



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Kandi M.,<sup>1</sup>  
Complainant,

v.

Kristi L. Noem,  
Secretary,  
Department of Homeland Security  
(Transportation Security Administration),  
Agency.

Appeal Nos. 2023004484  
2023004891<sup>2</sup>

Hearing No. 510-2023-00164X

Agency No. HS-TSA-02988-2022

**DECISION**

On August 7 and 31, 2023, Complainant filed appeals with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 9, 2023, final decision concerning her 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 decision.

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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.

<sup>2</sup> For the sake of clarity and administrative efficiency, we exercise our discretion and consolidate the above-referenced appeals based on the same complaint and Agency investigation.

### ISSUES PRESENTED

1. Whether appeal 2023004484 is premature.
2. Whether the Agency properly determined that Complainant failed to meet her burden of proving she was subjected to discrimination based on age and national origin.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for employment at the Agency's Fort-Lauderdale-Hollywood International Airport (FLL) in Florida.

On November 15, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of national origin (Hispanic) and age (55) when on September 7, 2022, management did not select Complainant for a Transportation Security Officer (TSO) position.

The evidence developed during the investigation revealed that on April 29, 2022, Complainant applied for a TSO position at FLL. The TSO Hiring Process contains several components. If an applicant passes a Computer Based Test (CBT), the applicant is scheduled for an in-person airport assessment structured interview. If an applicant fails the airport assessment, then the applicant no longer progresses in the TSO Hiring Process and cannot reapply to a TSO position for six months. An applicant fails the airport assessment if the applicant received 2 points (out of 5) for any answer given to any of the structured questions.

Complainant took and passed the CBT. Complainant was scheduled for an in-person airport assessment structured interview. A Supervisory TSO (STSO) and a Lead TSO (LTSO) composed the two-person panel that interviewed Complainant. The STSO and LTSO conducted Complainant's interview pursuant to the TSO Interview Guide. Complainant received a rating of 2 points (out of 5 points) on Question 17, which tested whether an applicant "[i]s open to change and new information; rapidly adapts to new information, changing conditions or unexpected obstacles." ROI at 87, 293.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ).

Complainant timely requested a hearing but subsequently withdrew her request. On June 27, 2023, the AJ assigned to the case issued an order dismissing Complainant's hearing request and remanded the complaint back to the Agency to issue a Final Agency Decision (FAD) pursuant to 29 C.F.R. § 1614.110(b).

On August 7, 2023, Complainant filed appeal 2023004484 requesting the Commission sanction the Agency, arguing that the Agency was required to issue the FAD within 40 days of the AJ's order. On August 16, 2023, the Agency submitted its opposition and motion to dismiss appeal 2023004484, arguing that the Agency had 60, not 40 days, to issue the FAD.

On August 9, 2023, the Agency issued its FAD. The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. On August 27, 2023, Complainant filed appeal 2023004891 regarding the same complaint and Agency investigation as appeal 2023004484.

#### CONTENTIONS ON APPEAL

In appeal 2023004891, Complainant argues that the Agency's reasons for her nonselection are pretextual and that she was nonelected solely because of her age.

The Agency argues that it proffered a legitimate nondiscriminatory reason for Complainant's nonselection. The Agency contends that Complainant has brought forth no evidence that the reason offered was pretext.

#### 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, at Chapter 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

### *Appeal 2023004484*

On June 27, 2023, Complainant requested a FAD. On the same day, the AJ issued an Order of Voluntary Dismissal, ordering the Agency to issue a FAD pursuant to 29 C.F.R. § 1614.110(b). Complainant argued that the AJ's Order explicitly stated that the Agency had 40 days to issue a FAD. However, 29 C.F.R. § 1614.110(b) states that when an Agency receives a request for an immediate final decision, the final decision must consist of findings by the agency on the merits of each issue in the complaint within 60 days of receiving the request for the FAD. 29 C.F.R. § 1614.110(b). The requesting date for the FAD was June 27, 2023, which required the Agency to issue a FAD on or before August 26, 2023. The Agency issued its FAD on August 9, 2023. Therefore, we find that the Agency timely issued its FAD in accordance with the AJ's Orders.<sup>3</sup>

Commission regulations provide that a complainant may file an appeal once an agency issues a final action or dismissal of a complaint. 29 C.F.R. § 1614.401(a). Since Complainant's first appeal (2023004484) was filed before the Agency issued a final decision, we find that the appeal was premature. However, the Commission finds that Complainant perfected her first appeal in filing appeal 2023004891 after the Agency issued its FAD. We find that the issue in Complainant's complaint that appears in both of the captioned appeals is now ripe for adjudication.

### *Disparate Treatment - Nonselection*

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). First, she must generally establish a prima facie case by demonstrating that she 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, 411 U.S. at 802 n. 13.

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<sup>3</sup> We note that as written, the AJ's Notice to the Parties section of the Dismissal Order does not correctly state the applicable time frame required for the Agency to issue its FAD. We redirect the parties to the ruling regulation cited by the AJ in the Dismissal Order itself, 29 C.F.R. § 1614.110(b).

### Prima Facie Case

To establish a prima facie case of nonselection, Complainant must show that: (1) she is a member of the protected class; (2) she applied for and was qualified for the position; (3) she was not selected despite her qualifications; (4) someone outside her protected class was selected. Williams v. Department of Education, EEOC Request No. 05970561 (August 6, 1998).

It is undisputed that Complainant is a member of protected classes for her age and national origin, applied for and was qualified for the position, and ultimately was not selected. Of the eight selectees for the position, Complainant was the oldest by four years. See ROI at 310 (one selectee's birth year is identified as 1978). We find the youngest of the selectees to be significantly younger than Complainant with a birth year identified as 2002. Id. Of the eight selectees for the position, six selectees did not identify as Hispanic. See ROI at 310 (two selectees identified as "Hispanic or Latino" and six selectees identified as "Black or African American without indication of "Hispanic or Latino"). Given the selectees' identified ages and national origins, we find that at least one of the selectees was significantly younger than Complainant and outside her protected class for national origin. Therefore, we find that Complainant has established a prima facie case of nonselection discrimination based on age and national origin.

### Legitimate, Nondiscriminatory Reasons

After establishing a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affs. 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 masking discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.at

In response to Complainant's nonselection claim, the STSO (one member of the two-person interview panel) stated that there was no selecting official for the position. ROI at 87. The STSO stated that if a candidate received a score of 2 or lower in any competency, the candidate would be disqualified. Id. The STSO and LTSO (second member of the interview panel) both stated that Complainant was not selected because she received a rating of 2 for question 17 under the competency for Flexibility. ROI at 87, 93.

The STSO added that Complainant's response to the question was vague and lacked details even after he used probing questions to get Complainant to elaborate and provide more details. Id. The Interview Decision Sheet completed for Complainant shows that both the STSO and LTSO rated Complainant a "2" for question 17. ROI at 161.

We find that the Agency has proffered a legitimate, nondiscriminatory reason for its nonselection.

### Pretext

Since the Agency provided legitimate nondiscriminatory reasons for its actions, Complainant now bears the burden to prove pretext. Indicators of pretext include, but are not limited to, discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, comparative or statistical data revealing differences in treatment across various protected-group lines, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015). 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 instead was motivated by a prohibited reason.

In this case, Complainant asserted that she was discriminated based on age because there were two young supervisors conducting her interview and she believes the individuals who were selected for the position were younger than her. On appeal, Complainant went further in stating that the Agency's intentions in the interview were always clear and that she was deemed too old to be hired. In reviewing the record, we find no clear evidence of age discrimination as Complainant alleged. Complainant asserted that she was also discriminated against based on national origin because she is Puerto Rican, and the Agency did not like it. Bare assertions, such as Complainant's, are insufficient to prove pretext. See Erby v. U.S. Postal Serv., EEOC Appeal No. 0120064377 (Feb. 12, 2008).

In an attempt to establish pretext, Complainant stated that she did in fact fully answer question 17, but that the interviewers misrepresented or misunderstood her response. In making this argument, Complainant failed to show how the interviewers alleged misinterpretation of her answer was related to her age or national origin.

Beyond the stated assertions, Complainant has not shown that the proffered reasons are not worthy of belief.

Additionally, the Commission has long held that an Agency has broad discretion to set policies and carry out personnel decisions, such as position selections, and it should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997). In this case, there is no evidence of unlawful motivation for the Agency's actions.

Therefore, we find that Complainant failed to prove that the Agency subjected her to discrimination based on age and national origin.

### 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 Agency Decision finding no discrimination.

### 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).

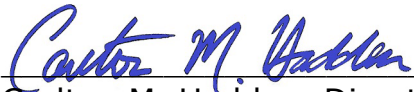
#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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

February 4, 2025

Date