



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

[REDACTED]
Melvin S.,¹
Complainant,

v.

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

Appeal No. 2024002634

Agency No. HS-TSA-01839-2023

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 March 4, 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. 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 Investigator (TSI) (H-Band) at the Agency's Midway International Airport in Chicago, Illinois.

On September 23, 2023, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on sex (male) when on May 23, 2023, management did not select him for the position of Transportation Security Inspector (I-Band), announced under vacancy number MDW-23-957973-11910670-I.

The EEO investigation revealed that on April 4, 2023, the Agency posted the vacancy at issue for a Transportation Security Inspector (I-Band). Report of Investigation (ROI) at 90-8. Complainant submitted his application, and he was referred for an interview. Complainant received an email on May 23, 2023, of his non-selection for the position. ROI at 58, 118.

The Selecting Official explained that he chose the two candidates with the overall highest 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. Complainant was "lacking" in his performance rating (4 out of 5) and his more recent EOD, which ultimately led to his non-selection for this vacancy. ROI at 801, 808. One selectee ("Selectee") is female and the other male. ROI at 1090.

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 EEO Commission 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 the Selecting Official articulated a legitimate, nondiscriminatory reason that he chose the candidates with the highest overall scores, with Complainant's performance rating and seniority less competitive than the selectees. The Agency then found that Complainant did not show pretext for discrimination. Complainant asserted that seniority should not have been considered and that his qualifications were plainly superior. However, the Agency determined that the record reflected the Selecting Official's reliance upon a structured hiring process with objective factors. The Agency concluded that Complainant failed to prove that he was subjected to discrimination as alleged.

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant argues that the Agency failed to articulate a legitimate, nondiscriminatory reason for his non-selection. He asserts that, while the Agency's position is that his performance appraisal rating and seniority were less competitive, they were not adequately explained or documented. Complainant also argues that the scoring of EOD was not an approved method for determining promotions, relying upon an email from the Office of Human Capital (OHC) that "[s]eniority should not be scored since time on the job does not equate to performance." Complainant further contends that the Agency's explanations are pretextual, as shown by the Selecting Official's history of favoring female employees and his plainly superior qualifications. Complainant challenges the credibility of the management officials and the redactions in the ROI as spoliation of evidence.

The Agency opposes Complainant's appeal. It responds that Complainant offers nothing more than unfounded suspicions and subjective beliefs of a conspiracy against him. The Agency provided legitimate, nondiscriminatory reasons for the selection, but Complainant did not meet his burden to present evidence that the explanations were pretextual. The Agency notes that any subjective criteria used for the selection, such as the interview, favored Complainant, but the objective EOD score and performance rating ultimately lowered his score. The Agency requests that the Commission affirm its 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 is a member of a protected class based on his sex, and he was subjected to an adverse employment action when he was not selected for a promotion. The Selectee was outside of his protected category. ROI at 1090. As such, Complainant established a prima facie case of sex discrimination.

The Selecting Official proffered a legitimate, nondiscriminatory reason for Complainant's non-selection. He responded that Complainant was "lacking" in his performance rating score (4 out of 5) and his more recent EOD of February 23, 2014. ROI at 808. To compare, the Selectee received a

performance rating score of five (5), and her EOD was August 25, 2002 (247 months), and she received a total weighted score of 78.13. Complainant's EOD score was 110 months, and he was ultimately the third ranking candidate with a total of 76.10 points. ROI at 1038.

Complainant asserts that the Agency failed to provide a legitimate, nondiscriminatory reason for his non-selection, but the Selecting Official specified that Complainant's performance rating and EOD were the difference in his candidacy resulting in 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).

The Agency's burden of production is not onerous, but it must provide a specific, clear, and individualized explanation for the treatment, as the Complainant is entitled to some rationale for the adverse action that provides him with an opportunity to attempt to satisfy his ultimate burden of proving that the Agency's explanation was a pretext for discriminatory animus. See Beasley v. U.S. Postal Serv., EEOC Appeal No. 07A40096 (March 18, 2005). Complainant notes that the Agency's position is that his performance appraisal rating and seniority were both less competitive than those of the selectees. While he contends that they were not adequately explained or documented, the record contains a State of Illinois Implementing Document Promotion Process for [Agency] Internal Positions ("Implementing Document"), signed by the Selecting Official on June 4, 2021, detailing that a candidate's EOD is calculated based on months of service, with a weighted score of 10%. ROI at 1042-4. Complainant also presented evidence to confirm that he received a Rating of Record of "Exceeded Expectations" on October 25, 2022. Previous performance plans show that an "Exceeded Expectations" is equal to a "4." ROI at 295, 260.

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).

Complainant argues that use of EOD was not an approved method for determining promotions, which was proven by an OHC email that "[s]eniority should not be scored since time on the job does not equate to performance." However, Complainant ignores the latter part of this email that stated, "seniority can be used for tie-breakers and/or the [Selecting Official] can consider seniority when making a selection decision." ROI at 477. We are not persuaded that this email shows pretext for discrimination because OHC substantiated that seniority can be a factor for a selection. In addition, even if the Selecting Official erred in "scoring" the EODs, a mistake, without more, does not establish discriminatory animus. See Calvin D. v. Dep't of the Army, EEOC Appeal No. 0120171662 (Sept. 25, 2018); Velda F. v. Dep't of the Interior, EEOC Appeal No. 0120122684 (Jul. 10, 2018).

Complainant avers that the Implementing Document was never used before this selection and the scoring tool was brought out in this single instance to justify the "unusual and unprecedented result" desired by the Selecting Official. Complainant Appeal Brief at 16. However, he offers no evidence to support his theory. Complainant submitted a revised promotion process for the State of Illinois, which did not contain the use of EOD, signed by another Agency official on March 26, 2024. Complainant Appeal Attachment 4. The Commission recognizes that employers are entitled to make their own business judgments, but the reasonableness of the employer's decision may be probative of whether it is pretext. However, the focus is on the employer's motivation, not its business judgment. See Matilda C. v. Equal Emp't Opportunity Comm'n, EEOC Appeal No. 0720140027 (Jul. 31, 2018); Eric M. v. Dep't of the Interior, EEOC Appeal No. 0120162148 (Feb. 13, 2018); Glass v. U.S. Postal Serv., EEOC Appeal No. 07A50068 (Jun. 15, 2006).

The Agency's decision to subsequently update the selection process in Illinois is insufficient to prove that the Selecting Official was motivated by sex discrimination for this vacancy.

The total scores received by Complainant and the Selectee were fairly close, and 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 only offers his disagreement with the Selecting Official's criteria, but he did not present evidence of an unlawful motive.

Complainant contends that the Selecting Official has a history of favoring female employees, as shown by other selections. However, selection decisions are highly fact-specific, and the examples given by Complainant do not reveal the circumstances surrounding the decisions. Complainant also submitted a table of TSI promotions from the H-Band to I-Band in the State of Illinois. We will assume, arguendo, that the Selecting Official was the responsible management official for these 31 promotions,² excluding the vacancy at issue. The data shows that 21 (67.7%) men and 10 (32.3%) women were promoted. In looking at only Midway International Airport, ten (71.4%) men were promoted, as compared to four (28.6%) women. There were nine (69.2%) male and four (30.8%) female TSIs at Midway. ROI at 386, 1090. We are not convinced that selection rates of 32.3% or 28.6% proves a history of favoring women because they are in line with their representation at the Midway International Airport.

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 highlights his high level of expertise in the Surface specialty. Complainant Appeal Brief at 15.

² The Selecting Official regularly sent global emails to announce Illinois promotions and selections. ROI at 423, 425, 447, 459.

The vacancy announcement shows that the position duties included performing the full range of regulatory compliance activities in one or more specialties for Aviation, Cargo, and/or Surface Inspections. ROI at 92. Even crediting that Complainant possessed a greater proficiency in the Surface area than the Selectee, her resume reveals that she had inspection experience in all three areas of Aviation, Surface, and Cargo. ROI at 921. We find that Complainant did not meet his burden to demonstrate that his qualifications were plainly superior to the Selectee's such that the disparities in their qualifications were of such weight and significance that no reasonable person could have chosen the Selectee over him. See Ash v. Tyson Foods, Inc., 126 S. Ct. 1195, 1197-1198 (2006).

Complainant contends that there are credibility issues, but he did not request a hearing before an EEOC AJ to make any credibility determinations. He further accuses the Agency of spoliation of evidence. For example, the names of three other candidates were deleted from the file, but we find that information related to other non-selected applicants is not relevant to Complainant's claim of sex discrimination when the Selectee was chosen over him. In addition, redactions to the interview notes are not material because it is undisputed that Complainant was credited with a higher interview score of 23 points, while the Selectee received 20 points. ROI at 1038. The interviews were not a cause for Complainant's non-selection.

Complainant specifically requested a final decision based on the existing record. 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).

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 the Selecting Official discriminated against him are insufficient to prove pretext or that the action was discriminatory. Accordingly, we find that Complainant did not establish discrimination based on sex when he was not selected for the 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.**

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