



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

[REDACTED]
Barabara C.,¹
Complainant,

v.

Michelle King,
Acting Commissioner,
Social Security Administration,
Agency.

Appeal No. 2023005183

Hearing No. 560-2023-00074X

Agency No. CHI-22-0424-SSA

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated August 30, 2023, finding no discrimination regarding her complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 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.
2. Whether the Agency's final order properly found that Complainant was not subjected to discrimination based on disability.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a GS-13, Social Insurance Administrator – (District Manager) at the Agency’s Office of Regional Commissioner in Litchfield, Illinois.

On August 19, 2022, Complainant filed her formal complaint alleging discrimination based on disability when on May 4, 2022, she learned that she was not selected for the Social Insurance Administrator – (District Manager) position advertised under Vacancy Announcement Number SI-11413426-22-IVOL-CB-235.

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 Agency’s Motion for Judgment Without a Hearing (Agency’s Motion). Complainant did not file a response to the Agency’s Motion. The AJ issued a decision without holding a hearing, finding no discrimination.

Complainant indicated that in 2011, she was diagnosed with multiple sclerosis. Complainant indicated that her condition did not affect performing her position duties.

On March 21, 2022, Complainant applied for the GS-14 District Manager position at issue in Springfield, Illinois. Complainant was qualified for the position and was referred to a Selecting Officer (SO). On May 4, 2022, Complainant was notified that she was not selected for the position at issue.

Complainant’s first level supervisor (S1), a GS-14 District Manager, indicated that she was aware of Complainant’s disability because Complainant voluntarily told her in 2017 (when she was not Complainant’s supervisor). S1 stated that she was not involved with the selection process other than providing a Supervisor Reference Check for Complainant. S1 stated that based on her performance, S1 did not recommend Complainant for the position at issue because she failed to exhibit effective communication style, political acumen, and accountability for actions/decisions. Report of Investigation (ROI) at 188.

Specifically, S1 indicated that during the re-entry planning and implementation, despite leadership’s guidance, Complainant improperly approved two employee telework plans which did not comply with the

guidance. Id. When S1 asked Complainant about her failure to follow the guidance, she responded that it was her office, and she created a business plan that worked for her office. ROI at 189. S1 also indicated that Complainant, in her position, did not consider the district's needs and/or prioritize the Agency's resources in the most efficient manner. In her Supervisor Reference Check, S1 did not recommend Complainant for the position at issue stating, in part, that Complainant had a difficult time following chain of command guidance, which could lead to legal implications for the Agency. Agency's Motion, Exhibit (Exh.) 2. S1 also stated that Complainant needed to balance her office goals and all Agency goals and to continue accepting the Agency business process. Id.

The SO, a GS-15 Area Director, indicated that four candidates, including Complainant, applied for the position at issue. ROI at 260. The SO stated that she was Complainant's first-line supervisor from December 11, 2017, through November 22, 2019, when Complainant was in her prior position as an Area Administrative Assistant at the Agency's Area Director's Office.

Regarding the selection, SO stated that she reviewed and considered each candidate's applications, supervisor feedback and recommendation, office background, service area, service area challenges, criteria, and responsibilities. ROI at 195. Specifically, SO indicated that she was seeking a candidate who was best suited for the leadership role including, in part: ability to collaborate across components; communication and interpersonal skills; responsiveness and accountability; analytical and strategic planning skills; and organizational skills and big picture awareness. Id.

SO stated that she did not interview the candidates. The SO indicated that she selected a Selectee (disability unspecified), a GS-13, District Manager at the Agency's Thomasville Georgia facility because she was *highly recommended* by her supervisor. ROI at 195. The SO noted that Complainant was not recommended by S1.

Complainant indicated that she did not know the Selectee or the Selectee's disability status. Complainant stated that one of her employees (E1) told her that while E1 was on detail in the Agency's Springfield, Illinois facility, another employee (E2) in that facility told E1 that Complainant would not be selected for the District Manager position because SO did not like Complainant. ROI at 182.

Complainant indicated that she was better qualified for the position at issue than the Selectee because she had an outstanding record of employment.

Specifically, Complainant stated that she had been in a GS-13 grade level since 2015, whereas the Selectee had been a GS-13 since 2018.

The record indicates that Complainant received her 2021 performance summary appraisal rating of Successful Contribution (highest to lowest was Outstanding Contribution, Successful Contribution, and Not Successful). Each of the six Individual Elements (i.e., Interpersonal Skills, Participation, Demonstrates Job Knowledge, Achieves Business Results, Demonstrates Leadership, and Manages Performance) of the appraisal was rated 5 or 3 (high or low). Complainant received the rating of 5 for three Elements (Participation, Demonstrates Job Knowledge, and Demonstrates Leadership) and the rating of 3 for the remaining three Elements, resulting in a total Individual Elements rating of 24 and an average rating of 4.0. ROI at 210.

S1 commented in Complainant's appraisal that Complainant should: listen carefully to feedback and consider how it could be incorporated into her work; maintain a positive attitude and make adjustments for feedback to decrease strained working relationships and to help improve morale; monitor workloads; and complete her performance management activities as required by leaderships expected due dates. ROI at 218-220

The record indicates that the Selectee received her 2021 performance summary appraisal rating of Successful Contribution with the rating of 3 for one Element (Interpersonal Skills) and the rating of 5 for the remaining Elements, resulting in a total Individual Elements rating of 28 and an average rating of 4.7. ROI at 382.

The AJ, granting the Agency's Motion, concluded that Complainant did not prove that she was subjected to discrimination. The Agency's final order implemented the AJ's decision. Complainant appeals from the Agency's final order.

CONTENTIONS ON APPEAL

Complainant contends that the AJ's decision without a hearing was improper. Complainant contends that she was discriminated against due to her disability when S1 did not recommend her to the position at issue. Complainant indicates that S1 subjected her to ongoing disparate treatment since 2021, when she requested a reasonable accommodation and when she requested a COVID vaccine exemption. Complainant does not indicate her requests were denied.

The Agency contends that Complainant on appeal raises new matters that are not at issue, i.e., disparate treatment since 2021, on the part of S1. The Agency contends that Complainant failed to establish a prima face case of discrimination and she further failed to show its reasons for her nonselection were pretext for discrimination.

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.

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).

To establish a prima facie case of disparate treatment discrimination based on disability, Complainant generally must prove the following elements: (1) Complainant is an individual with a disability as defined in 29 C.F.R. §§1614.203(a) and 1630.2(g); (2) Complainant is "qualified" as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(m); (3) the Agency took an adverse action against Complainant; and (4) there was a causal relationship between Complainant's disability and the Agency's actions. See Annamarie F. v. Dep't of the Air Force, EEOC Appeal No. 2021004539 (Aug. 17, 2023).

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.

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.

Here, the Agency did not contest Complainant was disabled. However, we find that Complainant failed to establish that there was a causal relationship between her disability and her nonselection. Therefore, upon review, we find that Complainant failed to establish a prima facie case of discrimination.

Further, we find that the Agency articulated legitimate, nondiscriminatory reasons for Complainant's nonselection. SO selected the Selectee because Selectee's supervisor highly recommended Selectee in a Supervisor Reference Check for the position at issue, whereas S1 did not recommend Complainant. Upon review, we find that Complainant failed to rebut the Agency's legitimate, nondiscriminatory reasons for not selecting her for the position. 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).

Complainant claimed that she was better qualified for the position than the Selectee because she had been in GS-13 level since 2015, whereas Selectee was a GS-13 only since 2018. However, there is no indication this attribute of length of time as a GS-13 was required for the position at issue. Also, despite her contentions, Complainant's 2021 performance, as shown in the performance ratings, was not better than the Selectee. Regarding SO's purported comment about her, Complainant's mere speculation without any evidence does not establish unlawful discrimination. Furthermore, we agree with the Agency that Complainant's allegations about other past incidents are not at issue in this complaint.

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 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

February 5, 2025
Date