



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Palmer P.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 2023004913

Hearing No. 510-2022-00343X

Agency No. HS-TSA-01326-2022

DECISION

On August 31, 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 August 16, 2023, 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.

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.

ISSUES PRESENTED

- (1) Whether the EEOC Administrative Judge's (AJ) grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.
- (2) Whether the Agency properly found that Complainant was not subjected to discrimination based on color and/or age.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Federal Air Marshal, SV-1801-J, at the Agency's Miami Field Office in Sunrise, Florida.

On April 15, 2022, Complainant filed a formal EEO complaint alleging discrimination on the bases of color (white) and age (57) when on January 27, 2022, management did not select him for the position of Assistant Supervisory Air Marshall in Charge ("ASAC") under vacancy announcement number FAM-MIAMI-21-006416.

The record shows that Complainant applied for the vacancy and was found to be qualified for the position. Complainant stated that he was not interviewed for the position and that he was never provided a reason for why he was not interviewed. Complainant stated that he is demonstratively more qualified than Selectee based on the requirements in the job vacancy of work experience and education. Complainant cited to his Master's degree, Bachelor of Science degree, and professional certificate from a Law Enforcement Executive Program. Complainant also cited to his 35 years of law enforcement experience including nearly 20 years at the Agency.

When asked why color was a factor in the selection process, Complainant stated that senior leadership encourages a culture to promote diversity. Complainant stated that he believes that such encouragement has led to a person's race, color, gender, or sexual orientation influencing the promotion process. When asked how age was a factor in the selection process, Complainant stated that he is eligible to retire as of June 2022, and that he will have to retire by June 2024. Based on the foregoing, Complainant reported a belief that management did not want to go through the hiring process for the vacancy twice in a relatively short amount of time.

The record contains the Agency's policy and process, dated September 3, 2021, for filling vacancies at the pay grade for the vacancy in question. The policy states that once the certificate of eligibles is issued, selecting officials may interview some, none, or all candidates from each certificate. The policy states that if a selecting official decides to use the structured interview process, the panel will consist of three diverse members to include the gaining Supervisory Air Marshal in Charge and/or equivalent. The policy indicates that the selecting official will make a recommendation during the next available meeting during which Senior Executive Management will by consensus either affirm or decline the recommendation of the selecting official.

In the present case, Complainant's second-line supervisor was the gaining Supervisory Air Marshal in Charge. He chose to have a structured interview as part of the selection process, and he was the lead panelist (Panelist-1) in the three-member interview panel. A Supervisory Air Marshall in Charge stationed in Houston, Texas was the second panelist (Panelist-2). A Supervisory Air Marshall in Charge stationed in Springfield, Virginia was the third panelist (Panelist-3).

Panelist-1 stated that the three panelists reviewed all the candidates' application packages, and each panelist created a list of the top 10 best qualified candidates to move forward to the next step of the process. Panelist-1 stated that those candidates who received two or more votes from panelists as a top 10 candidate were considered as candidates for an interview. Panelist-1 stated that the panelists discussed the three lists and narrowed the pool down to the top qualified candidates who would be interviewed. Panelist-1 stated that Complainant did not receive two or more votes as a top 10 candidate, so Complainant was not considered for an interview. Panelist-2 and Panelist-3 generally corroborated Panelist-1's description of the selection process. Panelist-2 added that the three panelists met telephonically to discuss each top 10 list and reach a consensus regarding who the top four candidates were. Panelist-2 and Panelist-3 denied any knowledge of Complainant's color or age during the process.

Panelist-1 included Complainant among his top 10 rated candidates, however, Panelist-2 and Panelist-3 did not include Complainant in their respective lists. The record shows that six candidates received two or more votes as a top 10 candidate. Selectee (black, born 1972) was among the four candidates who were chosen for interview.

Selectee's prior work experience includes Supervisory Federal Air Marshal in Miami from 2015-2022; Supervisory Federal Air Marshal in San Francisco from 2013-2015; Federal Air Marshal at Agency Headquarters from 2008-2013; Federal Air Marshal in New York City from 2002-2008; and Deputy Sheriff in Florida from 1996-2002. Interviewee-2's (white, born 1969) work experience includes being a Supervisory Federal Air Marshall since 2008 and a Federal Air Marshall since 2002. Interviewee-3's (white, born 1981) work experience includes being a Supervisory Federal Air Marshall since 2020; a stint as an Acting Supervisory Air Marshal in Charge; Visible Intermodal Prevention Response Supervisory Federal Air Marshal from 2017 to 2020; and a Federal Air Marshal from 2011 to 2016. Interviewee-4's (black, born 1974) work experience includes being a Supervisory Federal Air Marshal since 2008 and a Federal Air Marshal from 2002-2008.

Following the four interviews, Panelist-1 recommended Selectee for the vacancy with Interviewee-4 as alternate, and Interviewee-2 as the second alternate. Panelist-1 wrote, "I recommend [Selectee] for consideration for the [vacancy], as demonstrated during the [application process.] This selection recommendation has been evaluated thoroughly based on his well-rounded and intrinsic knowledge of the Federal Air Marshal Service. He has served in various critical positions throughout his almost 20-year tenure in the Agency. He has proved his leadership experience and strong work ethic in multiple field offices (NYC, SFO & MIA) and headquarters (ICD) assignments. He is a strong diversity candidate and advocate, who is capable and empathetic leader and a commendable example of forward-thinking employee deserving of advancement in this agency. [Selectee] has been recommended by multiple FAMS leaders, from various sections throughout the agency. At the conclusion of this applicant process and after taking into consideration the crucial and precise needs of the Miami Field Office, his resilient leadership experience, federal/local/state law enforcement experience, administrative prowess and transportation operations knowledge, along with his diverse background, professional demeanor, and strong work ethic, make him the most suitable and strongest applicant." Report of Investigation (ROI) at 149. Selectee's promotion to the vacancy was effective as of February 13, 2022.

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 requested a hearing. Over Complainant's objections, the AJ granted the Agency's March 22, 2023 motion for a decision without a hearing and issued a decision without a hearing finding no discrimination on July 22, 2023. 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

Complainant presents four contentions on appeal. First, Complainant contends that the Agency failed to follow its own policy when making the selection. Complainant bases this contention on Assistant Administrator telling the EEO Counselor that there was not an interview during the selection process. Second, Complainant contends that the Agency's use of an informal and unauthorized interview demonstrated pretext. Complainant argument is that the selection criteria in the vacancy announcement did not mention an interview panel and that the three panelists did not cite to the vacancy announcement when explaining how they ranked the applications. Third, Complainant contends that he was plainly superior to Selectee. Fourth, Complainant contends the Agency has a pervasive culture that improperly influences selection decisions.

The Agency requests affirmation of its final order.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, 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").

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*).

ANALYSIS

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, however, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant's favor.

To prevail in a disparate treatment claim such as this, 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 or she 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 804 n. 14.

A prima facie case of discriminatory non-selection may be established by showing: (1) the complainant is a member of a protected group; (2) the complainant applied and was qualified for a position for which the employer was seeking applicants; (3) that complainant was not selected for the position; and (4) that an applicant not in complainant's protected group was chosen for the position under circumstances that, if explained, would support

an inference of discrimination. Emery S. v. Fed. Deposit Ins. Corp., EEOC Appeal No. 2020001130 (Sept. 11, 2020) (citing McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973)).

Once Complainant has established a prima facie case, the burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

Complainant must prove that the employer's reasons are not only pretext but are pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 and 516 (1993). A factual issue of pretext cannot be established merely on personal speculation that there was discriminatory intent. Complainant v. U.S. Postal Service, EEOC Appeal No. 01A11110 (May 22, 2002); Springer v. Durflinger, 518 F.3d 479, 484 (7th Cir. 2008). Pretext means that the reason offered by management is factually baseless, is not the actual motivation for the action, or is insufficient to motivate the action. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000).

It is undisputed on appeal that Complainant established a prima facie case of discriminatory non-selection on the bases of color and age. We find the Agency articulated a legitimate, nondiscriminatory reason for not selecting Complainant for the vacancy. Specifically, Panelist-1 noted that Complainant did not receive two votes as a top 10 candidate from the three panelists to move forward for consideration as a potential interviewee for the position.

After a review of the record, we find Complainant failed to show that the Agency's articulated reason for his non-selection was a mere pretext for discrimination. Regarding Complainant's first contention, we find the Assistant Administrator's purported misstatement to the EEO Counselor is immaterial to the actual selection process and the outcome of the case. The undisputed evidence shows that interviews of four candidates were conducted, and that Complainant failed to reach this stage. The Assistant Administrator's failure to remember what had occurred is irrelevant to the selection process conducted by Panelist-1, Panelist-2, and Panelist-3 and as to whether any party had discriminatory animus.

We find Complainant's second contention lacks foundation. First and foremost, the record shows that a three-person panel for interviewing candidates is well within Agency policy for filling vacancies like the one in question. Furthermore, the process for determining who was to be interviewed applied equally to all candidates, preventing the process itself from demonstrating pretext. The panelists failure to cite to the vacancy announcement when completing their affidavits similarly does not demonstrate discriminatory animus.

Regarding Complainant's third contention, we find the record fails to establish that he was plainly superior to the four candidates selected for interview. Rather, the relevant resumes demonstrate that each candidate selected for interview had over 10 years of experience with the Agency across the positions of Federal Air Marshall and Supervisory Air Marshall, similar to Complainant.

Regarding Complainant's fourth contention, we find Complainant failed to present evidence of a culture that influences decisions based on discriminatory animus. We acknowledge that Panelist-1 referred to Selectee as a strong diversity candidate within the paragraph explaining why the panel recommended Selectee for the position. There is no indication, however, that this phrase somehow implicated that Complainant's race or age was in any way considered in the selection process. The paragraph itself contains descriptive language demonstrating why Selectee was the best candidate for the position. Significantly, Panelist-1 was the only panelist ostensibly aware of Complainant's membership in a statutorily protected class, but Panelist-1 also ranked Complainant among his top-10 candidates. Complainant was not considered as a potential interviewee because neither of the remaining two panelists, who were unaware of Complainant's membership in protected classes, considered Complainant to be a top-10 candidate.

CONCLUSION

Accordingly, the Agency's final order finding no discrimination is AFFIRMED.

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 21, 2025
Date