



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

[REDACTED]  
Dania S.,<sup>1</sup>  
Complainant,

v.

Marcia L. Fudge,  
Secretary,  
Department of Housing and Urban Development,  
Agency.

Appeal No. 2023003797

Hearing No. 570-2023-00078X

Agency No. HUD-00020-2022

**DECISION**

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 31, 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and 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.

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<sup>1</sup> 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 bases of race (African American), sex (female), color ("dark hue"), disability (heart attack, depression, stress, anxiety, and a speech impediment/stammer), age (62), and in reprisal for prior protected EEO activity.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Records and Information Management Specialist, GS-11, at the Agency's Headquarters facility in Washington, DC.<sup>2</sup>

On February 3, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on race (African American), sex (female), color ("dark hue"), disability (heart attack, depression, stress, anxiety, and a speech impediment/stammer), age (62), and in reprisal for prior protected EEO activity when, on or about December 23, 2021, the Office of Digital Enterprise did not select her for an interview for the Records and Information Management Specialist position, under Vacancy Announcement Number 21-HUD-2217.

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. Over Complainant's objections, the AJ granted the Agency's motion for a decision without a hearing and 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.

On November 9, 2021, Complainant applied for the Records and Information Management Specialist position, which was announced as a GS-11 to GS-13 position and was in a different Agency division than where Complainant worked. Complainant's application indicated that GS-12 was the lowest grade she was willing to accept. Applications consisted of the candidate's resume, a self-assessment to job qualification questions, and any required documents (such as SF-50 personnel forms and prior appraisals). Complainant received an email indicating that she was found eligible for the

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<sup>2</sup> Complainant retired from the Agency on or about December 31, 2021.

GS-12 position and was referred to the hiring manager. However, a month later Complainant received an email indicating that after review of her application, she was not among the most qualified and would not be referred for an interview.

The selecting official (SO) for the position was Director of Office of Digital Enterprise and Electronic Records Management Division. Interviews were based on candidates' own self-assessment scores and their resumes. Complainant's self-assessment score was 83, which was the lowest of the referred candidates. SO was aware of Complainant's prior EEO activity because he had submitted an affidavit in a prior EEO complaint filed by Complainant in 2019.

The Agency interviewed 12 candidates for the position (five were selected for the position). Those candidates outscored Complainant in their self-assessment scores by at least 15 points. SO also concluded that Complainant's resume did not reflect that she had the necessary skills and experience to do the job. As reflected in Complainant's resume, she assisted with Federal Records Center disposition reports, but did not have experience interpreting them. She also prepared assigned schedules in Excel but did not interpret or assist in assigning them. As a result, SO found Complainant's application did not warrant an interview.

After Complainant was denied an interview, SO apparently stated to a colleague, Director of Digital Documents, that he felt Complainant lacked the "mental capacity" to perform the Records and Information Management Specialist job, though SO averred that he was referring to Complainant lacking analytical skills needed to perform the job duties and that the comment was not related to any medical condition. ROI at 165. SO averred that he never supervised Complainant, as she worked in another Agency organization, but that he had met with Complainant "for work purposes, and provided training to her and her teammates in the past." ROI at 147.

#### CONTENTIONS ON APPEAL

Complainant argues on appeal that the AJ erred by finding no discrimination on the bases of disability and reprisal. Complainant argues that there were genuine issues of material fact and of credibility that required a hearing. She argues that the AJ simply adopted the self-serving statements of management while ignoring discrepancies in the record.

The Agency argues that summary judgment was proper. It argues that Complainant does not allege the evidentiary record was inadequately developed and that Complainant's arguments on appeal are based on her own subjective beliefs and therefore do not require a hearing. The Agency also argues that the evidence indicates that SO harbored no discriminatory or retaliatory animus.

### 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.

As an initial matter, we note that Complainant does not challenge the AJ's findings of no discrimination for her bases of race, sex, color, and age on appeal. Her brief addresses only the bases of disability and reprisal. The Commission exercises its discretion to address only those issues specifically raised on appeal and declines to address the bases of race, sex, color, and age further herein. See EEO MD-110 at Chap. 9, § IV.A.

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 804 n. 14.

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).

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Department of the Air Force, EEOC Appeal No. 2021004539 (Aug. 17, 2023).

For a reprisal claim, a complainant may establish a prima facie case by showing that: (1) she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, she was subjected to

adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000); see also Carr v. U.S. Postal Serv., EEOC Appeal No. 0120065298 (June 26, 2007); O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1252 (10th Cir. 2001); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976).

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 factfinder 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 (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.

We also find that Complainant established a prima facie case of reprisal for the nonselection. She engaged in prior protected activity, SO was aware of that activity, Complainant was not interviewed for the position at issue, and there is a nexus between that activity and her nonselection. The Agency argues that Complainant cannot establish the fourth element of the reprisal prima facie case because the time between her prior EEO activity and the nonselection is insufficient for temporal proximity. But the record does not indicate whether SO would have had an opportunity to retaliate against Complainant until this nonselection, as they worked in different areas of the Agency. Therefore, for purposes of a prima facie case and in viewing the evidence in the light most favorable to Complainant, as we must at the summary judgment stage, we find this sufficient to establish such a nexus.

We find that Complainant failed to establish a prima facie case of disability discrimination for the nonselection. Complainant argued that she was "regarded as" disabled because SO's comment regarding her lacking the mental capacity for the job indicates that he regarded Complainant as disabled. See 29 C.F.R. § 1630.2(l). The Agency disputes this, arguing that, based on SO's affidavit, he meant that Complainant lacked the analytical skillset for the position and that he was not aware that she had a

disability. We find that the comment by itself by the SO is insufficient to show that Complainant was regarded as disabled by SO.

Next, we find the Agency articulated legitimate, nondiscriminatory reasons for not selecting Complainant for an interview. First, when answering the job assessment questionnaire as part of her online application, Complainant's responses resulted in a score of 83 points, which was substantially lower than the scores of the applicants chosen for an interview. Complainant does not dispute this fact. The Agency also claims that Complainant's resume did not reflect the requisite experience for the GS-12 position in evaluating or reviewing the relevant records and information management programs or in reviewing retention schedules. SO averred that Complainant "lacked experience in developing File Plans, and interpreting schedules. She did not show experience developing reports or developing metrics to ensure sound information governance." ROI at 155. He also noted her lack of experience in training. While Complainant's resume included her work generally within records and information management programs and assisting with retention schedules, it did not evidence the ability to evaluate or review those programs or schedules as was necessary for the position.

We find that there is no genuine dispute of material fact regarding whether the Agency's reasons were pretextual. Complainant makes several arguments that SO's statements are contradicted by the record and that a hearing is warranted. For instance, she argues the affidavit of a Human Resources Specialist (HRS) contradicts SO's affidavit statements because the HRS indicated that the reason Complainant was not selected was due to her self-assessment score, whereas SO's affidavit focused on Complainant's experience level. She also points to SO's direct supervisor's statement that several months after Complainant's nonselection, SO told his supervisor that he did not interview Complainant because she did not perform well on a detail in which SO had supervised her. However, it's clear from SO's and Complainant's affidavit that no such detail occurred, so this appears to simply be an error on the part of SO's supervisor and does not create a genuine dispute. That HRS believed Complainant's nonselection stemmed from her self-assessment score also does not create a genuine dispute of material fact, as it appears HRS and SO were involved at different points in the selection process and both rationales are consistent with the evidence.

Complainant also argues that whether SO declined to interview Complainant due to her participation in protected activity is a material fact in dispute.

She points to SO's affidavit statement that he considered interviewing Complainant because he knew she had prior EEO activity and was likely to file a grievance if she was not granted an interview. However, this merely indicates that SO considered giving Complainant an interview in order to avoid any suspicion of reprisal but decided against this because "her experience did not match up to those I chose to interview and there were several other stronger applicants [than Complainant] who also did not get granted interviews." ROI at 164. SO's statement, therefore, indicates that he attempted to avoid considering Complainant's prior EEO as a factor.

Complainant also relies on a letter SO received on February 8, 2022, indicating that the Agency received "a complaint alleging that [SO] committed a series of Prohibited Personnel Practices during the selection process for" the position at issue.<sup>3</sup> ROI at 195. She then alleges, without citing to any record evidence, that SO received a two-week suspension for unfair hiring practices. There is no indication that such a suspension occurred, and the letter itself does not create a genuine dispute of material fact.<sup>4</sup> It merely stated that the Agency would investigate a complaint that alleged SO engaged in prohibited personnel practices, which is insufficient to require a hearing.

The Commission has held that agencies generally have broad discretion to set policies and carry out personnel decisions and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997); Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996). Upon review, we find Complainant failed to establish that the Agency's articulated reasons were pretextual. Complainant failed to rebut these reasons or offer any evidence that could establish discriminatory or retaliatory animus.

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<sup>3</sup> There is no indication whether the complaint referenced in the letter came from Complainant herself or not (though the record does indicate that she filed a grievance on her nonselection). In her brief on appeal, Complainant claims that the letter referenced "multiple complaints" made against SO, but the letter indicated only a single complaint.

<sup>4</sup> 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.

## 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

October 30, 2024  
Date