



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

[REDACTED]
Louise S.,¹
Complainant,

v.

Alex M. Azar II,
Secretary,
Department of Health and Human Services,
Agency.

Appeal No. 2019005381

Hearing No. 570201800729X

Agency No. HHSOS00622017

DECISION

Complainant timely appealed, pursuant to 29 C.F.R. § 1614.403, from the Agency's Final Order concerning an 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Logistics Management Specialist, GS-13, Office of the Assistant Secretary of Preparedness and Response ("ASPR"), Office of the Chief Operating Officer, Division of Administrative Management, Travel Management Branch, located in Washington, D.C.

On November 21, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female), and reprisal (prior protected EEO activity) when, in August 2017, she became aware that her "on the spot" award was not processed in a timely manner, but awards for white males were processed in a timely manner.

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.

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an Equal Employment Opportunity Commission (“EEOC” or “Commission”) Administrative Judge (“AJ”). Complainant timely requested a hearing. The AJ notified the parties *sua sponte* of an intent to issue a decision without a hearing. Over Complainant’s objection, the AJ subsequently issued a decision by summary judgment in favor of the Agency on July 24, 2019.

The record provides the following facts:

Complainant’s first level supervisor (“S1,” African American, female) was the Supervisory Development and Travel Specialist, GS-14. Complainant’s second level supervisor (“S2” white, female) was the Travel Branch Chief, GS-15. Complainant’s third level supervisor (“S3” white, male) was the Director, GS-15, Division of Administrative Management. S2 and S3 were both aware that Complainant named them as responsible management officials in an EEO complaint she formally filed in January 2017.²

From May 2016 through September 2016, Complainant was assigned to assist the ASPR Office of Emergency Management (“OEM”) with securing travel and arranging logistics for its August 2016 Medical Countermeasures (“MCM”) Summits. Complainant worked closely with her colleague (“C1,” white, male), an OEM Staff Assistant, GS-12. Ultimately, C1 and Complainant coordinated travel logistics for approximately 700 people for six events in six cities, over one month. By Complainant’s account, the MCM Summit represented an “unmatched achievement” given the short turnaround time between funding and processing travel, and that it was the first time ASPR Travel processed travel for over 500 individuals.

In August 2016, C1 was nominated for an “on the spot” award of \$1500 for his work on the MCM Summits. An “on the spot” award is issued through the ASPR Awards and Recognition Program, to recognize employees for contributions to a specific project or activity. An employee can nominate another employee (or themselves) for an “on the spot” award by submitting a completed nomination form to the Division of Workforce Development (“DWD”) in the ASPR Human Capital Branch. Nominators and program offices have no role in the processing once the nomination is submitted to DWD.

At C1’s suggestion, the Executive Officer, OEM nominated Complainant for a \$1500 “on the spot” award for her work on the MCM Summits as well. The nomination describes Complainant’s contributions as “invaluable to the success of the summit,” which “would not have been possible without [Complainant’s] consistent attention to ensuring the attendance of key stakeholders.” C1 notified S1 that OEM nominated Complainant for an “on the spot” award and submitted the nomination application. DWD confirms that the DWD Program Analyst, GS-13, (“H1,” African-American, female) assigned as the point of contact and responsible for processing all award

² EEOC Hearing No. 570201700975X (pending as of the date of this decision), Agency No. HHSOS00072017.

nominations submitted by OEM, received Complainant's nomination application on September 2, 2016.

In December 2016, C1 notified Complainant that she had been nominated for an "on the spot" award back in August, and asked if it had been processed. Complainant responded that it hadn't, and notified S1. S1 testified that she emailed H1 on January 3 and 25, 2017 about the award. C1 received his award (the record is not clear whether it was the recommended \$1500 or a modified amount) on June 1, 2017, Complainant still had not heard anything about her "on the spot" award.

In July 2017, Complainant emailed H1 and attempted to meet with her for an update on her "on the spot" award. She felt H1 was giving her the runaround, so she notified S1, who also contacted H1 and attempted to meet. On July 28, 2017, Complainant emailed H1's supervisor, the Chief, Human Capital Branch, GS-14 ("H2," Caucasian, Male). H2 responded the same day, apologizing to Complainant and promising to "get to the bottom of it." H2 forwarded Complainant's concerns to H1 and asked for an explanation. H1 informed him that the reason the award had not been processed was that the BUE committee had not met yet. H2 instructed H1 to explain the situation to Complainant and S1. H1 visited both S1 and Complainant separately to apologize for the delay, explaining it was due to her "administrative oversight" and erroneously informed them that the meeting would be at the end of the month and that the Awards Committee met "monthly." She was unresponsive to requests for clarification.

By August 14, 2017, when H1 failed to provide a clear answer about when Complainant would receive her award, S1 advised Complainant that Management would handle the matter. S1 notified both S2 and S3 that Complainant had not received her "on the spot" award. S2 and S3 notified H1's third level supervisor DWD Supervisory Management Analyst, GS-15, ("H3," African-American, Female) on August 15, 2014.

On August 15, 2017, Complainant contacted the Vice President of the Union ("Union VP"), who was the contact for the Labor-Management Incentive Awards Committee ("Awards Committee"). Where, as here, the nominee is a bargaining unit employee ("BUE"), DWD sends a copy of the application to the Union VP. The Awards Committee, comprised of Union and Management employees meets on a quarterly basis reviews the nominations and makes recommendations regarding whether to grant, deny, or modify the monetary award. The Union VP informed Complainant that she did not have Complainant's paperwork in her records, and followed up with H3.

On August 17, 2017, H3 notified S2 and S3 that Complainant's award application had been forwarded for review to the Awards Committee. H3 provided clarification that the next Awards Committee meeting was September 12, 2017. The Awards Committee approved the "on the spot" award, but modified the amount from \$1500 to \$750. The award was processed on September 22, 2017, and Complainant received it in her October 6, 2017 paycheck.

When the Agency failed to issue a final order within forty days of receipt of the AJ's decision, the AJ's decision became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i). The instant appeal followed.

ANALYSIS AND FINDINGS

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. (as revised, August 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*).

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.

On appeal, Complainant argues that the AJ erred, as she was not provided an opportunity to engage in discovery. However, she is unable to demonstrate that a question of fact exists to warrant further development of the record, as she has not satisfied the elements of a *prima facie* case of discrimination or reprisal.

It is undisputed that once an award nomination was submitted to DWD, the nominating party or program office had no further role in the processing of the award. H1, who was assigned to process all award nominations from OEM, was not in Complainant's chain of command, and they did not have a working relationship. H1 testified that she caused the year long delay by "overlooking" the email with Complainant's nomination form submitted by C1, and due to infrequent award committee meetings. She also indicated responsibility by apologizing for the delay in emails sent in July and August 2017, when S1, Complainant, and management, as well as H1's chain of command, followed up with H1 about the award. H1 also apologized to Complainant in person. When S1 notified S2 and S3 that Complainant still had not received her award after nearly a year, and they were receiving the "runaround" from H1, both acted promptly by contacting H3. The award was processed and reviewed at the next award meeting.

According to Complainant, H3 was close friends with S2. Complainant theorizes that because of her friendship with S2, H3 would have known about Complainant's prior EEO activity, and, in retaliation, S2, S3, and H3 "encouraged" H1 to "not process/delay/ignore" Complainant's award.

H1 testified that she was not influenced by anyone. As for race and sex discrimination, Complainant offers generalizations based on her experience, and testimony by the Union VP, who states in the record, “[a]s the union representative for bargaining unit employees in ASPR, I can say with authority that Caucasian males are definitely treated more favorably in any circumstance, particularly more than black females throughout ASPR.” While we do not intend to minimize the seriousness of Complainant and the Union VP’s characterization of ASPR, such generalizations, unaccompanied by evidence specific to this case are insufficient to overcome summary judgment.

We note that Complainant aptly points out that C1, a white male, who did not have a pending EEO complaint, received his award on June 1, 2017, much sooner than Complainant, even though they were nominated for the same award, for the same project, by the same management official around the same time. However, because the meetings to determine the awards were held on a quarterly basis, it appears the next opportunity was not until September 12, 2017. Complainant has not offered sufficient evidence that would establish, or give rise to a question of fact to show that the delay in issuing her award was motivated by discriminatory intent, or retaliatory intent by H3, S2, and S3 as alleged.

CONCLUSION

Accordingly, we AFFIRM the Agency’s Final Order adopting the AJ’s decision.

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 (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

August 31, 2020

Date