



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Dalton E.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2020001456

Agency No. BOP-2018-0511

DECISION

On December 12, 2019, 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 November 22 2019 final decision 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, the Commission AFFIRMS in part and REVERSES in part, the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Correctional Officer (CO), GS-0007-08, at the Agency's Federal Correctional Complex (FCC) in Pollock, Louisiana.

Complainant applied for the position of Maintenance Worker Supervisor under Vacancy Announcement No. POL-2018-0013, at FCC Pollock. Complainant stated he had applied to around 31 positions since 2006 and had made the best qualified list most of the time. Twelve of those applications were for Maintenance Worker Supervisor positions in Facilities.

The Complex Warden for FCC Pollock served as the Selecting Official (SO) for the vacancy at issue. On March 9, 2018, Complainant learned he was not selected for the Maintenance Worker Supervisor position via an office email announcement.

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 record indicates that the Selectee for the position was 36 years old at the time of the selection. Twenty candidates, including Selectee and Complainant, made the Best Qualified List and were listed on the merit promotion certificate sent to SO for his consideration.

SO attested that he chose the Selectee because he thought he was the best qualified for the position. He explained that he chose Selectee from the Best Qualified List and that everyone on the Best Qualified List was equally qualified. SO stated he received input from the Associate Warden regarding who should be selected for the position, however he did not give any information or details of the input he received.

Complainant explained that he believed his age was a factor in his non-selection because he had spoken with seven different men that had been hired in General Maintenance since 2006, and none of them were over 40 years old, the oldest candidate hired being 37 years old.² Complainant averred that his age can be inferred from his application because his resume states that he graduated high school in May 1983.

In the past, Complainant had received three Outstanding and two Exceed ratings for five specific elements in which he received ratings on his quarterly log entries: (1) Supervises inmates; (2) Inspects, operates and controls equipment; (3) Controls contraband; (4) Follows security procedures; and (5) Communication. His rater for his performance evaluation for the June and September 2018 quarterly log entries at issue was the Lieutenant and one of Complainant's immediate supervisors (S1). The first time S1 rated Complainant was for the first quarter ending in June 2018. The first quarter log entry period was from April – June 2018 and the second quarter log entry period from July – September 2018.

S1 sent Complainant an email on May 12, 2018, informing him that he would be completing his evaluation for the entire year and that communication was very important since S1 would not be working with Complainant directly. He stated he did not give out “Outstanding” ratings easily and it needed to be earned. If Complainant wanted S1 to consider something for his evaluation, Complainant needed to send it to S1. Complainant sent S1 an email explaining, among other things, how he processed visitors and monitored inmates to prevent the passing of contraband. S1 stated Complainant never informed S1 of any specific contraband that he had found or of any extraordinary circumstances where Complainant was involved.

When Complainant asked S1 about his ratings, S1 suggested that he needed to be more seen and or bid for a post besides Visitation as a way to find contraband and supervise more inmates because contraband generally does not come through Visitation and he could search inmates and their housing.

² Complainant explained that “General Maintenance” is the term commonly used for “Maintenance Worker Supervisor.”

Complainant reached out to his second-level supervisor (S2), a Deputy Captain at FCC Pollock, about his rating from S1. Complainant commented to S2 that he was suspicious that he received a lower rating from previous years after he filed an EEO complaint. S2 attested there was no information to suggest S1 knew of Complainant filing an EEO complaint during the rating period. S1 had completed the first and second quarter log entries rating Complainant's performance prior to having any knowledge about Complainant's EEO Complaint. Complainant informed S1 about his EEO complaint in a conversation regarding S1's lower first and second quarter ratings of Complainant's performance.

S2 stated neither the visibility of staff or assignment posts are set factors in the evaluation process, however, certain post assignments can give staff the ability to develop and become more effective within specific standards.

On June 4, 2018, Complainant filed an EEO complaint alleging the Agency discriminated against him on the basis of age (53) when:

- 1) On March 9, 2018, Complainant became aware that he was not selected for the Maintenance Worker Supervisor position under Vacancy Announcement No. POL-2018-0013. Complainant alleged that he had applied for this position on numerous occasions and had made the Best-Qualified list most times.

On September 24, 2018, Complainant amended his complaint, alleging the Agency subjected him to reprisal for prior protected EEO activity when:

- 2) In June and September 2018, his first and second quarter evaluations dropped.

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 EEOC Administrative Judge. Complainant requested a final Agency decision (FAD). In accordance with Complainant's request, the Agency issued a FAD pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination or reprisal as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant, through his representative, contends the Agency failed to meet its burden of production as it did not articulate a legitimate, nondiscriminatory reason for Complainant's non-selection. Complainant argues the Agency failed to provide a specific, clear, and individualized explanation for Complainant's non-selection that would have allowed him the opportunity to prove the Agency's non-selection was discriminatory.

Since the Agency failed to meet its burden, the Complainant requests the Commission reverse the FAD and find that the Agency discriminated against Complainant based on age when it failed to select him for the Maintenance Worker Supervisor position.³

ANALYSIS AND FINDINGS

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”).

Disparate Treatment

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 she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. 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. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Hon. Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tx. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

Claim 1

Complainant may establish a prima facie case of discrimination in the non-selection context by showing that: (1) he is a member of a protected class; (2) he was qualified for the position; (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 in the case of age, who are considerably younger than him. Obas v. Dep’t of Justice, EEOC Appeal No. 01A04389 (May 16, 2002); Williams v. Dep’t of Educ., EEOC Request No. 05970561 (Aug. 6, 1998).

³ Complainant’s argument on appeal only addresses the non-selection in Claim 1. No additional arguments or evidence were submitted regarding Claim 2.

Complainant may also set forth evidence of acts from which, if otherwise unexplained, an inference of discrimination can be drawn. Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978).

In the instant case, the Commission agrees with the Agency that Complainant established a prima facie case of discrimination based on his age. There is no dispute that Complainant established prongs (1) - (4). Once a complainant has established 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. Affairs v. Burdine, 450 U.S. at 253. The Supreme Court has described this burden as being met "if the [agency's] evidence raises a genuine issue of fact as to whether it discriminated against the [complainant]," and that "[t]o accomplish this, the [agency] must clearly set forth, through the introduction of admissible evidence, the reasons for the [complainant's] rejection." Id. at 254-55. Moreover, the agency must "frame the factual issue with sufficient clarity so that the [complainant] will have a full and fair opportunity to demonstrate pretext," with the adequacy of its evidence "evaluated by the extent to which it fulfill[ed] these functions." Id. at 255-56. The burden is incumbent upon the agency to respond to a complainant's prima facie case with a legitimate, nondiscriminatory reason for its actions is a burden of production, not persuasion. Reeves, 530 U.S. at 142. While the agency's burden of production is not onerous, it must nevertheless provide a specific, clear, and individualized explanation for the treatment accorded a complainant. Lorenzo v. Dep't of Def., EEOC Request No. 05950931 (Nov. 6, 1997); see also Woodward v. Dep't of Labor, EEOC Appeal No. 01970288 (Feb. 1, 2000) (agency failed to meet its burden of production with sufficient particularity when the selecting official's affidavit stated that the selectee was better qualified for the position because of her background, her superior experience in the field of interest, and her interview responses showing she had the perspective and attitude toward the position that would ensure success in the office).

Upon review of the record, we find that the Agency failed to meet its burden of articulating a legitimate, nondiscriminatory reason for Complainant's non-selection. Specifically, we find that SO failed to provide a specific, clear, and individualized explanation for Complainant's non-selection for the position at issue. As detailed above, SO stated that he chose the Selectee because he thought they were the best qualified for the position. SO only explained that he chose Selectee from the Best Qualified List and that everyone on the Best Qualified List was equally qualified. We find that SO's affidavit testimony is not sufficiently particularized or specific to permit Complainant to mount an evidentiary challenge to SO's only explanation that he thought the Selectee was the best qualified for the position.⁴

⁴ The Agency found SO's answers were so vague and inadequate that a Memorandum was submitted along with the FAD, finding SO failed to provide specific information as to why he chose Selectee for the Maintenance Worker Supervisor position. The Memorandum states, "Such terse, conclusory explanations are unacceptable in a selection case...[the Agency's] management officials must fully cooperate in EEO investigations by providing specific, detailed answers regarding the reasons for their selection decisions."

SO does not provide any examples or specifics as to why he thought Selectee was better qualified or provide evidence to support his conclusion. Due to SO's lack of specific details, the Commission finds the Agency's explanations are insufficient to afford Complainant a meaningful opportunity to prove the explanations to be false.

Based on the above, we find that the Agency failed to articulate a specific, clear, and individualized explanation for Complainant's non-selection, and consequently, Complainant was denied a fair opportunity to demonstrate pretext. See Stewart v. Dep't of Homeland Sec., EEOC Request No. 0520070124 (Nov. 14, 2011); Garcia v. Dep't of Homeland Sec., EEOC Appeal No. 01A32050 (Jan. 7, 2005), req. for recon. den'd, EEOC Request No. 05A50685 (Apr. 26, 2005); Young v. Dep't of the Treasury, EEOC Request No. 05940517 (Oct. 13, 1995). Thus, the Agency failed to rebut the inference of discrimination, which was created when Complainant established a prima facie case of age discrimination, by not articulating a legitimate, nondiscriminatory reason for its actions. Therefore, we find that the Agency discriminated against Complainant based on his age when it did not select him for the position of Maintenance Worker Supervisor, Vacancy Announcement Number POL-2018, 0013.

Claim 2

Complainant can establish a prima facie case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Specifically, in a reprisal claim, and in accordance with the burdens set forth in McDonnell Douglas, Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318,324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976), and Coffman v. Dep't of Veteran Affairs, EEOC Request No. 05960473(Nov. 20, 1997), a complainant may establish a prima facie case of reprisal by showing that: (1) he or she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he or she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

Assuming, arguendo, that Complainant established a prima facie case of reprisal for filing the current complaint, we find that the Agency articulated legitimate, nondiscriminatory reasons for their actions. S1 explained that he was unable to give Complainant "Outstanding" ratings for the elements where Complainant failed to provide S1 with enough information of his accomplishments during the quarters, such as finding contraband. S1 had informed Complainant that he did not give "Outstanding" ratings easily and that he needed Complainant to inform him of his accomplishments during the quarters so he could rate him accurately. Aside from Complainant's allegations that S1's ratings were motivated by reprisal because Complainant believed he deserved higher ratings since other supervisors had previously given him higher ratings, the record evidence does not show that S1's explanations for his actions were pretext for reprisal.

We find that Complainant has not proffered any evidence from which a reasonable fact finder could conclude that the Agency's explanation for its actions was pretext for reprisal. As a result, the Commission finds Complainant was not subjected to reprisal as to this claim.

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 finding that Complainant did not establish that he was subjected to reprisal as alleged with respect to the allegation in Claim 2. We REVERSE the Agency's final decision finding that Complainant was not subjected to age discrimination with respect to Claim 1, and REMAND this matter to the Agency for further action in accordance with the following Order.

ORDER (D0617)

The Agency is ordered to take the following remedial action:

1. Within 60 calendar days of the date this decision is issued, the Agency shall issue a written offer to Complainant for the position of Maintenance Worker Supervisor announced under Vacancy Announcement No. POL-2018-0013 or a substantially equivalent position, retroactive to the date of Complainant's non-selection. The Agency's written offer shall provide Complainant with fifteen (15) days from receipt of the offer to notify the Agency whether he accepts or rejects the position. Failure to respond within the 15-day time limit shall be construed as rejection. Any back pay liability shall cease to accrue with either the actual placement of Complainant into the position or with the date the offer was declined.
2. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than 60 calendar days from the date this decision is issued. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within 60 calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. Within 90 calendar days of the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive training to the management official identified as the selecting official (SO) particularly regarding age discrimination under the ADEA.

4. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against the management official identified as the selecting official (SO). The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the responsible management official has left the Agency's employ, the Agency shall furnish documentation of his departure date.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Federal Correctional Complex (FCC) facility in Pollock, Louisiana copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a).

The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit his or her 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 his or her 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(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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 his or her 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

August 17, 2021

Date