

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5646

Summary Calendar

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JAMES R. MORGAN,

Plaintiff-Appellant,

v.

MICHAEL P.W. STONE, Secretary,  
Department of the Army,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Western District of Texas  
(SA-89-CA-1501)

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(February 24, 1993)

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:\*

This case involves an employment discrimination claim brought by James R. Morgan, a civilian employee of the Department of the Army. Morgan claims that he was not selected for a promotion because the officials making the selection considered inappropriate factors such as race (black) and age (over 40). He asserts claims under Title VII and the Age Discrimination in

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Employment Act. The Army has admitted that the selection process of which Morgan complains was tainted.

After an agency review, the initial selection was voided, and a new selection panel chose another employee, an Hispanic male also over 40, to fill the position. Morgan requested a hearing before the EEOC. The Administrative Judge concluded that the second selection established that Morgan would not have been selected for the position even absent discrimination and denied relief. The Office of Review and Appeals affirmed the Administrative Judge's decision and denied Morgan's motion to reopen and reconsider. Morgan then filed this civil action.

On the Government's motion, the district court dismissed the case as moot. Relying upon DeVolld v. Bailer, 568 F.2d 1162 (5th Cir. 1978), the district court found that Morgan had to show not only that there was discrimination but also that he was the most qualified person for the job. The court then reasoned, following Pollard v. Grinstead, 741 F.2d 73 (4th Cir. 1984), that Morgan was entitled only to compete for the job without discrimination and that the second selection process provided that remedy. Thus, the court concluded, Morgan's claims were moot. Morgan appeals.

We agree with the district court that the second selection process restored Morgan to the position that he would have been in absent the discrimination that he complains of. Specifically, he was given the opportunity to compete for the promotion free of discrimination. All of the original candidates, including

Morgan, were evaluated and a new selection made. Morgan does not complain that the second selection process was tainted. Since Morgan has received what Title VII and the ADEA entitle him to, i.e., the right to compete for the promotion free of discrimination, his claims for relief are moot.

AFFIRMED.