



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

[REDACTED]
Maren K.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Investigation),
Agency.

Appeal No. 2023001704

Hearing No. 570-2022-0001272X

Agency No. FBI-2022-00012

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 January 6, 2023, final order 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, the Commission AFFIRMS the Agency's final order.

ISSUE PRESENTED

The issue presented is whether the Administrative Judge properly issued a decision without a hearing finding that Complainant did not establish age discrimination as alleged.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Intelligence Analyst (GS-14) at the Agency's Counterterrorism Division, at its Headquarters in Washington, D.C.

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.

On January 21, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on her age (65) when on September 3, 2021, she was notified that she was not selected for an interview for a GS-14 Intelligence Analyst Assistant Legal Attaché position. At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

On October 25, 2022, the AJ issued a Notice of Intent to Issue Summary Judgment (“Notice of Intent”). The AJ found that in taking the evidence presented in the light most favorable to Complainant, she failed to establish that the Agency’s actions were motivated by age. The AJ noted that Complainant’s application did not conform to the required format, i.e., situation-action-result (“SAR”), and she utilized bullet points, rather than sentences. There were over forty applicants, and Complainant was not offered an interview because her resume scored approximately 11 to 21 points lower than those interviewed. Those rated higher used the required SAR format. The AJ ordered the parties to respond to the Notice of Intent, and both parties submitted responses.

On December 7, 2022, the AJ issued a summary judgment decision in the Agency’s favor. As an initial matter, the AJ noted that Complainant’s response to the Notice of Intent did not adhere to the AJ’s instructions, but the AJ considered it despite its technical flaws. The AJ determined that Complainant did not establish a dispute of material fact that could impact the outcome of her case. The AJ was not persuaded by Complainant’s contention that management officials had constructive knowledge of her age based on information in her application, such as her work experience with another federal agency in 1986. The AJ found that even if there was imputed knowledge of Complainant’s age, the fact that the Selectee was over fifty years old did not support an inference of age discrimination.

Complainant alleged that the lowered scoring of her application due to her failure to use the SAR format was a ruse to remove the oldest and better qualified candidates, but the AJ stated that Complainant did not allege that this was only true for her. Rather, Agency officials provided materials demonstrating that the SAR format was used by other applicants, and the record showed that Complainant’s format was not a determinative factor. Further, the Agency interviewed a candidate who was four years older than Complainant.

While Complainant criticized her inability to question the parties involved, the AJ found that she failed to identify what relevant questions and/or information she sought to obtain that was not already part of the record. As such, Complainant did not demonstrate that the record was inadequate. The AJ concluded by entering summary judgment in favor of the Agency.

The Agency subsequently issued a final order adopting the AJ’s finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. Complainant filed the instant appeal and submitted a brief in support of her appeal. The Agency opposes her appeal.

ANALYSIS AND FINDINGS

Standard of Review

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). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and the Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chap. 9, § VI.A. (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").

Decision without a Hearing

We determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for 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 "material" fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute.

Here, Complainant argues that the AJ's decision contains errors of fact, such as noting Complainant's age as 56, but she is 66 years old. Complainant also contends that AJ asserted that an applicant older than Complainant was interviewed. However, Agency officials testified that they reviewed the applications blindly, so the AJ's finding was fallacious. In addition, the ages of the applicants were obtained after the fact, in the processing Complainant's EEO complaint. We are not persuaded by Complainant's arguments because the typographical error of Complainant's age, and when management officials learned of the applicants' ages, are not material because we assume a prima facie case of age discrimination, as discussed below.

Complainant asserts pretext for discrimination because "no sane party" would nullify the job application of a 42-year career candidate based on format, and that it is inherently unbelievable that her application was based on anything but age, and it was fraudulent to say that her application was reviewed blindly because her age was discernable based on the dates listed in her application. Complainant Appeal Brief at 3, 7. However, Complainant offers no supporting evidence of pretext, and mere allegations, speculations, and conclusory statements, without more, are insufficient to create a genuine issue of material fact. See Lee v. Dep't of Homeland Security, EEOC Appeal No 0520110581 (Jan. 12, 2012), citing to Baker v. U.S. Postal Serv., EEOC Appeal No. 01981962 (June 26, 2001), request for recon. denied, EEOC Request No. 05A10914 (Oct. 1, 2001).

Complainant further contends that the AJ denied her due process rights to question and confront witnesses. The hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See EEO MD-110, 7-1; 29 C.F.R. § 1614.109(e). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims." Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (March 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (October 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995). As noted by the AJ, Complainant did not explain what additional information she sought from witnesses, and she did not establish that the record was inadequate. Further, Complainant did not show a dispute of a material fact, and she failed to cite to any conflicting testimony to demonstrate a need for credibility determinations at a hearing. Accordingly, we find that the AJ properly issued a decision without a hearing.

Disparate Treatment

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). She must generally 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. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct.

See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep't of Veterans Affairs, EEOC Request No. 05950842 (Nov. 13, 1997). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, supra; Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995).

Assuming, arguendo, that Complainant established a prima facie case of age discrimination, we find that the Agency proffered legitimate, nondiscriminatory reasons for its action. The then-Chairperson of the Career Board ("Chairperson") explained that in May 2021, the Agency posted a vacancy announcement for Intelligence Analyst Assistant Legal Attaché positions for approximately ten locations, and about 40 candidates applied. A team of four Supervisory Intelligence Analysts rated the applications for Preferred Qualifications, such as prior overseas experience and specialized language abilities. ROI at 93-4. The Supervisory Intelligence Analysts consistently testified that they reviewed applications without the candidates' names or other identifying information, and they were unaware of which candidate they were ranking or their respective ages. ROI at 128-9, 133, 138, 143-4. Complainant received a Preferred Qualifications score of seven. ROI at 188.

The applications were then forwarded to the three voting members of the Career Board to evaluate competencies. The candidates were asked to provide two examples from the following competencies: Analytical Thinking; Liaison/Collaboration; Intelligence Writing; Leadership; and Problem Solving. The Career Board members were instructed to rate the candidates based on their applications, and they could not infer or assume anything not specifically stated. ROI at 95.

Regarding Complainant, the Career Board members testified that her competency responses were very general and failed to adequately address specific SARs; her use of short bullet point responses were less effective at thoroughly explaining competency examples; and her application was very fact-based and failed to adequately address her SARs. Further, all candidates were instructed to write their examples in the SAR format, and the high-ranking candidates who were offered interviews provided clear descriptions of a specific situation, their specific actions, and a specific result. ROI at 104, 112, 122.

The Chairperson then met with the Career Board members and reviewed their scores. The Preferred Qualifications and Competency Scores were totaled for an overall candidate score, and a cut-off score was used to determine which applicants would move forward to the interview phase. ROI at 95-6. Complainant's competency score was 20, for a total score of 27, while those interviewed received total scores between 38 and 48. ROI at 191, 193.

We find that Complainant has not shown that the proffered reasons were pretexts for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence.

See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

On appeal, Complainant asserts that she used the SAR format, and that she presented situations, actions, and results in a bullet format. However, a review of her application supports the management officials' explanations that Complainant's responses were general and did not thoroughly explain the competency examples. For example, for Analytical Thinking, Complainant responded that she served as the sole Agency representative on a joint duty tour; provided alternative analysis on counterterrorism, counterintelligence, and cyber issues through multiple simulated events and exercises; and participated in panel discussions with military leaders, and the result was considered one of the most successful in military history.² ROI at 199.

To compare, the Selectee stated that she was recognized as a subject matter expert in targeting certain redacted subjects. Based on her extensive research and analysis, she became the individual who possessed the most comprehensive information of that group. The Selectee formally briefed Executive Management and the field office on two targets, which led to the acceptance of her proposal. The Selectee also created a comprehensive reference guide and received positive feedback from several agents. ROI at 327. While Complainant disagrees, she has not proven that the management officials' responses were unworthy of belief.

Further, the Commission has long held that an Agency has broad discretion to set policies and carry out personnel decisions, and it should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997). In this case, there is no evidence of unlawful motivation for the Agency's actions, aside from Complainant's bare assertions, which are insufficient to prove pretext or that their actions were discriminatory. As such, we find that Complainant did not establish that the Agency discriminated against her based on her age when she was not selected for an interview for a GS-14 Intelligence Analyst Assistant Legal Attaché position.

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 adopting the AJ's decision without a hearing.

² The Agency redacted classified information in the ROI, and Complainant provided an unredacted copy of her application with her appeal. For the purposes of this decision, the unredacted information will not be considered.

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