



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

[REDACTED]
Nakesha T.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2024000009

Hearing No. 490-2023-00080X

Agency No. 2003-0350-2020104679

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 September 21, 2023 final order concerning an equal employment opportunity (EEO) complaint claiming 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.

ISSUE PRESENTED

Whether the EEOC Administrative Judge's decision properly found no discrimination by summary judgment regarding Complainant's claim that the Agency did not select her for a vacant position at its Little Rock Regional Office?

BACKGROUND

During the period at issue, Complainant worked as a Decision Review Officer at the Agency's Little Rock Regional Office in North Little Rock, Arkansas.

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.

On September 11, 2020, Complainant filed a formal complaint. Complainant claimed that the Agency discriminated against her based on race (African-American) and color (Black).

By letter dated September 25, 2020, the Agency accepted the formal complaint for investigation and determined that it was comprised of the following claim:

On May 15, 2020, Complainant became aware that [a named Caucasian Agency official] did not select her for the position of Supervisory Coach, Vacancy Announcement number 350-20-DLM-10787513-NBU.²

After an 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 Administrative Judge (AJ). Complainant timely requested a hearing.

Over Complainant's objections, the AJ assigned to the case granted the Agency's August 18, 2023, motion for a decision without a hearing (Agency's Motion) and issued a decision by summary judgment on September 13, 2023.

The AJ's decision found that Complainant's response to the Agency's Motion was untimely filed. However, the AJ exercised his discretion and still considered Complainant's response in reaching his decision finding no discrimination. The AJ found that assuming *arguendo* that Complainant established a *prima facie* case of discrimination, the Agency articulated legitimate nondiscriminatory reasons for his non-selection. AJ Decision at 5. The AJ stated that Complainant scored the maximum 20 points for her resume, but that the two selectees scored higher on the interview and had higher overall scores than Complainant. *Id.* at 5-6. Specifically, the AJ stated:

The other two candidates scored higher than Complainant in the interview. They were scored both by [Agency Official 1] (who identifies as White) and [Agency Official 2] (who identifies as Black/African-American). Both collectively and individually [Agency Officials 1 and 2] scored [selectee 1] highest on the interview, then [selectee 2] and finally Complainant. AJ Decision at 6.

The AJ further found that Complainant failed to establish that the Agency's articulated reasons for her non-selection were pretext for discrimination. The AJ noted that Complainant was offered the position at issue in September 2020, when another vacancy became available. However, Complainant believed that this offer was an attempt to silence her.³ The AJ found that there was no evidence to support this assertion. AJ's Decision at 6.

² The record reflects that the two selectees who were selected for the position at issue are White.

³ Complainant acknowledges that she was offered the position in September 2020, and declined it. ROI at 64. Complainant asserted that she believed this position was offered to her in

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The instant appeal followed. On appeal, Complainant asserts that the AJ improperly issued a decision without a hearing and asserts that she was scored and treated "unfairly," because Agency Official 1, one of the interviewers for the position at issue, is close friends with both selectees, and they are all of the same race. Complainant also raises new claims on appeal (that were not part of the accepted claims in her original complaint), such as her supervisor upholding rating errors that should have been overturned and assigning her a "workload that goes against QMS standards." Complainant further states that there is "only one Black in Senior Level Management."

In response, the Agency requests that we affirm its final order implementing the AJ's decision finding no discrimination. The Agency reiterates that it has articulated legitimate, nondiscriminatory reasons for Complainant's non-selection which Complainant failed to establish were pretext for discrimination.

STANDARD OF REVIEW

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). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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").

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for 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 "material" fact has the potential to affect the outcome of a case.

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 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 for Complainant.

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Services,

EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Agency management officials articulated legitimate, non-discriminatory reasons for Complainant's non-selection. The record contains an affidavit for Agency Official 1. Therein, Agency Official 1, who was a member of the interview panel, asserted that Complainant and the two selectees were interviewed for the position by herself and Agency Official 2. Report of Investigation (ROI) at 72. Agency Official 1 stated that the candidates were scored and ranked based on their resumes, prior supervisory experience, interview questions, and a written exercise. ROI at 72. After this ranking, Agency Official 1 stated that the two selectees ranked first and second on the scoring matrix. ROI at 73.

The record also contains an affidavit from Agency Official 2 who corroborated the selection process set forth by Agency Official 1, and asserted that the two selectees ranked first and second on the scoring matrix. ROI at 94-95.

The combined scoring matrix reflects that the two selectees scored higher than Complainant with total scores of 146 and 119, while Complainant received a total score of 96. The selecting official, in his affidavit, asserted that he based his selections on the recommendations from the interview panel. ROI at 84.

We further concur with the AJ that Complainant failed to establish that the Agency's articulated reasons for her non-selection were pretext for discrimination. Complainant asserts that Agency Official 1 (who identifies as White) was friends with the two selectees. However, the Commission has consistently held that employment decisions based on friendship or favoritism, while potentially unfair, do not violate EEO laws in itself. See Sierra-Barber v. Dep't of the Interior, EEOC Appeal No. 0120055126 (Jan. 31, 2007). The record also reflects that Agency Official 2 (who identifies as Black/African American) also ranked the selectees higher in the interview portion than Complainant. ROI at 178. In addition, Agency Official 2 provided a lower score, "27," to Complainant on the interview portion than Agency Official 1 who scored Complainant "29" on the interview portion. ROI at 141, 131. While Complainant may have believed she should have scored higher on the interview portion, this belief is insufficient to establish pretext. Finally, while Complainant asserted that she believed she was offered the position in September 2020, in an effort to "get rid of" her discrimination complaint (ROI at 65), we concur with the AJ that the record does not support this assertion. AJ Decision at 6. The record reflects that Complainant asserted that Agency Official 1 informed her on May 15, 2020, prior to initiating EEO Counselor contact on June 18, 2020, that there may be another vacancy in the near future and that Complainant could be selected based on the original certification list. ROI at 58, 12.

To the extent Complainant raises new claims on appeal pertaining to her supervisor, Complainant should contact an Agency EEO Counselor if she wishes to pursue these matters in the EEO process.

CONCLUSION

We AFFIRM the Agency's final order implementing the AJ's decision without a hearing finding no discrimination.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0124)

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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her 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 his or her 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 (S0610)

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 his or her 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 22, 2024

Date