

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-5412

September Term, 2000

Consuella Duckett, Appellee

v.

Andrew Cuomo, Secretary, U.S. Department of Housing and Urban
Development,
Appellant

Appeal from the United States District Court
for the District of Columbia
(No. 96CA0375)

Before: Edwards, *Chief Judge*, Ginsburg, and Tatel, *Circuit
Judges*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. The court has determined that the issues presented occasion no need for oral argument. See D.C. Cir. Rule 34(j). For reasons stated in the accompanying memorandum, it is

ORDERED AND ADJUDGED that the district court's orders granting summary judgment in favor of the defendant and dismissing all of the claims stated in Duckett's complaint be affirmed.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per curiam
FOR THE COURT:

Consuella Duckett v. Andrew Cuomo, Secretary, U.S. Dept. of Housing and Urban Dev. (No. 99-5412)

M E M O R A N D U M

Duckett sued the Secretary of HUD under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16, and under the ADEA, 29 U.S.C. § 633a, claiming she suffered adverse employment action on the basis of her race, age, and activity as an EEOC counselor. The district court correctly dismissed each of Duckett's claims on summary judgment as "there is no genuine issue as to any material fact." See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

Two of Duckett's claims, pertaining to her eligibility for union membership and to her inability to obtain a performance evaluation for work in her prior position through October 1993, are barred because she failed to exhaust her remedies. See *Brown v. Marsh*, 777 F.2d 8, 13 (D.C. Cir. 1985) ("plaintiff who fails to comply, to the letter, with administrative deadlines ordinarily will be denied a judicial audience"). EEO guidelines required that Duckett contact an EEO counselor within 45 days after the claims came to her attention, see 29 C.F.R. § 1614.105(a)(1), which she admittedly failed to do. Although Duckett asserts that the deadline should be equitably tolled because she relied upon the representations of a supervisor that she could not yet be evaluated in her *new* job, that

representation bears upon neither Duckett's eligibility for union membership nor her ability to obtain a performance evaluation based upon already-completed work in her *prior* position.

Duckett's claim that HUD unlawfully denied her request in October 1993 for a promotion to grade GS-9 fails because she produced no evidence from which a jury could conclude that either her education or her work experience qualified her for a GS-9 grade at the time of her transfer. *See Fischbach v. D.C. Dept. of Corrections*, 86 F.3d 1180, 1182 (D.C. Cir. 1996). The record also shows that, by refusing to cooperate and to supply samples of her work, Duckett disqualified herself from waiver of HUD's requirement that she spend one year at the GS-7 level before being promoted to GS-9. Furthermore, Duckett produces no evidence showing that the substance of the work she was performing as a Management Analyst was, notwithstanding her GS-7 grade, actually at the GS-9 level so as to qualify her for the waiver. Finally, Duckett's admitted refusal to cooperate in providing work samples gave HUD a nondiscriminatory basis for not granting the waiver.

Duckett's claim that her performance evaluation for the period ending October 1993 was delayed does not identify an adverse employment action. The Government points out that when an evaluation is delayed it is HUD's policy to treat the employee's subsequent evaluation as a proxy for the one she

requested, so that the delay did not cause the plaintiff any harm. See *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999) (no adverse action where "there is no objective basis for finding that [plaintiff] was harmed by these decisions in any tangible way").

Although Duckett complains that her March 1994 rating should have been "outstanding" rather than "fully successful," she has conceded that she failed to do her "most urgent assignment" in a timely fashion despite repeated requests, and that her supervisor ultimately had to complete the task in her absence. Because Duckett has offered no evidence suggesting an alternative explanation for this failure, a reasonable jury could not find that Duckett qualified for a rating of "outstanding."

Because each of Duckett's individual claims clearly fails, her claim that the Government's actions were retaliatory necessarily fails; the claim of retaliation also fails because Duckett did not dispute that three of her supervisors "were unaware that plaintiff was an EEO counselor for any employee" and the one supervisor who allegedly knew of her EEO activity admittedly sought to qualify her for the waiver.