



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

[REDACTED]
Rick M.,¹
Complainant,

v.

Antony Blinken,
Secretary,
Department of State,
Agency.

Appeal No. 2023003163

Hearing No. 570-2021-01344X

Agency No. DOS-0033-21

DECISION

On May 5, 2023, 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 May 3, 2023, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, we AFFIRM the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant and applied to Vacancy Announcement Number FSI-2020-0051, Training Instructor, GS-11, at the Agency's Foreign Service Institute, School of Language Studies in Monterey, California.

On February 18, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on age (63) when on November 10, 2020, he became aware of his non-selection for the training instructor position.

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.

The investigation into the complaint revealed applicants were not required to identify their age in the application. Complainant did not provide his age in his application materials. ROI at 00011-25; 00078; 00104-05; 00108-26. All applications were reviewed in a four-step selection process: (1) the Minimum Eligibility Screening Committee (“MESC”) determined whether applicants met the minimum qualifications for the position; (2) the Division Paper Screening Committee (“DPSC”) determined whether applicants met specialized experience requirements; (3) the Instructional Division Interview Committee (“IDIC”) conducted candidate interviews; and (4) the Hiring Official determined selection and non-selection for the vacant positions. Report of Investigation (ROI) at 00095-99; 00127-134; 00139-158. An applicant who was not assessed as having the minimum qualification for the position by the MESC would not advance to the next step in the selection process for review by the DPSC, and an applicant who did not score high enough with the DPSC would not advance to the next step in the selection process for an interview by the IDIC. ROI at 00094-99; 00127-134. During all phases of the selection process committee members used standardized guidance and scoring rubrics. ROI at 00039-58; 00094-99; 00127-134.

Three total positions were available; two positions in the Arabic-Gulf Saudi Dialect and one position in the Arabic-Egyptian Dialect. Applicants were not required to specify the dialects in which they were applying and Complainant’s application did not specify that he was applying for the Egyptian Dialect position. The Agency identified Complainant as applying for the Arabia-Gulf Saudi Dialect position based on information in his resume that he was a Senior Consultant/Language Analyst in Saudi Arabia. ROI at 00011-25; 00101-102; 00135. Complainant met the minimum qualification for the Arabia-Gulf Saudi Dialect position and advanced to Step 2, DPSC review. ROI at 00103; Supplement to ROI (ROI) at 0118-20.

At Step 2, candidates of all Arabic dialects were evaluated on their overall qualifications and scored according to the rubric. The raw scores on the scoring rubric were: Second Language Acquisition Knowledge (4 points); Teaching (6 points); Educational Technology (5 points); English (2 points); and Qualifications #2 (9 points). The scores were averaged, then converted into a numerical value between 1 and 4; 4 – Outstanding (90-100%); 3 – Well Qualified (70-89%); 2 – Minimally qualified (50-69%); and 1 – Not qualified (<50%). The committee members’ combined scores resulted in an average DPSC score for each applicant. ROI at 00102-103; 00139-147; 00217. Selectee scored 89.7 and received a numerical rating of 3.33. Complainant scored 80.8 and received a numerical rating of 3.0. ROI at 00069; 00159. One DPSC panel member gave Selectee a score of 100, reasoning, “he exhibited superior skill and experience in meeting the criteria of the vacancy announcement.” She gave Complainant a score of 73.1, concluding: “[t]he raw scores on the scoring rubric were: Second Language Acquisition knowledge 2 of 4 points. I marked him down for not being current of focused on adult learning principles. Teaching 5 of 6 points. I marked him down for not mentioning learner-focused emphasis. Educational Technology was 3 of 5 points. Marked down for his tech experience with teaching. English was 2 of 2 points and Qualifications #2 was 7 of 9 points. I marked him down for world affairs and evaluations.” ROI at 00066; 00252.

The top eight scoring Arabic-Gulf Saudi Dialect applicants and the top four scoring Arabic-Egyptian Dialect applicants were invited to take a language proficiency assessment before advancing to the Step 3, IDIC. ROI at 00102-103; 00215-17. Complainant's DPSC score ranked him seventh among the top eight candidates and he was invited to take the Arabic-Gulf Saudi language screening. ROI at 00009-10; 00101-02; 00217.

On November 10, 2020, Complainant informed the Agency that he applied for the Arabic-Egyptian Dialect position rather than the Arabic-Gulf Saudi Dialect position because "I can understand Gulf/Saudi dialect, but not sure I can teach it." ROI at 00008-9. Complainant indicated that he is "a perfect candidate for the [Arabic-Egyptian Dialect] position if age is not a factor." ROI at 00002; 00079. The Agency recharacterized his application as a candidate for the Arabic-Egyptian Dialect position and compared his score to the Arabic-Egyptian Dialect candidates. ROI at 00008-9; 00102-104; 00135-137; 00215-217. Complainant was informed that he was not invited to test for the Egyptian dialect because his DPSC score did not rank among the top four candidates. ROI at 00042-43.

At least one candidate to the Arabic-Egyptian Dialect position, who advanced past the DPSC stage of the selection process had professional experience and education listed on his resume as early as 1972. ROI II at 00013-37. This candidate ranked first as he scored the highest among all Arabic-Egyptian Dialect candidates during DPSC review with 90.3 points. ROI at 00159. Complainant's resume identified experience as early as 1984 and an educational degree in 1979. ROI at 00011-14.

On November 11, 2020, Complainant sought further explanation as to how he made the cut for a non-native dialect but did not make it for his native dialect. On November 12, 2020, Complainant's question was referred to the hiring official. ROI at 00006-7. The Hiring Manager did not select Complainant for the Arabic-Egyptian Dialect Training Instructor position, and she was not aware of his age at the time of the non-selection. ROI at 0093-94; 00100.

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 ordered the Agency to file a supplement to the ROI that includes, for each applicant selected for interview, the following information: age, qualifications, selection notes, and all scoring sheets, including scores for Stage 2 of the selection process. The Agency timely supplemented the record, providing all of the requested information, except for the applicants' ages. ROI at 00001-191.

Over the Complainant's objections, the AJ issued a decision without a hearing in favor of the Agency. The AJ found Complainant's argument unpersuasive because he failed to show that the Agency's legitimate business reasons were false. Consequently, the AJ concluded Complainant did not demonstrate the Agency subjected him to discrimination as alleged.

The Agency subsequently issued a final order implementing the decision of the AJ.

The instant appeal followed. On appeal both parties submitted statements in support of their arguments. Complainant maintains that his application mishandled, misclassified, and then denied due process that was afforded to other applicants, and that the Agency's reason for the non-selection is pretext for discrimination. In addition, the AJ should have held a hearing to address the Agency's failure to provide the ages of applicants selected to interview, in violation of the case management order. In its opposition brief, the Agency asserts that the AJ correctly concluded that the record had been fully developed, leaving no genuine issues of material fact in dispute, and that Complainant failed to establish that the Agency's articulated reasons for non-selection constituted a pretext to conceal a discriminatory motive.

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. See 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

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. (Aug. 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 animus.

Here, Complainant asserts that there are disputed material facts, but failed to establish such a dispute. We find that Complainant has not identified any disputed material facts on appeal, and we agree with the Agency that Complainant's proffered disputed facts are his arguments. As such, the AJ's issuance of a decision without a hearing was appropriate.

Disparate Treatment (Non-Selection)

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish 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 Construction 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, 411 U.S. at 802 n. 13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Should the Agency carry its burden, Complainant must then prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). When a complainant alleges that he has been disparately treated by the employing agency as a result of unlawful age discrimination, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S. Ct., 1701, 123 L. Ed. 2d 338 (1993)). "That is, [complainant's] age must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome." *Id.*

Here, we find that Complainant has established a prima facie case of age discrimination. Complainant has demonstrated that: (1) he is a member of a protected class (over 40 years of age); (2) he applied and was at least minimally qualified for the position at issue; (3) he was not selected for the position; and (4) he was accorded treatment different from that given to persons otherwise similarly situated who are not members of his protected group, or who are considerably younger than him. Obas v. Dep't of Jus., EEOC Appeal No. 01A)4389 (May 16, 2002); Williams v. Dep't of Educ., EEOC Request No. 05970561 (Aug. 6, 1998). As Complainant has established a prima facie case of age discrimination, the burden shifts to the Agency to show legitimate, nondiscriminatory reasons for its actions. Violet F. v. Dep't of the Navy, EEOC Appeal No. 0120162046 (Dec. 22, 2017); request for recon. den., EEOC Request No. 0520180202 1570 (May 8, 2018).

The Agency affirms that it did not select Complainant because his score was not as high as the top four candidates for the Arabic-Egyptian Dialect position. By way of example, at Step 2, he received an application review score of 80.8, nearly nine points lower than the Selectee, who received an application score of 89.7. The Agency maintains that the score was based on the applicant's experience and the ability to articulate specific competencies. In this regard, the record indicates that the Agency employed objective, standardized procedures to calculate the scores. Therefore, we find that the Agency has offered a nondiscriminatory legitimate reason for its action.

Given that the Agency has articulated legitimate, nondiscriminatory reasons for its actions, the Complainant now bears the responsibility to persuade the fact finder by a preponderance of the evidence that the agency's articulated reasons are pretextual and that the agency instead acted on the basis of a prohibited reason. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996). Complainant argues that the Agency's reason for his non-selection was unfair because he should have been ranked higher in Arabic-Egyptian Dialect. As part of his argument, he insists that scoring bias occurred when "other younger, less qualified and less experienced candidates were advanced to the Interview Stage at the expense of Complainant." Notwithstanding, Complainant presents no evidence to show how the Agency's selection criteria and process for determining the cut-off score was imbued with bias such that Complainant was not selected because of his age.

With regard to Complainant's claim that he was denied due process because his application was mishandled and misclassified, the record shows that the Agency mistakenly identified Complainant as applying to the Saudi Dialect position based on information in his resume that he worked a Senior Consultant Language Analyst in Saudi Arabia, however, upon Complainant's request, the Agency reclassified his application as a candidate for the Arabic-Egyptian Dialect position and his application score was compared against the scores of the top four applicants. The Commission has well established that "a mistake made by an agency is not evidence of pretext unless there is evidence that the mistake was based on a complainant's protected classes." Irwin W. v. Dep't of Transp., EEOC Appeal No. 0120141275 (Sept. 1, 2016). We find that Complainant makes no such showing here.

As to Complainant's contention that the Agency never revealed the age of the applicants selected to advance to the next round, in violation of the Case Management Order, the AJ noted in her decision that the Agency timely submitted the supplemental record as ordered. The Agency could not reveal the age of the applicants as part of the supplemental record because the applicants were not required to identify their age in their application materials, thus the reviewers were not aware of the applicants' ages. We find the Agency compliant with the AJ's order. Further, the absence of information revealing the applicants' ages supports the Agency's claim that it did not factor age into the scoring and selection process.

We find no evidence that Complainant's protected class was a factor. At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted on the basis of discriminatory animus. Complainant failed to carry this burden.

While we have long held that a complainant can demonstrate pretext in a non-selection case by showing that his or her qualifications were plainly superior to Selectee, we find that Complainant failed to do so, as Complainant proffered no persuasive evidence of pretext aside from his self-assessment of his qualifications. Palmer N. v. Dep't of Def., EEOC Appeal No. 0120140070 (Mar. 18, 2016) (finding that a complainant cannot demonstrate pretext by simply referencing his or her qualifications).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the AJ's finding that there was no discrimination and the Agency's final order adopting the AJ's decision.

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:



Carlton M. Hadden, Director
Office of Federal Operations

January 25, 2024
Date