



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

[REDACTED]
Pamela W.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Federal Emergency Management Agency),
Agency.

Appeal No. 2022003075

Hearing No. 550-2021-00038X

Agency No. HS-FEMA-00864-2020

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 April 13, 2022 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Program Analyst/Senior Resource Specialist, GS-12, at the Agency's Consolidated Resource Center, West Office in Sacramento, California.

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.

On or about January 28, 2020, Complainant contacted an EEO Counselor and filed a formal EEO complaint on March 10, 2020, alleging that the Agency subjected her to discrimination and harassment on the bases of race (African American), color (Brown), disability, and age (60) when:

1. In and around January 2019 through December 2019, management denied Complainant detail assignments and other opportunities for training and advancement.
2. On February 25, 2019, the Director publicly informed Complainant that she was not selected for the Executive Officer (IC-13) position.
3. In October 2019, the Director denied Complainant's request for the second Friday of the pay period as her compressed workday.
4. On November 19, 2019, the Director yelled at Complainant.
5. On November 25, 2019, several of Complainant's tasks were reassigned to the Executive Officer, and Complainant was expected to train her on the reassigned tasks.
6. In December 2019, the Executive Officer took Complainant's scanner and went through her files without permission.
7. In or around January 2020, a Deputy Director informed Complainant that she had not been selected for the Senior Quality Assurance Specialist (IC-13) position.
8. On January 15, 2020, the Director issued Complainant a lower fiscal year 2019 annual performance appraisal, and he made changes to the appraisal after it was issued to Complainant.
9. In or around January and February 2020, the Director denied Complainant's request to extend her detail.
10. On July 21, 2019, Complainant was forced to onboard new staff alone and without assistance.
11. In or around the fourth quarter of 2019, the Director failed to assign or approve Complainant's Position Task Book.

At the conclusion of the investigation, Complainant was provided a copy of the report of investigation (ROI) and requested a hearing before an EEOC Administrative Judge (AJ). The AJ issued a decision by summary judgment finding no discrimination was established. The AJ incorporated by reference and adopted the arguments and rationale in the Agency's motion for summary judgment. The AJ determined that Complainant did not establish discrimination on any basis and concluded that the Agency was entitled to judgment in its favor as a matter of law.

The Agency's final order implemented the AJ's decision. The instant appeal followed, and Complainant filed a brief in support of her appeal. The Agency opposed Complainant's appeal.

ANALYSIS AND FINDINGS

Standard of Review

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and the Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See *id.* at 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").

Decision without a Hearing

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. The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrener, 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." Pedersen v. Dep't of Justice, EEOC Request No. 05940339 (February 24, 1995).

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).

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. Through her attorney, Complainant only appeals claims 2 and 7,² and she requests a hearing on these claims. As such, we will only address claims 2 and 7 in the instant decision.

After a careful review of the record, we find that the AJ erred when concluding that there were no genuine issues of material fact in this case. In finding no discrimination, the AJ summarily relied upon the Agency's Motion for Summary Judgment. However, we find that the record is missing crucial information and there are genuine disputes of material facts.

For claim 2, the eventual selectee was a 28-year-old Asian American. ROI at 351-2. It is undisputed that Complainant was not interviewed for the Executive Officer position. The Director asserted that Complainant was not listed on the certificate of eligible candidates, and he believed that Complainant's lack of the minimum time in grade was "likely a factor." However, the Director admitted that the Office of the Chief Component Human Capital Offer did not inform him of the reason why Complainant did not make the certification list. ROI at 135-6. Complainant disputes the Director's belief and contends that her resume shows that she had over one year of experience. ROI at 111. The Agency did not identify the responsible individual who excluded Complainant from the certificate and there is no testimony evidence from this individual. The record only contains the Director's speculative reason for Complainant's non-selection. As such, we find that there is a genuine dispute regarding Complainant's qualifications for the Executive Officer position at issue.

We also find the circumstances surrounding the Selectee's placement into the position to be unclear and further development is needed. Complainant averred that, while the vacancy was posted in January 2019, Complainant knew that the Selectee was not interviewed in February for the position because Complainant was responsible for scheduling the interviews. Complainant learned that the Selectee would be starting in November 2019, and she noted that the position was not re-posted. ROI at 111-12.

The Director stated that the Selectee was hired under an "alternative procedure." Director Supplemental Affidavit at 2. We also find it curious that the Selectee was hired at the IC-12 level because the position was initially announced as an IC-13, and the Director informed Complainant that she was not qualified for the position since she did not have the time in grade

² The Agency raised the issue of timeliness for claims 1, 2, and 3, in its Motion for Summary Judgment and on appeal. We note that the AJ did not dismiss any claim as untimely and made a determination on the merits when finding that there was no discrimination for all claims.

for the IC-13 level. Further, the Director added that Complainant had been promoted to the IC-12 level in October 2018, and Complainant would have met the time in grade requirement to be eligible for an IC-13 level position around the time that the Selectee started the position in November 2019. ROI at 350, 135. Accordingly, we find that a hearing is necessary to explore the Director's motivations for his actions when filling the Executive Officer position.

Regarding claim 7, the Agency selected a 28-year-old, Caucasian woman. ROI at 513. We find that the record is missing relevant testimony from the selecting official for the decision, and as such, the Agency failed to provide legitimate, nondiscriminatory reasons for Complainant's non-selection. While the Agency's burden of production is not onerous, it must nevertheless provide a specific, clear, and individualized explanation for the treatment, as the Complainant is entitled to some rationale for the adverse action that provides her with an opportunity to attempt to satisfy her ultimate burden of proving that the Agency's explanation was a pretext for discriminatory animus. See Beasley v. U.S. Postal Serv., EEOC Appeal No. 07A40096 (March 18, 2005).

Complainant was interviewed by three management officials for the position: the Deputy Director; a Quality Assurance Lane Manager ("Manager"); and an Appeal Analyst. ROI at 317. The Manager named the Director as the selecting official, and the Deputy Director noted that she did not know who the selecting official was, but assumed it was the Director. The Appeal Analyst stated that she did not know who the selecting official was for this vacancy. ROI at 337, 318, 347. The certificate for this vacancy reveals that the Director was the selecting official, but he did not explain why he did not select Complainant for the position. ROI at 911. The Director only responded that he was not involved in the interviewing for this position or in informing Complainant of her non-selection. ROI at 142.

To the extent that the Director averred that Complainant did not make the certification list, we find that there is a genuine dispute because two of the interviewers testified that they believed that Complainant made the certificate. ROI at 142, 316, 345. We also find that additional evidence is needed to clarify the certificate because Complainant's name is listed with "NQ", "INEL" and "Selected" next to her name and there is no explanation for her entry. ROI at 912. Again, the Agency did not identify, or obtain evidence from, the individual responsible for generating the certificate. Further, if Complainant was determined to be ineligible for the position and was not on the certificate, there is no clarification for why she was interviewed since interviewers believed that she was on the certificate.

We also find that the interviewers provided vague and conflicting testimony regarding Complainant's performance during her interview. The Manager explained that the candidates were asked the same questions and were scored from zero to ten for their answers, and that Complainant was ranked "near the lowest score amongst interviewed candidates." ROI at 337-8. However, the Appeal Analyst stated that Complainant "wasn't on the bottom, but between average and great range." ROI at 346. The Deputy Director could not recall where Complainant ranked as a candidate. ROI at 317.

No interviewer provided any specific information regarding Complainant's interview or any explanation as to how they evaluated Complainant's interview performance. ROI at 316-19, 336-9, 345-8.

Further, the record is devoid of the notes and scores from the interviewers. The Deputy Director stated that the selection was based on interview performance and responses were numerically ranked on a rubric, and the notes and scores were collected by "the front office." ROI at 317. The Manager averred that Human Resources had scanned copies of the notes, scores, and rankings; and the Appeal Analyst stated that she gave her notes to either the Deputy Director or the Manager. ROI at 337, 346. The Agency did not provide any of the interviewers' notes and score sheets for the vacancy at issue.

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, in appropriate instances, to examine and cross-examine witnesses." See EEO MD-110, at 7-1; see also 29 C.F.R. § 1614.109(e). "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." Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (March 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (October 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995). In summary, there are simply too many unresolved issues which require additional evidence and an assessment as to the credibility of the various management officials. Therefore, judgment as a matter of law for the Agency should not have been granted as to claims 2 and 7.

Complainant's attorney explicitly requests a hearing for only claims 2 and 7. As such, we find that it is appropriate to remand the complaint for a hearing for just these two claims, in accordance with the Order below.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission REVERSES the Agency's final action for claims 2 and 7, and REMANDS these claims to the Agency in accordance with this decision and the Order below.

ORDER

Within fifteen (15) calendar days of the date this decision is issued, the Agency is directed to submit a renewed request for a hearing to the Hearings Unit of EEOC's Seattle District Office on Complainant's behalf on claims 2 and 7, as well as submitting the complaint file and a copy of this appellate decision. 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 for claims 2 and 7 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 7, 2023

Date