



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

[REDACTED]
Brant C.,¹
Complainant,

v.

Scott Turner,
Secretary,
Department of Housing and Urban Development,
Agency.

Appeal No. 2023002805

Agency No. HUD-00066-2021

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 April 5, 2023, 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 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, the Commission AFFIRMS the Agency's final decision finding no discrimination.

ISSUES PRESENTED

Whether the Agency properly determined that Complainant was not discriminated against based on race (African American), age (year of birth: 1970), sex (male), disability, and reprisal, when he was not selected for several supervisory positions that he applied for within the Agency.

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.

BACKGROUND

Complainant is a federal employee working at a different Agency as a Supervisory Equal Opportunity Investigator, GS 1860-13. He applied to several positions within the Agency's facility in Atlanta, Georgia. Notably, the record indicates that the United States Treasury Department, Bureau of Fiscal Services ("BFS") served as a third-party reviewer for the Agency's hiring managers. Report of Investigation (ROI) at 149.

On September 4, 2021, Complainant filed an EEO complaint alleging that:

1. The Office of the Chief Human Capital Officer, discriminated against him based on his race (African American), age (year of birth 1970), sex (male), disability (mental and physical) when on May 24, 2021, he was not referred for the position of Supervisory Equal Opportunity Specialist, GS-15, advertised under vacancy announcement numbers 21-HUD-1045-P and 21-HUD-1044.
2. The Office of Fair Housing and Equal Opportunity (FHEO) discriminated against him based on his race (African American), age (year of birth: 1970), sex (male), disability (mental and physical) when on June 7, 2021, he was not selected for the position of Supervisory Equal Opportunity Specialist, GS-14 advertised under vacancy announcement number 21-HUD-227-P.
3. He was discriminated against based on reprisal (instant EEO activity) when on November 16, 2021, he was deemed ineligible and not referred for the position of Supervisory Equal Opportunity Specialist, GS-360-14 and GS-360-13, advertised under vacancy announcement number 21-HUD-1904-R.²

Regarding Claim 1, Complainant asserts he applied to the position on USA Jobs, and on May 24, 2021, Complainant received an email informing him that he was not referred to the hiring manager. The email stated Complainant was ineligible because he did not possess the specialized experience required for the position.

² On December 21, 2021, Complainant requested to amend his complaint to include Claim 3.

Complainant asserts he has over 25 years of experience in supervising and investigating complaints of discrimination. He further asserts the same position was announced in another region with less restrictive qualifications. He asserts that there is no business reason for the difference in qualifications, but the difference has a disparate negative impact for African Americans in the Atlanta region. ROI at 75.

Complainant further asserts that Black males are noticeably absent from GS-15 positions in the federal government and that more likely than not, the selectee was a less qualified applicant of another race. ROI at 78. He further asserts that based on his experiences, he believes that more likely than not, the selectee was younger and of a different sex than him. He further asserts he believes his disability was a factor in his nonselection because he reported his status as a disabled veteran on his application and some hiring managers are reluctant to hire disabled veterans. ROI at 78.

Human Resource Specialist 1 – an employee of BFS – stated that she did not refer Complainant to the hiring manager because his application did not meet the specialized experience requirements outlined in the job announcement. Specifically, Complainant’s application failed to show he had Fair Housing experience, and the announcement required experience directing implementing, and evaluating investigative and enforcement programs as they relate to fair housing. ROI at 151.

Notably, on his application, in response to the question of the nature of his experience conducting investigations and compliance investigations or complaints under Title VIII, Section 504, Title II of the ADA, Uniform Federal Accessibility Standards (UFAS), and Architectural Barriers Act of 1968, Complainant responded, “None.” ROI at 91. Similarly, when asked to describe his experience investigating fair housing laws and regulations, his response was, “None.” ROI at 98.

Regarding Claim 2, the record indicates that BFS referred Complainant to the hiring manager. On February 10, 2021, Complainant was interviewed telephonically by three Agency panel members for both the GS-14 and GS-15 positions. ROI at 212-13. Two other candidates on the same certificate were also interviewed. ROI at 234. In a June 7, 2021 email, Complainant was informed that he was not selected for the positions. Complainant asserts that he contacted management to inquire about the status of the vacancy and was told they planned to select someone with housing discrimination experience. ROI at 81.

Complainant asserted he could not remember the names of the panel members but stated that his references were contacted, which were presumably favorable. Complainant asserts that Selectee 1 – a non-African American female – had less than five years of experience processing claims of discrimination and no supervisory or management experience. ROI at 142.

The record indicates that two Selectees were hired from a different vacancy announcement. ROI at 237, 266. The record also indicates that both Selectees had disabilities. ROI at 266. Selectee 1's application indicates that prior to being hired for the position at issue, she served approximately six years as an equal opportunity specialist with the Agency and served as a technical monitor for the region's fair housing assistance program. Selectee 2 – an African American female – served as an Equal Opportunity Director for a city and served as supervisor in the administration of fair housing investigations and compliance. ROI at 337, 341.

Program Analyst confirmed that she was on the interview panel and checked Complainant's references. She stated that the interview process consisted of an interview, written test, and reference checks. ROI at 220. The record indicates that she ranked Complainant highest of the other interviewees. However, she also noted that he did not have experience with The Fair Housing Act. ROI at 234.

Selecting Official also served on the panel and indicated that the section they were hiring for was one of the most demanding in the FHEO department. ROI at 178. He stated that most of the Equal Opportunity Specialists are new, and thus, he sought to hire a candidate with working knowledge of fair housing. Id.

Regarding Claim 3, Complainant also applied for the position of Supervisory Equal Opportunity Specialist, GS-360-13 and GS-360-14, advertised under vacancy announcement number 21-HUD-1904-R. On November 16, 2021, Complainant was notified that he was not referred for either position. ROI at 85.

Complainant asserts that the Agency deemed him ineligible for the position because he filed a complaint of discrimination based on his nonselection for the prior vacancies and the vacancy announcement was posted with a specialized experience requirement in retaliation for filing his instant complaint.

Human Resources Specialist 2 indicated that he did not refer Complainant to the hiring official because Complainant did not meet the specialized experience outlined in the posting. Specifically, the application required experience performing analyses and applying fair housing laws, which was not shown on Complainant's application.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

The Agency rejected Complainant's argument that the specialized experience requirement in Claims 1 and 3 negatively impacted Black males. Furthermore, the Agency found that Complainant failed to provide evidence of pretext. The Agency further found that Complainant failed to establish a connection between his protected activity and the Agency's actions.

Regarding Claim 2, the Agency found that Complainant failed to establish sufficient evidence of discriminatory intent. The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

Complainant asserts that he was more qualified than the Selectee and that management's assertion that he was not hired due to lack of fair housing experience is pretext for discrimination because he performed better on the interview and written test. He asserts that an adverse inference should be drawn because the hiring manager failed to provide interview notes. He further asserts the Selectees (as to claim 2) were both females and there were no African American males in the position.

The Agency contends Complainant failed to establish a prima facie case as to any of the claims and even if Complainant did establish a prima facie case, Complainant failed to rebut the Agency's asserted nondiscriminatory reasons for its actions.

STANDARD OF REVIEW

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”).

ANALYSIS

Generally, claims of disparate treatment are examined under the tripartite analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found, for Experimental Biology. Inc., 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976). For 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. McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978).

Once a complainant has established a prima facie case, the burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Com. Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is their obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983).

To establish a prima facie case of disparate treatment discrimination based on race, age, or sex, a complainant generally must prove the following elements: (1) the complainant was a member of a protected class; (2) the complainant suffered an adverse employment action; and (3) the complainant was treated differently than similarly situated employees outside her protected class, or there is some other evidentiary link between membership in the protected class and the adverse action. Complainant v. U.S. Postal Service, EEOC Appeal No. 0120080536 (July 10, 2009).

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) he is an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) he is "qualified" as defined in 29 C.F.R. §§1614.203(a) and 1630.2(m); (3) the agency took an adverse action against him; and (4) there was a causal relationship between his disability and the agency's actions. See Annamarie F. v. Department of the Air Force, EEOC Appeal No. 2021004539 (August 17, 2023).

To establish a prima facie case in a non-selection case, complainant must show: (1) he is a member of the protected class; (2) he applied for and was qualified for the position; (3) he was not selected despite his qualifications; and (4) someone outside his protected class was selected. Williams v. Department of Education, EEOC Request No. 05970561 (August 6, 1998). Complainant may also set forth evidence of acts from which, if otherwise unexplained, an inference of discrimination can also be drawn.

Complainant can establish a prima facie case of reprisal by showing that: (1) Complainant engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, Complainant was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Department of the Air Force, EEOC Appeal No. 01A00340 (September 25, 2000). Complainant can establish a prima facie case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Social Security Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas, 411 U.S. at 802). In general, a complainant can demonstrate a causal connection using temporal proximity when the separation between the employer's knowledge of the protected activity and the adverse action is very close. See Clark County School District v. Breeden, 532 U.S. 268 (2001) (holding that a three-month period was not proximate enough to establish a causal nexus).

Regarding all claims and bases, Complainant failed to establish a prima facie case of nonselection. Complainant has not established any connection between his protected classes and the Agency's actions. Furthermore, he has not shown that he was qualified for the positions given his lack of fair housing experience, which were requirements for the roles.

Furthermore, we reject Complainant's argument that an adverse inference should be drawn based on a lack of interview notes because the application was sufficient to draw conclusions as to whether discrimination occurred. Serita B. v. Dep't of Treasury, EEOC Request No. 0520150006 (Aug. 12, 2020).

Based on the foregoing, we find that Complainant failed to show that the Agency's actions were motivated by discrimination as alleged.

CONCLUSION

The Agency's decision finding no discrimination is AFFIRMED.

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).

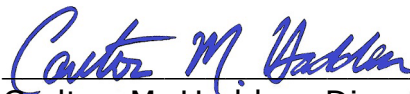
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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

February 11, 2025

Date