



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

[REDACTED]
Phyllis G.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Headquarters),
Agency.

Appeal No. 2023005033

Hearing No. 560-2022-00201X

Agency No. 4W-480-0001-22

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated August 23, 2023, finding no discrimination regarding her 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, we AFFIRM the Agency's final order finding no discrimination.

ISSUES PRESENTED

1. Whether the EEOC Administrative Judge (AJ)'s grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.

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.

2. Whether the Agency's final order properly found that Complainant was not subjected to discrimination based on age and sex.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Manager, Customer Service, Level 20, at the Agency's Postal facility in Topeka, Kansas.

On December 29, 2021, Complainant filed a formal complaint alleging discrimination based on sex (female) and age (over 40) when:

1. On September 30, 2021, she was not selected for the position of Supervisor, Print Operations at the National Print Center (NPC) in Topeka, Kansas.
2. On December 8, 2021, she was denied her request to downgrade to the vacant Management Analyst, Level 17, position at the NPC in Topeka, Kansas.²

The Agency investigated the complaint. 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 EEOC AJ. 29 C.F.R. § 1614.108(f). Complainant requested a hearing. The Agency filed a motion for summary judgment. Complainant responded. The AJ issued a decision without holding a hearing, finding no discrimination.

² Complainant also alleged discrimination concerning the denial of her requests to downgrade to a vacant EAS-19 Supervisor position at the NPC on March 4 and June 15, 2021. The Agency dismissed these claims for untimely EEO Counselor contact. Complainant did not contact an EEO Counselor until October 31, 2021, which was beyond the 45-day time limit set by the regulations. 29 C.F.R. § 1614.105(a)(1). Complainant did not contest the dismissal at hearing or on appeal. The Commission exercises its discretion to address only those issues specifically raised on appeal and declines to address this procedural dismissal. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) at Chap. 9, § IV.A (Aug. 5, 2015).

The record indicates that regarding claim 1, a Selecting Official (SO), EAS-23, Manager, NPC, indicated that Complainant applied and was interviewed but was not selected for the position of Supervisor, EAS-17, Print Operations at the NPC. The SO interviewed three applicants, i.e., Complainant, a Selectee (female, over 40, younger than Complainant), another applicant (male, younger than 40), and asked each applicant the same position related questions.

The SO stated that Complainant did not interview well regarding print operations management questions, and she mentioned in her application that she had no knowledge of print operations management. Report of Investigation (ROI), Affidavit (Aff.) B. Based on applications and interviews, the SO scored each candidate against the position requirements (KSA - knowledge, skills, and abilities) in Requirement-By-Applicant Matrix. ROI, Exhibit (Ex.) 4. The Matrix indicates that the Selectee received a total score of 15; male applicant, 12; and Complainant, 11. Id.

The SO stated that he selected the Selectee because she received the highest KSA requisite score, had the experience with the print operations management, and worked as a 204B Supervisor in the position at issue for over a year. ROI, Aff. B. The SO further stated that the Selectee's performance in her 204B Supervisor position was excellent and she worked well with her employees in that position. Id.

Internal Publication of Job Posting Number 10676166 for the position at issue indicates that the position's functional purpose was to supervise employees in the machine operation, warehousing, and shipping/receiving activities of a highly complex computerized print operations unit. Id. The position duties included, in part, supervising and coordinating the printing operations unit and scheduling work assignments according to the demands of workloads and product change-over schedules. The requirements for the position included having, in part, knowledge of manufacturing and production operations management and receiving, storing, shipping and inventory management; and ability to coordinate printing operations and related equipment, including peripherals. Id.

Complainant's application indicates that Complainant worked as a Manager, Customer Service, Delivery/Customer Service, in Topeka, Kansas, since September 21, 2014; prior to that, as a Supervisor, Customer Service, since March 8, 2014; and prior to that, as a Rural Carrier since May 19, 2001. ROI, Ex. 2.

The Selectee's application indicates that she worked as a Label Print Tech, Processing Operations, in Topeka, Kansas, since March 30, 2019, and prior to that, as a Carrier, Delivery/Customer Service, since December 25, 2008. ROI, Ex. 8. The Selectee also indicated that she worked as a 204B Supervisor, Print Operations at the NPC and in that position, she operated the machines; had an oversight of mid-sized warehouses; made necessary inventory adjustment; and supervised employees to meet unit objectives and daily productivity. Id.

Regarding claim 2, Complainant indicated that she requested to the SO for a downgrade (lateral) transfer to a vacant Management Analyst, EAS-17, position at the NPC in order to have an opportunity to get a higher paying position in the future. ROI, Aff. A and Ex. 6. The SO stated that he discussed Complainant's request with his manager, Executive Manager Asset Management Operations, to ensure he was following local policy concerning the matter. ROI, Aff. B. Based on the discussion, the SO emailed Complainant on December 8, 2021, that the NPC was not accepting laterals or downgrades and the subject position would be filled competitively. Id.

The SO noted that he previously denied another employee's (male, late 50s, who was working as a Planner) downgrade request to a vacant Customer Service position at the NPC. ROI, Aff. B. Further, the SO noted that accepting downgrades was not a practice at the NPC. Id.

The AJ found no discrimination on the part of the Agency when Complainant was not selected for the Supervisor, Print Operations, EAS-17, position at the NPC and when she was denied her downgrade request to a vacant Management Analyst, Level 17 position at the NPC.

The Agency's final order implemented the AJ's decision. Complainant appeals from the Agency's final order.

CONTENTIONS ON APPEAL

Complainant, reiterating her allegations, including her arguments previously made and considered by the AJ, contends that she was more qualified for the position at issue than the Selectee due to her long years of experience supervising postal employees.

Complainant also reiterates that the SO's written notes from her interview had one-word/short and/or broken English sentences. Complainant contends that the NPC has accepted lateral assignments for other positions, including that of her husband.³

In response to Complainant's appeal, the Agency contends that Complainant was not discriminated against as alleged. The Agency notes that Complainant on appeal fails to establish that the Agency's actions were motivated by discriminatory intent. The Agency requests the Commission affirm the Agency's final order.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, 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 (EEO MD-110), Chap. 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").

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 EEO MD-110, 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*).

³ Complainant's husband worked at the NPC (his position was not specified).

ANALYSIS

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 retaliatory 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 fact-finder could not find in Complainant's favor.

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 Complainant 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. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency's explanation was pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). Complainant can do this by showing that the proffered explanations were unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons were not credible permits, but does not compel, a finding of discrimination. Hicks, 509 U.S. at 511.

In order to establish a prima facie case of discrimination based on sex and age, Complainant must show that: (1) Complainant is a member of a protected class; (2) Complainant was subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) Complainant was treated differently than similarly situated employees outside Complainant's protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. McCreary v. Dep't of Defense, EEOC Appeal No.

0120070257 (Apr. 14, 2008); Saenz v. Navy, EEOC Request No. 05950927 (Jan. 9, 1998); Trejo v. Soc. Sec. Admin., EEOC Appeal No. 0120093260 (Oct. 22, 2009).

Regarding claim 1, to establish a prima facie case in a nonselection claim, Complainant must show that: (1) Complainant is a member of a protected class; (2) Complainant applied for and was qualified for the position; (3) Complainant was not selected despite Complainant's qualifications; and (4) someone outside Complainant's protected class was selected. Williams v. Dep't of Education, EEOC Request No. 05970561 (Aug. 6, 1998). Complainant may also set forth evidence of acts from which, if otherwise unexplained, an inference of discrimination can also be drawn.

Here, we find that Complainant established a prima facie case of age discrimination but did not establish a prima facie case of sex discrimination. Complainant applied and was qualified but was not selected for the position of EAS-17, Supervisor at the NPC. The Agency selected the Selectee, female, who was younger than Complainant. Because the Selectee was female, like Complainant, we find Complainant did not establish a prima facie case of sex discrimination.

The Agency articulated that it selected the Selectee because she had the highest KSA requisite score based on her application and interview. Further, the Agency stated that the Selectee was already working as a 204B Supervisor in the position at issue and her performance in that position was excellent and she worked well with her employees. We find that Complainant failed to show that the Agency's articulated nondiscriminatory reasons for her nonselection were a mere pretext for discrimination. Furthermore, Complainant failed to show that her qualifications for the position were plainly superior to the Selectee's qualifications. See Wasser v. Dep't of Labor, EEOC Request No. 05940058 (Nov. 2, 1995). Despite Complainant's contentions, the position did not require many years of supervisory experience at the Agency.

Regarding claim 2, we find that Complainant did not establish a prima facie case of discrimination as alleged because she failed to show that there were any similarly situated employees not in her protected groups who were treated more favorably regarding a downgrade to a vacant Management Analyst, EAS-17 position at the NPC. Although Complainant contends other people, including her husband, were given lateral assignments, she has not provided evidence that they were downgraded which is the issue in her claim.

Furthermore, she did not provide any specifics about these comparators such as their names (other than her husband), positions at issue, or dates of lateral assignments. We find that Complainant has not provided any evidentiary link between Complainant's protected classes and the alleged denial.

Further, the SO stated that based on his manager's recommendation and the NPC's policy, he denied Complainant's request for the downgrade to the position at issue, which was already being filled competitively. The SO indicated that he previously denied another employee's downgrade request and accepting downgrades was not a practice at the NPC. Other than her mere speculation, Complainant has not proffered any evidence the SO's explanations were a pretext for discrimination.

The Commission has held that agencies generally have broad discretion to set policies and carry out personnel decisions and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. Chavez v. U.S. Postal Serv., EEOC Appeal No. 0120055246 (Jan. 5, 2007); Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997). We find that Complainant failed to establish that the Agency's denial of her downgrade request was based on discrimination as alleged.

Based on a thorough review of the record, and considering all statements submitted on appeal, we find that Complainant failed to show that the Agency's actions were motivated by discrimination as she alleged.

CONCLUSION

Accordingly, the Agency's final order 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

November 18, 2024

Date