

Robert E. Bolger v. U.S. General Accounting Office

Docket No. 66-700-17-85

Date of Decision: November 5, 1986

Cite as: Bolger v. GAO (11/5/86)

Before: James, Presiding Member

Discrimination in Promotion

Reprisal

DECISION OF PRESIDING MEMBER ON PETITION FOR REVIEW

This matter is before me pursuant to a Petition for Review filed by Petitioner, Robert E. Bolger, on or about December 9, 1985, in accordance with the provisions of 4 C.F.R. Section 28.19 (a). In the Petition for Review, Petitioner alleged that he was discriminated against by the Respondent, the United States General Accounting Office because of his race (caucasian) and sex (male) when he was not selected for the position of Supervisory Employee Relations Specialist, and that because he filed an EEO Complaint regarding the nonselection, he was not selected for the same position when it subsequently became vacant the second time and was again advertised.

Pursuant to the provisions of 4 C.F.R. a hearing on the Petition for Review was held on May 20 and 21, 1986, during which both Petitioner and Respondent were permitted to call witnesses and present evidence in support of their respective positions.

FINDINGS OF RELEVANT FACTS

Petitioner is a white male and he is currently employed in the Management and Employee Relations Branch, Personnel Division, United States General Accounting Office, Washington, D.C. Petitioner is an Employee Relations Specialist, GS-230-13. In June of 1981, Petitioner was appointed to the position of Acting Chief of the Labor Management and Employee Relations Branch, Personnel Division, United States General Accounting Office (hereinafter referred to as Chief, LMER); and in May of 1982 Petitioner was temporarily promoted to the same position (e.g. Chief, LMER) at the grade of GS-14. Petitioner's temporary promotion was renewed in 1983 at the same grade and that renewal expired in May of 1984.

Upon expiration of the temporary promotion renewal in May of 1984, Petitioner was returned to his original grade of GS-13 and in June of 1984, the position of Chief, LMER was advertised government-wide within the Washington, D.C. metropolitan commuting area. [See Job Opportunity Announcement, File B-84-485] In accordance with Respondent's regulations (i.e. GAO Order 2335.6), a promotion panel reviewed the applications received in response to the advertisement and the panel prepared a Selection Certificate which identified the five "Best Qualified" candidates who were, at the time, not employed by Respondent. Because Petitioner was employed by Respondent his name appeared on a separate Selection Certificate which contained only the names of Employees of Respondent who were deemed "Best Qualified". Petitioner's application was not screened by the promotion panel. Both Selection Certificates, containing the six names, were referred to the Deputy Director of Personnel (a

black female) for review. The Deputy Director of Personnel referred only three of the six applicants to the Director of Personnel (a white male) for final selection. Petitioner's application was one of the three applications referred by the Deputy Director of Personnel.

Of the three applications referred to the Director of Personnel for selection, two were white males and one was a black female. The Director of Personnel selected the black female to fill the vacant position.

Upon learning that the black female had been selected, Petitioner, on October 22, 1984 file a formal complaint of discrimination in which he alleged that he was more qualified than the black female and that, but for her race and sex, she would not have been selected. Petitioner did not allege that the black female was not qualified, but that he was more qualified. Petitioner named the Deputy Director of Personnel and the Director of Personnel as "Alleged Discriminating Officials" (ADO's).

The story did not end there. For, shortly after her selection, the black female resigned from the position of Chief, LMER, for reasons unknown to the record before me, and the position again became vacant. On December 20, 1984, the position was advertised for the second time as vacant. [See Job Opportunity Announcement, File B-85-439] Once again, in accordance with Respondent's regulations and selection procedures, a promotion panel was created by Respondent to review the applications and make a recommendation to the Deputy Director of Personnel of the candidates deemed to be "Best Qualified". The selection panel referred ten names to the Deputy Director of Personnel as "Best Qualified". As in the first selection, Petitioner's name was one of the ten names and his name was the only name which appeared on a separate Selection Certificate. Nine of the applicants were not employed by Respondent.

Upon completion of her review, the Deputy Director of Personnel, again recommended three names to the Director of Personnel for selection. Of the three names recommended by the Deputy Director of Personnel, two were white males and one was a white female. Petitioner's name was one of the three names referred by the Deputy Director to the Director of Personnel. The Director of Personnel selected the other white male and not Petitioner. Whereupon, Petitioner file a second complaint of discrimination in which he alleged that his second nonselection and the selection of the white male was in retaliation against him for having filed the prior complaint of discrimination.

Also relevant to a determination in this matter is the fact that prior to and during the relevant time period of 1981 to 1984, while the position of Chief, LMER was vacant, advertised and filled twice, there were six formal complaints of discrimination filed by employees in Respondent's Personnel Division. Two of the six complaints were filed by Petitioner and the other four were filed by black employees who alleged discrimination on the basis of race. Two of the six complaints involved nonselection and two involved proposed removals. Also, during the relevant time period, there was Congressional concern expressed about the promotion policies of the Personnel Division of Respondent as those policies impact upon minorities; the General Counsel of the United States Personnel Appeals Board completed an extensive oversight review of equal opportunity for minorities employed by Respondent; and there was a class action complaint of discrimination filed in the United States District Court for the District of Columbia against Respondent by black employees. (See Long, et. al v. United States of America, Civil Action 84-3088, filed September 28, 1984) In the class action, black employees alleged that they suffered denials of promotions and other damage to their career advancement because of their race. Hence, it is reasonable to conclude that concern existed within Respondent about affirmative action and the promotion potential for blacks during the relevant time period.

Analysis and Conclusion

As stated in my decision on the Motion for Dismissal, Summary Adjudication and for Protective Order, where a Petitioner, as Petitioner in this matter, alleges that he has been treated differently than other employees and the basis of the difference in treatment is race and sex, to prevail the Petitioner must initially establish a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). However, a Petitioner who alleges a difference in treatment because of race and sex also has a continuing burden to establish that the motive for the difference in treatment is discriminatory. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 (1977). The matter before me does not involve a claim by Petitioner that Respondent has perpetuated a prior discriminatory practice (See Teamsters v. United States, 431 U.S. 324 (1977)) nor that a practice of Respondent has had an adverse or disparate impact on Petitioner (See Hazelwood School District v. United States, 433 U.S. 299 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971)). A claim by Petitioner under either of these two theories of discrimination would not require Petitioner to prove a discriminatory intent or motive on the part of Respondent to prevail. Rule v. International Ass'n of Bridge, Structural, and Ornamental Iron Workers, 568 F2d 558, (8th Cir., 1977); Hogan v. Pierce, 31 FEP Cases 115 (D.D.C., 1983) This does not mean, however, that Petitioner must produce direct evidence of overt or subjective racism or sexism. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) Rather, courts have developed a variety of rules governing when discriminatory intent must be inferred from objective evidence. See City of Mobile v. Bolden, 446 U.S. 55 (1980); Columbia Bd. of Ed. v. Penick, 443 U.S. 449 (1979); Personnel Administration of Mass. v. Feeney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); United States v. Texas Education Agency, (Austin), 564 F2d 162 (5th Cir., 1977)

The initial creation of the prima facie case by the Petitioner is important to the case because it eliminates the most common nondiscriminatory reasons for Petitioner's nonselection. Furnco Construction Co. v. Waters, supra; International Brotherhood of Teamsters v. United States, supra. It also creates a presumption that the employer unlawfully discriminated against the Petitioner. McDonnell Douglas Corp., supra. Petitioner's burden in establishing a prima facie case is not an inflexible or onerous burden. McDonnell Douglas Corp., supra; Brown v. Parker-Hannafin Corp., 35 EPD 34, 739 (10th Cir., 1984). The system of analysis set forth in McDonnell Douglas was never intended to be rigid, mechanized, or ritualistic. United States Postal Service Board of Governors v. Aikens, supra. Petitioner need only produce objective facts from which an inference of discrimination can be made.

I find that Petitioner in this matter has met that initial burden. Petitioner has established that: 1) he is a member of a protected class; 2) he applied for a position as Chief, LMER with Respondent; 3) he was qualified for the position; and 4) the position was filled by a person of a different race and sex. Also, Petitioner has met his initial burden on his retaliation claim. On the retaliation claim, Petitioner has established that: 1) he applied for a position as Chief, LMER with Respondent; 2) he was qualified for the position; 3) he engaged in protected activity when he filed the first complaint of discrimination; and 4) the position was filled by a white male.

Respondent asserts that because Petitioner is white, he has not and can not establish a prima facie case of discrimination. Respondent's assertion, however, is without merit. It has long been settled by the courts and the Civil Rights community that Title VII of the Civil Rights Act of 1964 does protect all races and colors, including whites from discrimination. See McDonald v. Santa Fe Trail Transportation Co., 427

U.S. 273 (1976).

With Petitioner's establishment of a prima facie case of discrimination and retaliation, the burden of proof shifts to Respondent to articulate a legitimate, nondiscriminatory reason for Petitioner's nonselection. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 257 (1981); McDonnell Douglas, supra. Respondent need only produce evidence of a legitimate, nondiscriminatory reason for not selecting Petitioner. Burdine, supra.; Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978). To satisfy its initial burden of establishing a legitimate and nondiscriminatory reason for Petitioner's nonselection, Respondent first argues that both selections to fill the position of Chief, LMER were made in accordance with the provisions of GAO order No. 2335.6, Chapter 7 paras. 4b(3) and 4c(1), which give the selecting official the right to select any one of the individuals certified to him as "Best Qualified" or to request a new certificate. It cannot go unnoticed that the parties stipulated that except for the number of panelists which comprised the screening panels, the process and procedures followed by Respondent to select or not select candidates for certification to the selecting official as "Best Qualified" for both of the positions were conducted in accordance with GAO Order 2335.6; and that the administrative processes and procedures employed by the selecting official for the two selections were in accordance with GAO Order 2335.6, Chapter 7, paragraphs 4(b)(2)(3); and 4(c). Thus, Petitioner concedes that the Director of Personnel could have selected any of the three candidates referred to him by the Deputy Director of Personnel. Also, the stipulation raises serious doubts about discriminatory acts which the Deputy Director of Personnel allegedly took if all proper procedures were followed.

Secondly, Respondent offers the testimony of the Director of Personnel as having provided a legitimate and nondiscriminatory reason for not selecting Petitioner. The Director of Personnel testified very creditably that he selected the black female because of her qualifications and potential and that race and sex were not considerations in his decision. The Director of Personnel cited as support of his decision his belief that the black female was a person with a great deal of potential who had performed extremely well up to that time. The Director of Personnel testified that he drew this conclusion from the appraisal of performance and potential prepared by the prior supervisor of the black female. He, also, testified that he based his selection of the black female on his belief that she possessed strong interpersonal skills, a high level of energy that is evidenced when you talk with her, her supervisory philosophy, and her diverse experience in a number of organizations.

The Director of Personnel testified also that he selected the white male because the white male possessed some of the same skills as the black female but he also had some knowledge of the use and knowledge of computers. The Director of Personnel testified that he believed that the white male had an extensive background in employee relations activities, he had been a trainer in the Office of Personnel Management, and he brought to the Personnel Division experiences which would be helpful to the organization

The reasons given for the two selections appear to be legitimate and nondiscriminatory. More importantly, Petitioner raised little, if any doubt, that the reasons given by the Director of Personnel were not in fact the true reasons for the nonselection of Petitioner. Thus, Respondent has rebutted Petitioner's prima facie case of discrimination. The burden is now upon the Petitioner to prove that Respondent's stated reasons are pretext for discrimination and that but for discrimination he would have been selected. McDonnell Douglas Corp., supra. Here, Petitioner fails to meet that burden. To show pretext, Petitioner offered only his alleged superior qualifications and a suggestion that he was not interviewed for the first selection. However, where the only available facts show that both the selectee and Petitioner were well qualified and both were on the "Best Qualified" list and the selecting official could have selected either candidate, it is

not difficult to conclude that Petitioner has failed to show pretext or that there was discrimination in either selection. Superior qualifications standing alone can not overcome Respondent's persuasive showing of legitimate nondiscriminatory reasons for nonselection.

Further, Petitioner's attempt to show that he was not interviewed for the position filled by the black female, has little merit since Petitioner was well aware that the interviews of candidates for the position of Chief, LMER were being conducted by the Director of Personnel and it is therefore reasonable to conclude that Petitioner had sufficient knowledge to know that the discussion he and the Director of Personnel engaged in upon Petitioner's return to work was in effect Petitioner's interview. [Petitioner participated in the interview to fill the GS-13 position which was closely related to the selection to fill the position of Chief, LMER and Petitioner's on interview.] Of further weight for consideration, is the fact that there was a meeting between the Director of Personnel and Petitioner prior to the selection of the black female during which the Director of Personnel made reference to conducting interviews for the position of Chief, LMER. Although this was not your ordinary garden variety interview, I find it difficult to believe that Petitioner was unaware that he was being considered for the position. Additionally, Petitioner has made no effort to link the alleged failure to interview him to an act or showing of discriminatory intent on the part of Respondent.

Finally, there is the suggestion by Petitioner that because there was concern within Respondent about affirmative action for blacks and the promotion potential of blacks, that this filtered into the first selection causing the black female to be selected. But, this suggestion fails also because Petitioner offers no evidence to link the two considerations together. There is no indication that the Director of Personnel considered the plight of black employees in making his selection or that there was a causal connection between the concern for the promotion potential for black employees of Respondent and the first selection of the black female. There is likewise, no showing of a causal connection between Petitioner's filing of his first complaint of discrimination and the failure of the Director of Personnel to select Petitioner.

Decision

For the reasons set forth above, I find that Petitioner has failed to establish that his nonselection on two separate occasions for the position of Chief, LMER was based on race and sex discrimination.