



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

[REDACTED]
Joannie V.,¹
Complainant,

v.

Eugene Scalia,
Secretary,
Department of Labor
(Occupational Safety & Health Administration),
Agency.

Appeal No. 2019004947

Agency No. DOL1911007

DECISION

Complainant timely appealed to the Equal Employment Opportunity Commission (“EEOC” or “Commission”), pursuant to 29 C.F.R. § 1614.403, from a June 25, 2019 Final Agency Decision (“FAD”) concerning an equal employment opportunity (“EEO”) complaint alleging employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (“ADEA”), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Budget Analyst, GS-12, at the Agency’s Directorate of Administrative Programs, Office of Financial Management of Budget and Resource Management (“Budget Office”), located in Washington, DC.

On April 12, 2018 Complainant filed an EEO complaint alleging that she had been subjected to a hostile work environment and discrimination by the Agency on the basis of age (49) when, on June 29, 2018, she learned that she was not selected for the position of Budget Analyst, GS-12/13 (Vacancy Announcement No. MS18HRCOSHA112).

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.

Complainant also alleged that on October 27, 2017, her supervisor had told her that she would not receive a promotion on her team.²

The Agency accepted the complaint for investigation. The record developed during the investigation provides the following facts:

Complainant had worked in the Budget Office as a Budget Analyst, GS-12, since 2002. Her first level supervisor (“S1,” age 52) was the Supervisory Financial Management Specialist, GS-15, and her second level supervisor (“S2,” age not specified in the record) was the Financial Manager.

On October 27, 2017, Complainant met with S1 to discuss her Performance Appraisal for Fiscal Year 2017 (“FY 2017 PA”). She received an overall score of “Highly Effective,” which is the second highest possible rating. Out of five elements, Complainant scored three “exceed standards” and two “meet standards.” During the meeting, Complainant alleges that she asked S1 about taking on additional responsibility, and S1 allegedly “blurted out” that Complainant would not get a promotion in their department. Complainant was confused because she had not inquired about a promotion and did not believe one was possible due to budgetary constraints. Complainant described S1’s tone as “bitter,” “harsh,” and “blunt” and that her words caused Complainant to feel undervalued. S1 denies making the comment.

On or about May 4, 2018, S1 initiated the Budget Analyst, GS-12/13 Vacancy Announcement, and on or about May 21, 2018, she emailed the Budget Office that it was advertised on-line on USAJobs. Complainant uploaded her resume and application online to USAJobs. According to Complainant, she was already “performing the specific duties of the job outlined, as a technical expert in all budget matters, with ...responsibilities [including] the development and execution the Agency's budget and spend plan.”

Complainant and two other candidates (“C1” and “C2”) were identified by Human Resources (“HR”) as qualified for the position, and all three were selected for interviews. C1 (age 29), a Program Analyst, GS-11, was Complainant’s colleague in the Budget Office. C1 also reported to S1 and S2 as her first and second level supervisors. C2 (age not specified) worked as an Investigator, GS-12, for another sub-agency within the Department of Labor.

S1 asked the Accounting Officer (“AO,” age 65) to assist with interviewing the three candidates for the position. AO testified that she had a “general understanding of work performed in the Budget Division,” as she worked closely with S1 managing the Agency’s funds.

² While the Agency defined this as a claim independent from the June 2018 non-selection, we find that it is more appropriate to consider the supervisor’s alleged comment as evidence proffered by Complainant in support of her claim that her subsequent non-selection was discriminatory.

Both S1 and AO asked questions during the interview and took notes. AO testified that she and S1 “briefly” discussed the interviews afterward, but she did not offer a recommendation to S1, nor was she involved with the subsequent selection decision.

On June 29, 2018, Complainant received an email generated from USAJobs informing her that she was not selected for the position. S1 called Complainant at home, apologizing, as she had intended to tell Complainant in person. According to Complainant, S1 offered to reach out to other managers in the office to see if Complainant could join their teams, and maybe they would be willing to promote her. Later that day, S2 sent an office-wide email congratulating C1 for being selected for the Budget Analyst position. The email stated that C1’s “astute attention to detail, ability to quickly grasp trivial and complex concepts, and receptiveness to take on new challenges are personal attributes that were factored in her selection.”

Complainant believed that age was a factor in S1’s decision because C1 was 20 years younger than Complainant. Complainant had trained C1 and said C1 regularly asked her for assistance with Budget Analyst tasks after she was promoted. Also, Complainant testified that she felt others in the office perceived her as the “office historian” whose perspective was “out of date” since she had been there longer than anyone else.

When Complainant returned to the office, she asked S1 and S2 why she had not been selected when she had already been performing the duties of the position, and both were “silent.” Complainant requested a detail outside of the Budget Office. S1 arranged for Complainant to be detailed to Grants Management, although Complainant claimed she and others in the office still regularly asked for Complainant’s assistance with budget matters.

At the conclusion of its investigation, the Agency provided Complainant with a copy of the report of investigation (“ROI”) and notice of her right to request a FAD or a hearing before an EEOC Administrative Judge (“AJ”). Complainant opted for a FAD. In accordance with Complainant’s request, the Agency issued a FAD pursuant to 29 C.F.R. § 1614.110(b). The FAD concluded that Complainant failed to prove that the Agency subjected her to age discrimination as alleged.

The instant appeal followed.

ANALYSIS AND FINDINGS

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”) 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").

A claim of disparate treatment based on indirect evidence 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 or she 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. 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. Texas Dep't. of Cmty. 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 acted on the basis of a prohibited reason. St. Mary's Honor Ctr. 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. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't. of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't. of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't. of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

The Agency's proffered legitimate nondiscriminatory reason for not selecting Complainant for the Budget Analyst GS-12/13 position was that the selectee, C1, was more qualified for the position. As selecting official, S1 testified that she based her decision on the candidates' resumes, interview responses, and relevant experience. S1 also said she relied on her impressions of both Complainant and C1's "personal attributes" based on her experience as their supervisor.

In a non-selection case, pretext may be demonstrated by a showing that complainant's qualifications are observably superior to those of the selectee. See Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) citing Bauer v. Bailor, 647 F.2d 1037, 1048 (10th Cir. 1981); Williams v. Dep't of Education, EEOC Request No. 05970561 (Aug. 6, 1998).

Here, we are not clear from the record, and S1 does not explain, how the interview helped her conclude that C1 was more qualified for the Budget Analyst GS-12/13 position than Complainant. The interview notes provided by S1 and AO show that Complainant and C1 conveyed enthusiasm for the opportunities provided by the Budget Analyst, GS-12/13 position. However, Complainant's responses to each question, according to the notes, were far more detailed than those of C1 and C2 and appear to demonstrate a depth of familiarity with the Budget Division's role within the Agency, its processes, and the nature of the Budget Analyst GS-12/13 position, that is not evident in the S1 and AO's interview notes for C1 and C2.

For example, S1's notes for Question 2, which asked about the budget formulation process and various cycles of budget submission, summarize C1's response as "doesn't do too much in the formulation process. Enters into [database]." S1 summarized Complainant's response as: "we send president's budget in February. Departmental submission in June. We take [illegible] into consideration, work with program offices to develop narratives and cost increases and decreases. Senior officials make changes, next it goes to OMB. Get pass back appeal, final submissions to appropriation."

Similarly, during the investigation S1 did not identify how C1's resume helped her conclude that C1 was more qualified for the Budget Analyst GS-12/13 position than Complainant. Complainant's resume reflects that she worked for the Agency since March 1989, and as a Budget Analyst, GS-12, in the OSHA Budget Office since 2002. C1's resume indicates that she worked for the Department of Labor since 2006, and had worked as a Program Analyst, GS-11, in the OSHA Budget Office since 2014. C1 earned an associate degree in General Studies in 2014, Complainant earned an accounting certification in 2012.

With respect to relevant experience, in her affidavit testimony, S1 acknowledged that Complainant was, as a GS-12 Budget Analyst, already performing the duties described in the Vacancy Announcement for the GS-12/13 Budget Analyst. S1 also testified that C1's duties, as a GS-11, "focused primarily on tracking agency staffing and onboard statistics, preparing reports for senior management, and responding to requests for related data from OMB, members of Congress and their staff, and the press." S1 also acknowledged that C1 (unlike Complainant) "did not assist with the development of the Agency's spend plan but on an as needed basis assisted with entering the data into the Departmental E-Business Suite."

S1 explains her choice by stating that that Complainant's "work product was not as reliable, and her communication skills were not as developed for her grade." However, this explanation seems to contradict her own statements in Complainant's FY 2017 PA. With respect to work product, S1 awarded Complainant a score of "exceeds" (the highest possible rating) for Elements 2 and 3. Element 2 required Complainant to, among other things, compile Spend Plan data, then enter it into the DOL Electronic Business Suite to submit allocations and allotments for Departmental review. Element 3 required her to provide technical direction, assistance, and review of the development of approved budgets by Regional and National Office Directorates [and] analyze spending trends and forecasts to ensure spending is in line with budget." To earn a "meets" rating (let alone "exceed") for either Element, Complainant's work had to "meet prescribed deadlines, and [be] substantially error free," i.e. "reliable."

As for communication skills, S1 also scored Complainant "exceeds" for "Element 5," which required her to "develop and maintain positive organizational relationships with financial management staff and program contacts, providing technical assistance to agency staff, departmental staff and members of the public on matters of financial management." In the "narrative" section, S1 states, among other things, that Complainant "is very attentive to her customers' needs and ensures that she provides a high quality of customer service to respond to their budget inquiries."

S1 also identifies areas of communication such as Regional and National Offices and other offices and with her peers in the Budget Office. Complainant also submitted extensive email evidence of her successfully collaborating with coworkers, with no indication of underdeveloped communication skills.

The record does not include C1's FY 2017 PA, however, S1 testified, "since I have been her supervisor, [C1], a GS-11, has demonstrated initiative and innovation in her work on complex projects, and has also demonstrated the potential to work above her grade level. For example, she worked on congressional requests and FOIA requests for agency staffing data for which she provided detailed analysis and verification of agency onboard counts. I gave her a highly effective rating for FY 2017, and gave her an outstanding rating for her work as a GS-11. She works independently, provides final products that are reliable and require little revision, is resourceful and able to solve problems, and exhibits effective communication skills. [C1] worked with senior management from the Directorate of Administrative Programs and representatives from OSHA's Regional Offices on a new SharePoint website and database to track OSHA hiring activities. She gathered data from around the agency and beta tested the new sites with agency focus groups."

Complainant's duties, provided in her resume, and her FY 2017 PA ratings, indicate that she too has the ability to problem solve and work independently on complex projects, exhibits effective communication skills, and works extensively with databases. Complainant points out that one of S1's few concrete examples of C1's work, "a new SharePoint website and database to track OSHA hiring activities" is not equivalent to the type of data gathering and reporting required of a Budget Analyst, GS-12.

In sum, we find, in light of the record as a whole, that this is insufficient evidence to support the Agency's proffered explanation for not selecting Complainant for the Budget Analyst, GS-12/13 position. Complainant has shown her qualifications to be demonstrably superior to those of the selectee, and therefore has successfully established that the Agency's articulated reason for her nonselection is pretext for discrimination based on age. See Chianti v. Social Sec. Administration, EEOC Appeal No. 0720080031 (Jan. 19, 2011) (finding the Agency's articulated reasons for not selecting the complainant for a Bilingual Claims Representative were pretext for age discrimination because the management official's testimony about the complainant's work backlog was not credible, and the selecting official added criteria to screen the Complainant out despite his demonstrably superior qualifications).

Alternately, we find the Agency failed to meet its burden of production, as the record is devoid of evidence to support S1's characterization of Complainant's work and communication deficiencies. See Woodard v. Dep't of Labor, EEOC Appeal No. 01970288 (February 1, 2000), reconsideration denied, EEOC Request No. 05A00416 (June 5, 2000) (finding the reasons given by the Agency for not selecting the complainant were neither specific, clear, nor individualized. As a result, the explanation was insufficient to give complainant a meaningful opportunity to challenge).

CONCLUSION

Accordingly, we REVERSE the Agency's finding that no age discrimination was proven with regard to Complainant's non-selection for Budget Analyst, GS-12/13 position. The complaint is hereby REMANDED to the Agency for further processing in accordance with the ORDER below.

ORDER (D0617)

The Agency is ordered to take the following remedial action:

1. Within **60 calendar days** of the date this decision is issued, retroactively place Complainant in the Budget Analyst, GS-12/13, position at issue retroactive to the date she would have been in the position had she been originally selected.
2. Determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than **90 calendar days** after the date this decision is issued. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within **60 calendar days** of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's
3. Provide at least 2 hours of in-person training for S1 **within 60 calendar days** of the date this decision is issued. This single training session can be prepared/provided by an Agency employee or contractor with subject matter expertise to: (1) explain this decision and what, if anything, S1 should do differently when recruiting, interviewing, and selecting applicants for promotion or to fill vacancies within the Budget Office, and (2) explain the Agency's obligations under the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621 et seq. If S1 has left the Agency, the Agency shall furnish documentation of her departure date.
4. Consider taking appropriate disciplinary action against S1 **within 60 calendar days** of the date this decision is issued. Training does not count as disciplinary action. The Agency shall report its decision to the EEOC compliance officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If S1 has left the Agency, the Agency shall furnish documentation of her departure date(s).

5. Post the attached Notice, in accordance with the "Posting Order" below.

The Agency is further directed to **submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision."** The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its OSHA facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)


This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision.

In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency or filed your appeal with the Commission. 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. **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

February 19, 2020
Date