



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Federal Operations**  
**P.O. Box 77960**  
**Washington, DC 20013**

[REDACTED]  
Derrick P.,<sup>1</sup>  
Complainant,

v.

Carlos Del Toro,  
Secretary,  
Department of the Navy,  
Agency.

Appeal No. 2023000522

Hearing No. 430-2021-00165X

Agency No. DON 20-62383-01548

DECISION

Complainant 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 November 2, 2022, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Second Radio Electronics Technician, GS-0856-5, at the Agency's Military Sealift Command in Virginia Beach, Virginia.

On November 7, 2019, Complainant applied for promotion to the position of First Radio Electronics Technician (RET1).

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<sup>1</sup> 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.

The promotion process involved a Merit Promotion Board reviewing candidates' application packages, scoring and ranking them based on specific knowledge, skills, and abilities (KSAs). Eight candidates were considered minimally qualified, and Complainant ranked seventh with a score of 57 points.

The Selecting Official (SO) identified two candidates as Best Qualified for the RET1 position based on their scores of 213 and 184 points. However, Complainant did not make the Best Qualified (BQ) list and, consequently, was not eligible for promotion to RET1. The entire process was conducted without revealing the candidates' identities to SO, and the promotion decision was made solely based on numerical rankings.

On May 29, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of age (61) and in reprisal for prior protected EEO activity when, on December 17, 2019, Complainant was not selected to the position of First Radio Electronics Technician (RET1) POA#20-212-01MP.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The AJ issued a summary judgment decision in favor of the Agency.

In the decision, the AJ determined that the Agency articulated legitimate, nondiscriminatory reasons for not selecting Complainant. Specifically, Agency officials affirmed they used a standard reference and selection process, and other than his assertions, Complainant offered no evidence that supports his claims of discrimination and/or harassment. 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.

The Agency issued a final order fully adopting the AJ's decision. The instant appeal followed.

### ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence, is such that a reasonable fact finder could find in favor of 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 fact is "material" if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review..."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110), at Chap. 9, § VI.B. (as revised, August 5, 2015)(providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the agency was motivated by discriminatory or retaliatory animus. Here, however, Complainant has failed to establish such a dispute.

### *Disparate Treatment*

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 Corp. 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. Co. 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).

Assuming Complainant established a prima facie case of discrimination and reprisal, we find that he failed to establish that the Agency's articulated reasons for its employment decisions were a pretext or otherwise motivated by discriminatory or retaliatory animus. The record shows that SO did not select Complainant for the position because Complainant did not rank amongst the best qualified candidates, but rather ranked seventh of the eight candidates. The Promotion Board determined that the selectees demonstrated "superior" knowledge in at least three of the KSAs, while Complainant demonstrated simply "satisfactory" knowledge in only one KSA and "acceptable" knowledge in the remaining KSAs. The Promotion Board members' comments in the record noted that Complainant's application package lacked sufficient detail for some of the KSAs and Complainant could benefit from additional training above the basic user level. By contrast, the Promotion Board members indicated that the selectees demonstrated advanced user knowledge and provided detailed responses demonstrating their knowledge and experience for each KSA. Ultimately, the SO selected the candidates who were recommended by the Promotion Board as top ranked. ROI at 90, 844-45.

Complainant now bears the burden of establishing that the Agency's stated reasons are merely a pretext for discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 9, 1996). Complainant can do this directly by showing that the Agency's proffered explanation is unworthy of credence. Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. at 256.

One way Complainant can establish pretext is by showing that his qualifications are observably superior to those of the selectee. Bauer v. Bailar, 647 F.2d 1037, 1048 (10th Cir. 1981). This is simply one method and is not the only way Complainant may establish pretext as to his non-selection claim.

The Commission finds that Complainant failed to show that his qualifications for the position at issue were plainly superior to those of the selectees'. In this case, the selectees had attributes that justified their selections, and SO affirmed that she believed the selectees were better equipped to meet the Agency's needs. In the absence of evidence of unlawful discrimination, the Commission will not second guess the Agency's assessment of the candidates' qualifications. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. at 259. We find that Complainant failed to present any persuasive evidence establishing that the Agency's selection or the selection process were tainted by discriminatory or retaliatory animus.

As Complainant chose not to request a hearing, the Commission does not have the benefit of an Administrative Judge's credibility determinations after a hearing. Therefore, the Commission can only evaluate the facts based on the weight of the evidence presented. The Commission finds no persuasive evidence that Complainant's protected classes were a factor in any of the Agency's actions. Aside from Complainant's conclusory allegations and speculations, Complainant has failed to establish that the Agency's articulated reasons are pretext for discrimination or reprisal. As a result, the Commission finds that Complainant has not established that he was subjected to discrimination or reprisal as alleged.

### CONCLUSION

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.

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.**

A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 their 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

January 30, 2024

Date