



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

[REDACTED]
Markus C.,¹
Complainant,

v.

Robert Salessis,
Acting Secretary,
Department of Defense
(Defense Finance & Accounting Service),
Agency.

Appeal No. 2023004286

Hearing No. 443-2023-00024X

Agency No. DFAS-00001-2023

DECISION

On July 23, 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 June 27, 2023, final order 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

Whether the AJ correctly issued summary judgment finding that Complainant did not establish that he was subjected to discrimination based on his sex, age, or disability.

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

At the time of events giving rise to this complaint, Complainant worked as a applicant for employment at the Agency's DFAS Indianapolis facility in Indianapolis, Indiana.

On October 24, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (male), disability (physical, mental), and age (YOB: 1970) when on August 12, 2022, he was not selected for the position of Financial Systems Specialist, GS-0501-7/9/11, job announcement DFAS-DHA-11525633-22, vacancy ID: 11525633.

Complainant stated that he applied for the position through USA Jobs on June 20, 2022. See Report of Investigation (ROI) at 345. He asserted that he suffers from unspecified physical and mental impairments from his military service for which he has received a 90% disability rating by the VA and that his conditions were variously documented in his cover letter and resume as submitted in his application package. See ROI at 349-51. He argued that the job posting was written in such a way that it was not open to eligible disabled veterans and severely disabled persons under the Schedule A hiring authority and that this was intended to disadvantage disabled applicants. See ROI at 352. He contends that the Systems Division Chief, who was the selecting official, (Division Chief) provided a post-hoc rationalization to justify his discriminatory hiring because his characterization of the job requirements and the job posting itself do not match up. See ROI at 346-47. He asserted that he believes his age was a factor because the selectee was significantly younger than he is and the position was for an entry-level position and he is an outlier because of his 25+ years of experience. See ROI at 349.

The Division Chief explained that he was looking for a Computer Programmer/application developer for their Application Development and Support Team. See ROI at 364. He stated that they had originally tried to fill the position at a GS-12 level but were not able to find anyone with the experience they sought and so they opened up the position as an entry level position at a GS-7/9/11 level in order to reach a larger candidate pool. See ROI at 364. He asserted that there were a total of 153 applicants and so rather than read 153 resumes, he created an automated process to scan the resumes for 40 keywords that were relevant to the knowledge, skills, and experience that were being sought and he then scored each resume based on the keyword review that was generated by the automated process. See ROI at 364-66.

He explained that 9 of the candidates received a score of at least 50 based on this keyword search and scoring system and he closely reviewed the resumes of all 9 of these candidates, which included Complainant, to look for information about how they had used relevant software, their direct experience programming and developing relevant applications to ensure that the points he assigned lined up with the information in the resume. See ROI at 367. He asserted that Complainant applied only at the GS-11 level which meant that the candidate would need to be outstanding and could be "hired off the street" without requiring significant training, which generally required a Master's degree in computer science or information technology or significant programming experience. See ROI at 367. He stated that Complainant did not have this experience so he decided to fill the position as a developmental GS-7 position, which meant the candidate needed to have basic user knowledge and some application development experience in the relevant programs and would then undergo training and development to advance to the GS-9 level. See ROI at 367. He asserted that he asked his Technical Lead to review the resumes of the top three GS-7 candidates, which included the Selectee, and his Technical Lead confirmed his scoring of the top three candidates' resumes so he selected the candidate with the highest score, the Selectee. See ROI at 467-68. He explained that Complainant's resume showed that the majority of Complainant's experience related to budget analysis and/or overseas experience, neither of which directly related to the position at issue, and that nothing in his resume indicated that Complainant had programming experience or knew how to develop a programming application. See ROI at 369-70. He stated that in contrast, the Selectee had a dual Bachelor's degree in Computer Science and Mathematics, design experience, programming experience, design experience in Microsoft Access which was particularly important as they were in the process of converting Access to a more secure system so whoever was selected would need to understand Access in order to assist in the conversion, as well as relevant experience with software and web-based technology. See ROI at 368-69.

The Division Chief further asserted that he did not look at the disability rating form Complainant submitted but only his resume and that he did not pay any attention to the dates of his education and experience and so did not have any knowledge of Complainant's age. See ROI at 372. He explained that because they were hiring for a 100% remote telework position, it was a new hiring technique and neither the veterans preference nor the Schedule A hiring authority applied but even if it had, Complainant would still have needed to meet the qualifications for the position, which he did not. See ROI at 375-76.

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 timely requested a hearing. The AJ assigned to the case determined *sua sponte* that the complaint did not warrant a hearing and over Complainant's objections, issued a decision without a hearing on June 23, 2023. The AJ found that Complainant did not establish a prima facie case but that even if he could, the Agency articulated legitimate, nondiscriminatory reasons for the non-selection and Complainant offered no evidence to support his assertions of discriminatory animus. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Complainant appealed.

CONTENTIONS ON APPEAL

On appeal, Complainant reiterates that a hearing was necessary because there are credibility disputes over whether the Division Chief manipulated the scoring of the resume in order to avoid a suspicious perfect score to a much younger, female, non-disabled Selectee and the AJ erred in simply accepting without question the Division Chief's explanation. Complainant insists that the non-selection was discriminatory and in violation of merit systems and non-discrimination principles.²

In response, the Agency contends that the AJ correctly found that Complainant did not establish that the Agency's reasons for the non-selection were a pretext for discrimination.

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

² To the extent that Complainant seeks to challenge the Agency's actions as violations of merit systems principles and veteran preference requirements, the Commission does not have jurisdiction over such claims. See 29 C.F.R. § 1614.103(a); Anglea R. v. Dep't of Justice, EEOC Appeal No. 2020005476 (Feb. 14, 2022).

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 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 Chapter 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”).

ANALYSIS

Issuance of Summary Judgment

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 insists that there are credibility issues in dispute and the AJ erred in accepting at face value the Division Chief's explanations. We reject Complainant's argument as he offered no evidence beyond his mere assertions to establish that such a credibility dispute exists. It is well settled that mere assertions of a factual dispute without more are not sufficient to defeat a motion for summary judgment. See Darrell C. v. U.S. Postal Serv., EEOC Appeal No. 0120181833 (July 12, 2019); Quarterman v. U.S. Comm'n on Civil Rights, EEOC Appeal No. 0120112994 (May 21, 2013). Upon our review of the record, we find that the AJ correctly determined that Complainant failed to establish a dispute of material fact. Accordingly, we find that the AJ properly issued a decision without a hearing.

Disparate Treatment

Applying the McDonnell Douglas burden-shifting standard defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a complainant initially must establish a prima facie case of discrimination by presenting facts which, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993); Texas Dep't of Community Affs. v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas 411 U.S. at 802. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Burdine, 450 U.S. at 253. Once the agency has met its burden, the complainant has the responsibility to demonstrate by a preponderance of the evidence that the agency's action was based on prohibited considerations of discrimination, that is, its articulated reason for its action was not its true reason but a sham or pretext for discrimination. See Hicks, 509 U.S. at 511; Burdine, 450 U.S. at 252-53; McDonnell Douglas, 411 U.S. at 804.

Complainant may establish a prima facie case of discrimination by providing evidence that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) either that similarly situated individuals outside his protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted).

We find that Complainant established a prima facie case of discrimination based on his sex and age because the Selectee was female and significantly younger than Complainant. We further assume without deciding that Complainant established a prima facie case of disability discrimination although there is no evidence in the record concerning the Selectee's disability status.

We further find, however, that the Agency articulated legitimate, nondiscriminatory reasons for the non-selection. The Division Chief stated that Complainant only received the fifth-highest score in the resume review and his resume did not reflect that Complainant had the necessary computer programming and application development experience. See ROI at 370. He further stated that in contrast, the Selectee had a dual bachelor's degree in computer science and mathematics, design experience, programming experience, and relevant experience with software and web-based technology. See ROI at 368-69.

We find that Complainant did not establish that the Agency's reasons are a pretext for discrimination. There is no evidence in the record to support Complainant's assertions of discriminatory animus. To the extent that Complainant insists that the job posting did not accurately reflect the Division Chief's description of the job requirements they were looking for, we note that the evidence in the record does not support Complainant's assertions and even if it did, it is irrelevant to the issue of whether Complainant's non-selection was due to discriminatory animus as Complainant was still deemed among the higher-ranked candidates after the resume review. While Complainant clearly disagrees with the Division Chief's assessment of his relevant experience, Complainant cannot demonstrate pretext solely on his subjective assessment of his own qualifications. See Palmer N. v. Dep't of Def., EEOC Appeal No. 0120140070 (Mar. 18, 2016). Moreover, it is well-settled that agencies have broad discretion to carry out personnel decisions and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation, which is not present here. See Complainant v. Dep't of Veterans Affs., EEOC Appeal No. 0120130083 (Aug. 8, 2014). The Commission has repeatedly stated that mere assertions or conjecture that an agency's explanation is a pretext for intentional discrimination is insufficient because subjective belief, however genuine, does not constitute evidence of pretext. See Juliet B. v. U.S. Postal Serv., EEOC Appeal No. 0120182519 (Oct. 8, 2019); Richardson v. Dep't of Agric., EEOC Petition No. 03A40016 (Dec. 11, 2003).

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 finding that Complainant did not establish that he was subjected to discrimination as alleged.

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 3, 2025
Date