



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

[REDACTED]
Lenard H.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2019001566

Agency No. 200H-0561-2017-105165

DECISION

On December 14, 2018, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 28, 2018 final decision concerning his 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. 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 REVERSES the Agency's final decision, in part.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Police Officer, GS-6, Step 5, at the Lyons Veterans Affairs (VA) Medical Center in Lyons, New Jersey. On October 26, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (Caucasian), national origin (Puerto Rican), age (53), and reprisal (prior protected EEO activity) when: (1) on August 3, 2017, Complainant was advised he was not selected for the position of Detective, GS-0083-7, from Vacancy Announcement No. BH-17-

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.

MSD-1964597; and (2) on September 19, 2017, Complainant was advised he was being maintained on the day shift sometime in October 2017, rather than rotating off it, which Complainant contended resulted in a loss of pay.

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

FACTUAL BACKGROUND²

Claim 1 – Non-selection

In or about May 2017, Complainant applied for the Detective position (non-supervisory), GS-0083-7, under Vacancy Announcement No. BH-17-MSD-1964597-BU. On July 26, 2017, eight out of ten applicants (including Complainant) were found qualified and interviewed for the position. The interview panel was made up of the Deputy Chief of VA Police (P1) (45 years old, White, German and Dutch, prior EEO not specified), the Chief of Police Service (P2) (57 years old, African American, Native American), and the Fire Chief (P3) (43 years old, White, Italian and Puerto Rican). All applicants received the same questions and were assessed on a scale of one to five based upon their answers to the questions. P2 testified that the panel used performance-based interview questions. P2 also testified that Complainant and other candidates' scores were based on their individual responses to the interview questions. After the panel interviewed all eight applicants, they sent the selecting official (SO) (54 years old, African-American, American, prior EEO activity) the names and rankings of the top two contenders. SO states that the selectee's (SE) (32 years old, White, Hispanic) ranking was 1 out of 8, while Complainant was 4 out of 8. Additionally, SE's score/ranking was a 20 which in turn was converted into 100 out of 100, while Complainant's score/ranking was an 18, which converted to a 97 out of 100. The interview notes were not preserved by the Agency and none of the panel members remembered why Complainant received the score that he did as compared to the scores of the two applicants who received a score of 20 on their interviews. On August 3, 2017, Complainant learned via email that he was not selected for the Detective position.

Complainant contends that he was more qualified than SE. Complainant asserts that his experience, citations, and awards made him an outstanding candidate for the Detective position. Complainant states that he has over 26 years of experience as a sheriff, one and one-half years as a policeman in Newark, New Jersey, 26 years as a military policeman, and over 100 citations and awards.

² The facts set forth below are not disputed unless stated otherwise.

Claim 2 – Schedule

Sometime in September 2017, Complainant's second-line supervisor (S2) (58 years old, Caucasian, American, prior EEO activity) retained Complainant on the day shift which he had been on since July 2017, rather than rotating him to another shift. S2 asserts that in October or early November 2017, he asked Complainant if he wanted to rotate out of the day shift and Complainant stated that he preferred not to do so. On March 16, 2018, S2 sent an e-mail to the staff stating that it has been his understanding that some staff members do not desire to rotate their 12-hour shift. S2 stated that if any staff member was not interested in rotating, they must be willing to forgo their night time differential pay, in writing, if they wish to stay on the day shift. S2 asked for a response from all staff, individually, by March 23, 2018. On March 19, 2018, Complainant responded to S2's e-mail stating, "Please be advised I am willing to forgo my nighttime differential pay and remain on the day tour permanently." S2 honored Complainant's request and maintained him on the day shift.

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, 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").

Disparate Treatment

Complainant must satisfy a three-part evidentiary scheme to prevail on a claim of disparate treatment discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, Complainant must establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Second, the burden is on the Agency to articulate a legitimate, nondiscriminatory, reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Third, should the Agency carry its burden, Complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Agency were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 144 (2000) (applying McDonnell Douglas paradigm to ADEA claim) (quoting Burdine, 450 U.S. 243, 253).

Claim 1 – Non-Selection

Complainant alleged that he was subjected to disparate treatment when he was not selected for the Detective position. To establish a prima facie case of discrimination, a complainant must show that: (1) he is a member of a protected group; (2) he is qualified for his position; (3) he suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination. We note that, although a complainant bears the burden of establishing a “prima facie” case, Burdine, 450 U.S. at 252-53, the requirements are “minimal,” Hicks, 509 U.S. at 506, and complainant's burden is “not onerous.” Burdine, 450 U.S. at 253. Here, record evidence reveals that Complainant established a prima facie case of age discrimination³ because: (1) Complainant was 53 years of age at the time of the non-selection and SE was more than twenty years younger at 32 years of age; (2) he was qualified for the Detective position; and (3) he was not selected for the Detective position. Accordingly, we determine that Complainant has established an inference that discrimination based on age was the reason for his non-selection.

Because Complainant established a prima facie case of age discrimination, the Agency now has the burden of producing a legitimate, non-discriminatory explanation for not selecting Complainant. While we note that an agency's burden of production is not onerous, it must provide a specific, clear, and individualized explanation for its selection decision. This is required for a complainant to have the opportunity to prove that the asserted reason was a pretext for discriminatory animus. See Stewart v. Dep't of Homeland Sec., EEOC Request No. 0520070121 (Nov. 14, 2011) (agency failed to meet its burden of production by simply explaining the general mechanics of the selection process but failed to provide an individualized explanation for complainant's specific score) (citing Boston v. U.S. Postal Serv., EEOC Appeal No. 0120042074 (May 26, 2004)); see also Ashlea P. v. Dep't of Homeland Sec., EEOC DOC 0120182299 (May 29, 2019).

The panelists and SO explain that Complainant was not selected because SE and one other applicant received higher interview scores than he did. The Agency's investigation included a copy of Complainant's application, the interview scores (but not the notes) from Complainant's interview, and the list of the other candidates with their scores. This was the extent of the Agency's reason for Complainant's non-selection and its supporting documentation provided to the Commission with respect to the Detective position.

We find that the evidence presented by the Agency is not sufficient to provide a specific, clear, and individualized explanation as to why Complainant was not selected for the position for which he was deemed qualified.

³ The record shows that like Complainant, SE was White. While SE's national origin was not specified, he was characterized as Hispanic by management officials. Accordingly, Complainant cannot establish a prima facie case of disparate treatment based on race or national origin. We also note that Complainant only alleged reprisal as a basis of discrimination as to Claim 2.

The Agency explained the general mechanics of the selection process but failed to provide an individualized explanation for Complainant's specific situation. See, e.g., Koudry v. Dep't of Educ., Request No. 0520100196 (Apr. 13, 2010) (discrimination found where agency merely explained the mechanics of selection process, provided list of candidates deemed best qualified, and summarized applications of selectee and complainant, but failed to provide statements from selecting officials explaining how complainant's qualifications were evaluated compared to selectee's qualifications). The record simply does not indicate how the Agency determined which candidate was selected. Therefore, the Commission finds that the Agency failed to overcome Complainant's prima facie case of age discrimination, and Complainant prevails without having to prove pretext. Chhe v. Dep't of Housing and Urban Dev., EEOC Request No. 0720090008 (Aug. 6, 2010) (the consequence of an agency's failure to meet its burden of production under McDonnell Douglas is that the complainant, having established a prima facie case, prevails without having to make any demonstration of pretext), request for recon. den. EEOC Request No. 0520100584 (Jan. 27, 2011). Accordingly, we find that Complainant has established that he was subjected to age discrimination when he was not selected for the Detective position.

Claim 2 – Schedule

Here, the Agency has articulated legitimate, nondiscriminatory reasons for its actions. The record shows that the staff often worked more than three months on any given shift before rotating. In 2016, Complainant work on the night shift most of the year. He only worked the day shift for two months in 2016. We find that the record supports the finding that in 2017, Complainant did not work the day shift until July and advised S2 in October or November 2017 and again in March 2018 that he preferred to remain on the day shift. In addition to the record showing that Complainant's preferred shift during the relevant time was, in fact, the day shift, we also find the record devoid of evidence that S2 was motivated by discriminatory or retaliatory animus when retaining Complainant on the day shift for more than three months. Therefore, we find that Complainant failed to establish discrimination or retaliation with respect to this claim.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's decision with respect to Claim 1 and AFFIRM the Agency's decision with respect to Claim 2.

ORDER (C0618)

The Agency is ordered to take the following remedial action:⁴

1. Within 60 calendar days from the date this decision is issued, the Agency shall extend to Complainant a written offer of promotion to the Detective position within his geographical area, retroactive to August 3, 2017. Complainant shall be provided 15 calendar days from receipt of this offer to decide whether to accept the position. Failure to respond within 15 days will be construed as rejection of the offer. If Complainant accepts the offer, he shall be retroactively promoted to the grade level he would have occupied at the date of promotion and awarded back pay as prescribed in 5 C.F.R. § 550.805. Back pay shall be computed from August 3, 2017 until the date he begins the Detective position. If Complainant rejects this offer, he shall be awarded back pay from August 3, 2017, through the date he rejects the offer. Complainant has a duty to mitigate his damages.
2. The Agency shall determine the appropriate amount of back pay, with interest, and all other benefits due Complainant pursuant to 29 C.F.R. § 1614.501. Complainant is entitled to any benefits to which he would have been entitled but for the discrimination, as well as expected promotions throughout the period, i.e., step increases and grade increases. 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 Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for enforcement or clarification must be filed with the Compliance Officer at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.

⁴ The remedies of compensatory damages and attorney's fees are not available under the ADEA. See Donna W. v. Dep't of Transp., EEOC Appeal No. 0720160002 (Aug. 17, 2016); Falks v. Dep't of the Treasury, EEOC Request No. 05960250 (Sept. 5, 1996).

4. Within 90 calendar days from the date this decision is issued, the Agency shall provide eight hours of in-person EEO training to SO, with an emphasis on age discrimination and retention requirements of documentary evidence pertaining to the application process, including all interview notes. If SO has left the Agency's employ, the Agency shall furnish documentation of his departure date.
5. Within 60 calendar days from the date this decision is issued, the Agency shall consider taking disciplinary action against SO. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the 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 any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
6. The Agency shall post a notice in accordance with the Order set forth below entitled "Posting Order."

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 Lyons VA Medical Center 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 (T0610)


This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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

May 12, 2020
Date