



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

[REDACTED]
Blanca B.,¹
Complainant,

v.

Todd B. Hunter,
Acting Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023005161

Hearing No. 490-2020-00172X

Agency No. 20003-0564-202010004

DECISION

On September 18, 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 final action concerning her 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 action.

ISSUE PRESENTED

Whether substantial evidence supports the Agency's final action fully implementing the EEOC Administrative Judge's post-hearing finding that Complainant did not establish by preponderant evidence that she was subjected to 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.

BACKGROUND

From June 2018 until December 2021, Complainant worked as a Medical Support Assistant (MSA), GS-6, for the Veterans Affairs Medical Center (VAMC) located in Fayetteville, Arkansas. Complainant worked in the Office of Community Care (OCC). During the relevant time, Claims Assistant Supervisor, was Complainant's first line supervisor (Person A). Person B and/or Person C were Complainant's second line supervisor. In 2018 Person B moved to OCC.

On May 19, 2019, Complainant emailed Person B regarding a meeting she had with Person A on May 16, 2019. Report of Investigation at 81. In the email, Complainant stated that she felt "like I was verbally abused and discriminated against as an older woman." Id.

On May 30, 2019, Person B convened a meeting between Complainant and Person A with the union president in attendance to discuss the allegations. The meeting became contentious, with Complainant and Person A making cross-allegations of sex-based misconduct.

Person B was the OCC Chief of Staff until August 2019. In August 2019, Person C became the Acting OCC Chief.

Move to the VA Hospital

On July 22, 2019, Person A emailed Complainant and Advanced Medical Support Assistant (Person D) and told them that they would be the first two from the Gold Team² to move to the hospital customer service office. The move was effective the following day, July 23, 2019.

Administrative Officer Position

In August 2019, Complainant applied for an Administrative Officer (AO), GS-0341-07/09 position, posted on USAJobs under Announcement Number CPCL-10582789-19-AH. Complainant was rated eligible for the position and referred for an interview. Complainant claimed Person A was to be on the initial interview panel until she complained that the process would not be fair if he was on the panel because of his bias against her.

² In the record the Gold Team was referred to as both the Emergency Care Team and the Eligibility Team.

On September 24, 2019, Complainant initially interviewed for the position before a panel consisting of the AO for Dental Services (Panel Member 1), AO for Nursing (Panel Member 2), and AO for Surgical Services (Panel Member 3). Complainant scored the highest of all interviewees on the first-round interview. The top three candidates, including Complainant, were referred for a second-round interview.

Person C was the Selecting Official. Person C stated Person A was never supposed to be on the first panel. Person C stated she referred the top three candidates for a second-round interview because she felt two employees would not be a large enough pool to select from and stated it was up to her discretion to decide who to refer. Person C stated she used Person A for the second interview panel because he was the only supervisor in the service.

On September 26, 2019, the top three candidates were interviewed by Person A and Person C. Complainant testified she had a more difficult time because Person A was on the second-round interview panel. Person A and Person C rated Selectee 1 higher than Complainant during the second-round interview. Person C rated Complainant's responses 76 and Selectee 1's responses 92 (16 points higher for Selectee 1). Person A rated Complainant's responses 64 and Selectee 1's responses 82 (18 points higher for Selectee 1).

Person C testified that first-round interview scores were not used in the final decision. Person C testified she was not informed of Complainant's complaint against Person A prior to the interviews.

Complainant testified that she did not believe that Person C acted with retaliatory animus. Hearing Transcript (HT) Volume IV at 167.

Lead Position

In March 2020, Complainant applied for a Lead Advanced Medical Support Assistant³ (Lead) position, which was posted on USAJobs under Announcement Number CBST-10739028-20-DS. There were two openings for the Lead position.

³ This position is referred to as both a Lead Medical Support Assistant and a Lead Advanced Medical Support Assistant position in the record.

Complainant was one of 11 applicants who were referred to the selecting official, Person C. Person C stated no resume review was completed due to the small number of applicants.

The record reveals that on April 7, 2020, Person F (Advanced Medical Support Assistant) emailed Person C noting that on more than occasion, including four days earlier, Person A spoke negatively about Complainant. The email noted that Person A stated he and Complainant had a past and that he did not want Person F to be negatively influenced by Complainant. In the email, Person F said, regarding Person A, that she "feel[s] that if it was up [to Person A, Complainant] will never move up regardless of her education and qualifications." Complaint file 1 at 666, Hearing Exhibit C-6.

On April 9, 2020, Complainant had an initial interview for the Lead position with a panel chosen by Person C consisting of Program Analyst/ADPAC (Panel Member 4), Medical Clerk (Panel Member 5), and Supervisory AMSA (Panel Member 6). Panel Member 4 was a Program Analyst outside of OCC. Panel Member 5 never worked in OCC. Complainant scored a total of 152/180 for her initial interview, making her the second highest rated applicant after the first interview.

Person E⁴ and Person C conducted the second-round interviews and Complainant received a total score of 153/180 and Selectee 2 and Selectee 3 received scores of 183/200 and 168/200, respectively. Person E gave Selectee 2 a score of 86, Selectee 3 a score of 76, and Complainant a score of 67. Person C gave Selectee 2 a score of 97, Selectee 3 a score of 92, and Complainant a score of 86.

On April 16, 2020, USAJobs notified Complainant that the Agency did not select her for either of the Lead positions.

Complainant stated she discussed her EEO complaint with Person E when Person E contacted her to schedule the first-round interview. Complainant stated that Person E told her Person A was on the first interview panel and she complained about being interviewed by him since she had filed a complaint against him. Complainant claimed Person A was removed from the interview panel after she complained.

⁴ We note Person E is the same person as Selectee 1 in the AO position, discussed above.

Person E denied knowing Complainant had filed an EEO complaint at the time of the selection process. Person E denied knowing Person A was on the first-round panel when she was selected for the second-round panel. Person E stated Person A never told her not to select Complainant.

Person C stated she chose the panelists to conduct the interviews. Person C denied telling Person E that there was an EEO complaint made by any of the interviewees before the interview. Person C stated as an MSA supervisor, Person A could have been a participant on the panels. However, Person C stated that after she learned of Complainant's EEO complaint, she made the decision that Person A should not participate in any of the interviews involving Complainant.

Selectee 2's resume reflects she had worked in the relevant medical field in the private and public sector since 1998, with the exception of a two-year, nine-month break. Selectee 2 had served as an official lead and was with the Agency since October 2018. Selectee 3's resume reflects she had been in the relevant medical field since 2017, and in the medical field more generally since 2006. Selectee 3 had official leadership experience as a Non-Commissioned Officer in the Army and had been with the Agency since 2016.

Complainant's resume reflects she had been with the Agency and in the relevant field since June 2018. Complainant had limited volunteer work in the medical field more generally prior to that time and had only been an unofficial lead.

Person C selected Selectee 2 and Selectee 3. Person C explained Selectee 2 had stronger past work and supervisory experience than Complainant. Person C stated Selectee 3 provided specific examples and was more well-rounded than Complainant. Person C testified she did not have a conversation with Person A about the finalists prior to making the final selection. Person C stated Complainant having a complaint against Person A was not a factor in the selection.

Selectee 2 testified that Person A told her he did not want her for the Lead position and that "[Person C] is the one that got you the lead position, not me." HT, Vol. IV at 161. Selectee 2 stated she asked Person C about this, and Person C admitted it was true. Selectee 2 testified that Person A told her Person C had "pulled strings" and said she "had to raise the score or something to get me past a few others that had made a higher score than me." HT, Vol. IV at 172.

Selectee 2 stated Person C told her the reason she did this was so Person A would not have "total control over the entire office" and she needed someone there to "stand up to him." Id. Selectee 2 also testified that within six months of her starting there in October 2018, Person A started talking about Complainant and how he did not like her and as far as he was concerned "as long as he was in his position, she would never be more than what she is" and that he wanted Selectee 2 to get "dirt" on Complainant so he could figure a way to get her out of there. HT IV at 166-167. Selectee 2 stated she did not comply.

Instant EEO complaint

On October 2, 2019, Complainant initiated contact with the Agency's EEO Office, concerning a claim of discrimination. The matter was not resolved. On December 26, 2019, Complainant filed a formal EEO complaint, which was subsequently amended, alleging that the Agency discriminated against her on the bases of sex (female), age (over 40), and in reprisal for protected EEO activity when:

1. On May 19, 2020, Claims Assistant Supervisor (Person A), stated to Complainant in a loud tone, that Complainant needed to tell him why she did not want to work with Coworker 1.
2. On July 9, 2019, Person A reassigned Complainant from the Office of Community Care building, to "the x-ray room in the hospital."
3. On October 3, 2019, Nurse Manager (Person C), and Person A failed to select Complainant for the position of Administrative Officer (Office of Community Care), GS-0341, 07/09, announcement #CPCL-10582789-19-AH.
4. On April 16, 2020, Person C and Person A failed to select Complainant for the position of Lead Medical Support Assistant, announcement #CBST-10739028-20-DS.

The Agency accepted claims 3 and 4 as timely discrete incidents and as part of Complainant's overall harassment claim. The Agency dismissed claim 2 as an untimely discrete action. The Agency noted that events 1-4 would all be considered as part of Complainant's harassment claim.

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 Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing. The Agency filed a motion for summary judgment. Complainant filed an opposition to summary judgment. The Agency filed a reply.

On February 1, 2023, the AJ issued a summary judgment decision. The AJ noted the selectees for the two nonselections were all women and that Complainant admitted she was not alleging sex-based discrimination as it related to her nonselection claims. Thus, the AJ found the earlier incidents, to the extent they constituted a hostile work environment claim on the basis of sex, were an untimely hostile work environment claim and were dismissed. The AJ noted Complainant failed to argue for a basis to impute discriminatory animus based on age and found none. However, as to the nonselections, the AJ found the basis of age remained. The AJ noted Complainant admitted that claim 1 occurred on May 16, 2019, which preceded Complainant's earliest protected EEO activity. Thus, the AJ noted claim 1 could not have been motivated by retaliatory animus. The AJ found claims 2, 3, and 4 survived summary judgment.

The parties engaged in discovery and the Agency supplemented the record with additional documentation. Each party provided their proposed witness list and exhibits. On February 28, 2023, when she submitted her Proposed Witness List and Exhibits, Complainant withdrew her harassment claim. Complaint file 1 at 633. She noted the only claims remaining were the two nonselections and her reassignment. Both sides submitted objections to some of the proposed witnesses and exhibits requested by the other side. Among the witnesses named by Complainant was Coworker 1, who Complainant stated would testify regarding the pain and suffering she witnessed Complainant suffer.

On March 15, 2023, the AJ issued a Prehearing Memorandum and Order. The AJ noted Complainant proposed 15 witnesses and that all except two were approved. In overruling the Agency's objection to Coworker 1, the AJ noted "the testimony of family and friends is common on the question of establishing non-pecuniary compensatory damages."

On May 12, 2023, Complainant withdrew the basis of age and stated the only remaining basis for her complaint was retaliation.

The AJ held a hearing from June 12 – June 15, 2023, and issued a decision on August 1, 2023. The AJ observed all the witnesses' demeanor during the hearing. The AJ found Person C to be a credible witness and noted her body language did not evince any hostility to Complainant's case, and she consistently explained her testimony. The AJ found Complainant's attacks on Person C's credibility unpersuasive.

The AJ found Complainant a less credible witness than Person C. The AJ noted Complainant had a bias in favor of herself. The AJ noted Complainant admitted many of the facts upon which she based her opinions came from the rumor mill and multiple levels of hearsay. The AJ found that admission significantly undercut the value of Complainant's affidavit testimony as that source of knowledge for that testimony was frequently lacking personal knowledge. Further, the AJ noted Complainant admitted to a propensity for paraphrasing significant events.

The AJ found Person A to be a less credible witness, on par with Complainant. The AJ noted Person A obviously wanted to not be found to have discriminated. The AJ noted Person A's timing of an allegation of inappropriate touching by Complainant lacked credibility as it came in response to allegations of his own misconduct. The AJ noted to a certain extent inconsistencies in his testimony may be attributed to Person A's disability, but stated this did not recover his credibility.

The AJ found Selectee 2 biased against Person A and Person C. The AJ found her testimony showed she was drawing unwarranted inferences. For example, the AJ noted that Selectee 2 concluded from Person A's statement that, "[Person C] got you the lead position not," that Person C had to "pull strings" to select her. The AJ stated this conclusion was unwarranted considering that Person C outranked Person A, participated in the interview, and was the selecting official. The AJ also noted that Selectee 2's testimony about events other than those she personally witnessed was rooted in the rumor mill and thus, lacked credibility.

The AJ found Person E "entirely credible." The AJ stated she exhibited no bias towards either party and was amenable to correction when the contemporaneous records (such as interview panel notes) reflected something different from their recollection.

The AJ found Coworker 1, who testified on June 14, 2023, regarding damages, was biased in favor of Complainant.

On June 15, 2023, Complainant's attorney sought to introduce a Report of Contact, form 119, from Coworker 1 regarding a conversation between Complainant and Person C, which Coworker 1 allegedly overheard. Complainant's attorney stated that she first obtained the document on the night of June 14, 2023. Complainant's attorney also sought to have Coworker 1 called as a rebuttal witness to testify regarding the conversation she overheard between Complainant and Person C. Complainant's attorney stated the Agency was on notice regarding the event as Complainant had mentioned it during the investigation and in discovery. The Agency objected to admission of the document noting the document was in existence for years but not provided previously. The Agency noted Coworker 1 was not listed to testify about the subject matter Complainant was now seeking. The Agency argued the prehearing conference was the cut off to submit exhibits absent extenuating circumstances and that none existed in this circumstance. The AJ did not admit either the document or testimony, noting that Complainant, if not her attorney, was aware of the document for years. The AJ noted the document was not provided in discovery. Regarding Coworker 1's testimony, the AJ noted there was ready access to the information and the individual was available, yet not in the proffer. The AJ declined to adjust proffers and requests for witness approval in the midst of the hearing.

The AJ found Complainant's reassignment claim was untimely. Regarding the two nonselections, the AJ found Complainant failed to show she was subjected to retaliatory discrimination.

When the Agency failed to issue a final order within forty days of receipt of the AJ's decision, the AJ's decision finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i).

Thereafter, Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

Reassignment

On appeal, Complainant claims the AJ erred in finding the Agency did not discriminate against her when it moved her workstation. She argues her claim should be considered timely raised. Complainant acknowledges the move was ordered on July 22, 2019, and she did not initiate EEO contact until October 2, 2019.

However, she claims Person A began to retaliate against her when she returned from leave in June 2019, and he continued to treat her adversely by taking away duties; refusing to communicate with her; by moving her workstation; not supplying her with the equipment and access to do her job; and by relegating her to a secretary like role. Complainant argues each day Person A required her to be in the new location was a continuing act of reprisal and thus, her EEO contact should be deemed timely as a continuing violation.

Nonselection for AO

Regarding her nonselection for the AO position, Complainant claims she met a prima facie case and established the Agency's articulated reason was a pretext for discrimination. She states there were several inconsistencies between Person A and Person C's testimony about the selection for the position. She notes that Person A stated Person C asked him not to be on the first panel because Complainant was concerned of bias which she claims shows Person C knew of her protected EEO activity before the selection.

Complainant also argues Person C's testimony that she did not know about Complainant's complaints against Person A before the AO selection was not credible because Person C falsely said at the hearing that she did not speak with Complainant about the reasons Complainant was not selected for the AO position, despite stating otherwise in her written testimony. Complainant also states Person B admitted to telling both Human Resources and EEO about Complainant's complaints that Person A discriminated against her, and thus argues it is hard to believe when Person C took over for Person B, Person B did not share this information with Person C for situational awareness.

Complainant also alleges Person C's testimony about why she allowed the top three candidates to move onto the second round of interviews is questionable. Complainant states she understood only the top two candidates would advance. She cites to Panel Member 1 who she states testified the top two candidates were referred to Person C. Complainant argues Panel Member 1's testimony conflicts with Person C's testimony that she unilaterally decided to refer the top three candidates because two employees would not be a large enough selection pool.

Further, Complainant argues neither Person C nor Person A gave credible testimony regarding their evaluation of the final candidates and their decision to choose Selectee 1.

Complainant notes that when rated by panel members outside the OCC, she received the highest score of all candidates. She states in the second round, Person A and Person C “coincidentally” each evaluated her exactly 20 points lower than Selectee 1.

Finally, Complainant claims that if it was a conflict for Person A to participate on the Lead selection panel because of her protected EEO activity, then it was also a conflict for him to have participated in the selection panel for the AO position.

Nonselection for Lead

Regarding Complainant’s nonselection for the Lead position, she notes two days prior to the first-round interview, Person F (AMSA) emailed Person C to warn that Person A was speaking negatively about Complainant and intended to block Complainant from advancing. Complainant states it is undisputed that Person A and Person C knew of Complainant’s pending EEO complaint. Complainant claims that Person E also knew about her pending EEO complaint as a result of Complainant telling Person E about it during the scheduling of interviews. She notes Person E admits to knowing there was an issue between Complainant and Person A, and claims Person E’s denial of knowledge of the actual EEO complaint was not credible.

Complainant argues Person E and Person C are not credible due to inconsistencies in their testimony. She notes that both initially stated that they chose the two individuals who received the highest scores as selectees. However, when it was pointed out that another applicant (Candidate X) had a higher score, Person E noted in rare circumstances a candidate could be selected that did not have the highest score. Complainant noted Person C stated she had the unilateral authority to select who she wanted if the highest scoring candidate was not a good fit.

Additionally, Complainant notes that during hearing preparation, her attorney discovered a Report of Contact from Coworker 1 which she stated memorialized overhearing a relevant conversation between herself and Person C. Complainant notes the AJ improperly excluded the document and testimony from Coworker 1. She states the probative value of the document exceeded any prejudice against the Agency since the Agency was on notice of the conversation. Further, Complainant notes that Coworker 1 had been approved as a witness to testify about damages and thus was available to testify concerning the conversation and authenticity of the document.

Thus, she argues the AJ abused his discretion by not allowing the document and testimony.

Complainant also claims her testimony was more credible than that of Person A and Person C. Specifically, she states Person A and Person C provided contradictory testimony regarding whether Person A was initially to be on the first-round interview panel and then removed.

Finally, Complainant challenges the AJ's assessment that Selectee 2 was an interested party and therefore he did not believe her testimony. Complainant claims Selectee 2's testimony showed that Person A or Person C manipulated the selection process.

In response to Complainant's appeal, the Agency argues the AJ correctly determined the move to a new duty station was a discrete incident and not raised within 45 days of occurrence. The Agency notes the AJ correctly found no discrimination with regard to the two nonselections.

STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

ANALYSIS

At the outset, we address Complainant's contention that the AJ improperly excluded the document and testimony from Coworker 1. The Commission notes that AJ's have broad discretion in the conduct of hearings, including discovery, and the determination of whether to admit evidence, or permit or

compel the testimony of witnesses. See 29 C.F.R. § 109; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 7 § III.D (Aug. 5, 2015). Upon review, we find Complainant has not shown the AJ abused his discretion.

Reassignment

In this case, the AJ dismissed Complainant's reassignment claim on the grounds of untimely EEO Counselor contact. On appeal, Complainant argues that her reassignment should be considered timely under a continuing violation theory.

The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the forty-five (45) day limitation period is triggered. See Grier v. Dep't of the Air Force, EEOC Appeal No. 0120093482 (Feb. 16, 2010). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent. In this case, we find that Complainant should reasonably have suspected discrimination on July 23, 2019, when she was actually reassigned. Complainant's initial contact of an EEO Counselor on October 2, 2019, was beyond the 45-day time limit set forth in 29 C.F.R. §1614.105(a).

Furthermore, we also reject Complainant's argument that her claim was timely under the continuing violation theory because she was alleging an overall claim of harassment. The continuing violation doctrine does allow for an otherwise untimely claim to be accepted for processing if it is part of a series of related violations where at least one discriminatory event occurred within the relevant timeframe. However, we note Complainant withdrew her harassment claim prior to the start of the hearing, thus, the only remaining claims at the hearing were the discrete actions of the two nonselections and the reassignment. The U.S. Supreme Court in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), rejected the use of the continuing violation doctrine in cases involving discrete acts of discrimination. Morgan at 113. Applying Morgan to the instant complaint, we find that Complainant cannot rely on the continuing violation doctrine to make the reassignment actionable. Because Complainant failed to provide sufficient justification to extend or toll the time limit, we find that the AJ properly dismissed the reassignment claim pursuant to 29 C.F.R. §1614.107(a)(2) for untimely counselor contact.

Nonselections

For a complainant to prevail on a claim of disparate treatment, they must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). A complainant must initially establish a prima facie case by demonstrating that they were subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. 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.

To establish a prima facie case of disparate treatment on the basis of reprisal, a complainant must show that: (1) they engaged in a protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, they were subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120132503 (Aug. 28, 2014), citing Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 253 (1981). A complainant must ultimately prove, by a preponderance of the evidence, that the agency's explanation is pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

In the present case, we find Complainant established the first three elements of a prima facie case in that she engaged in protected activity; the Agency was aware of the activity; and that she was subjected to adverse treatment when she was not selected for two positions. However, we do not find that Complainant met prong four as she has not established a nexus between the protected activity. Further, the Agency articulated legitimate, nondiscriminatory reasons for not selecting Complainant for either of the positions.

AO Position

For the AO position, the Agency stated Selectee 1 was chosen due to performing the best on the second-round interview, which was the

determinative step. We note Complainant herself acknowledged she had a more difficult time in the second-round interview and stated that she did not believe that Person C acted with retaliatory animus in relation to the AO position. We find substantial evidence supports the AJ's finding that Complainant failed to establish the Agency's actions were a pretext for discrimination.

Regarding Complainant's contention that Person A was initially on the first-round panel and then removed after she complained, substantial evidence supports the AJ's finding that the record does not support this. Person C testified Person A was never on the first panel. In his affidavit, Person A stated he was "excluded" to prevent bias. ROI at 113. We find being excluded from being on the panel does not necessarily equate to having been placed on the panel to begin with and doing so would not be inconsistent with Person C's affidavit stating outside panels are typically used for promotions so that there is an unbiased opinion as most of the applicants are usually internal.

Additionally, we address Complainant's contention regarding Person C's credibility. We find substantial evidence supports the AJ's determination that Person C credibly testified that Person B did not share information that Complainant had a complaint against Person A or complained that Person A was treating Complainant unfairly because she was an older woman. We find Complainant's challenge to Person C's credibility because Person C could not recall the details of a post-selection discussion with Complainant insufficient to demonstrate that Person C had knowledge of Complainant's complaint against Person A at the time of the selection decision. Additionally, we find Complainant's contention that Person B shared information of her complaint against Person A with Person C is speculative and without evidentiary support.

Next, we address Complainant's contention there was a discrepancy in the selection process due to the number of candidates advancing to the second-round interview. Complainant claims Panel Member 1 stated the top two candidates were referred to Person C. However, we note Panel Member 1 testified it was his *understanding* that the top candidates would be referred, and he stated he did *not actually know* how many candidates would proceed to the second round. Thus, we do not find Complainant has demonstrated a discrepancy.

Regarding Complainant's argument surrounding the evaluation of the candidates, we find substantial evidence supports the AJ's finding regarding Person A and Person C's credibility. While we acknowledge Complainant scored the highest in the first round of interviews, we note that the second round was on a different date, had different interviewers, and different interview questions. Complainant herself testified she had a more difficult time during the second round because Person A was on the panel. Person C testified the first round was only used to identify who would advance to the second round. Thus, the second-round scores were used independent of the first round to make the ultimate selection. Regarding Complainant's claim that both Person A and Person C "coincidentally" scored her exactly 20 points lower than Selectee 1, we note this appears to be an inaccurate representation of the actual scores (Person A scored Selectee 1 18 points higher; and Person C scored Selectee 1 16 points higher). Further, even if the scores were exactly the same (20 points higher for Selectee 1), we find Complainant failed to establish the articulated reason for the scores was a pretext for discrimination.

Further, even if we agreed with Complainant's contention that it was a conflict for Person A to serve on the selection panel due to her EEO activity against him, we note that at that time Person C made the decision to appoint Person A to be on the panel, she did not know about Complainant's complaint of discrimination against Person A. The record reflects Complainant did not initiate EEO contact until after she was informed of her nonselection for the AO position.

Lead Position

For the Lead position, we find that the Agency articulated legitimate, nondiscriminatory reasons for its action. The Agency selected Selectee 2 due to her stronger past work and supervisory experience, and Selectee 3 due to the fact she provided specific examples in the interview and was more well-rounded than Complainant.

Upon review, we find Complainant failed to establish the Agency's articulated reasons were pretext for discrimination. We determine the AJ's finding that Complainant did not establish by preponderant evidence that Person E was aware of her protected activity was proper. Thus, the only remaining responsible management official was Person C. The record reflects that while Person C rated Complainant lower than both selectees, Person E (who did not have knowledge of Complainant's protected activity) rated Complainant even worse relative to the selectees.

Next, we address Complainant's contentions that there were contradictions in the testimony of Person A and Person C regarding whether Person A was supposed to be on the first-round panel and then removed. We find the AJ properly found that there was no preponderant evidence that Person A was initially on the first interview panel and then removed. Complainant cited Person E as the source of knowledge. However, Person E stated she did not even know Person A was on the first panel when she was chosen for the second-round panel. Further, we note the AJ found Person E more credible than Complainant. Moreover, even if Person A had been scheduled to be on the first panel, we find Complainant was not harmed by this since he was ultimately not on the panel.

Regarding the April 7, 2020 email from Person F, we note that Person F's statement reflected her belief that if it was up to Person A, she felt Complainant would not advance; however, she did not report that Person A actually made that statement. Further, we note that Person F did not say that Person A made any reference to the selection process for the Lead position. Moreover, we note while Person F reported Person A stated he and Complainant "have a past," she did not say that Person A's statement was based on Complainant's protected EEO activity. Hearing Exhibit, C-6.

Regarding Complainant's contention that Candidate X received a higher score than the selectees but was not selected, we note the record reflects that Candidate X scored higher than Selectee 3, but not higher than Selectee 2. Further, we note Complainant does not contend and the record does not reflect that she scored higher than either Selectee 2, Selectee 3, or Candidate X. Person E testified that at that time Candidate X had issues being able to keep up with the daily work that she was doing and was "very distracted" and as a result they selected the next highest person for the position. HT, Vol. 2 at 86-87. Complainant failed to show this explanation was false or a pretext for discrimination.

Finally, regarding Selectee 2's testimony, we find substantial evidence supports the AJ's credibility determination regarding this witness. Further, we note that even if Person C manipulated the selection process (a fact Person C denies), Selectee 2 stated that the reason for doing so was to avoid having Person A in total control and to have someone to stand up to Person A, which is not discriminatory or based on Complainant's protected EEO activity.

Upon review, we find Complainant failed to show that the Agency's articulated reasons were a pretext for discrimination. Moreover, Complainant failed to show that her qualifications were plainly superior for either the AO or Lead positions.

CONCLUSION

Accordingly, the Agency's final action dismissing Complainant's reassignment claim for untimely EEO Counselor contact, and finding no discrimination on her two nonselection claims 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

February 5, 2025
Date