



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

[REDACTED]
Kathlyn K.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Immigration and Customs Enforcement),
Agency.

Appeal No. 2020002630

Hearing No. 4570-2017-00761X

Agency No. HS-ICE-26170-2016

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 January 31, 2020, final decision 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 MODIFIES the Agency's final decision.

ISSUES PRESENTED

The issues are whether the Agency should be sanctioned for its conduct related to the EEO investigations and final decision; and whether Complainant established that the Agency discriminated against her based on her age, national origin, or sex.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Special Agent (GS-1811-14) at the Agency's Homeland Security Investigations (HSI) in Tucson, Arizona.

The Assistant Director (AD) for Mission Support stated that employees apply to an annual category rating announcement to be considered for a promotion to a GS-1811-15 supervisory position. AD stated that the Office of Human Capital conducts an initial review to determine eligibility and refers the resumes to rating panels, who rate the candidates as Best Qualified, Well Qualified, or Qualified. AD stated that each rating panel is comprised of three senior management officials, and that they are trained annually and required to sign a nondisclosure agreement regarding the evaluation criteria/benchmarks and all training materials. AD added that the panelists also identify any applicants who they supervise, previously supervised, or know to avoid any conflicts of interest. Report of Investigation (ROI) at 67.

AD stated that applicants with Well Qualified or Qualified ratings can reapply in an effort to raise their ratings, but if an applicant subsequently receives a lower rating, the higher rating remains the official rating. AD stated that candidates with Best Qualified ratings are then eligible to apply for any position, and those with Well Qualified ratings are only referred for consideration if an announcement produces less than three Best Qualified applicants. Id.

On September 22, 2014, the Agency opened the Supervisory GS-1811-15 Annual Category Rating Opportunity under job announcement number DAL-INV-1203911-CAT-MP-PJB. ROI at 108-17. Complainant stated that she submitted her resume in September or October 2014, and on November 18, 2014, she received a Best Qualified rating. ROI at 55.

On November 19, 2014, the Acting Assistant Director (AAD) sent a global email regarding the Notice of Results (NORs) for the Category Rating Announcement. AAD stated that a technical error resulted in all the candidates receiving NORs of Best Qualified or multiple NORs with different ratings. AAD stated that these NORs were invalid and that they would issue correct NORs soon. ROI at 152. Complainant stated that on December 4, 2014, she received a Qualified rating, and on December 10, 2014, she received a Well Qualified rating. ROI at 55.

On September 28, 2015, the Agency opened the Supervisory GS-1811-15 Annual Category Rating Opportunity, under job announcement number DAL-1496837-CAT-MP-PJB-15. ROI at 118-26. Complainant stated that she submitted her resume on April 6, 2016, and that she was not rated Best Qualified. ROI at 56.

On March 1, 2016, the Deputy Director (DD) sent a global email announcing the cancellation of the current Supervisory Merit Promotion Process. DD stated that in the fall of 2014, the Agency learned that some applicants received the evaluation materials, which were not available to the entire applicant pool. DD stated that they determined that candidates could not have received a Best Qualified rating without the relevant experience, so those selected or determined to be Best

Qualified would retain their status. However, DD stated that effective immediately, GS-1811-15 promotional opportunities would no longer require a category rating determination. ROI at 151.

On April 13, 2016, Complainant initiated EEO counseling and on July 26, 2016, she filed an EEO complaint alleging that the Agency discriminated against her on the bases of national origin (Asian), sex (female), and age (49) when on March 1, 2016, she became aware that, as a result of the Agency cancelling the Supervisory GS-1811 Merit Promotion Process, the following occurred:

1. on November 18, 2014, Complainant received an official NOR from the 2014 Supervisory GS-1811 Annual Category Rating Opportunity, advertised under vacancy announcement number DAL-INV-1203911-CAT-MP-PJB, notifying her that the panel had rated her application Best Qualified. However, on December 4, 2014, she received an official NOR – Final Notice, that her rating had been reduced to Qualified. Finally, on December 10, 2014, Complainant received notice that the Agency's records indicated she previously had received a rating of Well Qualified, and that she would be allowed to maintain this higher rating when applying to future GS-1811 Supervisory Criminal Investigator job opportunity announcements; and
2. on October 9, 2015, Complainant was notified that her rating for the 2015 Annual Supervisory GS-1811 Category Rating Opportunity, advertised under vacancy announcement number DALINV-1496837-MPPJB-15, was not determined to be Best Qualified. The rating decision made her ineligible to compete for future covered vacancy announcements.

The Agency accepted the above claims for investigation, but it dismissed the claim alleging discrimination based on age, national origin, and sex when on March 1, 2016, Complainant became aware of discrimination when on April 8, 2014, Complainant received an official NOR for vacancy announcement number DAL-INV-1072616-MP-TRV, which rated her eligible for positions as a Supervisory Criminal Investigator. The Agency determined that Complainant failed to state a claim because she did not specify any action that resulted from her eligibility rating or that she suffered any loss or harm. ROI at 43-4.

The Agency also dismissed Complainant's claims alleging retaliation when on July 7, 2016, during the Alternative Dispute Resolution process, management revealed that it never intended to offer a single dollar, or provide any other resolution to Complainant, and caused a waste of money and time in setting up a mediation; and on July 7, 2016, an EEO Counselor attempted to schedule a close out interview with Complainant, while mediations were pending, in an attempt to intimidate Complainant. The EEO Counselor refused to address Complainant's attorney's inquiry to provide reasons for the action and manipulated the EEO process simply to further dispirit and retaliate against Complainant. The Agency found that Complainant alleged dissatisfaction with the EEO process, which failed to state a claim. ROI at 45.

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. On October 23, 2017, Complainant filed an amended motion for sanctions for the Agency's failure to cooperate with the EEO Investigator when it did not produce all the requested documents, such as comparative data. On or about October 26, 2017, the Agency provided a supplemental ROI, which included the workforce profile of the relevant comparators.

On June 28, 2018, an AJ (AJ1) issued a Case Management Order and identified the claim as whether the Agency discriminated against Complainants on the basis of sex and/or age, and/or national origin, and/or color, and/or race, in issuance of their respective 2014 Category Ratings, advertised under announcement number DAL-INV-1203911-CAT-MP-PJB.² AJ1 affirmed the Agency's procedural dismissals and denied Complainants' sanctions motions.

AJ1 also ordered the Agency to produce:

1. A table of all candidates in the 2014 Category Rating process by name; sex; national origin; race; age; initial (incorrect) rating; corrected rating; whether or not the individual received evaluation criteria in advance; any change in those individuals' ratings subsequent to the determination that they unfairly received evaluation criteria in advance; the individuals' 2015 Category Rating (if applicable); whether the individual was thereafter promoted based on their 2014 or 2015 Category Rating, and, if so, to what position.
2. Copy of evaluation criteria that was released to certain applicants in 2014.
3. Internal policies/procedures regarding the selection of panel members tasked with evaluating Category Rating candidates and [identity] of anyone else involved in the ratings process and their respective role(s).

On July 30, 2018, the Agency timely submitted its Supplemental Discovery Production. The Agency stated that, of the 275 applicants of the 2014 Category Rating, seven were identified as having received the evaluation materials in advance.³ The Agency provided the demographic information for five of the seven applicants, and it noted that it did not have the information for the remaining two applicants because they were no longer Agency employees.

² The AJ consolidated the complaints of six complainants and included a separate unrelated claim for another complainant. The five other complainants' appeals are addressed in EEOC Appeal Numbers 2020002744, 2020002745, 2020003445, 2020003444, and 2020003291.

³ AJ1 informed the Agency that she did not expect the Agency to contact applicants to ask if they received the evaluation materials in advance, but to only identify those applicants it knew, or reasonably knew, to have received the advance materials.

On October 18, 2018, Complainant withdrew her hearing request, and a second AJ (AJ2) remanded the complaint and ordered the Agency to issue a final decision within 60 days.

On April 3, 2019, the Agency ordered a consolidated supplemental investigation to obtain additional testimony and documents. The Agency noted that the complainants collectively identified 48 individuals, who allegedly received more favorable treatment in the Annual Category Rating Process because of their races, colors, national origins, sexes, or ages. The Agency ordered that the supplemental investigation contain:

1. For each applicant who was actually selected for a supervisory GS-1811-15 vacancy pursuant to a Category Rating resulting from the JAN DAL-INV-1203911-CAT-MP-PJB Category Rating Opportunity: (a) Race; (b) Color; (c) National origin; (d) Sex; (e) Year of birth; (f) Category Rating; and (g) Application questionnaire and resume (if not already provided to the EEO Investigator).
2. For each applicant who was actually selected for a supervisory GS-1811-15 vacancy pursuant to the Category Rating resulting from the JAN DAL-1496837-CAT-MP-PJB-15 Category Rating Opportunity: (a) Race; (b) Color; (c) National origin; (d) Sex; (e) Year of birth; (f) Category Rating; and (g) Application questionnaire and resume (if not already provided to the Investigator).
3. The application package (questionnaire responses and resume), Category Rating Opportunity Job Announcement Number(s) applied for, application outcome (Category Rating and whether it resulted in a selection for an actual supervisory GS-1811-15 vacancy), and protected class status of each of the complainants' 37 comparators for whom such information and materials had not yet been provided.

The Agency's deadline to complete the supplemental investigation was July 2, 2019; however, it did not transmit the supplemental ROI to Complainant until December 5, 2019.

On January 31, 2020, the Agency issued the final decision. As an initial matter, the Agency affirmed the earlier procedural dismissals. The Agency found that management provided a legitimate, nondiscriminatory reason when applicants received erroneous Best Qualified ratings due to a technical error, and that Complainant was rated Qualified by a rating panel. The Agency also found that applicants did not receive a 2015 rating because the rating panels did not meet, and that the announcement was canceled in March 2016. The Agency then found that Complainant did not show that the reasons were pretexts for discrimination.

The Agency found that, while Complainant alleged that she was discriminated against because the rating system was compromised and that panelists "want[ed] to help their peers and closest subordinates advance," the process was designed to avoid conflicts of interest, and that the panelists did not review those they had supervised or had a personal relationship with. Complainant identified ten applicants who were allegedly treated more favorably; however, the Agency found that none were promoted after the 2014 Annual Category Rating.

The Agency also determined that Complainant did not establish that she had plainly superior qualifications. The Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

Complainant filed the instant appeal and submitted a brief and documents in support of her appeal. The Agency opposed Complainant's appeal.

CONTENTIONS ON APPEAL

Complainant's Contentions

Through her attorney, Complainant requests that the Commission sanction the Agency with a default judgment because it issued a deficient initial ROI; issued a deficient and untimely supplemental ROI; and issued a final decision over one and a half years late. Complainant notes that she filed additional motions for sanctions with AJ2 for the Agency's failure to comply with his October 18, 2018, dismissal order, and that AJ2 never ruled on the motions.

Complainant asserts that Irvin M. v. Dep't of Homeland Sec., EEOC Appeal No. 0120170498 (Apr. 25, 2019) should be a "strong precedent" for her case because the Commission issued a default judgment when the agency issued a final decision more than two months late. Complainant asserts that the Agency refused to provide documentation, and that it did not respond to the core questions regarding the individuals who were advantaged, such as their ages and national origins, and that the record was still deficient because the Agency did not provide the most critical information regarding who benefited from the "tainted" ratings. Complainant argues that the proper sanction is a default judgment.

Agency's Contentions

The Agency notes that Complainant requested that the Commission impose a sanction due to procedural issues, but she did not argue the substance of the decision. The Agency asserts that Complainant failed to show that the Agency did not develop the evidentiary record in violation of an EEOC order; that sanctions are warranted due to the timing of the Agency's issuance of its final decision; or that she was prejudiced by the Agency's actions.

The Agency states that AJ1 did not err in deciding not to sanction the Agency for failure to develop the evidentiary record because it timely provided its Supplemental Discovery Production containing the documents identified in AJ1's order, and that Complainant did not challenge the sufficiency of these records, nor allege that the Agency had failed to comply with the order. The Agency notes that, rather than timely file another motion with AJ1 to cure any alleged deficiencies, Complainant chose to withdraw her hearing request. The Agency also states that Complainant filed additional motions for sanctions with AJ2; however, AJ2 did not err in not issuing sanctions because the Agency did not violate an EEOC order, and AJ2 no longer had jurisdiction over Complainant's complaint, after he remanded the complaint back to the Agency pursuant to Complainant's request.

The Agency states that the delay in issuing the final decision was caused by the need to reopen the investigation to determine if there was any additional evidence that was missing that would have had an impact on the outcome of Complainant's case, and that extending the timeline only served to benefit Complainant by ensuring that the record was thoroughly developed so that the Agency could arrive at a more informed decision. The Agency asserts that, since Complainant was not prejudiced by the Agency's delay, a default judgment is not an appropriate sanction. The Agency argues that Irvin M., supra, is distinguishable from this case because the Commission determined that the severe sanction of a default judgment was warranted because the agency "provided no explanation for its delay." The Agency states that, if the Commission decides to sanction the Agency for its untimely issuance of the final decision, it should narrowly tailor the sanction and not issue the broad and severe sanction of default judgment.

The Agency also argues that Complainant's complaint should be dismissed as untimely. The Agency states that, while Complainant claimed that she first learned of the alleged discrimination on March 1, 2016, when DD sent an email invalidating the ratings process, the Agency sent Complainant an email on December 4, 2014, notifying her of the technological error that resulted in her receiving the Best Qualified email, and informed her of her true rating. The Agency asserts that since there is indisputable evidence that Complainant was first informed of the action giving rise to her discrimination claims on December 4, 2014, her initial contact with an EEO counselor on April 13, 2016, was almost two years untimely. The Agency argues that sanctions are not warranted and requests that the Agency affirm its final decision.

STANDARD OF REVIEW

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 (EEO MD-110), at Chap. 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").

ANALYSIS AND FINDINGS

Claims

As an initial matter, we note that the Commission has the discretion to review only those issues specifically raised in an appeal. See EEO MD-110 at Chap. 9, § IV.A.3. On appeal, Complainant did not contest any of the Agency's procedural dismissals; as such, we will not address them in the instant decision.

We also note that the Agency requests that the Commission dismiss Complainant's claims as untimely. EEOC regulation requires that complaints of discrimination should be brought to the attention of the EEO counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action. 29 C.F.R. § 1614.105(a)(1). The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the forty-five (45) day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

In Complainant's formal EEO complaint, she stated that the "genesis" of the complaint was DD's March 1, 2016 email, and she alleged that certain individuals had an unfair advantage in the application process, while Complainant's rating was "reduced" to promote those individuals who were supplied the materials to guarantee that they would be rated as Best Qualified.⁴ ROI at 3. We find that Complainant's claim is more properly framed as an allegation that she was discriminated against based on her age, national origin, and sex, when on March 1, 2016, Complainant learned that others were given an "unfair advantage" in the 2014 Category Rating Opportunity because they were provided the evaluation materials in advance. Complainant then initiated EEO counseling 43 days later, on April 13, 2016. As such, we find that Complainant timely contacted the EEO Counselor, and we decline to dismiss Complainant's claim as untimely.

Sanctions

Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC Appeal No. 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Several factors are considered in "tailoring" a sanction and determining if a particular sanction is warranted: 1) the extent and nature of the non-compliance, and the justification presented by the non-complying party; 2) the prejudicial effect of the non-compliance on the opposing party; 3) the consequences resulting from the delay in justice; and 4) the effect on the integrity of the EEO process. Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (Mar. 1, 2007).

⁴ We note that Complainant's 2014 rating was never "reduced" because she was not rated as Best Qualified, and she was erroneously notified of a Best Qualified rating due to a technical error. The record contains the panelists' notes showing that they gave Complainant a Qualified rating on November 6, 2014. ROI at 144.

As an initial matter, we find that neither AJ erred when they did not grant Complainant's motions for sanctions. We note that under 29 C.F.R. § 1614.109, AJs are granted broad discretion in the conduct of administrative hearings, including the authority to sanction a party for failure, without good cause shown, to fully comply with an order. See Malley v. Dep't of the Navy, EEOC Appeal No. 01951503 (May 22, 1997). We find that Complainant did not show that AJ1 abused her discretion when she decided not to sanction the Agency and instead, ordered it to supplement the record. We also find that AJ2 did not err because he lacked jurisdiction over Complainant's complaint after he dismissed her hearing request, per her request, and returned jurisdiction to the Agency.

An agency is required to conduct an impartial and appropriate investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the time period. 29 C.F.R. § 1614.106(e)(2). While Complainant argued that the record was deficient because the Agency did not respond to the core questions regarding the individuals who were advantaged, such as their ages and national origins, and that the record was still deficient because the Agency did not provide the most critical information regarding who benefited from the "tainted" ratings, we find that this information is contained in the record. However, we find that the Agency did not meet its obligation to complete an appropriate investigation within 180 days, as shown by its two supplemental investigations and AJ1's order to provide additional evidence.

In addition, EEOC regulations provide that an agency shall issue the final decision within 60 days of receiving notification that a complainant has requested an immediate decision or within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision. 29 C.F.R. § 1614.110(b). Here, the final decision was issued on January 31, 2020, which was 470 days after AJ2's dismissal order and 410 days late. The Agency stated that the delay in issuing the final decision was caused by the need to reopen the investigation. While Complainant argued that Irvin M., should be a "strong precedent," we find that it differs because the agency did not provide any explanation for its delay in issuing a final decision, while here, the Agency provided an explanation.

On appeal, Complainant requested that the Commission sanction the Agency with a default judgment for issuing a deficient initial ROI; a deficient and untimely supplemental ROI; and a final decision over one and a half years late. In this case, we find that the Agency did not act in a manner to warrant a default judgment. See e.g., Beatrice B. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019001641 (Sept. 17, 2020) (the Commission declined to issue a sanction where following a supplemental investigation, the agency delayed in issuing a final decision for over eight months); Denisse Y. v. Dep't of Homeland Sec., EEOC Appeal No. 0120171448 (Apr. 30, 2019) (the Commission declined to grant the complainant's request for a default judgment and sanctioned the agency with a posting notice and training for EEO personnel for its delays in issuing the report of investigation and final decision).

Based on the specific circumstances of this case, we find the most appropriate sanction to address the Agency's conduct is to order the Agency to:

(1) analyze its performance in conducting timely and adequate EEO investigations and issuing timely final decisions in accordance with the Commission's regulations during this Fiscal Year and the previous two fiscal years, and to report its findings to the EEOC. In the event the Agency finds it is not in compliance with the Commission's regulations on EEO investigations and final decisions, the Agency is directed to propose to the EEOC a corrective plan of action; and

(2) provide training to its EEO personnel who failed to comply with our regulations.

Our decision to sanction the Agency in this matter will effectively emphasize to the Agency the need to comply with Commission regulations and orders in a timely manner.

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. Tex. Dep't of Cmty. 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 Serv. v. Aikens, 460 U.S. 711, 715-716 (1983).

Complainant may establish a prima facie case of discrimination by providing evidence that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) either that similarly situated individuals outside her protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted). We find that Complainant belongs to protected classes based on her age, national origin, and sex, but that she did not suffer an adverse employment action for claim 2. AD stated that the Agency canceled the ratings process, and that no one used a rating from announcement DAL-1496837-CAT-MP-PJB-15 for a subsequent position. Supplemental ROI at 20.

Assuming, arguendo, that Complainant established a prima facie case of discrimination based on her age, national origin, and sex, we find that the Agency proffered a legitimate, nondiscriminatory reason for claim 1. The record shows that the Agency's Office of Professional Responsibility conducted an investigation when a management official suspected an applicant of plagiarism of a "controlled benchmark document." The investigation revealed that a former Special Agent in Charge (SAC) of the HSI in El Paso, Texas, made an unauthorized distribution of the evaluation materials when he asked his then Secretary to email them to all the HSI El Paso GS-14 supervisors. SAC stated that his intention was to help employees, and the Secretary confirmed that he emailed the materials on March 31, 2014, pursuant to SAC's instructions to assist the employees seeking advancement. The email was sent to approximately thirty recipients. In addition, the supervisors were invited to a "familiarization" session on March 31, 2014, presented by SAC, to discuss the application process for a GS-15 Assistant Special Agent in Charge position.

In its response to AJ1's order to supplement the record, the Agency identified seven El Paso supervisors who received the advance evaluation materials and applied to the 2014 Category Rating Opportunity. Two applicants received Best Qualified ratings; four applicants received Well Qualified ratings; and one applicant received a Qualified rating. Of the five applicants who were still employed with the Agency, the record shows that they were all male; four were White and one was Hispanic; and their ages ranged from 43 to 52 years old. Agency's Supplemental Discovery Production, Tab A.

We find that Complainant has not shown that the proffered reasons were pretext for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opore-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008). Here, the record shows that one manager in the agency's El Paso office took it upon himself to assist the supervisors in his particular office by providing them the evaluation materials in advance. This affected everyone equally if you did not work in the El Paso office, and there is nothing to indicate this action was done for a discriminatory animus, but rather a misguided attempt to assist his employees obtain promotion. The Agency rightly found the process tainted and canceled the selection process.

We find that Complainant did not receive the advance materials because she was not a supervisor in the El Paso office. In addition, there is no evidence that any of the HSI El Paso GS-14 supervisors were excluded from receiving the evaluation materials. We also find that the record does not contain evidence of any other advance disclosure of the evaluation materials, aside from the El Paso disclosure. Complainant did not provide any evidence to show pretext for discrimination. Accordingly, we find that Complainant did not establish that the Agency discriminated against her based on her age, national origin, or sex.

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 decision finding that Complainant did not establish that the Agency discriminated against her based on her age, national origin, or sex. The Agency's final decision, however, is MODIFIED in accordance with this decision and the ORDER below.

ORDER

Within 60 days of the date this decision is issued, the Agency shall:

1. issue a written report to Director, Federal Sector Programs (FSP), Office of Federal Operations (OFO) that includes:
 - a. An analysis into the Agency's performance in conducting timely and adequate investigations and issuing timely final decisions on EEO complaints during Fiscal Years 2019, 2020, and 2021.
 - b. A detailed action plan setting forth how the problems identified in its analysis, if any, will be corrected; any delays ended; and the processing of EEO complaints will be brought in accordance with EEOC regulations. The Agency shall collaborate with contractors who process their EEO complaints when developing the action plan, and such plan will include specific and reasonable timeframes within which to meet such goals. The Agency shall provide quarterly progress reports to FSP on the achievements of its action plan throughout Fiscal Year 2022 and shall include a report of its progress in its next MD-715 report.
2. provide at least two (2) hours of in-person or interactive training to EEO personnel in the Department of Homeland Security's Office of Civil Rights and Civil Liberties and the U.S. Immigration and Customs Enforcement's Office of Diversity and Civil Rights involved in processing complaints regarding their case processing responsibilities, with special emphasis on the importance of abiding by regulatory mandates and time limits.⁵

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

⁵ The record indicates that the U.S. Immigration and Customs Enforcement's Office of Diversity and Civil Rights conducted the investigations, while the Department of Homeland Security's Office of Civil Rights and Civil Liberties issued the final decision.

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 (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

August 9, 2021

Date