



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

[REDACTED]
Cathy M.,¹
Complainant,

v.

Antony Blinken,
Secretary,
Department of State,
Agency.

Appeal No. 2023003188

Hearing No. 570-2022-01290X

Agency No. DOS-0307-21

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 13, 2023, 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, we AFFIRM the Agency's final order.

ISSUE PRESENTED

The issue presented whether Complainant was subjected to discrimination when she was not selected for promotion.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Foreign Service Officer, FS-02, at the Agency's Office of East Asian and Pacific Affairs, Bureau of Democracy, Human Rights, and Labor, in Arlington, Virginia.

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 December 22, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African American), national origin (American) and sex (female) when she was not selected for promotion on September 13, 2021.

In this matter a Board was convened of six members to review and rank applications. Report of Investigation (ROI) at 49. The Board was responsible for identifying and ranking, in order of merit, those employees recommended for promotion, without regard to the number of promotional spots available. The Board made their decisions for ranking based on Core Precepts. ROI at 309; 314; 432. Available promotional positions were determined by the Agency's Global Talent Management.

The Board members did not know Complainant and were not provided with personal information such as national origin, race, or age for any of the candidates. ROI at 309, 366, 395, 411. Board members, however, were given the candidates' names. One Board member, Consular Section Chief (Chief), noted that he had previously urged the Agency to remove names to make the process more gender-neutral and to stop potential unintentional bias. ROI at 411-412. Chief detailed the comprehensive steps the Board members took in reviewing each applicant and did not specify any belief that names factored into the decision-making process in the instant matter. Chief stated that candidates were scored from 1 to 6 points on each precept. This score was placed into a spreadsheet which added the points to give each candidate a total count. The minimum score was 6 points, with a maximum of 36 points. Chief stated that the Board considered a range of factors such as supervisory experience, impact of a candidate's work on a mission, strategic goals of the Department, leadership, and management skills, and more. ROI at 410. Chief explained that after the Board scored and ranked the candidates, the Board decided to re-rank female candidates higher due to concerns that not enough female candidates had scored high enough. ROI at 413.

Another Board member, International Narcotics and Law Enforcement Deputy Director (Deputy Director) stated that in reviewing the applications, the Board only utilized what was in the official file and ranked each candidate using the same precepts. ROI at 363. A third member, Senior Advisor reiterated the precepts used and stated that each member was ranked based on their total score from the Board members. ROI at 393. After narrowing down the 395 candidates, 160 candidates were recommended for promotion and ranked in order of their scores. Based on her application, Complainant was ranked number 54 out of 160. ROI at 307-310; 593. The Agency selected the top 46 based on availability. ROI at 310; 560. Since Complainant was recommended but not selected, she was provided with bidding privileges for the next cycle. ROI at 47.

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. On November 18, 2022, the AJ notified the parties of her intent to issue a decision without a hearing, in favor of the Agency, as the AJ found that the undisputed record showed that Complainant had not been subjected to discrimination as alleged.

The AJ determined that the Agency articulated legitimate, nondiscriminatory reasons for the alleged discriminatory actions. Specifically, that Complainant was ranked high enough for a recommendation but fell below the cutoff due to available positions. The AJ further determined that Complainant failed to demonstrate that such reasons were pretext for discrimination. The AJ determined that the record was devoid of any evidence that would raise an inference of discrimination or would demonstrate to a reasonable fact finder that Complainant's race, sex, or national origin was a factor in the Agency's actions.

In opposing the AJ's proposal to issue a decision without a hearing in favor of the Agency, Complainant argued, in relevant part, that there were genuine issues of material fact in dispute as to whether the Agency was aware of her protected bases and pointed to Chief's concerns to support her argument. Furthermore, Complainant argued that the Agency's decision to re-rank female candidates higher likely harmed her prospects, as people normally assume her sex to be male due to her name. To bolster her arguments regarding deficiencies in the Agency's hiring processes, Complainant provided a copy of a report from the Agency's Office of Inspector General, which noted non-EEO related concerns with the Agency's hiring practices.

Over Complainant's objections, the AJ issued a decision without a hearing in favor of the Agency on March 6, 2023, for the reasons articulated in the notice of intent. 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 then filed the instant appeal, reiterating, in relevant part, her prior arguments.

ANALYSIS AND FINDINGS

Standard of Review

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*).

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 factfinder could not find in Complainant's favor.

Disparate Treatment

For Complainant to prevail on her claim of disparate treatment, she 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 he 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). 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). Complainant can demonstrate pretext by showing that her qualifications for the position were plainly superior to those selected. Hung P. v. Dep't. of Vet. Affs., EEOC Appeal No. 0120141721 (Dec. 3, 2015). Complainant must ultimately prove, by a preponderance of the evidence, that the agency's explanation was pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

While we are certainly mindful of Complainant's arguments on appeal, we nevertheless agree with the Agency that Complainant cannot prevail, as the evidence of record fails to persuasively show that the Board was aware of Complainant's protected classes during the selection process. See Day v. Dep't of the Air Force, EEOC Appeal No. 01A14946 (Oct. 31, 2002) (concurring with AJ's ruling that agency could not have engaged in disability discrimination against complainant, as it was not aware of complainant's disability), req. for recons. den., EEOC Request No. 05A30387 (April 3, 2003). In reaching this conclusion, we recognize that Complainant believes that the Agency's failure to omit the names of candidates and decision to re-rank female candidates higher harmed her because the Agency may have perceived her as male due to her name. However, we ultimately find such assumptions to be speculative. As Complainant cannot establish a prima facie case of discrimination, she simply cannot prevail. See Randolph A. v. U.S. Postal Serv., Appeal No. 2021003495 (June 15, 2022) (finding that AJ properly found no prima facie case of discrimination, as agency was unaware of complainant's protected bases).

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 29, 2024

Date