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

Todd K. LeGrant,
Complainant,

v.

Janet Napolitano,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 0120102728

Hearing No. 570-2007-00658X

Agency No. HS-03-TSA-001163

DECISION

On June 11, 2010, Complainant filed an appeal from the Agency's May 12, 2010 final order concerning his 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. The Commission accepts the appeal pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission VACATES the Agency's final order.

ISSUE PRESENTED

The issue presented is whether the EEOC Administrative Judge correctly determined that the record was adequately developed for summary disposition.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Transportation Security Screener (TSS), SV-0019-D, at the Agency's Washington Dulles International Airport (Dulles Airport) in Dulles, Virginia. Complainant began his employment with the Agency in October 2002.

On January 17, 2004, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), sex (male), color (black), disability (obesity, chronic fatigue, sleep apnea), and age (41) when:

1. From January to August 2003, his request for an accommodation was denied;

2. In or about August 2003, he was not selected for a Lead TSS position;

3. In or about August 2003, he was not selected for a Supervisory TSS position;

4. In or about August 2003, he was not selected for a Screening Manager position; and

5. On August 21, 2003, he was constructively discharged.

At the conclusion of the investigation, Complainant was provided a copy of the report of investigation (ROI) and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. The AJ determined *sua sponte* that the complaint did not warrant a hearing and, over Complainant's objections, issued a decision without a hearing on April 30, 2010. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that he was discriminated against as alleged.

Regarding claim 1, the AJ found that Complainant failed to show that he ever requested a reasonable accommodation. Regarding claims 2- 4, the AJ found that Complainant failed to establish a prima facie case because he did not demonstrate that he applied for the Lead TSS, Supervisory TSS, and Screening Manager positions. Specifically, the AJ determined that the record was devoid of any indication that Complainant applied for the positions. In addition, the AJ cited affidavit testimony from the Human Resource Manager (HRM) that Complainant's name was not included on any of the selection certificates. Further, the AJ cited affidavit testimony from the Assistant Federal Security Director (AFSD) that there were no Screening Manager positions available during Complainant's tenure with the Agency. Regarding claim 5, the AJ found that Complainant failed to present sufficient evidence to show that his working conditions were so intolerable that he felt compelled to resign from his position.

CONTENTIONS ON APPEAL

On appeal, Complainant contended, among other things, that the Agency erred in failing to give him appeal rights to the Merit Systems Protection Board (MSPB) for his constructive discharge claim.[1] In addition, Complainant asserted that the record was not adequately

[1] We note, without so finding in this case, that the Commission properly may assume initial jurisdiction of a constructive discharge issue when, for example, the allegation is so firmly enmeshed in the EEO process that it would unduly delay justice and create unnecessary procedural complications to remand it to the MSPB. See Cullors v. Dep't of Veterans Affairs,

developed because "records in the Investigative File were not complete, requiring witness testimonies and further discovery activities." Moreover, Complainant argued that there were genuine issues of material fact regarding claims 1- 5 and specifically disputed over half the 16 facts listed in the AJ's decision. Finally, Complainant addressed the merits of his constructive discharge claim.

In response, the Agency requested that we affirm its final order. Regarding the MSPB issue, the Agency contended that the MSPB does not have jurisdiction over appeals from TSA screener personnel. Regarding the adequacy of the record, the Agency asserted that the AJ provided Complainant with the requisite safeguards prior to issuing a decision without a hearing. Regarding the merits of claims 1- 5, the Agency argued that Complainant failed to request a reasonable accommodation, failed to apply for the advertised vacancies, and voluntarily resigned from his position.

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 Ch. 9, § VI.B. (Nov. 9, 1999) (providing that an AJ's "decision to issue a decision without a hearing pursuant to [29 C.F.R. § 1614.109(g)] will 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 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 EEO MD-110, at Ch. 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").

AJ's Issuance of a Decision Without a Hearing

We must first determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure

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EEOC Appeal No. 01A41560 (June 27, 2006); Richardson v. Dep't of Veterans Affairs, EEOC Appeal Nos. 01982915 and 01984977 (Nov. 5, 2001).

set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

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

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 (Feb. 24, 1995). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims." Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (Mar. 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (Oct. 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (Apr. 25, 1995). The hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See EEO MD-110, at Ch. 7, § I.; see also 29 C.F.R. § 1614.109(e).

After a careful review of the record, we find that the AJ erred in issuing a decision without a hearing because the record was not adequately developed for summary disposition. Specifically, aside from general position descriptions, the record contains little or no documentation relevant to the Lead and Supervisory TSS positions. Regarding the Lead TSS position in claim 2, the record does not include copies of the vacancy announcement, the submitted applications, or the selection certificate. Regarding the Supervisory TSS position in claim 3,[2] the record includes two documents: (1) a July 29, 2003 certificate of candidates for a position, advertised under vacancy announcement number IAD-1202-001; and (2) an August 12, 2003 memorandum from HRM entitled "Selection of Supervisors (V.A. # 1202-001). ROI, at 127-28. The record, however, does not include copies of the vacancy announcement or the submitted applications for IAD-1202-001. While Complainant's name is absent from the certificate of candidates for IAD-1202-001, the record is unclear as to the reason why. We note that management's testimony provides nothing more than speculation about whether or not Complainant applied. For example, HRM averred:

> On two separate occasions, we announced (through our contractor) an open vacancy for lead and supervisors on USAJOBS which is the standard for all competitive positions. I received a certified/signed certificate from the contractor and list of persons who certified for Lead and Supervisor. [Complainant] was not on either of those lists. This *could mean* that he a: didn't apply or b: didn't qualify based on his past experiences or qualifications. [emphasis added] Id. at 98.

In contrast to the Agency's speculative response, Complainant definitively stated that he applied for the Lead and Supervisory TSS positions. For example, Complainant wrote in his formal complaint, "A promotion announcement was sent out Airport wide to all Screeners who wanted to be considered for a promotion to apply for the next position of 'Lead Screener' or 'Supervisor Screener.' I applied for both and was not selected ..." Id. at 18. In addition, Complainant wrote in his rebuttal to AFSD's affidavit testimony, "The promotions for Lead and Supervisor Screeners were posted about January or February 2003. I applied and followed the same instructions as everyone when I submitted my [KSAs]." Id. at 81. At the summary judgment stage, given the lack of documentary evidence in the record confirming whether or not he applied, we must believe Complainant's statement that he applied over the Agency's statement that he either did not apply or applied but did not qualify.[3]

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[2] The record also contains a certificate of candidates and an amended certificate of candidates for a Supervisory TSS position at Dulles Airport, advertised under vacancy announcement number TSA-04-0428. ROI, at 129-130. These certificates, issued in December 2003, do not appear to be relevant to the instant complaint because Complainant's non-selections allegedly occurred in August 2003.

[3] We note that if Complainant applied and was deemed not qualified, the Agency should have a record of that decision.

In summary, the record was not adequately developed. An "appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred." EEO MD-110, at Ch. 6, § I. Therefore, judgment as a matter of law for the Agency should not have been granted.[4]

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, the Commission VACATES the Agency's final order and REMANDS the matter to the Agency in accordance with this decision and the Order below.

ORDER

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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

[4] Because we determine in this decision that the record was not adequately developed regarding whether Complainant applied for the Lead and Supervisory TSS positions, and because the record is unclear as to whether Complainant's alleged denial of reasonable accommodation and non-selections had an impact on his resignation, we find it appropriate to remand the entire complaint to the Agency.

of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0610)

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

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

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

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

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the

local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Carlton M Hadden

Carlton M. Hadden, Director
Office of Federal Operations

JAN 12 2012

Date