



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

[REDACTED]  
Harry E.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 2023003942

Agency No. 200H-402GE-2022-145584

**DECISION**

On June 26, 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 May 30, 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. For the following reasons, the Commission AFFIRMS the Agency's final decision finding no discrimination.

**ISSUES PRESENTED**

Whether the Agency correctly determined that Complainant was not subjected to discrimination and harassment on the bases of national origin and/or reprisal.

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<sup>1</sup> 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

At the time of events giving rise to this complaint, Complainant worked as a Diagnostic Radiologic Technologist, GS-0647-09, at the Agency's Radiology Department in Lewiston, Maine.

On July 8, 2022, Complainant filed a formal EEO complaint alleging that he was discriminated against based on national origin (Puerto Rico/Hispanic) and in reprisal for prior EEO activity when on March 7, 2022, he learned he was not selected for the position of Supervisory Diagnostic Radiologic Technician, GS-647-11.

Complainant stated that he applied for and was interviewed for the vacancy in question. Complainant reported receiving the notice of non-selection via email on March 7, 2022. Complainant stated that he was not provided with a reason for his non-selection. When asked to identify how he was a superior candidate in comparison to the individual selected for the vacancy (Selectee), Complainant cited generally to his resume and work history. Complainant also stated that he was registered and licensed in three different radiology modalities while Selectee was registered in only a single modality. When asked why he believed his national origin was a factor in his non-selection, Complainant stated that the present vacancy was the twelfth position for which he was not selected.

The record shows that there were three members of the panel that conducted interviews and ultimately made the selection (Panelist-1, Panelist-2, and Panelist-3). Panelist-1 stated that Human Resources (HR) determined if an applicant was qualified before passing along the application. Panelist-1 stated that HR referred two candidates for consideration, Complainant and Selectee, who were both interviewed for the position. Panelist-1 stated that each candidate was asked the same questions during the interview. Panelist-1 stated that a candidate could earn up to 60 points from each panel member for the interview as well as up to 20 points from each panel member based on a review of the candidate's resume. Panelist-2 and Panelist-3 corroborated the foregoing information. The record contains the score sheets completed by each panelist. Complainant earned a total of 116 points for his performance during the interview and 38 points for the panelists' review of his resume. Selectee earned a total of 154 points for her interview performance and 54 points for the panelists' review of her resume.

Panelist-1 stated that she scored Complainant lower for his interview because Complainant did not fully answer the questions and because he failed to provide specific examples. Panelist-1 stated that Complainant also seemed to get side-tracked and provide unnecessary information. Panelist-1 stated that she found Complainant's resume to not be as detailed in reference to radiology and supervisory experience as the Selectee's resume. Panelist-2 stated that Complainant did not provide as high-quality answers as the Selectee during the interview. Panelist-3 stated that he rated Complainant lower than Selectee because "experience in supervision and department improvement activities and daily management of frontline staff was an important element in final scoring." Report of Investigation (ROI) at 116. Selectee's resume shows that she has worked as a radiologic technologist since 1996 across multiple facilities with her most recent experience including as an acting chief technologist directly supervising a multimodality imaging department. Complainant's resume shows that he has experience as a radiologic technologist since 2002 along with prior experience in the medical division of the U.S. Navy.

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). Complainant requested a hearing but subsequently withdrew his request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

#### CONTENTIONS ON APPEAL

Complainant submits no brief on appeal. The Agency requests affirmation of its final decision.

#### 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

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). Complainant must initially establish a prima facie case by demonstrating that he or she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction 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.

A prima facie case of discriminatory non-selection may be established by showing: (1) the complainant is a member of a protected group; (2) the complainant applied and was qualified for a position for which the employer was seeking applicants; (3) that complainant was not selected for the position; and (4) that an applicant not in complainant's protected group was chosen for the position under circumstances that, if explained, would support an inference of discrimination. Emery S. v. Fed. Deposit Ins. Corp., EEOC Appeal No. 2020001130 (Sept. 11, 2020) (citing McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973)).

Once Complainant has established a prima facie case, the burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the 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. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

Complainant must prove that the employer's reasons are not only pretext but are pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 and 516 (1993). A factual issue of pretext cannot be established merely on personal speculation that there was discriminatory intent. Complainant v. U.S. Postal Service, EEOC Appeal No. 01A11110 (May 22, 2002); Springer v. Durflinger, 518 F.3d 479, 484 (7th Cir. 2008). Pretext means that the reason offered by management is factually baseless, is not the actual motivation for the action, or is insufficient to motivate the action.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000).

It is undisputed that Complainant established a prima facie case of discriminatory non-selection. We find that the Agency articulated a legitimate, nondiscriminatory reason for selecting Selectee instead of Complainant for the vacancy. Specifically, Panelist-1 stated that Selectee scored higher across both her interview and resume. Furthermore, each panelist provided a specific reason for why Complainant scored less during his interview. For instance, Panelist-1 stated that Complainant failed to provide specific examples or fully answer interview questions.

We find Complainant failed to show that the Agency's articulated reason for selecting Selectee instead of Complainant was a mere pretext for discrimination. We find the record does not contain evidence demonstrating that Complainant's qualifications were plainly superior to Selectee's qualifications. Complainant's statement that he is licensed across three modalities ignores the job posting's requirement that applicants be licensed only by the American Registry of Radiologic Technologists, supporting that the full performance of the position does not require the unspecified extra licenses Complainant obtained. The record shows both candidates had over 10 years of experience in the relevant field while Selectee's recent position as the Acting Chief Technologist allowed her to develop her supervisory skills further. Furthermore, there is no indication that the selection was in any way influenced by Complainant's national origin or prior protected activity.

### CONCLUSION

Accordingly, the Agency's final 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

December 9, 2024  
Date