



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

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Emery S.,¹
Complainant,

v.

Janet Dhillon,²
Chair,
Equal Employment Opportunity Commission,
Agency.

Appeal No. 0120181312

Agency No. 2015-0068

DECISION

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 26, 2018, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

The issues presented are: 1) whether the Administrative Judge (AJ) properly issued a decision without a hearing; and 2) whether the AJ properly found that Complainant was not subjected to age, race, or sex discrimination when he was not selected for any of three AJ positions.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

² In the present matter, the Equal Employment Opportunity Commission (EEOC) is both the respondent Agency and the adjudicatory authority. The Commission's adjudicatory function is separate and independent from those offices charged with in-house processing and resolution of discrimination complaints. For the purposes of this decision, the term "Commission" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to the respondent party in this action.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Adjunct Professor and private-practice attorney in Texas. On April 10, 2015, Complainant applied at the GS-14 level for an AJ position within the Agency's Los Angeles District Office (LADO). The Commission received applications from 389 applicants it deemed qualified for the position, including Complainant, who was on the GS-14 Certificate of Eligibles (Certificate).³ Nine candidates who resided in the Los Angeles area were interviewed for the position on June 16, 2015. No candidates from outside the Los Angeles area, or not on the GS-13 Certificate, were selected for an interview. Complainant was not selected for the position, but a 37-year old Filipina-American female (S1) who was on the GS-13 Certificate was selected.

Complainant also applied for an AJ position within the Agency's Chicago District Office (CHIDO) on or about April 17, 2015. Approximately 600 persons applied for this position, but only four candidates from the GS-14 Certificate were interviewed. Complainant was not interviewed. Complainant was not selected for the position, but a 56-year old female (S2) was selected for a CHIDO AJ position. Additionally, during the selection process, CHIDO received authorization to hire an AJ in its Minneapolis Area Office and ultimately hired a 45-year-old Caucasian male (S3) for that position.

On April 23, 2015, Complainant applied for an AJ position at the Agency's Phoenix District Office (PHODO). Complainant was among 283 applicants for this position. Seven applicants were interviewed for the position, but Complainant was not among those selected for an interview. The Agency selected two Caucasian males, one 55-year-old (S4) and one 37-year-old (S5), for this position.

EEO Complaint

On December 18, 2015, Complainant filed a formal EEO complaint in which he alleged that the Agency discriminated against him on the bases of sex (male) and age (64)⁴ when:

1. On or about July 8, 2015, he was not selected for a GS-13/14 Attorney Examiner/Civil Rights Administrative Judge (AJ) position, advertised under Vacancy Announcement Number D15-LAX-1376075-079-TMD in the Agency's Los Angeles District Office (LADO);

³ The Certificate indicates that 164 applicants were deemed eligible and referred for consideration at the GS-13 level, and 225 applicants were deemed eligible at the GS-14 level, including Complainant.

⁴ Complainant subsequently moved to amend his complaint to include race as a basis, as noted infra.

2. On or about August 12, 2015, he was not selected for a GS-13/14 AJ position, advertised under Vacancy Announcement Number D15-CHI-1377961-080-TMD in the Agency's Chicago District Office (CHIDO); and
3. On or about October 12, 2015, he was not selected for a GS-13/14 AJ position, advertised under Vacancy Announcement Number D15-PHODN-1388924-089-JRG in the Agency's Phoenix District Office (PHODO) and Denver Field Office (DENFO).

After more than 180 days elapsed since the filing of his complaint, Complainant requested a hearing before an EEOC AJ. The Agency issued the Report of Investigation (ROI) on June 8, 2016. The AJ assigned this complaint to an independent contract AJ, who issued an Acknowledgement and Order on January 9, 2017.

AJ's Rulings and Decision

On February 24, 2017, Complainant filed a Motion to Compel Discovery to require the Agency to summarize documents contained in the ROI; to require the Agency to provide a copy of its "affirmative employment plans"; to require the Agency to disclose whether there were any other EEO complaints regarding nonselection for an AJ position; and to require the production of documents pertaining to the veterans' status of applicants. On March 6, 2017, the Agency filed an Opposition to Complainant's Motion to Compel.

On April 19, 2017, the AJ granted Complainant's Motion in part by ordering the Agency to provide "a copy of its Affirmative Action Plan(s) from 2012 through 2016 (also known as EEOC MD-715 Plan)." Additionally, the AJ ordered the Agency to comply with Complainant's request for information about other EEO complaints regarding nonselections for AJ positions. However, the AJ denied Complainant's request that the Agency summarize documents from the ROI.

On June 21, 2017, Complainant moved for reconsideration of the AJ's order, and requested to amend his complaint to include race⁵ as a basis for discrimination. On June 30, 2017, the Agency replied in opposition to Complainant's request for reconsideration and amendment of his complaint. The AJ denied Complainant's June 21, 2017, motion on the basis that it was untimely filed.

On June 30, 2017, the Agency filed a Motion for Findings and Conclusions without a Hearing. On July 24, 2017, Complainant filed a Motion to Strike Agency's Motion for Findings and Conclusions without a Hearing on the basis that it was not filed within 15 days of the April 10, 2017, close of discovery. On July 25, 2017, Complainant filed a Memorandum Contra Agency Motion for Findings and Conclusions without a Hearing. In that Motion, Complainant opposed the Agency's Motion, as well as reminded the AJ that he had filed a motion on June 21, 2017, to amend his complaint to add race as an alleged basis of discrimination. On August 3, 2017, the

⁵ Complainant identifies his race as "African, Hispanic, and Native American."

Agency filed a Response to Complainant's Motion to Strike in which it acknowledged that its June 30, 2017, Motion was untimely but argued that it should nonetheless be considered on its merits.

In a decision dated November 7, 2017, the AJ denied Complainant's Motion to Amend to include race as a discrimination basis because the interviewing and selecting officials testified that they were unaware of applicants' races or national origins. Regarding Complainant's Motion to Strike Agency Motion for Findings and Conclusions without a Hearing and to File a Reply Brief, the AJ noted that the Agency acknowledged that its Motion was filed after the due date but should nevertheless be considered. The AJ issued summary judgment in favor of the Agency. Specifically, the AJ determined that the Agency provided legitimate, nondiscriminatory reasons for not selecting Complainant for the AJ positions, and Complainant did not show that the reasons were pretext for unlawful discrimination.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant maintains that the AJ erred in issuing summary judgment in favor of the Agency. Complainant contends that the Agency filed its Motion for Findings and Conclusions without a Hearing 60 days past the deadline for doing so, and therefore, the AJ issued summary judgment in favor of the Agency "*sua sponte*." Complainant contends that the AJ's *sua sponte* issuance of a summary judgment decision violated the procedural requirements for issuing such a decision found in the Commission's Handbook for Administrative Judge (Handbook). Complainant points out that the Handbook provides that, before issuing summary judgment *sua sponte*, an AJ must: 1) indicate in whose favor the Motion for Summary Judgment is being proposed; 2) identify the applicable legal standards and burdens of proof with respect to each claim; 3) set forth the legal standards for issuing summary judgment; and 4) identify the undisputed material facts that appear dispositive of the case, or provide other forms of evidence that create a factual dispute regarding a material issue. Additionally, Complainant maintains that the AJ erred in failing to grant his request to amend his complaint to include race as a discrimination basis.

Regarding the merits of his complaint, Complainant contends that there were "anomalies and deviations" from Office of Personnel Management (OPM) hiring procedures for each vacancy announcement involved in this case. For example, Complainant argues that the Agency improperly considered only GS-13 applicants in the Los Angeles area for hiring at LADO and hired S1 despite the fact that she did not have an active license to practice law. Complainant maintains that the vacancy announcement for the LADO position did not have a residency requirement and did not limit selection to the GS-13 level.

Additionally, Complainant maintains that CHIDO improperly hired two attorneys at the GS-14 level, although only one position was advertised. Complainant further maintains that there was "an element of preselection chicanery" in S3's selection because only present or former Agency employees were considered for the CHIDO positions. Complainant further maintains that the

Supervisory AJ involved in the selection process for the PHODO position added an additional vacancy, although only one position was advertised. Complainant also maintains that S5 did not have an active license to practice law in any state when he applied for the PHODO position and had only seven years of experience practicing law.

Complainant notes that all the applicants hired for the AJ positions are Caucasian, except for S1, who is Asian. Complainant further contends that the selectees are “much younger” than he is with “far fewer years of litigation experience in federal courts with fair employment practices law.”

The Agency does not raise any contentions on appeal.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law”).

ANALYSIS AND FINDINGS

Summary Judgment

We first determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A “genuine issue of fact” is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A “material” fact has the potential to affect the outcome of a case. Further, an AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Having reviewed the record, we find that the AJ correctly determined that there are no genuine issues of material fact or credibility that merited a hearing. Therefore, the AJ's issuance of a decision without a hearing was appropriate, as discussed further below.

Here, Complainant contends that the Agency filed its Motion for Findings and Conclusions without a Hearing 60 days past the deadline for doing so, and the AJ therefore improperly issued summary judgment in favor of the Agency “*sua sponte*.” Upon review, we first note that the AJ did not issue summary judgment in favor of the Agency *sua sponte*. Instead, the AJ’s decision explicitly stated that the Agency’s Motion for Findings and Conclusions without a Hearing was “GRANTED,” which reflects the fact that the decision was in response to the Agency’s Motion, not issued *sua sponte*. AJ’s Decision, p. 9.

We have held that an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given: (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. Petty v. Dep’t of Def., EEOC Appeal No. 01A24206 (July 11, 2003).

In this case, we find that Complainant received notice of the proposal to issue a decision without a hearing, which included a comprehensive statement of allegedly undisputed material facts. Moreover, Complainant responded to the Motion, arguing that it was untimely submitted as well as opposing its request for summary judgment in favor of the Agency by addressing the merits of his complaint. Further, the record reveals that both parties had the opportunity to engage in discovery before the AJ’s issuance of a summary judgment decision. The AJ waived the time-limit for submitting summary judgment motions here, which we find to be a permissible exercise of an AJ’s broad discretion in adjudicating complaints.⁶

Further, we find that the AJ correctly determined that there are no genuine issues of material fact or credibility that merited a hearing. Therefore, we conclude that the AJ’s issuance of a decision without a hearing was appropriate for the reasons set forth below.

Motion to Amend

Regarding Complainant’s claim that the AJ erred in failing to grant his request to amend his complaint to include race as a basis of alleged discrimination, we note that the AJ ultimately addressed Complainant’s claim that he was subjected to racial discrimination, despite previously

⁶ Administrative Judges have full responsibility for the adjudication of the complaint, including overseeing the development of the record, and have broad discretion in the conduct of hearings. 29 C.F.R. § 1614.109(a),(e). Given the AJ’s broad authority to regulate the conduct of a hearing, a party claiming that the AJ abused his or her discretion faces a very high bar. Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016) (citing Kenyatta S. v. Dep’t of Justice, EEOC Appeal No. 0720150016 n.3 (June 3, 2016) (responsibility for adjudicating complaints pursuant to 29 C.F.R. § 1614.109(e) gives AJs wide latitude in directing terms, conduct, and course of administrative hearings before EEOC)).

denying his request to amend his complaint. Moreover, the record is adequately developed for us to determine whether Complainant was subjected to race discrimination. Therefore, we will address Complainant's race discrimination claim herein.

Disparate Treatment: Three Nonselections

Complainant alleged that he was subjected to disparate treatment when he was not selected for three AJ positions. To prevail in a disparate treatment claim absent direct evidence of discrimination, Complainant must satisfy the evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802-04 (1973). Complainant carries the initial burden of establishing a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 441 U.S. at 802 n.13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, Complainant bears the ultimate responsibility to prove, by a preponderance of the evidence, that the reason proffered by the Agency was a pretext for discrimination. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

LADO position

Complainant is a male and describes his race as "African American, Hispanic, and Native American." Complainant was 64 years old at the time of his nonselection for the LADO position. The record indicates that Complainant was qualified for the LADO position, but the Agency did not select him. Instead, the Agency selected a 37-year old Asian female (S1) for the position. Therefore, we find that Complainant established prima facie cases of race, sex, and age discrimination for the LADO position.

Nevertheless, we find that the Agency provided legitimate, nondiscriminatory explanations for not selecting Complainant for this position. Specifically, the LADO Director stated that Complainant was not selected for the LADO position because she limited consideration to those candidates who lived in the Los Angeles area. The LADO Director stated that, because of the large number of applicants, she and the Supervisory AJ decided to interview only candidates who currently resided within the borders/jurisdiction of the LADO. The LADO Director further stated that, in recent years, the LADO had hired candidates from outside of the area and experienced a high rate of individuals seeking hardship transfers back to their previous residency. She stated that, because hiring authorizations were "few and far between," the LADO is reluctant to hire individuals who are not likely to stay and are merely looking to get into federal employment so that they can transfer elsewhere. She stated that when the LADO has a large pool of candidates for positions, as here, the priority is to consider applicants who reside within the jurisdiction of the LADO.

The Supervisory AJ who initially reviewed the LADO applications stated that she limited consideration to candidates who were listed on the GS-13 Certificate, and no selection was made from the GS-14 Certificate because the LADO Director wanted the selectee to have promotion potential. The Supervisory AJ further stated that S1 was chosen for the position because she demonstrated experience in employment law, administrative law, and the judiciary by representing employees in federal sector labor relations and employment cases in administrative proceedings. The Supervisory AJ also stated that S1 had served as Agency counsel before the Commission and was a Hearing Officer for the State of California, and her prior positions were directly related and transferable to the AJ position at issue.

Additionally, the Supervisory AJ stated that, because of the large applicant pool, Agency officials decided to interview only the top applicants residing within the jurisdiction of the LADO. The Supervisory AJ stated that her supervisor had informed her that many employees who were previously selected for positions had thereafter requested hardship transfers to other areas of the country, and because of the high volume of federal sector cases, she did not want to hire an AJ and then lose the "slot" when the employee requests a hardship transfer to another geographical location with a lower cost of living.

The District Resources Manager (DRM) stated that Complainant was not interviewed for the AJ position because he did not reside within the jurisdiction of the LADO, and that the only candidates interviewed resided within the area served by the LADO and were on the GS-13 certificate. The DRM further stated that S1 was selected for the position because she had direct experience as a Hearings Officer and representing agency and union interests.

In an attempt to prove pretext, Complainant contends that S1's Bar membership was inactive at the time she was selected. However, S1's resume indicated that she was a current member of the California Bar, and there is no evidence that the Agency was aware that this representation was inaccurate. Further, documentation submitted by Complainant from the California State Bar indicates that S1's Bar membership was "active" in June 2014 but "inactive" in February 2016. However, the LADO selection occurred in or about July 2015, and there is no indication that S1's California Bar membership was inactive at that time.

Complainant also contends that the Agency improperly only considered applicants in the LADO jurisdiction, in violation of OPM regulations. However, the Assistant Director of the Office of the Chief Human Capital Office (OCHCO Assistant Director) stated that that the hiring manager permissibly narrowed the field of candidates considered to those residing in the Los Angeles District because of the large number of eligible candidates for the LADO position. Complainant notes that the OCHCO Assistant Director stated that the LADO area residency requirement was because of the large number (389) of applicants for this position, which he maintains contradicts other Agency officials' claim that it was imposed to discourage employees from transferring to another EEOC District Office because of the higher cost of living in the Los Angeles area. However, statements from the LADO selecting officials indicate that the residency requirement was implemented as *both* a narrowing criterion to select who would be interviewed from a very large number of applicants, *as well as* a way to avoid selecting applicants who would later request

a hardship transfer to another jurisdiction. At any rate, Complainant has not shown that the Agency used criteria that violated OPM regulations in this selection process.

Complainant has not shown that the Agency's explanations for not selecting him for the LADO position were unworthy of credence or that discriminatory animus more likely motivated the Agency's action. We find, therefore, that Complainant has not shown that the Agency's articulated reasons were a pretext for discrimination based on race, sex, or age.

CHIDO position

The record indicates that Complainant was qualified for the CHIDO AJ position, but the Agency did not select him. Instead, the Agency selected a 56-year old Caucasian female (S2) and a 45-year old Caucasian male (S3) for AJ positions within CHIDO. Therefore, we find that Complainant established prima facie cases of race, sex, and age discrimination for the CHIDO position.

Nonetheless, we find that the Agency provided legitimate, nondiscriminatory reasons for not selecting Complainant. Specifically, the Supervisory AJ (SAJ) who made this selection stated that Complainant was not selected for the CHIDO position because she only considered candidates who were current or former CHIDO employees, or who had performed the duties of an EEO AJ. The SAJ stated that Complainant was not selected for a CHIDO AJ position because he had not worked for the Agency, nor had he performed the duties of an EEO Administrative Judge. She stated that applicants were chosen for an interview based on their years of legal experience, experience with EEO law, experience as an AJ, litigation experience, and ties to the Chicago, Minneapolis, or Milwaukee areas. The SAJ stated that all three candidates interviewed had a connection with the CHIDO, except for S2, who was already performing the same duties of the position of an AJ.

The CHIDO District Director (Director) stated that Complainant was not granted an interview for an AJ position because Agency officials limited interviews to applicants who had a connection to the Agency, had a connection to one of the cities in which there are CHIDO offices (Minneapolis, Chicago, and Milwaukee), and had extensive EEO experience and/or EEO AJ experience. The Director stated that S2 was selected for the position because she had held the position of Administrative Law Judge (ALJ) with the Illinois Human Rights Commission for ten years, had many years of litigation experience, and had experience in EEO law. The Director further stated that the Illinois Human Rights Commission is the Agency's "sister agency" in Illinois, and as an ALJ, S2 performed many of the same duties of the AJ position for which she was selected. Additionally, the Director stated that S2 was selected because she lived in Chicago.

The Director further stated that S3 was selected for an AJ position because he had been a Trial Attorney for eight years at the Agency's Minneapolis Area Office, which is under the jurisdiction of CHIDO. The Director stated that S3 was familiar with the EEO law AJs enforce and was well-versed as a Trial Attorney with the Agency. The Director also stated that S3 received an "outstanding" rating on his performance appraisal and had years of litigation experience.

In an attempt to prove pretext, Complainant contends that the Agency's decision to hire an additional AJ pursuant to the vacancy announcement violated OPM's regulations because the announcement indicated that only one vacancy would be filled. However, Complainant has not provided any persuasive evidence that the Agency's selection process violated hiring regulations. Moreover, it is undisputed that Complainant has never worked for the Agency and did not live within the jurisdiction of CHIDO. As such, we find no evidence that hiring a second applicant under this vacancy announcement indicates a discriminatory motive. Complainant has not shown that the Agency's articulated reasons were a pretext for discrimination based on race, sex, or age.

PHODO position

Complainant was qualified for the PHODO AJ position, but the Agency did not select him. Instead, the Agency selected a 55-year old Caucasian male (S4) and a 37-year old Caucasian male (S5) for AJ positions within PHODO. Therefore, we find that Complainant established prima facie cases of race and age discrimination for the PHODO position. He has not established a prima facie case of sex discrimination.

Nevertheless, we find that the Agency provided legitimate, nondiscriminatory reasons for not selecting Complainant. Specifically, the PHODO District Resources Manager (DRM) stated that S4 was selected for the position because he was an internal candidate who had "working knowledge" of the Agency as a Trial Attorney. The PHODO Director stated that S4 was selected for the position because he was a Trial Attorney in the Agency's Denver Legal Unit. Additionally, the Supervisory AJ stated that S4 was selected for the position because he had been an Agency Senior Trial Attorney for many years and had built a reputation for "excellent lawyering" and had successfully litigated several high-profile Agency cases. The Supervisory AJ also stated that S4 had litigated employment discrimination cases in private practice before joining the Agency.

The Supervisory AJ stated that S5 was selected because he had practiced discrimination law with the U.S. Department of Education; had civil rights law experience; had an impressive background of judicial clerkships; had worked for several prominent national law firms; had attended a prestigious law school, where he ranked second in his graduation class; and had an undergraduate degree from an Ivy League university. The PHODO DRM stated that S5 was selected for the position because of his "vast work experience" with the Department of Education, clerkship with a judge, and legal fellowship with a U.S. Senator.

In an attempt to prove pretext, Complainant maintains that the Supervisory AJ involved in the selection process for the PHODO position added an additional vacancy, although only one position was advertised. However, we find no evidence that filling an additional vacancy under this announcement reflected a discriminatory motive in this case. Complainant also maintains that S5 did not have an active license to practice law when he applied for the PHODO position and had only seven years of experience practicing law. However, the record reveals that S5 had active membership with the Washington, D.C., Bar during the relevant period, as well as inactive Bar memberships in Colorado and Maryland. Additionally, although S5 had only approximately seven

years of practicing law, he had already worked as an Attorney Advisor for the Department of Education's Office of Civil Rights and as an attorney for a large law firm, where he litigated a disability discrimination class-action lawsuit. Complainant has not shown that the Agency's articulated reasons were pretextual.

Overall, regarding all three nonselections, we find that Complainant has failed to provide any evidence from which it can be reasonably concluded that the Agency's nondiscriminatory explanations are pretext for unlawful discrimination. In so finding, we determine that, although Complainant was qualified for the positions, his qualifications were not plainly superior to those of the selectees. See Mickie B. v. Dep't of Agriculture, EEOC Appeal No. 2019000356 (Aug. 13, 2019). In this case, Complainant essentially objects to the selection criteria used by the Agency, but we do not find the criteria unreasonable or evidence of discriminatory motive. We have consistently held that, absent discriminatory animus, the Commission will not second-guess an agency's personnel decisions, and substitute our judgment for that of the Agency. Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997) (citing Burdine, 450 U.S. at 259). The question is not whether the agency made the best, or even a sound, business decision; it is whether the real reason is discrimination. See Andres M. v. U.S. Postal Serv., EEOC Appeal No. 0120181837 (Aug. 13, 2019). There is simply no persuasive evidence here that Complainant was not selected because of his race, sex, or age. Therefore, we find that the AJ properly issued summary judgment in favor of the Agency.

CONCLUSION

Accordingly, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order for the reasons set forth in this decision.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B

(Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

/s/ Bernadette B. Wilson

Bernadette B. Wilson
Executive Officer
Executive Secretariat

December 10, 2019

Date