

Appellant’s Failure to Prosecute” (Motion) and Supporting Brief submitted by Appellee.¹

The Board takes notice that the Hearing Officer applied the appropriate procedural standards under regulation and case law, as herein noted.²

Under Office of Compliance Procedural Rules (OC Proc. R.) §§ 7.01(12), 7.02(a), a Hearing Officer is authorized to impose sanctions for a party’s failure to follow an Order including but not limited to striking part of a complaint and directing judgment against the non-complying party. Under Office of Compliance Procedural Rules, a Hearing Officer is authorized to dismiss an action with prejudice for failure to comply with an Order and for failure to prosecute or defend. OC Proc. R. § 7.02(b)(1) and (2). Federal Rules of Civil Procedure also provide for involuntary dismissal of actions where a plaintiff fails to prosecute a case or comply with a court order. Fed. R. Civ. P. 41(b). “Considerations relevant to ascertaining when dismissal, rather than a milder disciplinary measure, is warranted include the effect of a plaintiff’s dilatory or contumacious conduct of the court’s docket, whether the plaintiff’s behavior has prejudiced the defendant, and whether the deterrence is necessary to protect the integrity of the judicial system.” *Bristol Petroleum v. Harris*, 901 F.2d 165, 167 (D.C. Cir. 1990) citing *Shea v. Donahue Construction Co.*, 795 F.2d 1071 (D.C. Cir. 1986). *See also Gardner v. United States*, 211 F.3d 1305, 1309 (D.C. Cir. 2000). The court also stated within *Gardner*, that dismissal is justified “... when there is some indication that the client or attorney consciously fails to comply with a court order cognizant of the drastic ramifications.” *Gardner*, 211 F.3d at 1309 (citing *Shea*, 795 F.3d at 1078).

Title VII of the Civil Rights Act of 1964, as amended, provides, inter alia, that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."³

The Age Discrimination in Employment Act (ADEA) of 1967, as amended, provides that it is unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age”⁴

¹ The Board notes that Appellant included in her Petition for review conclusory statements about the Office of Compliance processing of this matter. Although noted, no action is deemed necessary based on the lack of specificity and Appellant’s lack of supporting evidence for her conclusions.

² Appellant failed to serve her Petition for Review by the Board on the Appellee. She also failed to submit the Supporting Brief as required by the pertinent Regulations. In accordance with the Regulations, and the Motion by the Appellee, this case could have been **DISMISSED** by the Board. The Board, however, elected to proceed in considering the Appeal even though it had not been perfected.

³ 42 U.S.C. § 2000e-2.

⁴ 29 U.S.C. § 621.

In a discrimination case brought by an aggrieved person pursuant to Title VII of the Civil Rights Act of 1964, the Complainant bears the burden to initially establish a prima facie case of discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If a prima facie case is established, the burden shifts to the Agency to articulate a legitimate, nondiscriminatory reason for the challenged action. *Burdine* at 253-4; *McDonnell Douglas* at 802. Complainant may then show that the explanation offered by the Agency was not the true reason, but a mere pretext for intentional discrimination. *Burdine* at 256; *McDonnell Douglas* at 804.

It is not enough to disbelieve the employer's articulated reason. In addition, the fact finder must believe the Complainant's explanation of intentional discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The ultimate burden of persuading the trier of fact that the Agency discriminated against the Complainant always remains with the Complainant. However, a prima facie case and sufficient evidence of the Agency's pretext may permit a finding of discrimination, even without additional, independent evidence of discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2108-09 (June 12, 2000) (proof of prima facie case and pretext alone usually sufficient to support a trier of fact's belief that discrimination occurred).

As noted by the Court, the factual circumstances necessarily vary in discrimination cases. Consequently, the courts have developed models for certain common situations to assist in determining whether a prima facie case has been established. See *Burdine* at 256, n. 6; *McDonnell Douglas* at 802, n. 13. Although *McDonnell Douglas* and *Burdine* were cases which arose under Title VII of the Civil Rights Act of 1964, the principles articulated in those cases are applicable to actions under the ADEA. *Cuddy v. Carmen*, 694 F. 2d 853, 857-8 (D.C. Cir. 1982), 30 EPD ¶ 33, 024; *Sutton v. Atlantic Richfield Co.*, 646 F. 2d 407 (9th Cir. 1981), 26 EPD ¶ 31, 897; *Loeb v. Textron, Inc.*, 600 F. 2d 1003 (1st Cir. 1979), 20 EPD ¶ 30, 028.

Generally, in order to establish a prima facie case of unlawful discrimination based on age, race or sex in a selection case, a Complainant must establish that: 1) she is a member of a protected class; 2) she applied for and was qualified for the position; and 3) notwithstanding her qualifications, an applicant outside of Complainant's protected class was treated differently and selected for the position under circumstances that give rise to an inference of unlawful discrimination. In establishing a prima facie case of discrimination based on age, a Complainant must demonstrate that she was 40 years of age or more at the time of the personnel action at issue and she was treated differently, with respect to a condition of employment, from a similarly situated person who is outside of her protected class or is a significantly younger person and in a manner that creates an inference of discrimination. *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307, 1310 (1996).

The Board concludes that based on appropriate rules and precedent, the Hearing Officer's Dismissal of the Rollins case was authorized. Procedurally, based on Complainant's repeated failures to respond to Respondent and the Hearing Officer, give notice for the need for rescheduling or seeking

an extension of dates for submissions, or comply with the Office of Compliance Procedural Rules, the Hearing Officer's Dismissal of the instant case was justified.

The Board also concludes that based on the evidence, the Hearing Officer correctly concluded that Complainant failed to establish a prima facie case of sex, race or age discrimination because she has not demonstrated that a similarly situated person who is not within her protected classes based on race or age or someone significantly younger was selected. She also failed to demonstrate, as a female applicant for a position wherein a male applicant was selected, that decisions were made under circumstances that give rise to an inference of unlawful sex discrimination since she had not demonstrated that she was as qualified as the selectee. Complainant's resume was extremely brief and failed to present a detailed description of her qualifications or experience. Comparatively, all applicants called for interview including the selectee, Mr. Dodge, submitted detailed multi-page resumes demonstrating their qualifications via specific listings of educational and professional experiences and their publications by title and name of publication. Based on the evidence, the Hearing officer concluded that Complainant did not demonstrate that she was as qualified as others. Accordingly, as the Hearing Officer concluded, Complainant did not establish a prima facie case of race, age or sex discrimination. She did not challenge the evidence of record about the selectee or demonstrate that the articulated reasons presented in Respondent's Prehearing Brief why applicants other than Complainant were called for interview and why the selectee was chosen are a pretext for discrimination. Accordingly, Complainant failed to prove, by a preponderance of the evidence, that the Respondent unlawfully discriminated against her.

Although the Hearing Officer did not cite the case law that guided her analysis, we have provided it herein and have viewed the Hearing Officer's Decision and the relevant law in arriving at our Decision. We are satisfied that the Hearing Officer applied the correct regulatory and legal standards in analyzing this case. We are satisfied that the Hearing Officer's conclusions are supported by substantial evidence.

Pursuant to § 406(e) of the Congressional Accountability Act and § 8.01(d) of the Office of Compliance Procedural Rules and Approved Amendments, the Board **AFFIRMS** the Hearing Officer's merits determination finding that Complainant failed to prove that the Respondent unlawfully discriminated against her. The Board also **AFFIRMS** the Hearing Officer's determination to Dismiss this case for the Complainant's failure to comply with procedures set forth in the Procedural Rules and Statute. Since the Hearing Officer's Decision is supported by substantial evidence, is legally sound, was not capricious, arbitrary, an abuse of discretion or otherwise not consistent with law or with required procedures the Board **AFFIRMS** the Hearing Officer's procedural Dismissal and Decision on the merits and **DENIES** the Appeal.

It is so ORDERED.

BY: THE BOARD OF DIRECTORS
OF THE OFFICE OF COMPLIANCE

Issued, Washington, DC
December 23, 2004.