

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
Washington, DC 20013

Marcus Geiger, Complainant,
v.
Social Security Administration, Agency.

Appeal No. 0120073735
Agency No. CHI-06-2379-SSA

DECISION

On August 27, 2007, complainant filed an appeal from the agency's August 1, 2007 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. The appeal is accepted pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission AFFIRMS the agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, complainant worked as a Management Support Specialist, GS-105-12, at the agency's Social Security Administration facility in Gallipolis, Ohio.

On August 28, 2006, complainant filed an EEO complaint claiming that he was discriminated against on the bases of race (Black) and sex (male) when, on July 21, 2006, he was not selected for the position of Social Insurance Administrator, GS-105-13, advertised under Vacancy Announcement No. PE-06-153-111937.

The record reveals that complainant applied for the position on May 12, 2006. Exh. 15 at 3. Ten candidates, including the complainant, were ranked as qualified and referred for an interview on May 19, 2009. Exh. 9 at 2. The interviews were conducted by telephone in June 2006. Id. Complainant was notified on July 21, 2006 that he was not selected for the position. Exh. 25.

At the conclusion of the investigation, complainant was provided with a copy of the report of investigation 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 (FAD) pursuant to 29 C.F.R. § 1614.110(b). The agency issued its FAD on August 1, 2007, finding that complainant was not discriminated against on the bases of race and sex as alleged.

CONTENTIONS ON APPEAL

Complainant has submitted additional evidence to supplement his claim. The agency asks that we affirm the FAD.

ANALYSIS AND FINDINGS

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). He must generally establish a prima facie case by demonstrating that he 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). The prima facie inquiry may be dispensed with in this case, however, since the agency has articulated legitimate and nondiscriminatory reasons for its conduct. See *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 713-17 (1983); *Holley v. Department of Veterans Affairs*, EEOC

Request No. 05950842 (November 13, 1997). 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 Products, Inc.*, 530 U.S. 133, 143 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Holley v. Department of Veterans Affairs*, EEOC Request No. 05950842 (November 13, 1997); *Pavelka v. Department of the Navy*, EEOC Request No. 05950351 (December 14, 1995).

Assuming arguendo that complainant established a prima facie case of race and sex discrimination, we find that the agency articulated legitimate, nondiscriminatory reasons for not selecting complainant for the position. The record reveals that the Assessment Panel (panel) consisted of the Deputy Area Director (PM1), the District Manager (PM2) from Springfield, Ohio, and the District Manager (PM3) from Hamilton, Ohio. Complainant's Affidavit at 3. The Selecting Official (SO) was the Area Director for southern Ohio. SO's Affidavit at 1. Complainant was not among the top three candidates referred to the SO by the panel. *Id.* at 4. Selectee was chosen because the SO stated that the selectee's performance during the interview coupled with her experience made her the panel's first choice for the position. *Id.* We find that the agency has given a legitimate, nondiscriminatory reason for hiring selectee.

Because we determined that the agency articulated a legitimate, nondiscriminatory reason for its actions, the burden shifts to complainant to show that the actions of the agency were a pretext for discrimination. In nonselection cases, a complainant can establish pretext by showing that his qualifications are "plainly superior" to those of selectee. *Bauer v. Bailar*, 647 F.2d 1037, 1048 (10th Cir. 1981).

Complainant contends that his twenty years at the agency makes his qualifications plainly superior to those of selectee. Complainant's tenure alone is not enough for a showing of pretext. *Harley v. Department of Agriculture*, EEOC Request No. 05880308 (1988); *Fodale v. Department of Health & Human Services*, EEOC Request No. 05940686 (1995). Length of service, without more, does not necessarily outweigh other factors which may impact qualifications. *Id.* Further, an employer has freedom to use discretion to choose among qualified candidates. *Canham v. Oberlin College*, 666 F.2d 1057, 1061 (6th Cir. 1981); *Ypsilantis v. Department of Labor*, EEOC Doc. No. 01A05062 (March 27, 2001).

Additionally, we find that nothing in the record supports complainant's contention that he held superior qualifications. Complainant was employed as a GS-12 Management Support Specialist for five years, and was employed by the agency for more than twenty years. Complainant's Affidavit at 1. At the time of application, selectee had been employed as a GS-12 Operations Supervisor for two years in the Dallas area. Exh. 16 at 1-2. In her position as Operations Supervisor, she acted as the direct supervisor of nineteen employees. *Id.* Complainant's application showed that he holds an Associate Degree in Business Administration, and attended numerous training classes. Exh. 15 at 15-16. The most recent class he attended was in 2001. *Id.* at 16. Selectee holds a Bachelor of Specialized Studies in Behavior Science and Communication, and a Master of Education in Community Counseling. Exh. 16 at 7-8. Like complainant, she also attended a number of in-house training courses, the most recent of which was in April 2006. *Id.* at 7-8. Accordingly, we find that complainant failed to demonstrate that his education, training, and work experience surpass selectee's.

Further, the record reveals that the panel was unimpressed with the answers complainant gave at the interview. Specifically, the panel members found it troubling that complainant said he would "charm" his employees to get them to perform tasks they did not want to do. Exh. 8 at 3. Out of ten candidates, complainant was ranked low, and was not recommended for the position. *Id.* The panel as a whole felt that the other candidates for the position provided more relevant and substantial answers to their questions. *Id.* The panel was extremely impressed by the way selectee put together a support unit to assist five offices that were closed due to Hurricane Katrina. *Id.* at 5. The panel noted that her answers to their questions contained concrete examples that illustrated her leadership skills. *Id.* Selectee was considered to be "head and shoulders" above the other candidates by the panel. *Id.* Out of the ten candidates, selectee was ranked the highest. *Id.* As such, we find that complainant failed to demonstrate that he performed better than selectee during the interview process.

Additionally, complainant argues that the SO should have obtained a supervisory reference on his behalf. However, the record reveals that a supervisory reference was not prepared on complainant's behalf because complainant was not among the top three candidates recommended by the panel. SO's Affidavit at 3. We find that the agency's failure to get a supervisory reference without more is not sufficient evidence to show

discriminatory animus.

On appeal, complainant argues that SO's testimony is not worthy of belief. In support of this argument, complainant submitted additional evidence to suggest that the SO was untruthful in the EEO counseling report when she stated she will "sometimes" appoint an Acting DM. Complainant contrasts this statement with a statement made by the SO in an October 2007 management meeting that she always appoints an Acting DM. Because the FAD was issued in August 2007, the Commission accepts this supplementary evidence because it was unavailable at the time the FAD was issued. 29 C.F.R. § 1614.404(b) (1999); EEOC Management Directive 110, Chapter 9, § VI.A (November 9, 2009). Complainant also submitted an undated agency roster to support his claim. However, the discrepancy in SO's statement is not sufficient to impugn her credibility in this case. Accordingly, we find that this supplementary information is unpersuasive.

We find that, even though both complainant and selectee were rated as qualified for the position, complainant failed to present any evidence to show that the SO's decision was based on anything but the unanimous recommendation of the panel. Complainant even stated after the interview that he felt the panel had not considered his race or sex during the selection process. Complainant's Affidavit at 3. Accordingly, we find that complainant has failed to show by a preponderance of the evidence that the agency's legitimate reasons for his nonselection were a pretext for discrimination.

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 FAD finding that complainant failed to show that he was discriminated against as alleged.

FOR THE COMMISSION:

Carlton M. Hadden, Director
Office of Federal Operations

March 2, 2010
Date

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M1208)

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (S0408)

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 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 (Z1008)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").