



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

[REDACTED]
Alan F.,¹
Complainant,

v.

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

Appeal No. 2024003217

Agency No. 200H-620A4-2023-151091

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated April 2, 2024, finding no discrimination regarding his 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., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, we AFFIRM the Agency's final decision finding no discrimination.

ISSUES PRESENTED

Whether the Agency correctly determined that Complainant was not subjected to discrimination on the bases of race and disability.

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

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a WG-2, Housekeeping Aid, at the Agency's Franklin Delano Roosevelt Campus of the Hudson Valley Veterans Affairs Health Care System in Montrose, New York.

On May 11, 2023, Complainant filed his complaint, as defined by the Agency as, alleging discrimination based on race (Black) and disability (unspecified) when:

1. On March 14, 2023, he learned that he was not selected for the position of Maintenance Assistant Helper (Maintenance Helper), Vacancy Announcement Number CBTE-11798411-23-KH.
2. On June 15, 2023, he learned that he was not selected for the position of Electrical Worker, Montrose facility, Vacancy Announcement Number CBTE-11950839-23-KH WG.
3. On June 15, 2023, he learned that he was not selected for the position of Electrical Worker, Castle Point facility, Vacancy Announcement Number CBTE-11950839-23-KH WG.²

The Agency investigated the complaint. Complainant has not challenged the framing of the complaint. At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge or a final Agency decision. When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

² On September 20, 2023, the Agency dismissed Complainant's claims of nonselection which purportedly occurred from June 2019 to May 2022, due to untimely EEO Counselor contact because Complainant did not contact an EEO Counselor until March 15, 2023, which was beyond the 45-day time limit. Complainant does not contest this dismissal on appeal. Upon review, we find that the Agency properly dismissed the nonselection claims of June 2019 to May 2022, due to untimely EEO Counselor contact. 29 C.F.R. §1614.107(a)(2).

Complainant did not submit an affidavit as requested by the EEO investigator. The Chief of Engineering at the Hudson Valley Veterans Affairs Health Care System, Engineering Service, was a Selecting Official (SO) for the selections at issue. The SO stated that he never met Complainant and he was not aware of Complainant's race or disability. Report of Investigation (ROI) at 720. The SO did not participate in the interviews for the selections at issue. Complainant did not specify his disability in the informal or formal complaint.

Regarding claim 1, the SO indicated that in February 2023, the Agency announced three vacancies for the Maintenance Helper, WG-5, position at issue. There were eight candidates, including Complainant, referred for consideration for the position. The candidates took a competency technical assessment test (written) which included 20 questions (2.5 points for each correct answer with maximum 50 points) related to the position duties. They were also interviewed by two interview panelists, a Maintenance Mechanic Supervisor and a Carpenter Shop Work Leader. The interview panel stated that the candidates were asked the same ten job related questions (each 0-5 points with maximum 50 points).

The interview panel combined the candidates' interview and assessment scores and ranked them. ROI at 528, 529. Complainant received a total score of 76 (average interview score of 36 and his assessment test score of 40) out of 100. ROI at 647 - 655. On March 8, 2023, the SO selected the top three ranked Selectees (race or disabilities not specified) with total scores of 93, 90, and 88.5. ROI at 530, 531. The SO stated that he was not aware of the Selectees' race or any disabilities. The SO noted that a natural break in scores was 85 for the selection.

Regarding claims 2 and 3, in May 2023, the Agency announced three vacancies for the Electrical Worker, WG-8 position at issue. There were ten eligible candidates, including Complainant, for consideration for the position at issue. Seven candidates (two declined an interview and one failed to respond), including Complainant, were interviewed by three interview panelists (different officials from the interview panelists in claim 1) and took a written technical competency assessment test. The assessment test included 50 technical questions related to the position duties.

The candidates were ranked based on their combined interview and assessment test scores. ROI at 518. Complainant received the score of 60 out of 100 (answering correctly 30 out of 50 questions) for his assessment test. ROI at 307 - 318.

Complainant received interview scores of 36/37/31 from three interview panelists. As such, Complainant's total average score for the combined interview and assessment was 65 (30 for assessment + 35 for interview = 65). ROI at 319- 327. On June 6, 2023, the SO selected the top three candidates (one Selectee was Caucasian, disability not specified; and two Selectees' race and disabilities not specified) with the total average scores of 74, 70, and 68 for the position at issue. ROI at 200, 201. The SO stated that he was not aware of the Selectees' race or any disabilities. The SO noted that Complainant failed to score his written assessment test high enough to be selected. The record indicates that the top three Selectees received 82, 74, and 76 assessment test scores whereas Complainant received a score of 60.

The Agency found that it articulated legitimate, nondiscriminatory reasons for its actions, as set forth above. The Agency also found that Complainant failed to demonstrate he was subjected to discrimination based on his race or disability as alleged. Complainant appeals from the Agency's final decision.

CONTENTIONS ON APPEAL

Complainant does not submit a statement or brief on appeal.

The Agency contends that Complainant failed to rebut the articulated reasons for his nonselections.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to *de novo* review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, § VI.A. (Aug. 5, 2015) (explaining that the *de novo* standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that Complainant was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency's explanation was pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). Complainant can do this by showing that the proffered explanations were unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons were not credible permits, but does not compel, a finding of discrimination. Hicks, 509 U.S. at 511.

In order to establish a prima facie case of discrimination based on race, Complainant must show that: (1) Complainant is a member of a protected class; (2) Complainant was subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) Complainant was treated differently than similarly situated employees outside Complainant's protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. McCreary v. Dep't of Defense, EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Navy, EEOC Request No. 05950927 (Jan. 9, 1998); Trejo v. Soc. Sec. Admin., EEOC Appeal No. 0120093260 (Oct. 22, 2009).

To establish a prima facie case of disparate treatment discrimination based on disability, Complainant generally must prove the following elements: (1) Complainant is an individual with a disability as defined in 29 C.F.R. §§1614.203(a) and 1630.2(g); (2) Complainant is "qualified" as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(m); (3) the Agency took an adverse action against Complainant; and (4) there was a causal relationship between

Complainant's disability and the Agency's actions. See Annamarie F. v. Dep't of the Air Force, EEOC Appeal No. 2021004539 (Aug. 17, 2023).

Here, the Agency did not contest whether there was a prima facie case of discrimination based on Complainant's race or disability. We find that the Agency articulated legitimate, nondiscriminatory reasons for its nonselections. Specifically, the Agency stated that it selected three Selectees for the Maintenance Helper positions (claim 1) and three other Selectees for the Electrical Worker positions (claims 2 and 3) based on the combined scores of their assessment test and interview, as set forth in detail herein. Complainant failed to rebut the Agency's legitimate, nondiscriminatory reasons for not selecting him for the positions. Furthermore, Complainant failed to provide any evidence that his qualifications for the positions were plainly superior to the Selectees' qualifications. See Wasser v. Dep't of Labor, EEOC Request No. 05940058 (Nov. 2, 1995).

Upon review, we find that Complainant failed to show that the Agency's articulated reasons were a mere pretext for discrimination. Based on a thorough review of the record, we find that Complainant failed to show that the Agency's actions were motivated by discrimination as he alleged.

CONCLUSION

Accordingly, the Agency's final decision 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 21, 2025

Date