



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

[REDACTED]
Maricela P.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Immigration and Customs Enforcement),
Agency.

Appeal No. 2024000969

Hearing No. 570-2022-00733X

Agency No. HS-ICE-01156-2021

DECISION

On November 9, 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 October 10, 2023, final order 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 order.

ISSUE PRESENTED

The issue is whether the EEOC Administrative Judge (AJ) properly issued a decision without a hearing concluding that Complainant was not discriminated against and subjected to a hostile work environment regarding non-selections,

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.

promotion and terms and conditions based on her race (Caucasian) and reprisal.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as Information Technology Cybersecurity Specialist, GS-2210-14 at the Agency's Cyber Crimes Unit (CCU) Homeland Security Investigation (HSI) in Fairfax, Virginia. Complainant is Caucasian. Her first-line supervisor (Supervisor 1B) was a Section Chief. Prior to Supervisor 1B, another Section Chief (Supervisor 1A) was Complainant's first-line supervisor. ROI at 171-72. A Deputy Assistant Director (DAD), African American, was Complainant's fourth-line supervisor (Supervisor 4). Supervisor 4 became aware of Complainant's EEO activity on or around July 1, 2021. ROI at 172 and 506.

Complainant initiated EEO contact on April 26, 2021. On August 6, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of race (Caucasian) and reprisal for the instant protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. On September 29, 2020, Complainant was not given the same opportunity as an African American female after Supervisor 4 granted the female exclusive access to the Acting Unit Chief position within the Cyber Training & Engagement Unit (CTEU) without competition, despite the promotion potential of the acting role;
2. On September 29, 2020, Complainant was not given the opportunity to compete for a position Supervisor 4 advertised under Vacancy Announcement Number (VAN): DALINV- 10861680-MP-ETA. Supervisor 4 hired an African American female into the CTEU Section Chief position ten days prior to the announcement of the new unit and thirteen days before the new unit became effective. Complainant was not aware of the vacancy;
3. On December 17, 2020, Supervisor 4 interfered with the hiring process for the CTEU Unit Chief (GS-15) position, advertised under VAN: DAL-INV-10946105-MP-ETA) in order to hire an African American female, at Complainant's expense;
4. On January 11, 2021, Complainant was ostracized when Supervisor 4

stopped communicating, and providing her information and resources to successfully perform her job;

5. On March 4, 2021, a Cyber Crimes employee made an inquiry against Complainant;
6. On March 5 and 6, 2021, Complainant's work on the Information Technology Investigation Support Service ("IDIQ") and Marshall Opioid Epidemic Initiative contracts was criticized; and
7. On July 28, 2021, Complainant was excluded from an on-site visit to Marshall University on the day of her EEO mediation meeting.

The Agency conducted an investigation into the complaint. The investigation revealed that in an October 19, 2019, email, management announced that Supervisor 4 was selected as the DAD for the Cyber Crimes Center (C3). ROI at 240. Supervisor 4 previously served as Assistant Director for Investigations for the Office of Professional Responsibility (OPR) and as Deputy Assistant Director for the Workforce Management Division. ROI at 240. At the time, Complainant was an IT Cybersecurity Specialist, GS-14, C3. ROI at 171.

In a January 16, 2020, email, management announced the welcoming of a Management and Program Analyst (MP Analyst, African-American [hereinafter Selectee 2]), GS-14, to C3. ROI at 242 and 550. Selectee 2's prior position was as an MP Analyst, GS-13, in OPR under Supervisor 4. ROI at 242 and 549-50. Selectee 2 did not supervise Complainant but worked with Complainant as the Subject Matter Expert on contracts. ROI at 868. C3 consists of the Cyber Division which includes the Cyber Crimes Unit (CCU), Computer Forensics Unit (CFU), Child Exploitation Investigation Unit (CEIU), and Cyber Training and Engagement Unit (CTEU). Agency's motion at 18-23.

Selectee 2 was the only section chief in CTEU at a time when there was a vacant Unit Chief position. According to the Agency, it is a common practice to follow the management succession within a unit for supervisory acting positions. Complainant's position is not in CTEU and did not manage or oversee the functions that the unit was responsible for. ROI at 508.

On September 27, 2020, the CTEU Section Chief, Selectee 2, was placed in the Acting Unit Chief position. The CTEU Section Chief position is in the order of succession within the unit. ROI at 507-08, 600, 645, and 1080. According to Complainant, Supervisor 4 selected Selectee 2 as Section Chief for a not

yet approved unit while Complainant, unaware of the nonexistent unit, did not apply.

The Office of Human Capital (OHC) authorized C3 to recruit and fill the vacant position for Supervisory Management & Program Analyst (Section Chief), GS-14, (DAL-INV-10861680-MP-ETA) and provided active certificates of eligible candidates. ROI at 511. A July 10, 2020, email sent to multiple employees, including Complainant, provided the USAJOBS link for the Supervisory MP Analyst (Section Chief) announcement for C3, with the open period between July 13, 2020 to July 17, 2020. ROI at 911. A July 16, 2020, email to all HSI personnel announced the vacancy of the Supervisory MP Analyst (Section Chief) (GS-14) position located in Fairfax, VA (DAL-INV-10861680-MP-ETA). The position had two vacancies. The position was under HSI, Cyber Crimes Division. ROI at 253-61, 514, and 603.

According to Complainant, the announcement for Job Announcement DAL-INV-10861680-MP-ETA was without reference to the job duties, ICE component, or even HSI. She asserted that the announcement was only open for the minimum time of five days. Complainant described the rating and evaluation plan for the position, which advises that "any other approved assessment method or process may be used provided it is based on a relevant job analysis that can measure an applicant's job-related knowledge, skill, or ability requirements and can be fairly and consistently applied to all candidates." ROI at 255-61. Complainant also stated that to her knowledge, the only announcement that was released about the two Section Chief positions "did not state any information about the Cyber Crimes Center, a new unit, or that this was a Section Chief position for a new unit." ROI at 175.

Supervisor 4 explained that one vacancy was in a Cyber Training and Engagement Unit (CTEU) proposed as part of a not yet approved reorganization. According to Supervisor 4, ICE Chief Human Capital Office authorized C3 to fill this position although, even months later, the "entire Directorate was still under a reorganization that has yet to be formally approved." ROI at 510. A Division Chief (Division Chief 1 [Caucasian]) also stated that "the unit is technically still not an official unit within the organization on the Table of Organization structure." ROI at 647.

There were sixteen individuals on the certificate list for the C3 Section Chief position received by HSI on August 13, 2020, for consideration. ROI at 603. The panel who reviewed the resumes and conducted interviews for the Section Chief position were three Unit Chiefs (Panelists 1, 2, and 3). Division Chief 1 was the selecting official and Supervisor 4 was the appointing official. ROI at

512, 604, 647, 901 and 1085. Complainant did not apply to the Section Chief position. ROI at 512.

A job announcement, DAL-INV-10946105-MP-ETA for Supervisory Management and Program Analyst (Unit Chief), HSI, GS-15, was posted on USAJOBS with an open date of November 16, 2020. ROI at 297. Complainant applied to the Unit Chief position. ROI at 304. The first round of interviews panel for the Unit Chief vacancy included Division Chief 1, Panelist 1, and Panelist 2. ROI at 517.

The panel interviewed four candidates, which included Complainant and Selectee 2, and recommended a named individual (Candidate). ROI at 674 and Agency's motion at 28-9. In a December 17, 2020, email, Supervisor 4 asked Division Chief 1 whether Candidate was officially a first line supervisor. The next day, in a December 18, 2020, email, Supervisor 4 instructed Division Chief 1 to interview an additional eight candidates for the first round after reviewing the cert list, not fully aware of the criteria that Division Chief 1 used to identify candidates for interview. Agency's motion at 31-2.

The Unit Chief certificates were extended due to the fact they were unable to complete all of the interviews prior to the holidays. Agency's motion at 34-5. The first round of interviews panel ranked Candidate first, Complainant third and Selectee 2 seventh out of 12 candidates for the Unit Chief position. The panel did not consider Complainant the most qualified of the individuals interviewed. ROI at 573 and 988. Supervisor 4 did not offer Complainant a second-round interview because Complainant's resume did not highlight important criteria for the position. ROI at 518.

Supervisor 4 assessed the candidates and participated in the second-round panel interview for the Unit Chief position. ROI at 516. The second-round interview panel also included two Assistant Directors (Assistant Directors 1 and 2). ROI at 516. Although not standard practice in C3, Panelist 1 believed that second round interviews were not unreasonable given that it was a selection for a GS-15 Unit Chief position, and he had seen second round interviews done in other divisions. ROI at 610.

Assistant Director 1 scored Selectee 2 as the top candidate based on her responses to the questions in the interview. ROI at 1053. According to Assistant Director 2, Selectee 2 gave the best interview and provided the best responses to the questions. The panel members all came to the conclusion that Selectee 2 was the best qualified candidate. ROI at 1016. Supervisor 4

also stated that Selectee 2's resume highlighted important criteria/qualifications for the position. ROI at 518.

Supervisor 4 was the selecting official for the Unit Chief position and a third Assistant Director (Assistant Director 3) was the appointing official. ROI at 338 and 651. The selection memorandum of Selectee 2 stated, "This selection is based on a review of her resume and credentials along with her performance during two structured interview panels. She has demonstrated her ability to communicate effectively the breath and scope of her capabilities as well as show an affinity to develop and mentor her direct reports." Agency's motion at 40.

In a Memorandum for the Record, an Acting Chief (Acting Chief) stated that it was later discovered that a junior Human Resources Specialist responsible for processing the announcement made an error by applying Selectee 2's excepted service time toward her time-in-grade eligibility for the GS-15 position. Selectee 2 was erroneously referred for the position even though she did not possess the required 52 weeks time-in-grade until December 21, 2020, which was several weeks after the closing of the announcement. Agency's motion at 42.

A Computer Forensics Analyst (CF Analyst [Caucasian]) stated that while he, unlike Complainant, knew about the new unit, he did not apply. He explained that Division Chief 1 had been discussing this position with him for over three years. According to CF Analyst, on June 26, 2020, Division Chief 1 told him that the position announcement was coming, asking CF Analyst to make sure to apply. CF Analyst asserted that he saw the announcement and was going to apply. He also asserted that Division Chief 1 told him that "they have someone else in mind for that Section Chief spot." CF analyst stated that he wanted to know if Supervisor 4 was not promoting Selectee 2, her friend that she brought from OPR. CF Analyst stated that he was discouraged and depressed, stating that Selectee 2 had only perform one contract that another employee had worked on since Selectee 2 came onboard. ROI at 961.

Supervisor 1A corroborated CF Analyst, explaining that Complainant and he were having to shoulder a lot of contractual work due to Selectee 2's lack of experience. ROI at 835. Supervisor 1A also stated that Complainant probably spent more time working on the Marshall contract than everyone else combined and it was all in vain. ROI at 837.

On September 14, 2020, Supervisor 4 had named Panelist 1, a Computer Forensics Unit Chief, who then oversaw two units, to also serve as acting Unit

Chief of the CCU. ROI at 598. On September 29, 2020, HSI announced Supervisor 4's selection of Selectee 2 as Section Chief, CTEU, indicating that Selectee 2 previously "directed all service contracts as the Contracting Officer's Representative." ROI at 266-67. According to Complainant, at the time, C3 had four service contracts: Marshall University, Bluestone, MITRE, and FireEye. Complainant stated that Selectee 2 was unable to serve as the Contracting Officer's Representative (COR) on the MITRE contract, as the task order required the COR be certified at Level III while Selectee 2 was only certified at Level II. ROI at 262-63. The email also announced Supervisor 1B's selection as Section Chief, CCU, making him Complainant's first-line supervisor. ROI at 266-67.

CF Analyst stated that prior to the announcement of Selectee 2's selection, Division Chief 1 notified him and that he complained to Division Chief 1 that Supervisor 4 acted preferentially toward those of her own race; and that Selectee 2 "did not know procurement or contracts." According to CF Analyst, Division Chief 1 agreed and told CF Analyst that the selection decision was made above him. ROI at 962.

Division Chief 1 stated that when Workforce Management decided to announce the position, he was the selecting official and Selectee 4 was the approving official. ROI at 647. Supervisor 4, however, ultimately was the selecting official. ROI at 509. According to Supervisor 4, once C3 management received the certificates, a resume review and interviews were conducted. ROI at 504.

Supervisor 4 stated that the selection panel's first choice (Selectee 1 [Caucasian]) declined the position leading to an offer being made to Selectee 2, the second ranked candidate.

According to Complainant, the job announcement was for two positions and Selectees 1 and 2 were both selected simultaneously for those positions. Supervisor 4 then prioritized Selectee 2's placement into the position. ROI at 255-61 and 505-06. Division Chief 1 stated that two names were submitted to him for the two vacant SC positions (Selectee 2 and Selectee 1), and both were selected. However, only one section chief position was able to be filled at the time so Selectee 1's selection was with workforce management until they could release the second section chief position. By the time they released it, Selectee 1 had already accepted another section chief position elsewhere. ROI at 513 and 655.

Complainant believed that Selectee 1 accepted the position elsewhere because of Supervisor 4 favoring Selectee 2's prioritized placement. ROI at 185.

Division Chief 1 responded did not recall whether Complainant was qualified for the position at issue. ROI at 649. Panelist 3, who was on the interview panel, stated that Selectee 2 was not the highest rating interviewee based on Panelist 3's own assessment. ROI at 904. Panelist 2, who also was on the interview panel, stated that Selectee 2 was not the most qualified for the position based on the interviews conducted. ROI at 983.

Complainant alleged that upon selecting Selectee 2 as Section Chief, Supervisor 4 immediately placed her into the Acting Unit Chief, GS-15, position. ROI at 507. According to Complainant, that action, or the existence of CTEU, was not announced within C3, as other opportunities to serve in an acting capacity typically are. See ROI at 249 for ICE bulletin announcing opportunity to apply for an acting unit chief role.

Complainant asserted that had she known that becoming the CTEU Section Chief would automatically make Complainant the Acting CTEU Unit Chief with exclusive access to the position and experience, Complainant would have applied for the Section Chief position. ROI at 181.

Complainant raised several arguments, including that the Agency did not announce the creation of CTEU, however, until October 9, 2020, when Supervisor 4 announced the unit as part of a C3 Reorganization. ROI at 269. The draft organization charts showed Selectee 2 as a Section Chief below a vacant CTEU Unit Chief position, with Selectee 2 as the sole Section Chief reporting to the Unit Chief, unlike the other units. ROI at 271-75.

Complainant also stated to the EEO Investigator that she was not given any reason for not being selected as Section Chief of Acting UC because she did not inquire since the unit and position were not known to her nor advertised by management broadly within either C3 or HSI until after the position had already been occupied by Selectee 2. ROI at 182.

By email dated January 28, 2021, Contracting Officer (Contracting Officer), Office of Acquisition Management (OAQ), expressed to two MP Analysts (MP Analyst 1 and 2) and Selectee 2 that she wanted to remove Complainant from the weekly meetings with Marshall University as Complainant was not a Contracting Officer Representative (COR) and technical items were not discussed at the meetings. Contracting Officer also added that Complainant needed to use the time to work on the Functional Requirements Documents (FRDs). ROI at 870-71 and Agency's motion at 44.

In a February 1, 2021, email from MP Analyst 2 to Complainant, a Special Agent, National Program Manager (Program Manager), Supervisor 1B, Selectee 2, and MP Analyst 1, MP Analyst 2 stated that it has been requested that weekly Marshall meetings would include CORs and Marshall only and would remove Complainant and Program Manager from the recurring meetings. ROI at 336 and 870-71.

In a March 8, 2021, meeting, Supervisor 4 provided an update on the Information Technology (IT) Investigative Support Service ("IDIQ") and Marshall Opioid Epidemic Initiative contracts. Supervisor 4 discussed the five-year strategic roadmap that was not finalized and re-tasked all of appropriate managers to work collectively to complete this task. ROI at 525. In a March 10, 2021, email, Division Chief 1 informed Supervisor 4 of Complainant's feelings of a hostile work environment from CTEU, specifically from Selectee 2. ROI at 670.

Marshall University representatives lacked foundational understanding on how to engage with the federal government on the contract. C3 management officials and the CORs conducted an on-site visit to Marshall University. Complainant was not a COR on the contract or a C3 Management Official. ROI at 530-31. In a July 21, 2021, email, a second Division Chief (Division Chief 2 [Caucasian]) relayed to Selectee 2 and Supervisor 1A that Supervisor 4 wanted them and anyone else they wanted to attend to travel to Marshall University. The meeting was scheduled on July 28, 2021, based on the availability of Division Chief 2. Agency's motion at 46-9.

Because Supervisor 1A had a presentation, Supervisor 1B, a Technical Subject Matter Expert, went in his place. Supervisor 1B was involved with the management of the contract working with Complainant and the CORs. Agency's motion at 51-3. Supervisors and CORs attended the on-site meeting at Marshall University. The meeting was also a Microsoft Teams invite for those who were not on-site. Complainant was included on the invite. ROI at 280 and 530; Agency's motion at 46-7 and 55.

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 Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

On July 21, 2023, the Agency filed a motion for summary judgment (Agency's motion).

On August 7, 2023, Complainant filed her opposition to the Agency's motion (Complainant's opposition), and the Agency filed its reply on August 14, 2023 (Agency's reply). The AJ found that the record had been adequately developed, Complainant was given ample notice of the Agency's motion; the Agency provided a comprehensive statement of the undisputed facts; and Complainant had the opportunity to respond, and did respond, to the Agency's motion.

Because there were no genuine issues of disputed material fact or credibility in this case, the AJ found that summary judgment in favor of the Agency was appropriate. After consideration of the entire record and viewing the facts in the light most favorable to Complainant, the AJ assigned to the case granted the Agency's motion and issued a decision without a hearing pursuant to 29 C.F.R. § 1614.109(g) (2022) in favor of the Agency.

According to the AJ, the Agency's motion and reply (both attached and incorporated in the AJ's Decision) accurately identified the issues and outlined the factual background, established that there were no genuine issues of material fact, and provided sound and persuasive analysis of Complainant's arguments regarding pretext and disparate treatment. The AJ adopted the Agency's motion and reply in their entirety with minor exceptions.

Specifically, the AJ made no determination as to whether Complainant established a prima facie case of discrimination and/or retaliation based on a protected class or activity. In this case, asserted the AJ, the prima facie inquiry had been dispensed with because the Agency articulated legitimate and non-discriminatory reasons for its conduct. The AJ also noted that the Agency's analysis of whether Complainant was subjected to a hostile work environment was limited to whether the Agency's actions were so severe or pervasive that a reasonable person in Complainant's position would have considered it hostile or abusive. However, observed the AJ, Complainant had also alleged retaliatory harassment. Therefore, the AJ's analysis also considered whether the Agency's actions individually or collectively created a chilling effect necessary to state a claim of actionable harassment.

Complainant's opposition was also attached to the decision. To the extent that Complainant alleged any disputes of fact or credibility, the AJ found that the disputes were either immaterial, unsupported by any reference in the record, and/or rested on assertions unsupported by legally sufficient evidence. In summary, asserted the AJ, Complainant had not set forth any facts or evidence to rebut the Agency's articulated reasons for its actions or show that the acts complained of were based on the alleged protected bases.

The AJ observed that Complainant did not present any facts that indicated she was treated differently than similarly situated individual outside of her protected classes or otherwise establish a link between her protected classes and the Agency's actions.

The AJ also determined that Complainant's allegations of a hostile working environment, neither individually nor collectively and taken as true, created a chilling effect or rose to the level of severity or pervasiveness necessary to state a claim of actionable harassment. Rather, the AJ observed, they were the ordinary tribulations of the workplace. Moreover, the AJ asserted that the record was devoid of evidence that any of the incidents alleged by Complainant resulted from a discriminatory or retaliatory animus. Nor did Complainant provide any reason to suspect such an animus other than her own speculation.

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. This appeal followed.

CONTENTIONS ON APPEAL

On appeal, among other things, Complainant contests the AJ's decision and the Agency's final order adopting it. By alleging five issues for consideration in her appeal statement, Complainant generally reiterates her allegations. Through counsel, Complainant argues that the AJ erroneously considered a claim Complainant had withdrawn during the investigative process. She also argues that the AJ abused their discretion by failing to analyze the non-selection claims which, Complainant states she timely raised, under a disparate impact theory. Complainant's Appeal Statement at 22-3. Complainant also raises argument previously reviewed and considered by the AJ, including that she could not show pretext when the Agency failed to provide a reason for its actions.

Complainant argues that when Selectee 2 was selected as Section Chief, she was made Acting Unit Chief immediately; and that Supervisor 4 named Panelist 1 the acting Unit Chief of CCU instead of naming a Section Chief from CCU, "showing that the 'order of succession' is not consistently followed." Complainant's Appeal Statement at 26. Complainant asserts that Supervisor 4 treated Selectee 2 more favorably. Regarding the Unit Chief position, Complainant focuses on the second round of interviews, arguing that there was evidence both of disturbing procedural irregularities and the use of subjective criteria.

As support for her assertions and argument, Complainant cites to CF Analyst's statements that Division Chief 1 told him "they have someone else in mind" for the Section Chief position. Complainant's Appeal Statement at 29.

Complainant asserts that the Agency's actions, including the non-promotion, were sufficiently severe and/or pervasive to create a hostile work environment. According to Complainant, Supervisor 4 favored Selectee 2 by selecting Selectee 2 as Section Chief and then naming her Acting Unit Chief before Selectee 2 was selected as the Unit Chief. Complainant also argues that she had to cover for Selectee 2's performance which created a race-based hostile work environment. Complainant states that shortly after Supervisor 4 learned of her EEO complaint, Supervisor 4 excluded Complainant from the on-site visit to Marshall University. Complainant's Appeal Statement at 31-2.

On appeal, the Agency requests that the Commission affirm its final order, asserting that the AJ properly adjudicated the claims. According to the Agency, Complainant could not establish a *prima facie* case of disparate treatment, nor did she demonstrate pretext by a preponderance of the evidence. The Agency also asserts that Complainant failed to demonstrate that she was subjected to harassment constituting severe or pervasive conduct based on any protected class.

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 Chapter 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. Instead, Complainant repeated previously raised arguments that were considered by the AJ and found to be insufficient in establishing that management was motivated by discriminatory or retaliatory animus.

We also note Complainant's appeal argument that she timely raised her non-selection, but the AJ failed to analyze that claim under a disparate "impact" theory where she "directly demonstrated" that the Agency treated her differently than someone not in her protected class. In that regard, EEOC Regulation 29 C.F.R. § 1614.107(a)(2) provides for the dismissal of complaints where the complainant did not initiate contact with an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. We disagree with the Agency's appeal assertion that Complainant's non-selection claim for the Unit Chief position was untimely filed. Complainant was interviewed for the position on December 17, 2020. A few days later, Panelist 1 notified Complainant that she should be prepared for a possible second round interview. ROI at 186. While Complainant was not invited for a second-round interview, Panelist 1's notice to Complainant does not show that she was aware of her non-selection prior to February 26, 2021, the 45-day window.

Therefore, this decision will analyze Complainant's non-selection allegation for the Unit Chief position as a timely filed claim. The claim is properly analyzed will be analyzed under a disparate treatment theory.

We however find that the AJ appropriately adjudicated the three non-selection claims under a harassment/hostile work environment theory, finding Complainant's arguments and assertions insufficient to sustain her claims.

The record is also devoid of any evidence that Complainant raised the framing of the accepted claims as an issue before the AJ. Nor did she file a motion to amend at any time prior to the discovery deadline. See Owen W. v. Dep't of Veterans Affairs, Agency Request No. 2020002215 (Jun. 2, 2020) (affirming initial decision not to review dismissed claim "because the record clearly shows that Complainant did not challenge the Agency's framing of his complaint."). Therefore, Complainant's appeal argument that the AJ erroneously addressed a previously withdrawn claim fails.

Moreover, based on the record, including Complainant's appeal arguments, we do not find sufficient evidence to support a conclusion that Complainant has met the very high bar that a party faces when alleging that the AJ abused her discretion in this case. An Administrative Judge has full responsibility for the adjudication of the complaint, including overseeing the development of the record, and have broad discretion in the conduct of hearings. 29 C.F.R. § 1614.109(a)(e). Given the AJ's broad authority to regulate the conduct of a hearing, a party claiming that the AJ abused his or her discretion Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016) citing Kenyatta S. v. Dept. of Justice, EEOC Appeal No. 0720150016 n.3 (June 2, 2016) (responsibility for adjudicating complaints pursuant to 29 C.F.R. § 1614.109(e) gives AJ's wide latitude in directing terms, conduct, and course of administrative hearings before EEOC).

As for Complainant's remaining appeal arguments and assertions, given that Complainant had access to the ROI concerning her complaint and the opportunity to develop the record significantly during the EEO investigation and discovery before the AJ, we find that summary judgment was appropriate in this case. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor.

Disparate treatment based on race (Claims 1-3)

The Commission has adopted the burden-shifting framework for analyzing claims of discrimination outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term,

condition, or privilege of employment; and (3) they were treated differently than similarly situated employees outside their protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nanette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (March 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

In a non-selection case, a complainant can establish a prima facie case of discrimination by showing that they: (1) are a member of a protected group; (2) applied for a position for which they were qualified; (3) were not selected for the position; and (4) someone from outside of their protected group was selected for the position under circumstances that, if unexplained, would support an inference of discrimination. See German D. v. Dep't of Homeland Sec., EEOC Appeal No. 2019000743 (Aug. 19, 2020) (citing McDonnell Douglas Corp., 411 U.S. at 802).

Once Complainant has established a prima facie case, the burden of production 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). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

For the following reasons, we find that Complainant failed to establish a prima facie case of discrimination based on race.

Complainant established a prima facie case of discrimination based on race to the extent that she was a qualified applicant to a vacancy and a candidate not of her race was selected. The Agency has also provided legitimate nondiscriminatory reasons for the challenged management actions; and we find no persuasive proof of pretext.

Regarding Claims 1-3, the Agency asserted that Complainant was not selected for the Section Chief position because she did not apply for it even though an email to several employees, including Complainant, announced vacancies for the position. ROI at 511-12. Complainant did not demonstrate that she was prevented from applying.

Selectee 2 was selected for the Section Chief position because she was one of the top two candidates. As such, she was qualified for one of the two open positions. The record reflects that for their interviews, Selectee 1 scored 57; and Selectee 2 scored 48. ROI at 603 and Agency's motion at 26. Both Selectees 1 and 2 were selected for the Section Chief position. Selectee 1 however declined the position to accept another Section Chief position somewhere else. ROI at 513 and 648.

As for the Unit Chief position, management explained that the second-round interview questions focused on scenarios on leadership and supervision. ROI at 541. The record contains the resumes of the four candidates who advanced to the second round of interviews demonstrating they had first line supervisor experience. ROI at 543, 549, 557, and 568. Notably, Panelist 1 stated that when Candidate was recommended during the first round of interviews, Supervisor 4 indicated that Candidate was not a first line supervisor and wanted additional candidates to be interviewed. ROI at 609.

Importantly, for the second round of interviews, Assistant Director 1 scored Selectee 2 as the top candidate based on her responses to the questions in the interview. ROI at 1053. According to Assistant Director 2, Selectee 2 gave the best interview and provided the best responses to the questions. The panel members all agreed that Selectee 2 was the best qualified candidate. ROI at 1016.

Regarding Complainant argument that she did Selectee 2's work, Division Chief 1 explained that Complainant's caseload was not based on race, but "based on her being very technically competent and not wanting items with the Marshall contract to fail. She would routinely do more than what she was responsible for, including work that should have been performed by others." ROI at 658.

We next turn to Complainant to show pretext. The Commission has stated that proof of pretext includes discriminatory statements or past personal treatment attributable to the named managers, unequal application of agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. See Ricardo K . v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004809 (date/year) (citing January B. v. Dep't of the Navy, EEOC Appeal No. 0120142872 (Dec. 18, 2015) (Citing Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015)).

Here, Complainant's allegations are based on her belief that her race was a factor for her non-selections. She however failed to show pretext because she failed to establish a link between the challenged non-selections and her race. Nor did she present any evidence to refute management's explanations or demonstrate that the non-selections were motivated by discriminatory or retaliatory animus. For example, in terms of second round interviews, Panelist 1 explained that even though it was not the standard process used for selection, it was not unreasonable as it was for a selection of a GS-15 Unit Chief position. ROI at 610.

In that regard, the Commission has held that employers have the discretion to choose among equally qualified candidates as long as the selection is not based on unlawful criteria. See Merle J. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120143212 (Feb. 11, 2016); King v. Dep't of the Army, EEOC Appeal No. 0120064903 (Apr. 11, 2008) (noting that agency officials are afforded broad discretion in the use of subject criteria when filling a supervisory position). Therefore, while the selection process for the Unit Chief position may have been perceived by Complainant as imperfect, it was not based on Complainant's race. The record also reflects that the interviewees for the second round of interviews included two Caucasians, one of whom declined the interview. ROI at 518 and 945; Agency's motion at 37-8.

Regarding Complainant's appeal argument that the order of succession was not consistently followed, we note record evidence reflecting that Panelist 1 position does not parallel Selectee 2's position. During the time of the complaint, Panelist 1 was the CFU assigned as the Interim Cyber Crimes Unit Chief. ROI at 598. Panelist 1 himself also stated that it was "normal practice to have the current section chief of a unit to act as the Unit Chief of the unit if the position is vacant." ROI at 600.

The crux of Complainant's remaining arguments is that Supervisor 4 took actions based on favoritism to benefit Selectee 2 over Complainant. For example, Complainant asserted on appeal that she was informed that management had someone in mind. She also identified a witness who alleged informed her that he heard from a coworker that Supervisor 4 had stated that all the white male managers put their guys in whatever positions they wanted so Supervisor 4 was just doing the same thing. See Complainant's Appeal Statement at 29-30. This insinuates a preselection for the Section Chief position.

We however note Division Chief 1's explanation that the applicants were interviewed, and a recommendation was provided to him which he accepted.

ROI at 650. We also note Panelist 1's admission that he had commented that Supervisor 4 mentored Selectee 2 closely. ROI at 601. However, an alleged mentoring relationship does not evidence disparate treatment. Similarly, while favoritism is a practice prohibited by most agencies, favoritism, without more, is not a violation of Title VII or EEOC Regulations. See Alcocer v. U.S. Dep't of the Air Force, EEOC Appeal No. 01851239 (Jan. 30, 1987).

Agencies may even preselect a candidate as long as the pre-selection is not premised upon a prohibited basis. Complainant v. Dept. of Homeland Sec., EEOC Appeal No. 0120132858 (Mar. 9, 2015). Here, Complainant has failed to describe any management action or inaction to support a conclusion that her three non-selections were premised on a prohibited basis.

To the extent that Complainant alleged she was subjected to a hostile work environment, that allegation is also precluded by the determination above that the Agency's explanations demonstrate that her non-selections in Claims 1-3 did not involve discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

Harassment/Hostile Work Environment (Claims 4-7)

Complainant alleged that Supervisor 4 ostracized her; that Supervisor 4 and Selectee 2 criticized her; and that she was not invited to the on-site meeting with Marshall University.

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her protected class; (3) that the harassment complained of was based on her protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994)

In other words, to prove her hostile work environment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a “reasonable person” in Complainant’s position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis; in this case, her race or engagement in prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

Complainant belongs to a protected class based on her race. She also engaged in prior protected EEO activity when she filed the instant complaint; and she was subjected to unwanted conduct. However, Complainant did not show a connection between any protected basis and the alleged harassment. Importantly, Complainant failed to establish a *prima facie* case of retaliation because she was not subjected to adverse treatment regarding the Marshall on-site meeting which was attended by C3 management officials and the CORs. Complainant was neither a management official nor a COR. ROI at 530-31.

Moreover, there was a Microsoft Teams invite for those who were not onsite to attend the July 28, 2021 meeting. Complainant was included on the invite. Agency’s motion at 46-7 and 57. In the end, Complainant not attending the meeting in-person did not affect her job performance or negatively impact her conditions of employment. Therefore, there was no adverse treatment to meet the retaliation criteria.

The record is also devoid of any evidence that Supervisor 4 ostracized Complainant even though their communication may have been limited since there were two levels of supervision between Supervisor 4 and Complainant. Nor does the record show that Selectee 2, who did not supervise Complainant, criticized her. It was also the suggestion of Contract Officer to not include Complainant in some of the administrative meetings involving the Marshall University contract so that Complainant could complete her other tasks.

To the extent that Complainant perceived any of Supervisor 4’s actions to favor Selectee 2, her friend, a complainant’s mere perception that she was subjected to nepotism and favoritism will not sustain a hostile work environment harassment claim. See Complainant v. U.S. Dep’t of Agric., EEOC Appeal No. 0120161248 (May 23, 2018).

We also find that beyond conclusory and speculative assertions, and even assuming that additional statements by the parties would have favored Complainant, Complainant has presented no other affidavits, declarations, or unsworn statements from other witnesses nor documents which contradict or undercut the explanations provided by management or which would cause us to doubt their veracity as witnesses. Ultimately, we find that Complainant failed to establish the existence of a factual dispute sufficient to give rise to a genuine issue of material fact.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the AJ's decision and the Agency's final order adopting it.

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

November 25, 2024

Date