



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

[REDACTED]  
Shantay H.,<sup>1</sup>  
Complainant,

v.

Louis DeJoy,  
Postmaster General,  
United States Postal Service  
(Pacific Area),  
Agency.

Appeal No. 2019004237

Hearing No. 550-2015-00231X

Agency No. 4F-956-0133-14

**DECISION**

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 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., 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 VACATES the Agency's final order.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant served as a temporary "204b" Supervisor at the Agency's Paradise Post Office in California from January 2014 through April 2014, and August 2014 through September 2014. The Paradise Postmaster (PP) served as Complainant's manager while Complainant temporarily worked at the Paradise Post Office.

In March 2014, the PP authorized the posting of a vacancy for a Customer Service Supervisor position at the Paradise Post Office (Vacancy 1). Report of Investigation (ROI), at 105-106.

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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.

A selection panel ranked Complainant second for the position behind a female candidate who was ranked first. Agency's Responses to Complainant's Written Discovery, at 10. Nevertheless, the PP, who served as the selecting official, made the decision to select the third ranked candidate (male, 46) over Complainant and the first ranked candidate. Id. The PP made the decision to select the third ranked candidate even though he had not previously worked at the Paradise Post office as Complainant had. Complainant maintained that she was surprised by her non-selection to Vacancy 1 because the PP sought input from two employees, both union representatives, seeking advice on who would be the best fit for Vacancy 1. ROI, at 105-106. According to Complainant, both commented to the PP that Complainant would be the best fit for the position. Id.

In May 2014, the PP authorized a second vacancy announcement for a Customer Service Supervisor position at the Paradise Post Office (Vacancy 2), which the PP apparently canceled. Id. at 175. Complainant contended that she did not apply for the position at the time because she was unaware of the vacancy announcement. She also maintained that no male candidates applied for the position.

In August 2014, while Complainant was serving a detail to the Paradise Post Office as a 204b Supervisor, the PP authorized another vacancy announcement (No. 79066847) for a Customer Service Supervisor position at the Paradise Post Office (Vacancy 3). Id. at 106-107. Complainant applied for the position along with a male candidate (age 37) who ranked fifth during the selection process in Vacancy 1. According to the PP, rather than go through the competitive selection process for Vacancy 3, she granted the male candidate's request to laterally transfer into the position. Id. at 168. The PP specifically stated that the male candidate sent her an email requesting the lateral transfer, but she deleted his email. Id. at 293.

After Complainant became aware of her non-selection, she asked the PP why she kept being overlooked for the position and asked how she could improve her performance. According to Complainant, the PP then told her that the reason for her non-selection was due to her "longevity" because she was eligible for retirement. Id. at 107. The PP admitted telling Complainant that she was not selected due to her longevity but averred that her reason for making the longevity comment was because Complainant had told her that she wished to be a Postmaster and would not hold the Customer Service Supervisor position for a long period of time. Id. at 175. The PP therefore denied telling Complainant that she was not selected because she was eligible for retirement. Id. The PP maintained that she believed the male candidate was a good fit for the office because he had some experience running a delivery unit. Id. at 176.

On September 17, 2014, Complainant contacted an EEO Counselor and filed a formal EEO complaint on December 17, 2014, alleging that the Agency discriminated against her on the bases of sex (female) and age (61) when on or about September 12, 2014, she was notified that she had not been selected for the Supervisor, Customer Services position at the Paradise Post Office.<sup>2</sup>

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<sup>2</sup> Complainant withdrew her claim alleging that she was denied overtime.

Following 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 requested a hearing. The AJ assigned to the case determined *sua sponte* that the complaint did not warrant a hearing and, over Complainant's objections, issued a decision without a hearing in the Agency's favor.

The AJ specifically found that the Agency articulated a nondiscriminatory explanation for choosing to fill Vacancy 3 through a lateral transfer rather than going through the competitive selection process. The AJ noted that Complainant acknowledged that it was her intention to only hold a supervisory position at the Paradise Post Office temporarily, and it was her ultimate goal to attain a Postmaster position elsewhere in another office closer to home. The AJ noted that, even assuming that the PP's remark concerning Complainant's longevity did establish a prima facie case of age of discrimination, the evidence in the record did not establish that the Agency's reasons for her non-selection were pretextual. The AJ determined that the PP was well within her supervisory authority in choosing to select the male candidate, who was a qualified highly recommended lateral candidate, for Vacancy 3.

#### CONTENTIONS ON APPEAL

##### *Complainant's Brief on Appeal*

On appeal, Complainant, through her attorney, contends that her qualifications were "plainly superior" to those of the male candidate for Vacancy 3, and therefore she demonstrated that the Agency's reasons for her non-selection were pretextual. Complainant specifically states that she was in the middle of completing her second 204b tour at the Paradise Post Office, and therefore she had familiarity with the staff, the postal routes, and other unique qualities of the Paradise office that the male candidate did not possess, having never worked at the office prior to his selection. Complainant also maintains that she ranked second while the male candidate ranked fifth for Vacancy 1 just five months earlier. Complainant states that the male candidate had only been promoted into his supervisory position just 11 months prior to his selection for Vacancy 3. Complainant states that, in comparison, she had over four years of supervisory experience with five different post offices.

Complainant additionally maintains that, pursuant to Agency Handbook EL 312, a selection official cannot accept a lateral transfer to a supervisory position of EAS-17 or higher if the individual simultaneously submitted an application through the competitive process for selection. Complainant contends, moreover, that the PP alleged she deleted the male candidate's transfer request despite the existence of the Agency's retention policy, requiring that selection files be maintained for two years. Complainant asserts that the PP's statement that she accepted the male candidate's lateral request is not credible given that the Agency has not produced the request for the transfer. Complainant believes that the PP fabricated the male candidate's lateral transfer request as a pretext to support the male candidate's selection over her.

Complainant asserts, moreover, that the PP mentioned to her that she was not selected due to her longevity, which the PP said referred to her retirement eligibility. Complainant asserts that the Postmaster's concern that she intended to quickly depart the Paradise post office is simply not supported by the record.

#### *Agency's Response*

In response, the Agency argues that Complainant has failed to establish that the Agency's reasons for her non-selection were pretextual. The Agency contends that, even assuming the PP referred to Complainant's retirement eligibility, such a statement would not be direct evidence of age discrimination. The Agency maintains, moreover, that even if Complainant could show that the Agency's selection procedures were not properly followed, such evidence would be insufficient to show that the Agency's reasons were pretextual. The Agency also maintains that Complainant did not establish that her qualifications were plainly superior to those of the male candidate. The Agency specifically states that Complainant had only served temporary stints as an acting supervisor, while the male candidate served as a full-time supervisor for a year. The Agency maintains that the PP properly relied on subjective criteria in accepting the male candidate's transfer request, including the PP's assessment that the male candidate was a good fit for the office.

#### 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.E.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.E.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). We are free to accept (if accurate) or reject (if erroneous) the AJ's, and 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 Chap. 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").

#### ANALYSIS AND FINDINGS

##### *Summary Judgment*

We must determine whether it was appropriate for the AJ to have issued a summary judgment decision on this record. 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.

In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment “where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition.” Anderson, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an AJ could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

After a careful review of the record, we find that the AJ's issuance of a decision without a hearing was not appropriate, as the record is not sufficiently developed, there are genuine issues of material fact, and the credibility of witnesses is at issue, as explained below.

### *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 she 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. Co. 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 Center v. Hicks, 509 U.S. 502 (1993).

Complainant may establish a prima facie case of discrimination in the non-selection context by showing that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she was not selected for the position; and (4) she was accorded treatment different from that given to persons otherwise similarly situated who are not members of her protected group, or in the case of age, who are considerably younger than she. Complainant v. Dep't of Justice, EEOC Appeal No. 01A04389 (May 16, 2002); Complainant v. Dep't of Educ., EEOC Request No. 05970561 (Aug. 6, 1998). Complainant may also set forth evidence of acts from which, if otherwise unexplained, an inference of discrimination can be drawn. Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978).

Here, the record reflects that the PP selected a male candidate who was significantly younger than Complainant at 37 years of age. There is no dispute that Complainant was qualified for the position, and we find that Complainant clearly has met prongs 1-4, as noted above. As such, we find that Complainant has established the relatively light burden of a prima facie case of discrimination based on her age and sex. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 01A31036 (Mar. 18, 2004) (complainant established a prima facie case on the bases of race, age, and sex by demonstrating that a similarly situated person not of his race, age, and sex was treated more favorably than he when that person was selected for the position); Complainant v. U.S. Postal Serv., EEOC Appeal No. 07A30024 (Feb. 25, 2004) (complainant established a prima facie case based on sex simply by showing that male individuals were selected over her).

We further find that there are genuine issues of material facts in dispute as to whether Complainant established that the Agency's legitimate, nondiscriminatory reasons for her non-selection were pretext for discrimination based on sex and age. In so finding, we note that the PP attested that the male candidate was chosen because a decision was made to accept his lateral transfer for Vacancy 3. However, the record does not contain the male candidate's written transfer request and the male candidate was not asked to provide an affidavit for the record concerning whether he actually made the transfer request. The PP asserted that she was unable to produce the male candidate's transfer request because it was in the form of an email that she deleted. However, it is Complainant's belief herein that the PP fabricated the male candidate's lateral transfer request as a pretext to support the male candidate's selection over her, especially given that she was previously ranked second for the position while the male candidate was ranked fifth. We also note that no other management official herein has corroborated the PP's assertion that the male candidate had in fact requested a lateral transfer.

In addition, the PP does not dispute that she told Complainant that the reason she was not selected was due to her longevity.

We note that Complainant attested that the PP said to her that her longevity comment meant that the reason she was not selected was because she was eligible for retirement. The PP however averred that she never mentioned Complainant's retirement. The PP instead claims that she did not select Complainant because Complainant acknowledged that it was her intention to only hold a supervisory position in the Paradise Post Office temporarily, and it was her ultimate goal to attain a Postmaster position elsewhere in another office closer to home.

The AJ has clearly credited the PP over Complainant in finding that the male candidate had requested a lateral transfer and that the PP never mentioned Complainant's retirement eligibility as the reason for her non-selection. As such, we find that the AJ impermissibly relied on credibility determinations in making her summary judgment finding.

We also note that the Commission has found that not selecting an individual because he/she is eligible for retirement can be evidence of discriminatory animus based on age. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120121771 (July 11, 2012), req. for recon. denied, EEOC Request No. 0520120563 (Jan. 25, 2013) (finding that complainant had produced direct evidence of age discrimination when it was shown that his former supervisor was told that complainant would not be considered for the position because he was "too old," and the manager "was seeking someone who would hang around a long time"); Complainant v. U.S. Postal Serv., EEOC Appeal No. 0720140039 (June 3, 2016) (finding age discrimination when complainant established that her qualifications were plainly superior to the selectee's after complainant was questioned during an interview regarding her years of eligibility and retirement).

In addition, the Agency does not dispute that a younger male employee was selected over Complainant for Vacancy 1 by the PP just months earlier. According to the Agency, Complainant ranked second for the position while the male selectee ranked third. Also, Complainant was apparently working as a Supervisor at the Paradise Post Office at the time of her non-selection, and therefore we find there are genuine issues of material fact concerning whether Complainant's qualifications were plainly superior to those of the male candidate (who ranked fifth for Vacancy 1) who was chosen for Vacancy 3.

We further conclude that the investigative record is not complete, which should have precluded a decision by summary judgment. The record, as noted above, does not contain the affidavit of the male candidate of Vacancy 3 regarding his alleged lateral transfer email request. Testimony at a hearing would rectify this omission. Additionally, although the District Manager reportedly served as the concurring official, the District Manager attested that she was unaware of the selection of the male candidate for Vacancy 3. Thus, there are these additional material credibility determinations that require a hearing.

We note that the courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrenner, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that, when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." Complainant v. Dep't of Justice, EEOC Request No. 05940339 (Feb. 24, 1995).

“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.” Complainant v. U.S. Postal Serv., EEOC Appeal No. 01961575 (Mar. 26, 1998). See also Complainant v. U.S. Postal Serv., EEOC Request No. 05950628 (Oct. 31, 1996); Complainant v. U.S. Postal Serv., EEOC Request No. 05940578 (Apr. 25, 1995). 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, in appropriate instances, to examine and cross-examine witnesses.” See EEO MD-110, at Ch. 7; see 29C.F.R. § 1614.109(e).

In summary, there are simply too many unresolved issues which require further development of the record and an assessment as to the credibility of the various management officials, other witnesses, and Complainant herself. Therefore, judgment as a matter of law for the Agency should not have been granted.

### CONCLUSION

We VACATE the Agency's final order and REMAND the complaint to the Agency for further processing, in accordance with this decision and the ORDER herein.

### ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC San Francisco District Office Hearings Unit within thirty (30) days of the date this decision is issued. The Agency shall provide written notification to the Compliance Officer at the address set forth herein 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 (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).

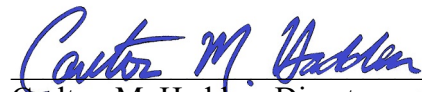
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

June 17, 2021  
Date