

Romantic Favoritism Is Tolerable Basis for Promotion under Title VII

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Kimberly Roy, Complainant, v. John E. Potter, Postmaster General, United States Postal Service, (Southwest Area), Agency.

Equal Employment Opportunity Commission-OFO

Appeal No. 01A50021

Agency No. 4G-770-0420-03

Hearing No. 330-A4-0059X

December 21, 2004

Ruling

The AJ properly dismissed the claim of gender-based discrimination. Even if the applicant selected for promotion over the complainant was chosen because of her personal/sexual relationship with the selecting official, this was not a prohibited form of discrimination.

Meaning

Title VII does not bar isolated instances of favoritism based on consensual romantic relationships.

Case Summary

The complainant alleged discrimination on the basis of sex (female) after she was denied a promotion to a supervisor position. She claimed the selectee's personal/sexual relationship with the selecting official -- rather than her qualifications -- prompted the promotion. The AJ dismissed the complaint. The EEOC affirmed the final agency decision implementing the AJ's ruling.

While unfair, isolated incidents of preferential treatment based on consensual romantic relationships are not banned under Title VII. Such favoritism is not gender-based discrimination because both men and women are equally disadvantaged for reasons other than their gender.

Decision

Complainant timely initiated an appeal from the agency's final order concerning her equal employment opportunity (EEO) complaint of unlawful 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. The appeal is accepted pursuant to 29 C.F.R. § 1614.405. For the following reasons, the Commission affirms the agency's final order.

The record reveals that complainant, a level 4 Data Conversion Operator (Tour 2) at the agency's Beaumont Remote Encoding Center, in Beaumont, Texas, filed a formal EEO complaint on August 18, 2003, alleging that the agency had discriminated against her on the basis of sex (female) when she was not selected for the position of Supervisor, Remote Encoding Operations.

At the conclusion of the investigation, complainant received a copy of the investigative report and requested a hearing before an EEOC Administrative Judge (AJ). The AJ issued a decision without a hearing, finding no discrimination.

The AJ found that complainant's allegation that the selectee was chosen based upon a personal sexual relationship between her and the selecting official was not discrimination under Title VII. The agency's final order implemented the AJ's decision. Neither complainant nor the agency make any contentions on appeal.

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 in dispute. 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. *Chelates v. Citrate*, 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, a hearing is required. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without a hearing only after determining that the record has been adequately developed for summary disposition. *See Petty v. Department of Defense*, EEC Appeal No. 01A24206 (July 11, 2003).

In her affidavit, complainant alleges that she was treated differently than the female selectee whose promotion was based upon a "personal/sexual relationship" she was having with the selecting official. Complainant concluded that the selectee was not selected based upon her qualifications, but upon her relationship with the selecting official.

The Commission has taken the position that sexual favoritism in the workplace which adversely affects the employment opportunities of third parties may, under certain circumstances, constitute sexual harassment prohibited by Title VII. *See* EEOC's Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, Notice No. N-915-048 (January 12, 1990) (hereinafter referred to as "EEOC Policy Guidance"). However, the Commission's position on this issue clearly holds that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. While favoritism towards a spouse or friend may be unfair, it does not constitute discrimination in violation of Title VII because both men and women are equally disadvantaged for reasons other than their gender. EEOC Policy Guidance at 2. *See also*, *Miller v. Aluminum Co. of America*, 679 F. Supp. 495 (W.D. Pa., *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988); *DeCintio v. Westchester County Medical Center*, 807 F.2d 304 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 89 (1987). In the instant case, complainant has alleged a romantic relationship between the selectee and the selecting official, but has made no allegation of any

coercion. Moreover, there is no evidence in this case that favoritism based upon the consensual granting of sexual favors was widespread in this workplace which might also have created a hostile work environment in violation of Title VII.

Accordingly, we find that there is no genuine issue of material fact in dispute over the issue of whether or not complainant should have been selected for the Supervisor, Remote Encoding Operations, position. Construing the evidence in a light most favorable to complainant, we find that complainant has failed to present evidence from which a reasonable fact-finder could conclude that any of the agency's actions were motivated by discriminatory animus toward complainant's protected class. Accordingly, the agency's final order implementing the AJ's decision was proper and is AFFIRMED for the reasons set forth herein.

Statement of Rights -- On Appeal Reconsideration (M0701)

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), 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 19848, Washington, D.C. 20036. 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 (S0900)

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. 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 (Z1199)

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 that the Court appoint an attorney to represent you and that the Court 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 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").