



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

[REDACTED]  
Ismael N.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2023005083

Hearing No. 480-2023-00083X

Agency No. 6P-130-0002-22

**DECISION**

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated August 16, 2023, finding no discrimination regarding his 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 for one claim and dismissing one claim.

**ISSUES PRESENTED**

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

---

<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.

2. Whether the Agency's final order properly found that Complainant was not subjected to discrimination based on race, age, and sex when a job listing was cancelled.
3. Whether the Agency properly dismissed one claim for untimely EEO Counselor contact.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Level 17, Supervisor, Customer Services at the Agency's Bicentennial Station in Los Angeles, California.

The record reveals that on May 4, 2022, Complainant contacted an EEO Counselor regarding his complaint. Unable to resolve the matter informally, Complainant filed a formal complaint on August 11, 2022. Therein, Complainant alleged discrimination based on race (Black), age (over 40), and sex (male) when:

1. On January 28, 2022, Complainant was notified that the listing for the position of Retail Support Specialist, a position he was offered on December 3, 2021, had been cancelled.
2. On February 16, 2022, Complainant attempted to apply for the position of Retail Support Specialist and was informed the listing had been cancelled. Subsequently, on April 7, 2022, Complainant became aware the job had been awarded to another employee.

On August 29, 2022, the Agency dismissed claim 1 due to untimely EEO Counselor contact, pursuant to 29 C.F.R. § 1614.107(a)(2). The Agency stated that on January 28, 2022, Complainant was notified the listing for the position at issue had been cancelled, but he did not contact an EEO Counselor until May 4, 2022, which was beyond the 45-day time limit under 29 C.F.R. § 1614.105(a)(1).

The Agency accepted and investigated claim 2. 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 EEOC AJ. Complainant requested a hearing. The Agency filed a motion for summary judgment. Complainant filed his opposition. The AJ issued a decision without holding a hearing.

Regarding claim 1, Complainant requested the AJ to reconsider the Agency's dismissal of the claim. In his complaint, Complainant indicated that in November 2021, he applied for the Retail Support Specialist position (Job Posting 10718580) and was offered the position on December 3, 2021, by a then selecting official (who is no longer employed at the Agency). Complainant also indicated that that selecting official told him that Complainant "would be hearing from some else regarding start date, pay increase and any other particulars." Report of Investigation (ROI) at 7.

Complainant stated that after not hearing from anyone about the job offer, on January 27, 2022, he sent an email to a new Selecting Official (SO) (who started on January 2, 2022, as an EAS-25, Post Office Support Specialist Team Lead in Denver, Colorado) and inquired regarding the start date. Complainant indicated that on January 28, 2022, the SO replied and notified him that the position had been cancelled and would be reposted. Id.

The Agency stated that the foregoing position had been cancelled because it had not been concurred by a high-level management official and the job was reposted (described in claim 2). ROI at 21. The AJ, denying Complainant's request, affirmed the Agency's dismissal of claim 1. Specifically, the AJ agreed with the Agency's reason that Complainant should have formed a reasonable suspicion of the alleged discrimination on January 28, 2022, when he was informed the position had been cancelled and would be reposted. The AJ stated that Complainant's EEO Counselor contact regarding the subject matter on May 4, 2022, was beyond the 45-day time limit.

Regarding claim 2, the record indicates that Job Requisition 10862908 for the Level 19, Retail Support Specialist position at issue opened on February 1, 2022, with a closing date of February 16, 2022. ROI at 112. In his email, dated February 16, 2022, to the SO, Complainant inquired if the job posting for the position at issue was removed because when he went on eCareer on February 15, 2022, he could not find it. ROI at 117.

The SO responded to Complainant's email confirming his statement. The SO indicated that the job posting was removed from eCareer prior to its closing date because a Selectee (Hispanic, male, over 40, younger than Complainant), Level 19, Supervisor, Los Angeles Customer Care Center, was laterally transferred into the position at issue. The record indicates that on February 9, 2022, the Selectee emailed the SO requesting a lateral transfer to the Level 19 position at issue. ROI at 116.

The SO accepted the Selectee's lateral transfer request. The SO indicated that he had no organizational relationship with Complainant.

The AJ found that Complainant failed to establish a prima facie case of discrimination based on race, age, and sex regarding claim 2 because he did not apply for the position. The AJ also found that the Agency articulated a legitimate, nondiscriminatory reason for its action. The AJ stated that the Agency placed the Selectee, Level 19, into the Level 19 position at issue through a proper lateral transfer. The AJ concluded that Complainant failed to establish that he was subjected to discrimination as alleged.

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

#### CONTENTIONS ON APPEAL

Neither Complainant nor the Agency submits a statement or brief on appeal.

#### 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*).

### 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.

#### *Dismissal – Claim 1*

EEOC Regulation 29 C.F.R. § 1614.107(a)(2) provides, in relevant part, that the Agency shall dismiss a complaint that fails to comply with the applicable time limits contained in 29 C.F.R. § 1614.105. EEOC Regulation 29 C.F.R. §1614.105(a)(1) requires that complaints of discrimination be brought to the attention of the EEO Counselor within 45 days of the alleged discriminatory event, or the effective date of an alleged discriminatory personnel action.

The Commission has adopted a “reasonable suspicion” standard (as opposed to a “supportive facts” standard) to determine when the limitation period is triggered under the EEOC Regulations. See 29 C.F.R. § 1614.105(a)(2); Hilda A. v. Dep’t of Veterans Affairs, EEOC Appeal No. 2020000832 (Jan. 31, 2020); Ball v. U. S. Postal Serv., EEOC Request No. 05880247 (July 6, 1988). Thus, the limitations period is not triggered until a complainant reasonably should have suspected discrimination, but before all the facts that would support a charge of discrimination have become apparent.

Here, we find that Complainant should have suspected discrimination on January 28, 2022, when he was notified of the cancellation of the listing for the Retail Support Specialist position for which he previously applied and was verbally offered the position on December 3, 2021. Complainant however did not contact an EEO Counselor regarding the matter until May 4, 2022, which was beyond the 45-day time limit set by the regulations.

Complainant has not provided adequate justification to warrant an extension of the applicable time limit for contacting an EEO Counselor. Thus, we find that the Agency properly dismissed claim 1 due to untimely EEO Counselor contact and the AJ properly denied Complainant's request for reconsideration of the Agency's dismissal. 29 C.F.R. § 1614.107(a)(2).

### *Disparate Treatment – Claim 2*

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 race, age, and sex, 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 2, we find that Complainant failed to establish a prima facie case of discrimination as alleged. Complainant, who was Level 17, did not apply for the Level 19, Retail Support Specialist position at issue. We find that Complainant has failed to establish any evidentiary link between membership in any protected class and the adverse employment action, and therefore has failed to establish a prima facie case of discrimination. Further, the Agency stated that it cancelled the job posting at issue because on February 9, 2022 (while the job posting was open), it accepted a lateral transfer request made by the Selectee who was a Level 19, Supervisor, Los Angeles Customer Care Center. Upon review, we find that Complainant failed to show that the Agency's articulated reason was a mere pretext for discrimination. Based on a thorough review of the record, we find that Complainant failed to show that the Agency's action was motivated by discrimination as he alleged.

### CONCLUSION

Accordingly, the Agency's final order 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 25, 2024  
Date