

DISTRICT OF COLUMBIA COMMISSION ON HUMAN RIGHTS

COMPLAINANT	§	
	§	
Complainant,	§	
	§	DOCKET NO. 11-333-P (CNTR)
V.	§	Administrative Law Judge Dianne Harris
	§	
HOWARD UNIVERSITY	§	
Respondent.	§	
	§	

ORDER ON MOTION FOR SUMMARY JUDGMENT

The undersigned judicial officer has reviewed the entire record, as well as the pleadings and exhibits, with respect to the instant Motion. The issue has been fully briefed, and no hearing is deemed necessary. For the reasons stated more fully below, the undersigned judicial officer **DENIES** the Respondent’s Motion for Summary Judgment.

I. OVERVIEW

Complainant alleges that Howard University (“Howard” or “Respondent”) discriminated against him based on his race (White), color (white), national origin (United States), age (63), and sex (male) when it did not admit him to any of the three medical school residency programs to which he applied. Respondent filed a Motion requesting the District of Columbia Commission on Human Rights (“Commission”) to grant summary judgment in its favor as to its claim. Res. Mot. for Summary Judgment (Jan. 28, 2019) [hereinafter “MSJ”]. Howard contends that Complainant cannot make a prima facie case of discrimination. MSJ at 14-20. Even if he could, Howard contends it had a legitimate, nondiscriminatory reason for not selecting him: he was less qualified than the chosen applicants. MSJ at 20-24. Finally, Howard argues Complainant cannot show pretext. MSJ at 24-26. Complainant, in response, argues that material facts are in dispute, and Respondent therefore is not entitled to summary judgment. Compl.’s Opp. at 1-2 (Mar. 1, 2019)

[hereinafter “Compl.’s Opp.”]. Upon careful consideration of the parties’ memoranda, the applicable law, and the entire record herein, the Commission **DENIES** summary judgment.

II. STATEMENT OF THE CASE

On April 20, 2009, Complainant filed a charge of discrimination with the United States Equal Employment Opportunity Commission (“EEOC”) alleging Howard discriminated against him based on his race, color, national origin, age, and sex by denying him admission to any of the three residency programs to which he applied. On May 8, 2009, the EEOC transmitted Complainant’s charge to the District of Columbia Office of Human Rights (“Office” or “OHR”). OHR conducted an independent investigation into Complainant’s allegations of discrimination and issued its findings in a Letter of Determination dated March. 26, 2014 [hereinafter “LOD”]. The LOD found probable cause that Howard discriminated against Complainant based on his race, color, national origin, age, and sex when it failed to admit Complainant to any of its residency programs to which he applied. LOD at 16.

On May 25, 2018, this case was certified to the Commission.¹ On January 28, 2019, Howard filed its Motion for Summary Judgment on all of Complainant’s claims. On March 1, 2019, OHR filed an opposition to Respondent’s MSJ. It argued that entertaining a motion for summary judgment was improper because neither the DCHRA nor its accompanying regulations permit such motions. OHR Opp. at 1. Also on March 1, 2019, Complainant filed his own opposition. Compl’s Opp. He agreed with OHR’s interpretation of the DCHRA and relevant regulations but also argued in the alternative that Howard had not met its burden to be awarded summary judgment. *Id.* at 2. On March 11, 2019, Howard filed a reply.

¹ Proceedings before the Commission are *de novo*, and therefore we do not rely on findings of fact or conclusions of law stated in LOD.

III. STATEMENT OF THE ISSUE

Whether, the undisputed material facts established by a preponderance of the evidence and considered in the light most favorable to Complainant, Howard is entitled to judgment as a matter of law on the claim that it discriminated against him by not admitting him to any of its residency programs to which Complainant applied.

IV. FINDINGS OF FACT NOT IN DISPUTE²

1. Complainant attended college and graduate school in Georgia. Complainant's Exhibit [hereafter "Comp. Ex. 7"] 7.
2. Complainant attended medical school at the Saba University School of Medicine on Saba Island in the Caribbean. Comp. Ex. 7.
3. In 1998, Complainant failed the Step 1 exam. HUMSJ 004.
4. In 1999, Complainant passed the Step 1 exam with a score of 77. HUMSJ 004. The minimum passing score was 75. *Id.*
5. In 2000, Complainant failed the Step 2 – Clinical Knowledge exam. HUMSJ 004.
6. In 2001, passed the Step 2 – Clinical Knowledge exam with a score of 76. HUMSJ 004. The minimum passing score was 75. *Id.*
7. In January 2001, Complainant graduated from medical school. Comp. Ex. 7.
8. In July 2001, Complainant obtained his Educational Commission for Foreign Medical Graduates, which he needed to apply for residency programs in the United States. Comp. Ex. 3.

² This decision involves a case at the summary judgment stage. As will be discussed further, all factual conflicts are resolved in Complainant's favor, and all permissible inferences are drawn on his behalf. Therefore, these "Findings of Fact" represent only those facts being used for purposes of summary judgment and would not govern in any subsequent proceedings.

9. In 2003-04, Complainant held a residency position at Louisiana State University (“LSU”). Comp. Ex. 7 at 3. His stated reason for leaving was that his young daughter had a birth defect and needed surgery. *Id.*
10. Between 2004 and 2006, Complainant took but failed the Step 3 exam five times. HUMSJ 004.
11. Between 2004 and 2007, Complainant did not apply for any residency programs. Comp. Ex. 1 at 6-8.
12. In January 2007, Complainant passed the Step 3 exam on the sixth try with a score of 76. HUMSJ 004. The minimum passing score was 75. *Id.*
13. In September 2008, Complainant obtained a license to practice medicine in Wisconsin. HUMSJ 006.
14. In 2008, among other programs at other institutions, Complainant applied for three residency programs at Howard: Family Medicine, Internal Medicine, and Psychiatry. Comp. Ex. 1 at 8; HUMSJ 007-009.
15. Howard’s Family Medicine residency program requires a combined two-digit score of 160 on the Step 1 and Step 2 – Clinical Knowledge exams, that the tests be taken within the past five years, and that the applicant have not failed either exam two or more times. HUMSJ 0029.
16. Complainant’s combined two-digit score on his Step 1 and Step 2 – Clinical Knowledge exams was 153. HUMSJ 004.
17. Complainant passed Step 1 nine years before applying to Howard. HUMSJ 004.
18. Complainant passed Step 2 – Clinical Knowledge seven years before applying to Howard. HUMSJ 004.

19. Howard's Family Medicine residency program requires applicants to have graduated within the past seven years and not to have been out of a medical education program for the past three years. HUMSJ 0029.
20. Complainant graduated seven years before applying to Howard. However, he had not worked since 2005. Comp. Ex. 1 at 9-10.
21. Complainant was not given an interview for Howard's Family Medicine residency program. Comp. Ex. 1 at 5.
22. No one who was selected for a 2009 Howard Family Medicine residency identified as white. Comp. Ex. 11.
23. No one who was selected for a 2009 Howard Family Medicine residency was older than 43. Comp. Ex. 11.
24. No one who was selected for a 2009 Howard Family Medicine residency had a national origin from the United States. Comp. Ex. 11.
25. One person who was selected for a 2009 Howard Family Medicine residency, D.P.M., had a combined Step 1 + Step 2 score of 159. Comp. Ex. 11. That person attended Howard, a United States institution, for medical school. *Id.*
26. One person who was selected for a 2009 Howard Family Medicine residency, N.M., took both Step 1 and Step 2 three times. Comp. Ex. 11. That person attended Howard, a United States institution, for medical school. *Id.*
27. Howard's Internal Medicine program requires applicants to have passed the Step 1, Step 2 – Clinical Knowledge, and Step 2 – Clinical Skills exams. HUMSJ 0038.
28. Candidates who score in the 90th percentile or higher on these exams are considered first. HUMSJ 0038.

29. Complainant was not given an interview for Howard's Internal Medicine residency program. Comp. Ex. 1 at 5.
30. No one who was selected for a 2009 Howard Internal Medicine residency identified as Caucasian or white. Comp. Ex. 10.
31. No one who was selected for a 2009 Howard Internal Medicine residency was older than 44. Comp. Ex. 10.
32. Witness 1 of the Family Medicine program testified that having attended a United States medical school "would suggest... that that applicant might be more qualified" because Howard "would know more about the medical education that the individual received." Witness 1 Depo. at 70:5-17.
33. Complainant also testified that Howard had a "concern of the overall quality on both the pre-clinical and clinical side of the education that the individual received." Witness 1 Depo. at 71:1-4.
34. Complainant testified that, of all the Caribbean medical schools, Saba was "one of the least respected" in terms of reputation. Witness 1 Depo. at 71:7-16.
35. Howard's Psychiatry residency program requires applicants to have passed the Step 1, Step 2 – Clinical Knowledge, and Step 2 – Clinical Skills exams. HUMSJ 0033.
36. Candidates who score in the 90th percentile or higher are considered first. HUMSJ 0033.
37. The Psychiatry residency program also has indicia of preferred applicants, including having passed the Step 3 exam and, for international medical school graduates, clinical experience in the United States "as well as solid passing scores." HUMSJ 0033.
38. Complainant was not given an interview for Howard's Psychiatry residency program. Comp. Ex. 1 at 5.

39. No one who was selected for a 2009 Howard Psychiatry residency identified as Caucasian or white. Comp. Ex. 8.
40. Only one person who was selected for a 2009 Howard Psychiatry residency was male. Comp. Ex. 8.
41. No one who was selected for a 2009 Howard Psychiatry residency was older than 41. Comp. Ex. 8.
42. Complainant has not applied to any residency programs or other medical jobs since 2008. Comp. Ex. 1 at 6-8.

V. MATERIAL FACTS IN DISPUTE

1. Complainant disputes Howard's statement that he had not passed or even taken the Step 2 – Clinical Skills exam before applying to its residency programs. Compl's Opp. at 3.
2. Complainant disputes Howard's argument that admission to its residency programs required passage of the Step 2 – Clinical Skills exam upon application as opposed to matriculation. Compl's Opp. at 4.
3. Complainant disputes that the ability to obtain a District of Columbia medical license was a formal requirement. Compl's Opp. at 6.

VI. SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. Pro. 56(c); D.C. Sup. Ct. R. Civ. Pro. 56(a); *Celotex Corp. v. Catrell*, 477 U.S. 317, 318 (1986); *Padou v. District of Columbia*, 29 A.3d 973, 980 (D.C. 2011). In deciding summary judgment motions, courts view the evidence in the light most favorable to the non-moving party. See *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 243 (1986). Summary judgment is appropriate only if the pleadings, depositions, answers to

interrogatories, admissions, and affidavits filed pursuant to discovery show that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006); *see also Graff v. Malawer*, 592 A.2d 1038, 1040 (D.C. 1991).

If a moving party has made an initial showing that the record presents no genuine issue of material fact, the burden of production shifts to the non-moving party to show that a genuine material issue exists. *See Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005). In opposing a summary judgment motion, a party may not rely on vague allegations but instead must present specific facts showing that there is a genuine issue for trial. *Graff v. Malawer*, 592 A.2d 1038, 1040 (D.C. 1991).

VII. DISCUSSION

In its opposition to Howard's Motion for Summary Judgment, OHR argued that motions for summary judgment generally are improper. OHR Opp. at 1. The Commission has historically entertained motions for summary judgment, and nothing in the DCHRA or its accompanying regulations specifically prohibits it from doing so. When there is a formal policy change, the Commission will act accordingly. Until then, however, the Commission deems Howard's Motion for Summary Judgment proper.

When, as here, a complainant does not put forth direct evidence of unlawful discrimination, the proof paradigm established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) is used to analyze the claim. *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003). Under this framework, a complainant must first establish a *prima facie* case of discrimination by showing that: (1) a protected trait was at issue; (2) she was otherwise qualified for the position; and (3) she suffered an adverse employment action, (4) which gave rise to an inference of

discrimination. *Id.* After a complainant has established a *prima facie* case, a respondent must articulate that the complainant was rejected for one or more legitimate, non-discriminatory reasons. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142 (2000); *Lathram*, 336 F.3d at 1088.

Once a respondent has made this articulation, to survive summary judgment, a complainant must show that a reasonable jury could conclude from “all of the evidence” that the respondent’s proffered reason or reasons were a pretext for intentional discrimination. *Lathram*, 336 F.3d at 1088. “All of the evidence” means the combination of (1) evidence establishing a complainant’s *prima facie* case; (2) evidence a complainant presents to attack the employer’s proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to a complainant, such as independent evidence of discriminatory statements or attitudes on the part of the employer. *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1289 (D.C. Cir. 1998) (en banc).

A. Prima Facie Case for Disparate Treatment

Factual disputes preclude ruling definitively that Complainant does not have a *prima facie* case. He meets the first element because every trait at issue in his complaint – race, color, sex, age, and national origin – are protected under the DCHRA. Whether he meets the second element, that he was otherwise qualified for the residency positions to which he applied, is disputed. Howard contends Complainant had not taken or passed the Step 2 – Clinical Skills exam when he applied to its programs. Complainant contends he had passed it, but even if he had not, that Howard required passage only upon matriculation. A hearing is necessary to resolve this factual dispute.

Complainant meets the third and fourth elements. He suffered an adverse employment action when he was not chosen to interview for any of the Howard residency programs to which he applied, and an inference of discrimination exists: based on the data provided, none the 32

applicants chosen identified Caucasian or white; only three indicated a national origin from the United States; and none were older than 44.

As for sex, there is not enough evidence to conclude either party is entitled to judgment at this stage. A hearing is necessary to determine whether Complainant can make a *prima facie* case for sex discrimination.

B. Respondent's Proffered Nondiscriminatory Reason.

In accordance with the *McDonnell Douglas* burden shifting paradigm, if Complainant provides reliable evidence to state a *prima facie* case for interference, Howard must proffer a legitimate nondiscriminatory reason for its refusal to admit him to a residency program. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Howard survives this burden of production.

Respondent proffers it did not discriminate against Complainant because he was not qualified for any of the three residency programs to which he applied because, for example, he had not taken the Step 2 – Clinical Skills exam. Because the parties dispute whether Complainant took and passed this exam, and this fact is material to whether Complainant was qualified, summary judgment is not appropriate. A reasonable juror could, accepting Complainant's assertion that he took and passed this exam as true, find in his favor. Accordingly, a hearing is necessary to resolve this question of fact.

VIII. CONCLUSIONS OF LAW

Due to the undisputed material facts established by a preponderance of the evidence and considered in the light most favorable to Complainant, Howard is not entitled to judgment as a matter of law on the claim that it discriminated against him by not admitting him to any of its residency programs to which Complainant applied.

VII. ORDER

For the reasons set forth above, the undersigned judicial officer hereby **DENIES** Respondent's Motion for Summary Judgment.

So Ordered this 8th day of April 2019.

Dianne Harris

Dianne Harris
Administrative Law Judge
D.C. Commission on Human Rights