



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

████████████████████
Mitchell H.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Logistics Agency),
Agency.

Appeal No. 2023005133

Hearing No. 532-2023-00003X

Agency No. DLAC-22-0169

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from an EEOC's Administrative Judge's (AJ) decision dated July 20, 2023, which effectively became the Agency's final decision, pursuant to 29 C.F.R. § 1614.109(i), 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 decision finding no discrimination.

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.

ISSUES PRESENTED

1. Whether the EEOC 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.
2. Whether the Agency's final decision properly found that Complainant was not subjected to discrimination based on race or color.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a GS-13, Accountant, assigned to the Agency's facility in Fort Belvoir, Virginia.

On July 14, 2022, Complainant filed a formal complaint alleging discrimination based on race (African American), color (black), sex (male), and age (early 60s) when he was not selected for the Lead Business Readiness and Compliance Specialist, GS-13 position advertised under Vacancy Announcement DLALndMartm-22-11455325-MP on June 6, 2022.

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. 29 C.F.R. § 1614.108(f). Complainant requested a hearing. On June 22, 2023, the AJ issued a Notice of Intent to Issue a Decision Without a Hearing. On June 29, 2023, Complainant responded to the notice indicating that he did "not challenge the AJ's dismissal of his gender and age discrimination claims" but opposed dismissal of his race discrimination claims. The Agency did not respond to the notice. After a review of Complainant's response to the notice and evidence in the record, the AJ issued a decision without holding a hearing, finding no discrimination.

Complainant indicated that he applied for the GS-13, Lead Business Readiness and Compliance Specialist position at issue within the Agency's Business Readiness and Compliance Branch (BACB) in Whitehall, Ohio. Report of Investigation (ROI) at 80-86. Complainant was qualified and was interviewed but was not selected. The subject position duties included, in part, conducting Internal Control Reviews and leading a team consisting of various types of Business Process Analysts from the Order Fulfillment, Planning and Technical/Quality functional areas at BACB. ROI at 82, 186.

A Selecting Official (SO), GS-13, BACB Chief and two other officials (Division Chief (DC) and a former BACB Team Lead (TL)) telephonically interviewed six candidates, including Complainant. ROI at 139. The candidates were asked the same six interview questions related to the position at issue with a maximum score of four points per each question (24 points maximum score). The interview panelists, including SO, did not know Complainant until the interview process.

Complainant's resume indicates that he worked as a GS-13, Accountant at the Agency in Fort Belvoir, Virginia, since June 2019; prior to that as a GS-13, Information Technology Auditor at Environment Protection Agency since June 2018; prior to that as an GS-12, Auditor at Department of Health and Human Service since April 2016; prior to that as a GS-11, Auditor at Defense Contract Audit Agency since September 2015; and prior to that in various positions of Accounting/Auditor within federal agencies or private sectors. ROI at 98-113. Complainant had a bachelor's degree in business management and master's degree in information resource management. ROI at 111.

Selectee's (White, male, mid-50s, and 30% disabled veteran) resume indicates that he worked as a GS-12, Supply Management Specialist at the Agency in Whitehall, Ohio, since March 2020; prior to that as a GS-12, Business Process Analyst at the Agency since June 2014; prior to that as a GS-12, Supervisor Quality Assurance Specialist at the Agency since February 2011; prior to that as a GS-11, Quality Assurance Specialist at the Agency since February 2008; and prior to that at various positions in the Army Aviation Flight Facility or Army National Guard. ROI at 210-214. The Selectee attended a community college studying in computer information systems and did not possess bachelor's degree. ROI at 214.

Interview scores show that the Selectee received the highest total scores of 24, 24, and 24, and Complainant the second highest total scores of 23, 24, and 24 (from SO, DC, and the former TL, respectively). ROI at 151, 178, 173. The SO gave Complainant a score of three (four being the highest), for his answer for Question 3 (regarding his challenge dealing with a complicated task) because he did not explain clearly his results (i.e., in regard to identifying excessive leave approved by high level management while working as a Lead Auditor at Defense Finance and Accounting Service). ROI at 107, 108.

Complainant stated that he was more qualified than the Selectee for the position because he had over 12 years direct audit experience and a higher level of education. Complainant indicated that he did not know SO or any of the interview panelists. Complainant claimed that DC reviewed his LinkedIn profile, which included a color facial picture of him, and was aware of his race and color.

The DC stated that he reviewed Complainant's LinkedIn profile because he did not know Complainant and he wanted to see endorsements Complainant might have that would help in the decision of a tie breaker since he gave both Selectee and Complainant the same interview total score (no endorsements were found). The DC indicated that he never discussed Complainant's LinkedIn profile with SO or the selection panel members.

The former TL, who worked in the position at issue from 2015 to 2019, stated that the Selectee had a great interview and had exhibited superior knowledge of the skills required for the job. The former TL noted that the Selectee was Acting in the position at issue, was excellent at that position, and was a perfect fit for the position. ROI at 286.

The SO stated that she selected the Selectee for the position at issue effective May 22, 2022, because he worked as a member of her BACB team; he performed high-level BACB work; and he interviewed well showing complete mastery of the desired skills for the position at issue. The SO noted that the Selectee was a disabled veteran.

The AJ stated that despite Complainant's contentions, his educational qualifications did not make him better qualified than the Selectee and the Selectee's resume indicated that the Selectee also had auditing experience. The AJ concluded that Complainant failed to establish that the Agency's proffered reasons were pretext for discrimination.

The Agency did not issue a final order after the AJ's decision which effectively became the Agency's final decision. 29 C.F.R. § 1614.109(i). Complainant appeals from the Agency's final decision.

CONTENTIONS ON APPEAL

Complainant contends that the Agency's investigation was inadequate concerning the job interview questions and selection process, including improper reference checking on his supervisors.

Complainant also contends that the AJ improperly issued a decision without a hearing denying his opportunity to discover information regarding his discriminatory nonselection.

The Agency argues that the AJ properly found no discrimination regarding Complainant's nonselection and also that the investigative record was sufficient.

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 factfinder 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.

To establish a prima facie case in a nonselection claim, as here, 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.

Since Complainant does not contest the AJ's dismissal of the alleged discrimination based on his sex and age, we will not discuss such herein. We find that Complainant established a prima facie case of discrimination based on race and color since he was qualified, but Selectee (White) was selected for the position at issue.

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its action. The Agency stated that they selected Selectee for the GS-13, Lead Business Readiness and Compliance Specialist position at BACB in Whitehall, Ohio, because he was already acting in that position and was doing an excellent job, and he did well (and superior to or as well as Complainant) on the interview. Upon review, we agree with the AJ that Complainant failed to rebut the Agency's legitimate, nondiscriminatory reasons for not selecting him for the position at issue.

Furthermore, Complainant failed to show that his 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, there is no indication Complainant's many years of auditing experience or a higher level of education were required for the position at issue. Furthermore, we find no indication that the investigation was inadequate. Based on a thorough review of the record, considering all statements submitted on appeal, 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 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).

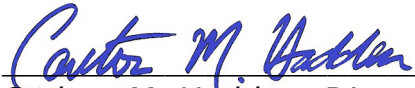
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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