Sample Post-Hearing Brief

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Philadelphia District Office
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Mr. Client,	)
	)
COMPLAINANT,	)
vs.	)
	)
COMMISSIONER,	)
******	)
ADMINISTRATION,	)
	)
AGENCY.	)

COMPLAINANT'S POST HEARING BRIEF

The Complainant, by and through his attorney, Michael J. Snider, Esq., hereby submits his Post Hearing Brief in this case, and states:

Introduction

Complainant believes that he has been discriminated against on the basis of his race, color, and / or sex. The Complainant was objectively ***much higher qualified*** than any other candidate in his area, and was clearly ***much higher qualified*** than many of the other selectees outside of his protected classes. The Agency destroyed essential information in this case and failed to present non-discriminatory reasons for its actions in this case sufficiently specific to allow the Complainant a reasonable opportunity for rebuttal. Complainant hereby incorporates his **Pre-Hearing Statement** and all other pleadings by reference.

Standard and Burden of Proof

Discrimination cases generally turn on circumstantial evidence. **Gavalik v. Continental Can Co.**, 812 F.2d 834, 852 (3d Cir. 1987), **cert. denied**, 484 U.S. 979 (1987). A presumption of discrimination arises when a prima facie case is established. **McDonnell-Douglas Corp. v. Green**, 411 U.S. 792 (1973); **Texas Dep't of Community Affairs v. Burdine**, 450 U.S. 248 (1981). Initially, it is the burden of the complainant to establish

that there is some substance to her allegation of discrimination. In order to sustain this burden, the complainant must establish a prima facie case of discrimination. **McDonnell Douglas Corp**; **Furnco Construction Co. v. Waters**, 438 U.S. 567 (1978). This means that the complainant must present a body of evidence such that, were it not rebutted, the trier of fact ***could conclude that unlawful discrimination did occur.***

In the present case Complainant can establish a **prima facie** case of color, race or gender discrimination by showing:

(1) he was a member of a protected class or classes;

(2) he was qualified for the position for which he applied;

(3) he was not recommended, hired or promoted despite his qualifications; and

(4) the job was given to a person outside of the protected group(s).

Keyes v. Secretary of the Navy, 47 FEP Cases 891, 896 (1st Cir. 1988).

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) held that once the plaintiff establishes a prima facie case, the defendant must then produce evidence that it took the action for a legitimate, non-discriminatory reason. If the defendant fails to meet its burden, judgment must be entered in favor of the plaintiff as a matter of law. If the defendant is able to meet its burden, the plaintiff may show that the defendant's proffered reasons are pretextual. Once the factfinder finds that the proffered reasons are pretext, it may find discrimination. **See Sheridan v. E.I. DuPont de Nemours and Co.**, 100 F.3d 1061 (3rd Cir. 1996)(en banc), **cert denied**, – U.S. –, 128 L.Ed.2d 1031 (1997). The factfinder need find only that the discriminatory or retaliatory motive was a substantial motivating factor to find that the employer is liable.

In order to prevail, Complainant must show that the agency's reasons for its actions were a pretext to mask discrimination, either because the agency ***more likely*** had a discriminatory motive, or because the stated reasons ***lacked credibility***. **Burdine** at 248. Further, evidence of preselection operates to discredit the agency's explanation for its decision. **Goostree v. State of Tennessee**, 796 F.2d 854, 861 (6th Cir.1986).

The Commission has also held that, pursuant to **Burdine**, certain statements – due to their vague nature – ***cannot, as a matter of law,*** serve to form nondiscriminatory reasons for nonselection. **William Hogsten v. Shalala**, EEO No. 01A00208 (April 5, 2000).[2]

The United States Supreme Court addressed this issue explicitly, in **Texas Dept. Of Community Affairs V. Burdine, 450 U.S. 248 (1981)(emphasis added):**

> "The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need

not persuade the court that it was actually motivated by the proffered reasons. See Sweeney, supra, at 25. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. FN 8 [450 U.S. 248, 255] To accomplish this, the defendant must **clearly set forth**, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. FN 9 The **explanation provided must be legally sufficient** to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, FN 10 and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to **frame the factual issue with sufficient clarity so that the [450 U.S. 248, 256] plaintiff will have a *full and fair opportunity to demonstrate pretext.*** The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions."

The plaintiff retains the burden of persuasion. He now **must have the opportunity to demonstrate that the proffered reason was not the true reason** for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See **McDonnell Douglas**, 411 U.S., at 804 -805."

In a recent case (eerily similar to the instant matter), the EEOC OFO found discrimination on the basis of gender and race for non-selection of a white male ABC Representative to the GS-9 XYZ Specialist position. **Michael A. O'Brien v. Massanari, Commissioner, Social Security Administration**, EEOC OFO, Agency No. 9950.SSA; EEOC 07A10034, 102 FEOR 1051 (October 3, 2001)(attached).

In cases involving nonselections, a complainant may demonstrate that the agency's reason for its action was a pretext for discrimination by showing that he was better qualified or "plainly superior" to the selectee, but still was not selected. **See Patterson v. McLean Credit Union**, 491 U.S. 164, 187-88 (1989); **Isadore v. Dep't of the Interior**, EEOC Request No. 05930335 (September 23, 1993).

Argument

The Complainant Has Proven A Prima Facie Case of Discrimination, Which – If Left Unrebutted – Entitles Him To Prevail in this Matter

The Complainant has proven a **prima facie** case of discrimination. He is a male, and is Caucasian. One Selectee from the same component, Ms. Selectee (black, female) is not in his protected classes. Other Selectees for the position, including A, B and C, were female, black or both. The Complainant was qualified for the position and was not recommended or promoted, being ranked ***27th out of 27*** candidates in his component.

As stated above, once the Complainant establishes a **prima facie** case, the Agency must then produce evidence that it took the action for a legitimate, non-discriminatory reason. If the defendant fails to meet its burden, judgment must be entered in favor of the plaintiff as a matter of law. **St. Mary's Honor Center v. Hicks**, 509 U.S. 502 (1993).

An Adverse Inference Should Be Drawn From the Agency's Failure to Preserve Evidence

The Agency did not address its failure to preserve evidence in this case. "The blackboard was erased," confirmed each of the management witnesses. The ranking process that was not recorded, or was recorded and then erased in violation of the law, would have shown that the Complainant would have been selected but for intentional discrimination. The Agency's complete failure to even offer an excuse as to this destruction of evidence is concerning at the least. **See** Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure.

The United States Supreme Court has sanctioned the use of the "adverse inference rule," namely, that if the information had been provided, it would have been unfavorable to the agency and favorable to the opposing party. **See Insurance Corp. of Ireland v. Compayne Des Bauxites**, 456 U.S. 694, 705 (1982), **Hammond Packing Co. v. Arkansas**, 212 U.S. 322, 350-1 (1909). As in the attached EEOC decision, these "records destroyed by the agency were highly relevant to the matters raised" in this Complaint. Further, "The agency's failure to make any effort to reconstruct the record is evidence of bad faith." **Reginald T. Huey v. Department of Health and Human Services Equal Employment Opportunity Commission, EEOC** 01831403, 86 FEOR 3088 (February 28, 1986).

The Agency Failed To Present A Legitimate, Non-Discriminatory Reason For Non-Selection of the Complainant Sufficiently Specific To Allow Meaningful Rebuttal

The Agency attempted to explain its selection of Ms. Selectee, but was unsuccessful. It simply did not proffer reasons with sufficient specificity to allow Complainant an opportunity to offer meaningful rebuttal. The Agency used "fuzzy" subjective criteria that were impossible to quantify. "...subjective criteria are particularly easy for an employer to invent in an effort to sabotage a plaintiff's prima facie case and mask discrimination." **McDonald v. Eastern Wyoming Mental Health Ctr.**, 941 F.2d 1115 (1991). Further, the Commission has noted that when a Complainant's qualifications are objectively better than the Selectee's, an **extremely heavy burden** is imposed upon the Agency to justify its actions with proof that the selection was ***based upon proper subjective considerations***. **Long v. NASA**, EEOC Appeal No. 01941238 (September 8, 1994), **citing Adams v. Gaudet**, 515 F.Supp. 1086 (W.D. La. 1981).. When the record indicates that a Complainant is objectively more qualified than Selectee, the Commission will ***closely scrutinize*** the Agency's proffered subjective basis for selecting the Selectee over Complainant. **Joseph T. Varley v. Reno, Attorney General, Department of Justice**, EEOC 01972338, 99 FEOR 1072 (December 3, 1998). See **Young v. Treasury**, EEOC No. 01933006 (March 9, 1994); **Miles v. M.N.C. Corp.**, 750 F.2d 867, 871 (1985).

It is well established that pretext can be shown when the Complainant is qualified to perform a position at a higher grade level than the Selectee and the Selection is based on different assumptions about the respective qualities of the candidates without a solid factual basis for making the assumptions. **Byler v. Secretary of the Air Force**, EEOC 01923010 (1993). Here, Complainant had many years of service not only at the GS-12 grade level, but actually making adjudicatory claims decisions (for an Administrative Law Judge) – precisely the type of work required by the position in question.

The Commission has held that subjective determinations, in particular, require that the Agency produce solid evidence to substantiate its position. Failure to do so exposes the Agency to the risk that the Complainant will take advantage of the Agency's lack of proof to establish pretext. **Weaver v. USPS**, 01860291 (1987). In particular, when subjective determinations make up the Agency's legitimate reason, the Agency must present more evidence than just the conclusory testimony of the selecting official. In **Parker v. Postmaster General**, EEOC 05900110 (1990), the Selecting Official did not cite sufficient examples to illustrate his conclusions. The Commission accordingly found that the Agency failed to sustain its burden of production because the issue was not sufficiently framed for pretext by such conclusory testimony, stating that "Where a candidate is found to be objectively better qualified than the selectee, the use of subjective criteria such as **aggressiveness, initiative, and leadership potential**, while not impermissible, may offer a convenient pretext for giving force and effect to racial prejudice, especially in this case where the subjective reasons given for not choosing appellant were unsupported by any independent evidence." **Parker**, supra (**emphasis added**). Further, an Agency cannot simply hide behind its own stated policies, without explaining how those policies apply in a particular case. In the absence of a suitable explanation, the Agency fails to meet its burden of production. **Jones v. Postmaster General**, 01950129 (1996).

Higher education degrees can add to a candidate's qualifications in much the same way as extensive work experience. **Currie v. Dept of the Navy**, EEOC 01831303 (1987). The Complainant's advanced degree in this case made him clearly the most qualified.

The Agency notably failed entirely to present any legitimate non-discriminatory reasons for its selection of the other individuals identified by the Complainant, including (for example and not by way of limitation) A, B or C. This total failure to present evidence should be taken as an adverse inference. Further, the inconsistencies in testimony of Agency managers is indicative of pretext. Pretext is often demonstrated by showing the record of the Agency's actions contains "inconsistencies" and discrepancies that render the Agency's proffered explanations unworthy of credence. **Williams v. Dept of the Army**, 01842729 (1986).

The Agency's Witnesses Were Not Credible

The Agency's witnesses contradicted themselves and each other in this case. Since a transcript was not available at the time of writing of this brief, Complainant is unable to point to exact pages in which the contradictions were found, but believes that it was made

clear at the hearing which statements were contradictory. The Agency witnesses were unable to explain how the rankings were developed, and no evidence was introduced regarding that method. In similar cases, the Commission has found that Agencies ***fail to meet their burden***. See, e.g., **Jones vs. Postmaster General**, EEOC 01950129 (1996).

In the Alternative, Complainant Presented a Complete Rebuttal of the Agency's Proffered Non-Discriminatory Reasons for Non-Selection

In this case, the Complainant has presented evidence which tends to demonstrate that his qualifications were superior to those of the selectees and the other recommended candidates. **See Bauer v. Bailer**, 647 F.2d 1037, 1048 (10th Cir. 1981); **Guyton v. Department of Veterans Affairs**, EEOC Appeal No. 01931099 (December 7, 1993). Mr. Complainant was by far objectively the best candidate for the position, and would have been selected ***but for*** the Agency's discrimination against him. He should have been selected for promotion based on his work experience, professional qualifications and educational background. He met and exceeded the work experience criteria described in the vacancy announcement, the selection factors, and the position description. Mr. Complainant's career accomplishments were superior to that of the Selectees.

Complainant attended the ABC University School of Law and was admitted to the AA State Bar in October. He has practiced law continuously since that time. The Agency knew or should have known all of this information.

The Complainant spent years as a GS-12 Attorney Advisor writing opinions for a X Administration Administrative Law Judge. He also spent two years as a GS-9 and then GS-11 Attorney Advisor writing opinions for a X Administration Administrative Law Judge. He wrote over 1000 opinions and always had sterling performance evaluations.

He also spent 4 years in the Asset Claims Division of the Resolution Trust Corporation under the Federal Deposit Insurance Corporation reviewing and resolving **claims** for assets sold under contractual arrangements. Two of those years were as a GS-12 Senior Claims Analyst in the Real Estate Section, Sales Section, and Financial Instruments Division, and then two years as a GS-12 Senior Claims Analyst.

Further, as noted above, the Agency has failed to state sufficiently specific reasons for the Complainant's non-selection, and has therefore failed to rebut the Complainant's **prima facie** case of discrimination. Even the Agency's proffered reasons, however, fall short. The Agency has not, and can not, explain why Mr. Complainant was not selected. The Agency's proffered reasons were rebutted completely. The Agency's witnesses contradicted themselves and each other.

Officials involved in the hiring process s stated that although there was a discussion and rating/ranking of candidates, ***no written information was saved***. The Complainant was ***never interviewed***. His oral skills were ***never evaluated objectively***. His details were ignored, but others were considered. His past experience was not considered, but that of

others was considered. Worst of all, no notes were preserved from the "closed door" meeting, and the "blackboard was erased."

Higher rankings in the Complainants' component were given to Female, Black and/or Hispanic candidates, who had ***negative comments*** on their written narrative evaluations where the Complainant had *no negative comments*. This is probative of discriminatory intent on the part of the black supervisors who controlled the process.

One must keep in mind that **not one of the applicants for the position of Claims Authorizer involved herein knows how to do the job**. Each person selected must complete a nine month training course successfully. Experience representative of being able to perform the job is certainly therefore contemplated by the recommended Guidance statement, and the only one with that experience was the Complainant.

Finally, it was clear from the Complainant's credible testimony and demeanor at the hearing that his oral skills, analytical ability and technical prowess are clearly exceptional. This strongly mitigates against the Agency's unsupported and subjective assessments of the Complainant and instead is suggestive of intentional discrimination.

Documentary Evidence Supports Complainant's Contentions of Discrimination

The Complainant also showed that the Agency discriminated against him on the basis of his gender and/or race when it failed to comply with the provisions of the National Agreement between the American Federation of Government Employees and the X Administration (CX 9)("National Agreement"). The National Agreement clearly states that where an underrepresentation exists, management must give "serious consideration" to applicants from the underrepresented groups for a targeted occupation (CX 9 at Article 26, Section 11 (C), page 142). Further, the Agency agreed that:

"Should adverse EEO impact be evidenced pursuant to the Affirmative Employment Program Plan, specific and measurable objectives shall be set to correct the conditions. Those objectives will include but not be limited to:

A. Validating existing selection procedures or;

B. Modifying or substituting selection procedures to alleviate adverse impact."

(CX 9 at Article 18, Section 3, page 100).

Complainant's Exhibit C-7 clearly showed a manifest imbalance of white males at the relevant grade levels. This systemic evidence of adverse impact on his protected class(es) is probative of the Agency's discrimination in this case, especially given the Agency's failure to act on the imbalance or change in any way the selection process to alleviate the imbalance. Further, it failed to give "serious consideration," or any different consideration, to white males despite a clear obligation to do so.

Conclusion

The Complainant was discriminated against on the basis of his gender and/or race and/or color. He requests only that he be made whole.

Respectfully Submitted,

Date: _____ _____

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Attorney for Complainant