA No. 21-ITN0160-2210-14, he ranked resumes by the level of experience with Cybersecurity, Systems Administration, and most importantly, Cloud related skills and knowledge sets. According to him, while Complainant is a cybersecurity practitioner, his resume did not speak much to either systems administration or Cloud experience at the level they required. Therefore, because Complainant did not have enough experience in the skillset management were looking for, he was not selected. He also denied awareness of Complainant's race and color at the time the selection for the position was made. ROI 1 at 736-41.

Regarding Claim 1b, the Deputy Assistant Chief Information Officer (ACIO) for Applications Development for IT, in Lanham, MD (Hiring Manager 2) who was the selecting official for VA No. 21-ITX0372-2210-14 stated that only preference eligible veterans were referred on the best qualified certificate since veterans are given first consideration per Office of Personnel Management (OPM) regulations. He also denied knowledge of Complainant, his race or color. ROI 1 at 151, 260-61 and ROI Volume 3 (ROI 3) at 749-54. See ROI 3 at 827-30 for supporting statements provided by a Human Resource (HR) Specialist and a Program Manager in Centralized Information Request Team. See also ROI 1 at 234-39 and 258-63 reflecting that Complainant is not a veteran.

Regarding Claim 1c, the Agency stated that the vacancy announcement for VA No. 21-ITN0440-2210-14 was cancelled; no selections were made; and no certificates were generated. ROI 3 at 827.

Regarding Claim 1d, the Director in the Network Engineering Division, and the Director, United Communications (UC), two executives in User and Network Services (UNS) who were involved in making selections within their division for VA No. 21PHI-ITX0475-2210-14, stated that both selectees were eligible for the vacancy announcement under the Veterans' Recruitment Authority and had compensable service-connected disability ratings of 30% or more. ROI 3 at 182-84 and 187-201. Again, Complainant was not a veteran. Nor did he indicate having a disability or other eligibility qualifier under any special or preference hiring authorities. ROI 1 at 260-61.

Regarding Claim 1e, The Director, Security Operation and Standards (SES) for IT Enterprise Operations in Kearneysville, WV (Hiring Manager 3) stated that the selection for VA No. 21-ITX0546-2210-14 was made from the disabled veteran roster. According to Hiring Manager 3, Complainant's name did not appear on the roster of best qualified candidates; and he had no knowledge of Complainant's race or color. ROI 1 at 765-67.

Regarding Claim 1f, the Agency stated that VA No. 21-11124878P-ITN-2210-14 was a nonspecific announcement number which allowed dozens of managers from various IRS divisions/branches, to make numerous selections, in numerous locations around the country.

According to the Agency, since the vacancy announcement was malleable, it could be used by numerous managers and the specific qualifications for any given position would vary depending upon the needs of the particular division/branch/office using the vacancy announcement. After gathering statements from over 30 management officials that used the vacancy announcement, the Agency stated that at least nine managers reported that they made no selections to their division/branch/office under the announcement number; and 10 of the managers involved in making a selection under the vacancy announcement did not select Complainant for various reasons that include: (1) the selectee was already doing the work required for the vacancy position, and already had a security clearance for global administrative work; (2) the selectee having multiple years of direct experience performing as an Information System Security Officers (ISSO) while Complainant lacked sufficient experience with Insider Threat processes and programs; (3) selectees were more qualified than Complainant in the field of Security Policy authoring, and had more knowledge of federal laws, regulations, and the IRS policy publishing process; (4) the selectee had greater familiarity with IT organization processes, knowledge of various IT systems, machine learning, was skilled as a data and computer scientist and had the analytics skills necessary for the Insider Threat Program; and (5) Complainant's resume did not show that he had experience in performance metrics, dashboard development/creation, or utilization of Tableau toolset. Notably, there is no evidence that any management official involved in the selection process had any knowledge of Complainant's race and/or color at the time of the announcement/selection process. ROI 1 at 742, 830, 854-59 and ROI Volume 2 (ROI 2) at 2-3, 10-12, 60-2, 68-70, 207, and 212. Some of the selectees for the position at issue also belonged to Complainant's protected race and color classes.

Regarding Claim 2, the Agency asserted that, consistent with applicable Agency policy Internal Revenue Manual (IRM Section 6.531.1.3.8), Complainant's November 12, 2021, anniversary was only five days into pay period 23; and that his WGI was not to be effective until the beginning of pay period 24, on November 21, 2021. Therefore, Complainant's WGI was not delayed as alleged. According to the Agency, step increases are processed automatically by the IRS HCO (undefined acronyms) or Payroll, and management is not involved in effecting the step increases. The applicable Agency policy included in the record states that a within grade increase (i.e., step increase) is effective on the first day of the first pay period following the completion of the required waiting period. Supervisor 1 provided supporting statements, noting that in his 20 years at the Agency, he is not aware of anyone who has ever gotten a step increase on their date of hire. He also stated that the WGI process was explained to Complainant in 2020 "ad nauseum." ROI 1 at 530-32 and 534.

The Agency has provided legitimate nondiscriminatory reasons for the challenged actions. We next turn to Complainant to show pretext. To the extent Complainant is arguing disparate treatment, Complainant bears the burden of establishing that the Agency's stated reasons are merely a pretext for discrimination. Goldie L. v. Department of Justice, EEOC Appeal No. 0120182710 (Oct. 24, 2019). Complainant can do this directly by showing that the Agency's proffered explanation is unworthy of credence. Tex. Dep't of Cmty Affairs, 450 U.S. at 256.

Here, Complainant's main contention is that due to "systemic racism in all facets of life in America," his race and color factored into his non-selections, the lack of notifications about his job application status, and his allegedly delayed WGI. ROI 1 at 66, 183, 186, 189, 192, 198, and 201. However, Complainant presented no evidence to support his contention; he did not link the challenged agency actions to either his protected race or color classes; and he did not identify any selectee who was chosen over him or who received job application status notifications based on their race or color for Claim 1. Nor did he refute the Agency's assertions or demonstrate that they were motivated by discriminatory animus. That Complainant had served in two detail assignments in GS-14 roles is no such evidence. Moreover, contained in the record is Complainant's SF-50 showing that he was a GS-14 in 2022, not that he was never a GS-13 employee. See ROI 3 at 36.

Complainant also repeatedly alleged and asserted on appeal that inaccuracies (including that he was not a GS-13 employee [which the record shows he was]), discrepancies, and outright deliberate and cherry-picked omissions or inclusions exist in the ROI and FAD. These include that he would have no way of knowing or identifying the selecting officials who discriminated against him; and that management deleted and replaced selecting officials' responses to fit their narrative for his non-selections. Importantly, even if Complainant's appeal assertions and allegations are true regarding Claims 1a-1f, Complainant failed to present any evidence that he possessed superior qualifications to any of the selectees for the positions at issue, but only expressed his wish that an audit be conducted to compare his qualifications to those of the selectees. In that regard, we note that Complainant bears the burden of proving discrimination. EEOC case law is replete with cases supporting the principle that, absent a showing that Complainant was the best-qualified candidate, management did not demonstrate discriminatory animus when the most qualified candidates were selected. See e.g., Judson v. Dep't of Veterans Affairs, EEOC Appeal No. 0120141750 (May 26, 2016) (declining to find a pretext of discriminatory action when the Complainant was not selected due to his application rating of five out of eight candidates); Whitfield v. Dep't of the Army, EEOC Doc. 0120082612 (July 11, 2012) (finding that the Complainant failed to show discrimination when the Complainant's qualifications were not plainly superior to the selectees for two separate postings); King v. Dep't of Veterans Affairs, EEOC Appeal No. 012022423 (Nov. 2, 2012) (Complainant was not ranked among the top candidates and presented no evidence of pretext).

As for Claim 2, Complainant failed to show that the applicable Agency policy upon which the effective date for his WGI was based inconsistently applied to him. In that regard, Complainant may demonstrate pretext - that the agency's explanation is not the real reason but rather a "cover" to disguise unlawful discrimination - by showing various inconsistencies, contradictions, or other evidence of discriminatory motive in the evidentiary record such that a reasonable fact-finder could find the articulated reason(s) for the agency's action(s) unworthy of credence. Walton v. Dep't of the Army, EEOC Appeal No. 0120072925 (Jul. 10, 2012). We find no such showing here. As Complainant has failed to meet his burden of proof in this case, his claims fail and he does not prevail.

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

January 25, 2024
Date