



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

[REDACTED]
Harmony E.,¹
Complainant,

v.

Scott de la Vega,
Acting Secretary,
Department of the Interior
(National Park Service),
Agency.

Appeal No. 2020001323

Hearing No. 520-2018-0358

Agency No. DOI-NPS-17-0358

DECISION

On November 20, 2019, 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 20, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for employment as a Seasonal Visitor Use Assistant (SVUA), GS-5, at the Agency's Adams National Historical Park ("Park") in Quincy, Massachusetts.

On June 22, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and reprisal for prior protected EEO activity when:

1. On April 10, 2017, Complainant became aware that she had not been rehired as a SVUA at the Park; and

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.

2. On or around April 10, 2017, Complainant was denied a modified work schedule to care for her child.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's September 23, 2019, motion for a decision without a hearing and issued a decision by summary judgment on October 22, 2019. Specifically, the AJ found that Complainant failed to establish a prima facie case of either non-selection or the denial of a modified work schedule. With regard to the non-selection, the AJ found that the record showed that Complainant did not apply for the position at issue. With regard to the denial of a modified work schedule, the AJ found that since Complainant was not hired, she did not have a schedule to modify, and hence failed to show she was harmed by any Agency action.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination or retaliation as alleged. The instant appeal followed.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. 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. If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate.

Where, as here, Complainant does not have direct evidence of discrimination, a claim alleging disparate treatment is examined under the three-part test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this analysis, a complainant initially must 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. See St Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas 411 U.S. at

802. Next, in response, the agency must articulate a legitimate, nondiscriminatory reason for the challenged actions. See Burdine, 450 U.S. at 253-54; McDonnell Douglas, 411 U.S. at 802. Finally, it is complainant's burden to demonstrate by a preponderance of the evidence that the agency's action was based on prohibited considerations of discrimination, that is, its articulated reason for its action was not its true reason but a sham or pretext for discrimination. See Hicks, 509 U.S. at 511; Burdine, 450 U.S. at 252-53; McDonnell Douglas, 411 U.S. at 804.

In order to establish a prima facie case, a complainant may show that she is a member of a protected class, that she was subjected to adverse treatment, and that she was treated differently than otherwise similarly situated employees outside of the protected class. See Potter v. Goodwill Industries of Cleveland, 518 F.2d 864 (6th Cir. 1975). In the non-selection context, Complainant may establish a prima facie case by showing that she was a member of a protected class, (2) she applied for and was otherwise qualified for the position(s) at issue, (3) despite her qualifications, she was rejected, and (4) the Agency either selected someone from outside of her group or continued to seek applicants from persons with the same qualifications. McDonnell Douglas, at 802.

The AJ found that Complainant failed to establish a prima facie case of non-selection because she never applied for the position. The record shows that Complainant was a Seasonal Visitor Use Assistant working in a seasonal six-month temporary appointment. Complainant's previous appointment ran from April 2016 to the end of October 2016. Complainant does not deny that she did not re-apply for the position for the 2017 season beginning in April of that year, but maintains that two male colleagues (CW1 & CW2) similarly did not re-apply for the position yet both were rehired. Complainant points out that CW1's name does not appear on the Agency's Certificates of Eligibles for the 2017 season.

The Deputy Superintendent/Chief of Interpretation ("DSCI: female") averred that:

Returning seasonal employees are handled somewhat differently. Seasonal employees are only allowed to work 1039 hours [six months] in a year. Any SVUA who worked last year and did not use all of their 1039 hours would potentially be eligible for rehire without competition, although there is no guarantee that anyone will be rehired. As to the employees who worked for [the facility] as SVUAs in 2016, [Complainant's supervisor: male ("S1")] spoke with each of them during and at the end of the 2016 season and got a sense from them about who was interested in returning.

DSCI further averred that S1 told her around the end of the 2016 season three male SVUAs notified him that they planned on returning but that:

As to Complainant, [S1] advised [me] that [Complainant] was unsure whether or not she wanted to return. . . . Based on the information above, and based on the nature of the rest of the workforce, [another named supervisor: female ("S2")] and I decided that we could manage operations with three SVUAs for the 2017 season,

and we had three of last year's SVUAs interested in returning, and they could be hired without competition. We had HR send out forms to the three SVUAs who had worked for us last year and had indicated a desire to return to begin the rehire without competition process. We operated under the assumption that Complainant was not sure about returning, and we never considered her. Had she been interested in returning, she should have let us know that.

DSCI's testimony thus indicates that returning employees did not need to formally re-apply. We further note that CW2 averred that:

I made it clear at the conclusion of the season in 2016 that I wanted to return for the 2017 season. Once in February and once in March of 2017, I received emails to my personal email account from HR enclosing paperwork for me to fill out, and I responded to what I was sent. One email asked me to complete a statement of understanding, and one asked me to complete a form OF306, which is a declaration of federal employment. I responded to each email when I received them. Subsequently I heard from [S1] in March 2017 and he advised of me of my 2017 start date.

CW2's testimony similarly does not indicate that he was asked to formally re-apply. We therefore find that the matter of whether or not returning SVUAs needed to formally re-apply is in dispute. Furthermore, because the AJ concluded that Complainant's failure to apply for the position meant that she failed to establish a *prima facie* case, we find that the question of whether or not a formal application was in fact necessary is a material issue.

Assuming *arguendo* that not all returning applicants needed to formally re-apply and that those SVUAs who indicated at the end of the prior season their intention to return the following season were excused the need to submit a formal application, we note that Complainant maintains that she did notify S1 of her intention to return. S1, however, averred that Complainant was ambivalent about returning despite him telling her that he wanted to know if she wished to return. Furthermore, DCSI averred that she relied upon S1's representations to her that Complainant had not firmly committed to returning in her decision-making. Accordingly, the issue of whether or not Complainant timely notified S1 of her firm intentions to return is a material issue in dispute.

We note that the hearing process is intended to be an extension of the investigative process, designed to "ensure that the parties have a fair and reasonable opportunity to explain and supplement the record and to examine and cross-examine witnesses." See EEOC Management Directive (MD) 110, as revised, November 9, 1999, Chapter 6, page 6-1; see also 29 C.F.R. §§ 1614.109(c) and (d). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives complainant of a full and fair investigation of her claims." Mi S. Bang v. United States Postal Service, EEOC Appeal No. 01961575 (March 26, 1998). See also Peavley v. United States Postal Service, EEOC Request No. 05950628 (October 31, 1996); Chronister v. United States Postal Service, EEOC Request No. 05940578 (April 23, 1995).

Because of unresolved issues which require an assessment as to the credibility of the various management officials, we find that judgment as a matter of law for the Agency should not have been granted.

With regard to matter of the alleged denial of Complainant's modified work schedule, because the issue of whether or not Complainant can state a valid claim on that issue depends on whether or not she can establish her non-selection was discriminatory, we decline to address that issue in the present decision and it is remanded for consideration with the non-selection issue.

CONCLUSION

For the reasons stated above, the Agency's final action adopting the AJ's dismissal decision is VACATED and the matter is REMANDED to the Agency for further processing in accordance with the ORDER below.

ORDER

The Agency is directed to submit a renewed request for a hearing, as well as a copy of the complaint file and this appellate decision, to the EEOC Hearings Unit of the Boston Area Office within fifteen (15) calendar days of the date this decision becomes final. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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 (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC’s Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party’s request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit 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, a complainant’s request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency’s request for reconsideration must be submitted in digital format via the EEOC’s Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files 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).

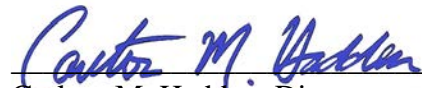
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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 9, 2021

Date