



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

[REDACTED]  
Eryn M.,<sup>1</sup>  
Complainant,

v.

Chad F. Wolf,  
Acting Secretary,  
Department of Homeland Security  
(Transportation Security Administration),  
Agency.

Appeal No. 2019005404

Hearing No. 480-2017-00709X

Agency No. HSTSA003172017

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 19, 2019, 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 Administrative Judge properly issued a decision without a hearing finding that Complainant did not establish that the Agency discriminated against her based on her race or sex, or in reprisal for prior EEO activity when it did not select her for a position as a Transportation Security Manager.

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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.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Behavior Detection Officer (SBDO) (SV-1802 G) at the Agency's Honolulu International Airport in Honolulu, Hawaii. On an unspecified date, Complainant stated that she emailed the Regional Director to inform him that she believed that she was discriminated against based on her race and sex because she did not receive a 3% raise, which a male SBDO received. Report of Investigation (ROI) at 55.

On August 30, 2016, the Agency announced a vacancy for a Transportation Security Manager – Screening Checkpoints (SV-1801 H), under vacancy announcement number HNL-16-167615. ROI at 136-42. Complainant timely submitted her application in August 2016. Complainant stated that on October 26, 2016, she received an email to schedule her interview for November 2, 2016. Complainant stated that on October 28, 2016, the Deputy Assistant Federal Security Director (DAFSD) (Caucasian, white) called to inform her that the time for her interview was changed from 11:00 a.m. to 8:00 a.m. Complainant stated that when she arrived for her 8:00 a.m. interview, the interviewers stated that they were not informed about a time change, and were unable to interview Complainant until 10:00 a.m. Complainant stated that she was pregnant at the time and prior to the interview, the Selecting Official (SO) (African American, female) asked if Complainant's baby "was happy." ROI at 55-7.

Complainant stated that the conference room was booked, and they held her interview in the Appointing Officer's (AO) (Caucasian/Asian, White/Mixed) office. Complainant stated that on November 26, 2016, AO sent a global email to announce the selection of the new Transportation Security Manager (TSM) (Asian, male). ROI at 56.

On February 21, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Caucasian) and sex (female/pregnancy), and in reprisal for prior protected EEO activity when on or about November 16, 2016, it did not select her for a position as a Transportation Security Manager – Screening Checkpoints (SV-1801 H), under vacancy announcement number HNL-16-167615.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's December 12, 2017, motion for a decision without a hearing and issued a decision without a hearing on May 22, 2019.

The AJ assumed that Complainant established a prima facie case of discrimination based on her race and sex, and in reprisal for prior EEO activity, and she found that the Agency articulated legitimate, nondiscriminatory reasons for Complainant's non-selection. The AJ found that Complainant scored 25, out of 30, points for her interview, and was ranked sixth out of the eleven candidates.

The AJ noted that the interview panelists focused on the candidates' demonstrated knowledge and experience of running screening operations and implementing recent policy changes impacting screening operations, and that TSM was selected because he was involved in running screening operations, while Complainant's experience was limited to Behavior Detection Officer duties and not screening operations.

The AJ found that while Complainant raised a number of arguments on pretext, her arguments failed. For example, Complainant asserted that she had more experience because she started at the Agency in October 2006, while TSM started in August 2007. However, the AJ determined that it was not clear how the approximate one-year difference was significant, and that the Commission found that length of service does not make a candidate more qualified.

While Complainant stated that she was asked how she was feeling and if her baby was happy, the AJ found that the statement itself does not demonstrate a bias based on her pregnancy. To the extent that AO was aware of Complainant's prior EEO complaint, the AJ noted that AO was not involved in the interviewing, scoring, or ranking of the candidates, nor had any influence on the process. Regarding the statistics that show that the majority of Transportation Security Managers were male, the AJ noted that they did not rebut the fact that TSM had the stronger qualifications for the position. The AJ found that Complainant did not meet her burden to establish a genuine issue of material fact or that credibility determinations were needed to be rendered, and she concluded that the Agency was entitled to summary judgment.

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. Complainant filed the instant appeal and submitted a brief in support of her appeal. The Agency did not respond to Complainant's appeal.

### CONTENTIONS ON APPEAL

Through her attorney, Complainant argues that there are sufficient issues of material fact that require a hearing, and that the AJ erred in finding that Complainant did not establish that the Agency's reasons were pretextual.

Complainant asserts that there are credibility issues. For example, Complainant notes that SO denied asking Complainant about her pregnancy, and that the AJ "apparently believed" SO. In addition, Complainant states that there are issues of credibility because SO denied being aware of Complainant's complaint about not receiving a 3% raise and that Complainant produced an email showing that SO was aware of her complaint. Complainant also asserts that there is a credibility issue because DAFSD denied promising Complainant the next Transportation Security Manager position.

Complainant argues that the AJ erred in finding that there was insufficient evidence to establish a prima facie case of discrimination based on race and sex.

Complainant asserts that she “clearly” had more experience than TSM because she worked at the Agency for 11 years, as compared to TSM’s four years. Complainant also argues that there is a genuine issue regarding a “fair process.” For example, Complainant asserts that the interview scores were subjective and cannot be verified by objective criteria, and there “may be a bias in the meaning of command presence.”

Complainant also asserts that she established a prima facie case of retaliation. Complainant states that both SO and AO were copied on her complaint about not receiving a 3% raise and that the non-selection was “close in time” to her complaint. Complainant also states that the AJ did not address the differential treatment in the non-payment of the raise.<sup>2</sup> Complainant argues that the AJ erred when she stated that AO did not discriminate because he merely approved the selection made by SO and the other members of the interview panel, and that this was an “erroneous statement of fact.”

Complainant argues that the AJ erred in finding no pregnancy discrimination under the Pregnancy Discrimination Act of 1978 (PDA). Complainant stated that at the interview, SO asked if her “baby has been doing okay?” Complainant asserts that the comment, the change in interview location, and the statistical evidence show that she was treated differently because she was pregnant and due to her sex.

Complainant also argues that the AJ erred in finding no pretext for discrimination. Complainant states that DASFSO told her that she would be selected for the next open position. Complainant asserts that she provided statistical evidence to show that a disproportionate number of Transportation Security Managers were male and that there were no pregnant Transportation Security Managers. Complainant also argues that past cases of discrimination can be used as a pattern of discrimination, and when Complainant was previously tied for a selection, a male was selected. Complainant requests that the Commission reverse the AJ’s decision and remand her complaint for a hearing.

## ANALYSIS AND FINDINGS

### *Standard of Review*

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).

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<sup>2</sup> We note that the allegation that Complainant was discriminated against when she did not receive a 3% raise is not an accepted claim in this complaint.

This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and the Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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”).

#### *Decision without a hearing*

We determine whether the AJ appropriately issued the decision without a hearing. The Commission’s regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC’s decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party’s evidence and must draw justifiable inferences in the non-moving party’s favor. Id. at 255. A “genuine issue of fact” is one that a reasonable judge could find in favor for 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 “material” fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep’t of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, Complainant argues that there are sufficient issues of material fact that require a hearing.

For example, Complainant argues that there is a genuine issue regarding a “fair process” and questions the interview scores and possible bias in “the meaning of command presence.” However, we find that Complainant did not identify any facts to establish a dispute, and only offers her opinion that the selection process was unfair. In addition, Complainant states that the AJ erred when she stated that AO did not discriminate because he merely approved the selection made by SO and the other members of the interview panel, and that this was an “erroneous statement of fact,” but Complainant did not offer any evidence to show that this was an error.

Complainant also argues that there are credibility issues. However, we do not find that there are any credibility issues that warrant a hearing. Regarding SO's awareness of Complainant's "complaint" regarding her 3% raise, we note that Complainant raised the issue to have the matter corrected, and that she did not claim that it was discriminatory in the emails that SO was copied on. In addition, we find that Complainant's arguments related to DAFSD are not material because he was not involved in the selection process, aside from scheduling the interview.

Complainant argues that the AJ erred when she did not analyze Complainant's claim under the PDA. However, we note that the PDA provides that discrimination on the basis of pregnancy constitutes sex discrimination under Title VII and claims brought under the PDA are examined using the traditional disparate treatment analysis. See Bernardi v. U. S. Postal Serv., EEOC Appeal No. 01954090 (Aug. 21, 1997). As such, we find that the AJ did not err and properly analyzed Complainant's claim.

We find that the AJ viewed the record in the light most favorable to Complainant when she assumed that Complainant established a prima facie case of discrimination based on race and sex, and in reprisal for protected EEO activity, and she found that Complainant did not show that the Agency's reasons were pretext for discrimination. As such, we find that the AJ properly issued a decision without a hearing.

#### *Disparate Treatment*

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, 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. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dept. 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 Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Service v. Aikens, 460 U.S. 711, 715-716 (1983).

Assuming, arguendo, that Complainant established a prima facie case of discrimination based on her race and sex, and in reprisal for prior EEO activity, we find that the Agency proffered legitimate, nondiscriminatory reasons for not selecting Complainant for the Transportation Security Manager position. SO stated that they selected TSM because he had knowledge of checkpoint operations and was familiar with the challenges of baggage operations, while Complainant did not have operational experience to manage screening checkpoints and baggage

locations, and she could not clearly articulate that she understood the intricacies of running a screening operation. ROI at 91.

On appeal, Complainant argues that the AJ erred in finding no pretext for discrimination. However, we find that Complainant has not shown that the proffered reasons were pretext for discrimination. Complainant can establish pretext in two ways: “(1) indirectly, by showing that the employer’s proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer.” Chuang v. Univ. of Cal. Davis Bd. of Trs., 225 F.3d 1115, 1127 (9th Cir. 2000) (internal quotation marks omitted); see also McDonnell Douglas, 411 U.S. at 804-05.

Complainant states that she provided statistical evidence to show that a disproportionate number of Transportation Security Managers were male and that there were no pregnant Transportation Security Managers. However, the Commission and the courts have held, that while statistics are relevant, statistics alone, especially if they are generalized and over broad, will not be sufficient to prove pretext in individual complaints of disparate treatment. See Stevens v. EEOC, EEOC Appeal No. 01970848 (Aug. 14, 1997); Talley v. United States Postal Serv., 720 F.2d 505, 508 (8th Cir. 1983), cert denied 466 U.S. 952 (1984); Hudson v. IBM Corp., 620 F.2d 351, 355 (2d Cir.), cert denied 449 U.S. 1066 (1980). In this case, we not find that a disproportionate percentage of males in the Transportation Security Manager position establishes pretext for discrimination. While Complainant argues that past discrimination can be used to show a pattern of discrimination, Complainant only makes bare assertions that the prior selections of male candidates for Transportation Security Manager positions were discriminatory, without providing any evidence.

Complainant has not shown that the Agency’s reasons for not selecting her are unworthy of belief. We note that SO stated that TSM was selected due to his experience in checkpoints and baggage locations, and Complainant did not assert that she had any experience in these areas.

In addition, in a non-selection case, pretext may be found where the complainant’s qualifications are plainly superior to the qualifications of the selectee. See Wasser v. Dep’t of Labor, EEOC Request No. 05940058 (Nov. 2, 1995); Bauer v. Bailar, 647 F.2d 1037, 1048 (10th Cir. 1981). Here, Complainant asserts that she “clearly” had more experience than TSM because she worked at the Agency for 11 years, as compared to TSM’s four years. However, the Commission has found that number of years of experience does not establish that an applicant’s qualifications are superior. See Kopkas v. U.S. Postal Serv., EEOC Appeal No. 0120112758 (Oct. 13, 2011). Complainant also argues that she had experience as an Acting Transportation Security Manager, while TSM did not, but she did not provide any details of her acting experience to show that she was better qualified to be a Transportation Security Manager for Screening Checkpoints. As such, we find that Complainant has not shown that she had plainly superior qualifications, as compared to TSM.

Even assuming that Complainant was as equally qualified as TSM, the Commission has previously found that an Agency has the discretion to choose among candidates whose qualifications are relatively equal as long as the decision is not premised on an unlawful factor. Devance-Silas v. U.S. Postal Service, EEOC Appeal No. 0120110338 (March 23, 2011), citing Texas Dept. of

Community Affairs, 450 U.S. at 248, 252-259; Mitchell v. Baldrige, 759 F.2d 80 (D.C. Cir. 1985); Canham v. Oberlin College, 555 F.2d 1057, 1061 (6th Cir. 1981). Further, we note that in the absence of evidence of unlawful discrimination, the Commission will not second guess the Agency's assessment of the candidates' qualifications. Texas Dept. of Community Affairs, 450 U.S. at 259. To the extent that Complainant argues that SO's question about how her baby was feeling is evidence of discrimination, we are not persuaded that SO's question demonstrated an unlawful bias based on Complainant's pregnancy. In addition, we find that there is no evidence of unlawful discrimination due to Complainant's race or EEO activity.

Accordingly, we find that Complainant did not establish that the Agency discriminated against her based on her race or sex, or in reprisal for prior EEO activity when it did not select for a position as a Transportation Security Manager.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order adopting the AJ's decision without a hearing finding that Complainant did not establish that the Agency discriminated against her based on her race or sex, or in reprisal for prior EEO activity when it did not select her for a position as a Transportation Security Manager.

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the 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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>.



Alternatively, complainant can submit his or her 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, 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 his or her 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(c).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

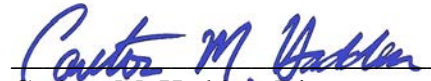
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

October 27, 2020  
Date