



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

[REDACTED]
Harry E.,¹
Complainant,

v.

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

Appeal No. 2024002188

Agency No. HS-TSA-01917-2023

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 February 1, 2024, final decision 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 decision.

ISSUE PRESENTED

The issue presented is whether the Agency properly determined that Complainant was not discriminated against as alleged.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Transportation Security Inspector (H-Band) at the Agency's Midway International Airport in Chicago, Illinois.

On September 14, 2023, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (male) and age (YOB: 1968) when:

1. beginning in May 2022, management did not pay Complainant for performing duties he believed are at an I-Band level; and
2. on May 23, 2023, management did not select Complainant as a Transportation Security Inspector (I-Band), advertised under vacancy number MDW-23-957973-11910670-1.

The EEO investigation revealed that Complainant claimed to have performed the duties of a retired I-Band coworker ("Coworker") starting in April 2022. Complainant asserted that management did not pay him at an I-Band level since May 2022. Report of Investigation (ROI) at 55.

On April 4, 2023, the Agency posted a vacancy for a Transportation Security Inspector (I-Band), under vacancy number MDW-23-957973-11910670-I. ROI at 71-8. Complainant applied for the position on or about April 4, 2023, and he was referred for an interview. Complainant was notified of his non-selection on May 23, 2023. ROI at 61.

The Selecting Official explained that he chose the top two candidates from the "Selection Tool" scores. He did not participate in the interview process, which accounted for 25% of the total. A candidate's performance rating score and entry-on-duty (EOD) were 30% of the score. The two selectees were: "Selectee 1" (female, YOB: 1973) and "Selectee 2" (male, YOB: 1983). ROI at 192-4, 559.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

The Agency found that management officials articulated legitimate, nondiscriminatory reasons for the allegations.

For claim 1, Complainant's first-line supervisor ("Supervisor") responded that Complainant performed inspection duties upon the Coworker's retirement in May 2022, until another inspector was brought on board in July 2022. The Supervisor noted that Complainant did not request additional pay, although he mentioned a loss of income from the time he worked in the private sector. She added that it was Complainant's decision to complete this work, and it was not assigned.

Regarding the non-selection (claim 2), the Selecting Official stated that there were three candidates who scored higher than Complainant. While Complainant received the highest score for the interview, multiple factors were considered and weighed for the ultimate scores. Complainant did not offer evidence to successfully rebut the Agency's reasons. The Agency concluded that Complainant failed to prove that he was subjected to discrimination as alleged.

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant contends that management did not articulate legitimate, nondiscriminatory reasons. For claim 1, he avers that they did not present compelling evidence or testimony to refute his claims that he was performing work at a substantially equal level to those at the I-Band. In response to his non-selection, Complainant states that the Selecting Official's use of EOD was illegitimate and prohibited by "National Policy." He further argues that he established pretext because he was plainly superior to those selected.

The Agency opposes Complainant's appeal. It asserts that even if Complainant could establish a prima facie case of discrimination for claim 1, he offered nothing but conclusory assertions and cannot show discrimination when the Agency did not provide compensation at the I-Band level while employed at the H-Band. For claim 2, the two highest scoring individuals were selected with Complainant as the fourth highest, and he cannot show that the Agency's reasons for choosing the selectees were pretextual. The Agency requests that the Commission affirm the final decision.

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

Disparate Treatment

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), *aff’d*, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. 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 Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency’s reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Serv. v. Aikens, 460 U.S. 711, 715-716 (1983).

Complainants may establish a prima facie case of discrimination by providing evidence that: (1) they are a member of a protected class; (2) they suffered an adverse employment action; and (3) either that similarly situated individuals outside their protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v.

CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted).

Complainant belongs to protected classes based on his sex and age.² For claim 1, he averred that he was treated less favorably than female I-Band employees, but he did not know their ages. ROI at 59.

To establish a prima facie case of discrimination under the Equal Pay Act (EPA), Complainant must show that he received less pay than an employee of the opposite sex for equal work, for equal skill, effort, and responsibility, and under similar working conditions within the same establishment. See Sheppard v. Equal Emp't Opportunity Comm'n, EEOC Appeal No. 01A02919 (Sept. 12, 2000); Corning Glass Works. V. Brennan, 417 U.S. 188 (1974). Complainant asserts that he performed substantially equal work to those of female I-Band employees.

However, the Supervisor explained that Complainant performed inspection duties, but she would not quantify his duties as I-Band level because the performance goals and ratings for an I-Band differ from the H-Band. She did not believe that I-Band level pay was warranted because Complainant performed Inspector duties that were commensurate with the H-Band. While Complainant occasionally commented that he was doing I-Band level work, the Supervisor seldomly reacted because Complainant was often boastful about the caliber of his work. She added that Complainant was fairly new to the Compliance Division, and she believed that he was misguided as to what qualifies as I-Band level work. Complainant was promoted to an inspector position during the COVID-19 pandemic, and he was not adequately exposed to the full scope of what an I-Band Inspector was required to do. ROI at 151-2, 154-5. As such, we find that Complainant did not establish a prima facie case of sex discrimination under the EPA.

Regarding Complainant's claims under Title VII and the ADEA,, there is no evidence that Complainant suffered an adverse employment action. The Supervisor replied that Complainant informed her of his desire to be promoted to the I-Band, but she did not view his statements as a request to be paid at the I-Band. She also did not recall any formal request for I-Band pay, and there was no "denial," per se, of a request for a pay increase.

² In his formal EEO complaint, Complainant specified that his claims were raised under Title VII and the ADEA. However, in his affidavit, he claimed a violation of the Equal Pay Act (EPA). ROI at 22, 60. The Agency did not analyze claim 1 under the EPA, but we will address it in the instant decision.

ROI at 152, 158. Complainant corroborated that he did not specifically request to be paid for the work and believed that he would be recognized and rewarded. ROI at 58. Regardless, we will assume, for the sake of argument, that Complainant established a prima facie case of discrimination based on sex and age for claim 1.

Complainant suffered an adverse employment action when he was not selected for a promotion (claim 2). Selectee 1 is outside of Complainant's sex category. Selectee 2 turned 40 years old in 2023, and he is 15 years younger than Complainant. ROI at 559. The Commission has recognized that a prima facie case of age discrimination is established when a complainant is treated differently than a substantially younger comparator, which is generally an age difference in excess of five years. See Complainant v. Dep't of Labor, EEOC Request No. 0520120381 (Jun. 25, 2015); Hammersmith v. Social Security Admin., EEOC Appeal No. 01A05922 (Mar. 6, 2002). As such, Complainant established a prima facie case of discrimination based his sex and age for claim 2.

We now turn to the Agency's legitimate, nondiscriminatory reasons for the actions. Complainant named the Assistant Federal Security Director – Inspections as the responsible management official for claim 1, but she responded that she was not aware that Complainant was performing I-Band duties because she was his second-line supervisor and not responsible for his day-to-day duties. ROI at 56, 200. As noted above, the Supervisor explained that Complainant did not actually perform I-Band level work.

Regarding claim 2, the Selecting Official testified that he chose the two candidates who received the highest overall "Selection Tool" scores. The scores for the applicants' performance ratings and EOD accounted for 30% of the total scores. The record shows that Selectee 1 received a total weighted score of 78.13 and Selectee 2 received a 76.29, as compared to Complainant's score of 72.89. Complainant was credited with the highest score from the interview portion at 25 points, while Selectee 1 received 20 points and Selectee 2 scored 23 points. Both selectees received the maximum score on their performance ratings of five (5), and Complainant received a four (4). For the candidates' EODs, Selectee 1 had 247 months and Selectee 2 had 189 months, while Complainant only had 51 months. ROI at 193-4, 507.

While Complainant contends that the Agency failed to provide legitimate, nondiscriminatory reasons, the Supervisor explained that Complainant was not performing at the I-Band level and the Selecting Official specified

Complainant's performance rating and EOD as the difference in his candidacy that ultimately led to his non-selection. The consideration of a candidate's length of service with the Agency was a legitimate, nondiscriminatory criteria. See Couture v. Social Security Admin., EEOC Appeal No. 01A11327 (Aug. 27, 2001) (the agency's legitimate, nondiscriminatory reason for not selecting the complainant was the selectee's greater seniority), request for recon. denied, EEOC Request 05A20017 (Apr. 24, 2002); Shack v. U.S. Postal Serv., EEOC Appeal No. 01971739 (Jul. 29, 1999) (promotion based on seniority is a legitimate, nondiscriminatory reason).

To the extent that Complainant complains that the Agency did not provide evidence to support its explanations, an Agency merely has to articulate legitimate, nondiscriminatory reasons for its actions, and then it is Complainant's burden to prove that the Agency's actions were pretext for discrimination. See Complainant v. Dep't of Homeland Security, EEOC Appeal No. 0120123327 (Apr. 28, 2015); Yoon v. Dep't of the Army, EEOC Request No. 0520110577 (Dec. 16, 2011); O'Loughlin v. Social Security Administration, EEOC Request No. 05980011 (Apr. 26, 2001).

We find that Complainant has not shown that the proffered reasons were pretexts for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

In response to claim 1, Complainant only offers general claims that he submitted evidence to prove that he was working at an I-Band level, without citing to such evidence. In addition, to the extent that Complainant disputes the Supervisor's explanations regarding the accurate level of his duties, he did not request a hearing before an EEOC AJ. Complainant bears the burden to prove, by a preponderance of the evidence, that the alleged discriminatory acts occurred. When the evidence is at best equipoise, Complainant fails to meet that burden. See Lore v. Dep't of Homeland Security, EEOC Appeal No. 0120113283 (Sept. 13, 2013) (complainant failed to establish that witnesses made false statements where he withdrew his request for a hearing and credibility determinations were unable to be made); Brand v. Dep't of Agriculture, EEOC Appeal No. 0120102187 (Aug.

23, 2012) (complainant failed to establish that his coworker made offensive comments in a "he said, she said" situation where complainant requested a final decision and an Administrative Judge did not make credibility determinations).

For claim 2, Complainant argues that the Selecting Official did not review the candidates' backgrounds to compare his strengths and weaknesses of his qualifications against those of the selectees, but he offered no supporting evidence. Further, the Selecting Official specified that the two areas where he was "lacking" that did not raise Complainant to the level of selection were his performance rating score (4 out of 5) and his more recent EOD of January 6, 2019, which comprised 30% of the total scores. ROI at 194. Selectee 1's EOD was August 25, 2022, and Selectee 2's EOD was July 8, 2007. ROI at 507.

Complainant argues that the Agency did not refute his contention that use of EOD was illegitimate because it was prohibited by "National Policy," but he did not present any "National Policy." Complainant Appeal Brief at 2. Instead, the record contains the State of Illinois Implementing Document for the Promotion Process for [Agency] Internal Positions, signed by the Selecting Official on June 4, 2021, showing that a candidate's EOD is calculated by number of months in service, with a scored weight of 10%. ROI at 511-13.

The total scores received by Complainant and the selectees were fairly close, but the Commission has previously found that an Agency has the discretion to choose among candidates whose qualifications are relatively equal as long as the decision is not premised on an unlawful factor. Devance-Silas v. U.S. Postal Service, EEOC Appeal No. 0120110338 (March 23, 2011), citing Texas Dep't of Community Affairs, 450 U.S. at 248, 252-259; Mitchell v. Baldrige, 759 F.2d 80 (D.C. Cir. 1985); Canham v. Oberlin College, 555 F.2d 1057, 1061 (6th Cir. 1981). In the absence of evidence of unlawful discrimination, the Commission will not second guess the Agency's assessment of the candidates' qualifications. Texas Dep't of Community Affairs, 450 U.S. at 259. Complainant submits no more than his disagreement with the Selecting Official's criteria, without evidence of an unlawful motive.

In a non-selection case, pretext may also be found where the complainant's qualifications are plainly superior to the qualifications of the selectee. See Wasser v. Dep't of Labor, EEOC Request No. 05940058 (Nov. 2, 1995); Bauer v. Bailar, 647 F.2d 1037, 1048 (10th Cir. 1981).

Complainant generally asserts that his qualifications were plainly superior, without further explanation or evidence. We find that Complainant did not meet his burden to demonstrate that his qualifications were plainly superior to the selectees' such that the disparities in their qualifications were of such weight and significance that no reasonable person could have chosen the selectees over Complainant. See Ash v. Tyson Foods, Inc., 126 S. Ct. 1195, 1197-1198 (2006).

Complainant did not show that the proffered reasons are not worthy of belief or that he was the plainly superior candidate. His bare assertions that management officials discriminated against him are insufficient to prove pretext or that their actions were discriminatory. Accordingly, we find that Complainant did not establish discrimination based on his age or sex when he was not paid at an I-Band level and not selected for a Transportation Security Inspector (I-Band) position.

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 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.**

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION-EQUAL PAY ACT (Y0408)

You are authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. § 216(b)) to file a civil action in a court of competent jurisdiction **within two years** or, if the violation is willful, **three years** of the date of the alleged violation of the **Equal Pay Act** regardless of whether you have pursued any administrative complaint processing. The filing of the 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 5, 2025
Date