



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Ayesha W.,¹
Complainant,

v.

Kilolo Kijakazi,
Acting Commissioner,
Social Security Administration,
Agency.

Appeal No. 2022002856

Hearing No. 531-2021-00042X

Agency No. OCO-19-1227

DECISION

On April 28, 2022, 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 March 29, 2022, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS, in part, and REVERSES, in part, the Agency's final order.

BACKGROUND

During the relevant time, Complainant worked as an Earnings Reporting Technician at the Agency's Division of Earnings and Business Services in Baltimore, Maryland. Supervisory Contact Representative (Supervisor) was her first-level supervisor. Report of Investigation (ROI) at 261. Branch Manager was her second-line supervisor. ROI at 290. Division Director (Director) was her fourth-level supervisor. ROI at 272.

On December 23, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to harassment on the basis of age (63) when:

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.

1. The Agency subjected her to harassment (non-sexual) based on age (over 40) between May 2018 and the present, in terms of being bullied, performance appraisal, denied being selected as an instructor, reassignment requests, working conditions, and time and attendance; and
2. Whether the Agency subjected her to disparate treatment based on age (over 40) when, on August 12, 2019, she became aware that she was not selected as an instructor for the 2019 Employer Record Technician class.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

When the Complainant did not object, the AJ assigned to the case granted the Agency's June 11, 2021, motion for a decision without a hearing and issued a decision without a hearing on March 29, 2022. The AJ incorporated the Agency's Motion including facts and, without further specification or analysis, the Agency's legitimate nondiscriminatory reasons for its actions from the Agency's motion for summary judgment in whole. In addition, the AJ asserted that Complainant had not met a prima facie case for disparate treatment because she was unable to identify a similarly situated employee who received preferential treatment under similar facts or circumstances.

The Agency subsequently issued a final order adopting the AJ's finding. The instant appeal followed without specific comment.

ANALYSIS AND FINDINGS

Standard of Review

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). 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. 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*).

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law.

Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus.

Disparate Treatment—Claim 2

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For a 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. See McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the Agency to articulate a legitimate, non-discriminatory reason for its actions. See Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Ctr. 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 her. Obas v. Dep't of Just., EEOC Appeal No. 01A04389 (May 16, 2002); Williams 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 Constr. Corp., 438 U.S. at 576. We note that, although a complainant bears the burden of establishing a “prima facie” case, the requirements are “minimal,” and complainant’s burden is “not onerous.” Burdine, 450 U.S. at 252-53, see also St. Mary's Honor Ctr., 509 U.S. at 506.

While the Agency argued that Complainant did not establish a prima facie case of disparate treatment, we disagree. Complainant was not selected as an instructor for the 2019 Employer Record Technician class. While the position of instructor was not a detail or a promotion, it was a collateral duty. ROI at 263, 292. The Commission has long held that collateral duties are a condition of employment. Paul v. Dep't of Def., EEOC Appeal No. 01924516 (Nov. 24, 1992) (citing Rios v. Dep't of Justice, EEOC Appeal No. 01920841 (May 13, 1992)). Complainant was 63, well over the age of 40, at the time in question. ROI at 358. Nobody has contested that she was qualified to be an instructor for the 2019 Employer Record Technician class. Complainant was not selected for the collateral duty assignment.

Finally, Complainant must show that she was accorded treatment different from that given to persons otherwise similarly situated who are not members of her protected group. While the AJ found that Complainant did not provide evidence of a person outside her protected class who received preferential treatment, the evidence of record contradicts this finding. Complainant was 63 years old, and the selectees were between 26 to 45 years old at the time of they selection.

Therefore, we find that Complainant has shown that individuals younger than her were chosen for the collateral duty assignment.

To the extent that one of the selectees was over the age of 40, we note that to prove age discrimination, it is not necessary that all selected individuals be under the age of 40. Obas, supra; Williams, supra. We note, however that U.S. Supreme Court has held that a complainant may still claim age discrimination when both the complainant and the comparative are both over 40 as long as the comparative is substantially younger than the complainant. See O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (holding that in age cases, the comparative need not be outside the protected group, i.e., under 40, but must be substantially younger than Complainant); see also Hammersmith v. Soc. Sec. Admin., EEOC Appeal No. 01A05922 (Mar. 6, 2002) (while there is no bright-line test for what constitutes “substantially younger,” that term has generally been applied to age differences in excess of five years). Therefore, we find that Complainant has shown that individuals younger than her were chosen for the collateral duty assignment and has established a prima facie case of age discrimination.

The Agency now has the burden of producing a legitimate, nondiscriminatory explanation for not selecting Complainant. The agency must provide a specific, clear, and individualized explanation for its selection decision. This is required in order for a complainant to have the opportunity to prove that the asserted reason was a pretext for discriminatory animus. See Stewart v. Dep’t of Homeland Sec., EEOC Request No. 0520070121 (Nov. 14, 2011) (agency failed to meet its burden of production by simply explaining the general mechanics of the selection process but failed to provide an individualized explanation for complainant’s specific score) citing Boston v. U.S. Postal Serv., EEOC Appeal No. 0120042074 (May 26, 2004).

We find that the evidence presented by the Agency is not sufficient to provide a specific, clear, and individualized explanation as to why Complainant was not selected for the position. The Agency argued, in its Motion for Summary Judgment and again in opposition to Complainant’s appeal, that their legitimate nondiscriminatory reason was that “the Agency determined, based on job knowledge, interpersonal skills and presentation experience, other volunteers were better qualified than Complainant to perform the collateral duty.” The AJ adopted the Agency’s motion including this assertion.

Our review of the record indicates that Branch Manager averred that the Division of Training and Program Support (DTPS) was involved with the selection process and that he provided recommendations based on the solicitations received. ROI at 291. As for the selection process, Branch Manager indicated several times in his affidavit that a named individual in DTPS should be contacted for more information, however the investigation did not obtain any information from said individual. ROI at 292-93. Branch Manager’s role as he described it was that he was provided a list of candidates from DTPS and he “recommended five interested applicants from [his] branch but did not recommend Complainant.” ROI at 297. Branch Manager stated that he relied on feedback from the employees’ managers regarding job knowledge, interpersonal skills, and presentation experience to find others more qualified.

However, the record contains no evidence or explanation of such assessments and feedback concerning Complainant, or any of the recommended individuals. Furthermore, to the contrary, Supervisor averred that Branch Manager was alone responsible for the recommendation of the instructor position and DTPS handled the selection. Supervisor did not indicate that she provided any such feedback on the selection of the nominees for the instructor position. ROI at 263.

In this case, we find that the Agency has not met its burden of production. As noted above, the Branch Manager stated that he recommended five individuals but not Complainant and that recommendations were based on management's input. However, there is no explanation provided by Branch Manager on why he recommended the selectees nor what specific feedback Branch Manager received on any of the selectees or Complainant. See Jackson v. Lowndes Cnty. Sch. Dist., 2010 WL 91245 (N.D. Miss. 2010) (defendant failed to meet its burden of production when it merely stated that it did not hire plaintiff because he scored lower in his interview than candidate who was hired and provided tally sheet reflecting scoring of candidates on a scale of one to five but failed to explain reasons for scores). Therefore, upon review, we find that the Agency explained the selection process but failed to provide an individualized explanation for Branch Manager's decision not to recommend Complainant. See Koudry v. Dep't of Educ., EEOC Request No. 0520100196 (Apr. 13, 2010) (discrimination found where agency merely explained the mechanics of selection process, provided list of candidates deemed best qualified, and summarized applications of selectee and complainant, but failed to provide statements from selecting officials explaining how complainant's qualifications were evaluated compared to selectee's qualifications). We have held that an Agency fails to articulate a legitimate, non-discriminatory reason when it fails to provide specific information to explain why Agency officials assigned their respective ratings or scores to a complainant.

Therefore, we find that the Agency failed to overcome Complainant's prima facie case of age, and Complainant prevails without having to prove pretext. Chhe v. Dep't of Hous. & Urb. Dev., EEOC Request No. 0720090008 (Aug. 6, 2010) (the consequence of an agency's failure to meet its burden of production under McDonnell Douglas is that the complainant, having established a prima facie case, prevails without having to make any demonstration of pretext), request for recon. den., EEOC Request No. 0520100584 (Jan. 27, 2011). As a result of the Agency's failure to meet its burden of production, we find that Complainant has established that she was subjected to discrimination based upon age when she was not selected for the collateral duty assignment.

Harassment—Claim 1

To establish a claim of harassment a complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment.” Harris, 510 U.S. at 21. The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Sys., Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994). With respect to element (5), an agency is subject to vicarious liability for harassment when it is created by a supervisor with immediate authority over the employee. See Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

As to the issue of harassment due to nonselection, we find that Complainant has proven that she was harassed as alleged. However, we find that this claim was discrete from the events alleged in support of Complainant's claim of harassment. Therefore, we shall review Complainant's claim of harassment with respect to the other events raised.

As to the other enumerated issues, we find that, even if all of the events listed were true, Complainant has not provided sufficient evidence to demonstrate that the asserted behavior was due to her statutorily protected class. Where Complainant has “adduced no evidence that [s]he was harassed because of [her] protected class characteristics,” Complainant's claims of harassment must fail. Davis v Dep't of the Army, EEOC Appeal Nos. 01A22812, 01A24469, 01A30558 (Nov. 14, 2003). Therefore, we conclude the Complainant has failed to demonstrate that she was subjected to harassment based on age as alleged.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final decision. We REVERSE the decision with respect to claim 2 and REMAND the matter for further action in accordance with the Order below. We AFFIRM the Agency's decision with regard to claim 1.

ORDER

The Agency is ordered to take the following remedial action:

1. Within thirty (30) calendar days of the date this decision is issued, the Agency shall offer Complainant the collateral duty assignment of instructor of the Employer Record Technician class, or a substantially equivalent assignment.
2. Within sixty (60) calendar days of the date this decision is issued, the Agency shall perform an analysis of whether the selectees were afforded bonuses, increased ratings, promotions, or other tangible benefit because of their selection for the instructor assignment. If this analysis renders the conclusion that such tangible benefits were afforded for the instructor skills or benefits, the Agency shall, within sixty (60) days of this analysis, provide comparable benefits to Complainant.

3. Within ninety (90) days from the date the decision is issued, the Agency is directed to conduct eight (8) hours of in-person or interactive training for Branch Manager. The Agency shall address management's responsibilities with respect to eliminating discrimination in the workplace and training in EEOC regulations concerning the maintenance of records under 29 C.F.R. § 1602.14. Within thirty (30) calendar days of the date the training is completed, the agency shall submit to the Compliance Officer appropriate documentation evidencing completion of such training.
4. Within one hundred and twenty (120) calendar days of the date this decision is issued, the Agency shall consider disciplining Branch Manager. The Commission does not consider training to constitute disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to issue any disciplinary action, it shall set forth the reason(s) for its decision. If any of the named management officials is no longer employed by the Agency, the Agency shall furnish proof of the date(s) of separation.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation that the Agency's corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Baltimore, Maryland facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g).

The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (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)

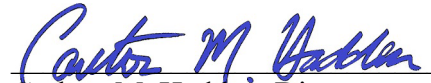
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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

May 16, 2023
Date