



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

[REDACTED]
Vickie P.,¹
Complainant,

v.

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

Appeal No. 2023005267

Hearing No. 410-2023-00103X

Agency No. DLAN-22-0099

DECISION

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 August 29, 2023, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

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

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

- (2) Whether the Agency's final order properly found that Complainant was not subjected to discrimination on the basis of age when she was not selected for a position.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Transportation Assistant, GS-05, at the Agency's Albany Transportation Center in Albany, Georgia.

On July 12, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on age (68) when Complainant was not selected for the Transportation Assistant, GS-2102-06 position advertised under Job Announcement No. DLADist-22-11291258-MP.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant requested a hearing. The AJ determined *sua sponte* that the complaint did not warrant a hearing and, over Complainant's objections, issued a decision by summary judgment in favor of the Agency. The Agency subsequently issued a final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

At the time of her application for the position at issue, Complainant had worked at the Agency for 24 years and been a Transportation Assistant for ten years. She averred that her job duties were those of a GS-05 Transportation Assistant. Complainant's first-level supervisor (S1), Transportation Officer/Traffic Office Supervisor, was the selecting official for the position at issue. Complainant applied for the GS-06 Transportation Assistant position in November 2021, at which time she was the only applicant included on the certificate of eligible candidates. S1 and Complainant's second-level supervisor (S2), Inventory Supervisor, interviewed Complainant for the position in December 2021. Complainant was the only person interviewed, as she was the only candidate on the certificate.

S1 decided not to hire from the certificate. She felt that Complainant had "very basic skills and is barely able to perform the minimum transportation functions even after being in the office for years." ROI at 154. While S1 acknowledged that Complainant mostly managed to meet her position's

minimum requirements, S1 averred that Complainant required assistance from less-tenured employees to complete her tasks or to fix things she had “crossed up in the computer but does not know how to fix.” Id. The position at issue included more complex shipments that required substantial attention to detail, including those of weapons, classified shipments, and oversized freight, such as combat tanks. S1 felt that Complainant had not attempted to learn about how to handle these more complex shipments or increase her skill level so as to “have proven capability” when positions such as the one at issue became available.

S1 also believed that Complainant’s resume appeared to be “cut and pasted from” a position description or job posting but that “most of it is not what she currently does in our office.” ROI at 155; see id. at 106-07. As to Complainant’s interview performance, S1 stated that Complainant’s responses “all scored low and did not have any depth.” Id. S1 stated that most of Complainant’s answers did not fully answer the question, if at all. This was concerning to S1, because she felt that Complainant’s years of being in transportation should have resulted in a better interview and allowed Complainant to pull examples from past situations for the behavior-based interview questions.

After S1 declined to select Complainant for the position, S1 decided to look for applicants under Schedule A² or veterans’ preference. Ultimately, S1 filled the position using the Schedule A hiring authority. The person S1 selected (Selectee) was younger than Complainant (between the ages of 38 and 44, according to the record). Selectee was not interviewed for the position, and therefore S1 selected her based on her resume. At the time of her selection, Selectee was working at the Agency as a Distribution Process Worker, WG-05, and had been in her position since July 2018. S1 felt that Selectee’s resume indicated a variety of skills and that Selectee was a well-rounded person who could multitask and be detail-oriented. S1 also noted that Selectee had greatly assisted the Traffic Office when it had an influx of shipments for an area to which Selectee had previously been assigned, and Selectee had trained others to get the shipments out on time. S1 felt that the position at issue, because it involved being the primary weapons shipment processor for the office, required attention to detail, which S1 felt Selectee possessed more than Complainant.

² We note that Schedule A is an appointment authority used for hiring applicants with “an intellectual disability, a severe physical disability, or a psychiatric disability.” 5 C.F.R. § 213.3102(u).

According to Complainant, the day after the interview, S1 asked Complainant her age and later asked her if she was planning on retiring. ROI at 138. Complainant added that S1 asked Complainant whether she was planning to retire on three separate occasions when Complainant called her to report being out sick for work. We note that S1's affidavit form for the investigation did not include questions about these allegations.

According to Complainant, the Agency offered her a GS-06 position during settlement negotiations, but Complainant declined the position. Before the AJ, Complainant argued that this proved she was qualified for the position at issue, which was also at the GS-06 level. Complainant also argued before the AJ that she was initially the only applicant under consideration for the position and was therefore deemed best qualified, even though the position eventually went to a younger and less-experienced employee.

The AJ found that, assuming Complainant established a prima facie case of disparate treatment based on age, S1 proffered legitimate, nondiscriminatory reasons for not selecting Complainant and that Complainant could not show that the reasons were pretextual. The AJ concluded that Complainant's qualifications were not plainly superior to those of Selectee. The AJ also found that Complainant's allegations that S1 asked Complainant her age and whether she planned on retiring, without more, did not amount to evidence of discriminatory animus based on age. As to Complainant's arguments opposing summary judgment, the AJ found that an Agency's actions during settlement negotiations could not be used in support of Complainant's discrimination claim but that, even if they could, such acts in this case only established that Complainant was minimally qualified for the position at issue, which the Agency did not dispute. Instead, the AJ found that the relevant issue was whether Complainant's age motivated the Agency's decision, and the AJ found that Complainant failed to show there was a genuine issue of material fact in that regard.

CONTENTIONS ON APPEAL

On appeal, Complainant submits the rebuttal statement she provided during the investigation in response to S1's affidavit. See ROI at 146-47. Within the rebuttal statement, Complainant includes a copy of a list of her annual appraisals dating from about 2004 to 2022, which indicates that she received a "3," or "Fully Succ[essful]" rating, for each appraisal listed. Complainant argues in the rebuttal statement that Selectee "didn't have any experience or skill."

Complainant argues that she was the only one who made the certificate of eligibles but that “management hire[s] the people they like” by selecting candidates outside of job postings. Complainant contends that S1 lies about everything and that Complainant has been mistreated by S1 in her job. On appeal, Complainant also submits two pre-complaint intake forms (DLA Form 1877) she filled out on or around January 26 and 27, 2023, both of which include narratives Complainant wrote alleging that S1 began retaliating against her after Complainant filed the instant complaint.

The Agency does not submit a statement 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, at 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 Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 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 discriminatory 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 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 802 n.13.

Complainant may establish a prima facie case in a nonselection claim by showing 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 placed in the position. Williams v. Dep't of Educ., EEOC Request No. 05970561 (Aug. 6, 1998).

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affs. 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 Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (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, neither party appears to dispute that Complainant can establish a prima facie case of age discrimination. Next, we find that the Agency articulated legitimate, nondiscriminatory reasons for Complainant's nonselection. S1, who was Complainant's current supervisor at the time of her nonselection and the selecting official for the position at issue, felt that Complainant's inability to perform complex tasks in her current position without assistance made her a poor choice for the GS-06 position, especially given the sensitive nature of the position (which included weapons shipments). S1 also noticed that Complainant's resume appeared to be copied and pasted from some kind of Agency position description, a claim that Complainant has not denied. S1 also noted that Complainant's interview performance was lacking, as she did not fully answer some of the questions and was not able to provide examples for the behavioral interview questions. S1 ultimately chose Selectee for the position under Schedule A after the job posting to which Complainant applied had closed. S1 had experience with Selectee after Selectee had assisted the office with complex shipments in a particular area. S1 also felt that Selectee's resume detailed a variety of experiences within her position at the Agency and evidenced an ability to multitask.

We find that Complainant fails to establish that the Agency's legitimate, nondiscriminatory reasons for her nonselection are pretext for age discrimination. Complainant alleges that S1 asked about her age and questioned her about retirement plans several times. We note that, in addressing an AJ's issuance of a decision without a hearing, a complainant's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for a hearing. See Celotex, 477 U.S. at 324. But even if S1 had asked such questions, we find that fact alone is insufficient to create a genuine dispute of material fact regarding pretext. See, e.g., Abe U. v. Dep't of the Army, EEOC Appeal No. 0120141099 (Mar. 3, 2016) (finding that, "[w]ith regard to the selecting official asking [c]omplainant how old he is, the question by itself, without further evidence, does not establish that age discrimination occurred particularly in light of" complainant's poor interview performance); Complainant v. Soc. Sec. Admin., EEOC Appeal No. 0120110491 (July 16, 2014) (noting that "[c]omplainant provided testimony that management mentioned her age and asked when she intended to retire" but finding that she failed to establish such comments were "a proxy for age[-]based animus") (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 613 (1993)).

As for Complainant's submissions on appeal, we find that Complainant's prior appraisal ratings of Fully Successful do not create a genuine dispute of material fact that require a hearing. The record does not indicate that Complainant was unable to perform her GS-05 job. S1 acknowledged that Complainant could perform the minimum tasks she was required to complete in her position but felt that Complainant could not handle the more complex requirements the GS-06 position would have entailed. Her appraisals do not cast doubt on this explanation and in fact support S1's belief that Complainant had not attempted to increase her skillset within her position. Regarding Complainant's argument that Selectee had much less experience than Complainant did, the Commission has repeatedly held that mere length of service does not necessarily make an individual more qualified to meet the needs of the organization. See Kenyatta S. v. Dep't of Homeland Sec., EEOC Appeal No. 0120161689 (Sept. 21, 2017).

We also find that the manner in which the selection at issue was made does not create a genuine dispute of material fact. Complainant was the only applicant listed on the certificate for the job posting of the position at issue, and because S1 and S2 did not find her suited for the position, management opted to review possible candidates under the Schedule A hiring authority. This alone does not call into question the Agency's proffered reasons. Complainant's allegation that management hires "the people they like" is merely speculative and also irrelevant to the issue of whether Complainant's age motivated her nonselection. Lastly, we find that Complainant's bare assertions regarding S1's alleged mistreatment and retaliation, as stated in the two pre-complaint forms (dated after the instant complaint was filed), are insufficient to create a genuine dispute of material fact requiring a hearing.

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

January 8, 2025
Date