

William A. Mullen v. U.S. General Accounting Office

Docket No. 14-201-17-82

Date of Decision: February 5, 1983

Cite as: Mullen v. GAO (2/5/83)

Before: Ross, Presiding Member

Disparate Treatment

Age Discrimination

Promotion

Prohibited Personnel Practices

Management Rights

DECISION OF THE PRESIDING MEMBER

Petitioner, William A. Mullen, alleges that he has been the victim of age discrimination by the Energy and Minerals Division (EMD), and its successor division, of the General Accounting Office (GAO), in violation of 29 U.S.C. §633(a).¹ Mr. Mullen claims that he has been disparately treated because of his age by being denied promotions to GS-15 positions and by being denied GS-15 pay for jobs he has held which he says were equal to other GS-15 positions in GAO. He also contends that certain personnel policies have a disparate impact upon older employees.

Mr. Mullen also alleges that he is the victim of an EMD practice of discriminating against professional employees hired by the agency at or above the GS-13 grade level with respect to performance appraisals and promotions, in violation of the personnel practice prohibited by 5 U.S.C. Section 2302 (b)(6).²

Mr. Mullen was hired as a GS-14 by EMD in 1975. He was 48 years old at that time. In January 1978 he was assigned to be in charge of the International Energy Branch (IEB) of EMD. He remained classified as a GS-14. In May 1990 a reorganization took place within EMD, and Mr. Mullen was named the human resources officer of EMD, still classified as a GS-14.

Disparate Treatment in Compensation

Mr. Mullen contends that his position as GS-14 group leader of the IEB was equivalent to GS-15 group leader positions in other branches of EMD. He also contends that his position as GS-14 human resources officer (HRO) was equivalent to GS-15 HRO positions in other divisions of GAO. He claims that his positions were not classified as GS-15 because of his age. He argues that an employee in the protected age group can show disparate treatment in compensation by showing that, because of his age, he was paid less than others outside the protected group were paid, for performing a job which involved substantial equality of tasks.

Mr. Mullen was group leader of IEB from January 1978 until May 1980. His informal complaint of age discrimination was filed on April 23, 1981, almost 12 months after he left that position. GAO Order 2713.2, Chapter 3, paragraph 1, provides that EEO discrimination complaints must be brought within 30 days after the matter complained of occurred.³ Therefore, his claim of compensation discrimination while group leader of IEB was not timely filed. In any event, even if Mr. Mullen's position in IEB was substantially equal to the GS-15 group leader positions in other branches within EMD, no evidence was produced to show that the other incumbents were younger than Mr. Mullen. Thus, whatever the reason for the differing classifications, the evidence does not permit a finding that the difference was due to age discrimination.

Mr. Mullen's claim of compensation discrimination while he was the HRO in EMD was timely filed. Many of the HRO positions in other GAO divisions have been classified as GS-15. Prior to adoption by GAO in 1982 of standard classification guidelines for HRO positions, it appears that the content of the jobs varied among the divisions. The evidence does not clearly show that the duties of the HRO position in EMD were substantially equal to any of the GS-15 HRO positions. In any event, as with the IEB group leader position, even if Mr. Mullen's HRO position was substantially equal to GS-15 HRO positions in other divisions, no evidence was produced to show that the incumbents of the GS-15 positions were younger than Mr. Mullen. Thus, whatever the reason for the different grade classifications, like the IEB position, the evidence does not permit a finding of age discrimination in classifying Mr. Mullen's HRO position.

Disparate Treatment Because of Age in Promotions

Mr. Mullen also contends that GAO has treated him disparately on the basis of his age by not promoting him to a GS-15 position. Specifically, he argues that he was discriminated against because of his age when he was not selected for any of eight GS-15 vacancies in EMD, for a GS-16 position, and for the SES candidate pool.

1. The 1979 GS-15 Application.

In January 1979, Mr. Mullen formally applied for a GS-15 position in the Fossil Fuels Branch of EMD. In February 1979, Flora Milans was selected for the position. At the time of her selection, Ms. Milans was 33 years old, and Mr. Mullen was 52 years old. Mr. Mullen contends that his non-selection was because of his age.

Initially, GAO contends that Mr. Mullen's complaint is untimely. His age discrimination complaint was filed with the Civil Rights Office of GAO on April 23, 1981, more than two years after his non-selection. Nevertheless, Mr. Mullen argues that his complaint should be deemed timely with respect to the 1979 vacancy for two reasons.

First, he argues, the 30-day filing period should be tolled because he was given assurances that he would be promoted to the GS-15 level, and because he was unaware of the facts necessary to conclude that he was being discriminated against (i.e., the identities, qualifications, and ages of those he was competing against). This argument is unconvincing. I do not find from the evidence that management assured Mr. Mullen that he would in fact be promoted to GS-15 without applying and competing for vacancies. Nor was he deprived of necessary information--he knew, or easily could have learned, the identity, relative age, and general qualifications of Ms. Milans at the time the position was filled.

Second, Mr. Mullen argues that his non-selection for the 1979 vacancy was part of a continuing violation of age discrimination. I do not find that the Competitive Selection Process itself results in a pattern of discrimination against older employees in promotions. There is no evidence that older employees who apply are promoted, in EMD or GAO as a whole, disproportionately compared to younger applicants. That being so, a single unsuccessful application for promotion to GS-15 is not sufficient to establish a continuing pattern of age discrimination in promotions against Mr. Mullen. Therefore, I find that his complaint concerning the 1979 vacancy was untimely.

Even if his complaint were timely, however, I find that Mr. Mullen has failed to prove that age was a determining factor in his non-selection for the Fossil Fuels Branch vacancy. In Cuddy v. Carmen, 694 F.2d 853 (D.C. Cir. 1982), the Court of Appeals for the District of Columbia Circuit set forth the burdens of proof in an individual case of age discrimination:

To make out a prima facie case of age discrimination against either government or private employers, a plaintiff must demonstrate facts sufficient to create a reasonable inference that age discrimination was "a determining factor" in the employment decision. Such an inference is created if the plaintiff shows that he (1) belongs to the statutorily protected age group (40-70), (2) was qualified for the position, (3) was not hired, and (4) was disadvantaged in favor of a younger person. Once a prima facie case has been established, the employer has the burden of producing evidence tending to show that the applicant was denied employment for a legitimate, nondiscriminatory reason. If the employer does so, and if his evidence is credible, the plaintiff must show by a preponderance of the evidence that the employer's asserted legitimate reason is merely pretextual. Once this stage is reached, the order and allocation of proof has served its purpose of bringing "the litigants and the court expeditiously to [the] ultimate question" of discrimination. The plaintiff, who at all times retains the burden of persuasion, must then show by a preponderance of the evidence that age was "a determining factor" in the employer's decision.

694 F.2d at 856-857 (citations and footnotes omitted).

Mr. Mullen met his burden of establishing a prima facie case: he was 52 years old when the position was filled, he was qualified for the position, he was not selected for the position, and a younger person (33 years old) was selected.

However, GAO met its burden of producing credible evidence showing that Mr. Mullen was not selected for legitimate, nondiscriminatory reasons. The Competitive Selection Process (CSP) is used by GAO to govern the filling of vacant positions. The essential elements of the CSP involve posting notice of a vacancy and the basic qualifications for the job, accepting written applications within a specified period, convening a competitive selection panel to review the applications and numerically ranking the applicants based on specified criteria (such as experience, appraisals, training, and awards), and presenting the selecting official with a list of the best qualified candidates (based on the panel's numerical rankings). In order to fill a vacancy, the selecting official must appoint one of the best qualified candidates.

In the case of the position in question, the panel certified five best qualified candidates. Ms. Milans was one of the best qualified candidates listed by the panel. Mr. Mullen was ranked eighth numerically by the panel and thus his name was not forwarded to Mr. Peach, the selecting official, as one of the best qualified candidates.⁴ There is no evidence at all that age played a part in the ranking decisions made by the competitive selection panel.⁵ Because Mr. Mullen was not on the best qualified list, age could not have been a determining factor in his non-selection by Mr. Peach. Mr. Mullen has not shown that adherence to

the Competitive Selection Process was a pretext for age discrimination.

2. The other GS-15 Vacancies in EMD.

Seven other GS-15 vacancies were filled in EMD between the time Mr. Mullen began working in the division and the time he filed his age discrimination complaint. Mr. Mullen did not apply for any of those positions. He contends, nevertheless, that he is entitled to complain of promotion denial for each of those vacancies because (a) he made his interest in a GS-15 position clearly known to GAO, and (b) it would have been futile to formally apply for those positions because of age discrimination in GAO and the division.

Mr. Mullen's contentions are unmeritorious. He has failed even to begin to establish, as necessary elements of a prima facie case, that he applied for any of those positions and was rejected. GAO's regulations clearly required that written applications be made for announced vacancies. There is nothing whatsoever discriminatory about such a requirement. Filling a vacancy with a person who had not formally applied would have violated those regulations. Even if Mr. Mullen's desires for a GS-15 position were known, management could not have selected him absent written application, and nothing precluded him from filing such applications.

Furthermore, there is simply no evidence to establish that formal applications would have been futile. One unsuccessful application is not a sufficient basis to conclude that application for other positions would have been futile. In fact, four of the seven vacancies were announced (and presumably filled) before Mr. Mullen's lone application in 1979. As to those vacancies, Mr. Mullen did not even have the experience of his one unsuccessful GS-15 application upon which to base any notion of futility.⁶

Finally, I note that Mr. Mullen's claim concerning these seven vacancies is seriously undermined by his own testimony at the hearing that he did not formally apply for these positions because he was not interested in them--that he wanted to remain in the job he was in and have it "targeted" as a GS-15.⁷

3. The GS-16 Application.

Mr. Mullen testified that he applied for a GS-16 position in the former Logistics and Communication Division of GAO. No other evidence was presented concerning this vacancy. Mr. Mullen has not shown what the qualifications for that job were, that he was qualified for it, or the age of the successful applicant. The elements of a prima facie case of age discrimination are wholly lacking.

4. The SES Candidate Pool.

Sometime in 1981 GAO created a Senior Executive Service (SES) candidate pool to select certain employees with high potential and prepare them for possible movement into SES positions. Division directors forwarded names of applicants whom they believed were most qualified for the SES pool. While the evidence is sketchy, it appears that 48 applicants were forwarded for consideration. Nineteen were under 40 years old and 29 were over 40. Seven applicants were selected for the pool--six under 40 and one over 40. Although the sample is quite small, these statistics show a marked preference for younger candidates by those in GAO management who made the final selections.

Mr. Mullen applied for the SES candidate pool. His division director, Mr. Peach, did not approve and forward his application for consideration, however. He believed that Mr. Mullen should first achieve and perform well in a GS-15 position; he also felt other applicants in his division were better candidates. Mr. Peach disapproved other applications besides that of Mr. Mullen.

Mr. Mullen has not established that Mr. Peach discriminated against him because of his age when his SES candidate pool application was not approved and forwarded for further consideration. Statistically speaking, there is prima facie evidence of age discrimination in the selection of candidates from among those whose applications were forwarded by the division directors for consideration. Mr. Mullen was not, however, among those applicants. There is no evidence that Mr. Peach favored younger applicants in determining which names to forward for further consideration.⁸ He forwarded some applications and did not forward others (including Mr. Mullen's). The record does not indicate who else applied from EMD, what their ages were, and whose applications were and were not forwarded by Mr. Peach for further consideration. I cannot conclude from this record that age discrimination was a determining factor in Mr. Mullen's unsuccessful application for the SES candidate pool.

5. Other Evidence of Alleged Disparate Treatment Because of Age.

In support of his claim that he was intentionally not promoted because of his age, Mr. Mullen makes several widespread assertions about personnel practices and policies in EMD and GAO that allegedly evidence age discrimination against him. In analyzing his specific claims of discrimination, discussed above, I took these assertions and the evidence concerning them into account. They did not persuade me that he was a victim of intentional age discrimination with respect to any of his specific promotion claims.

In particular, much was said of the BARS performance evaluation system. A statistical analysis for the year 1982 shows that of EMD employees above GS-12, younger employees (under 40), on the average, fared better than older employees (40 or over), on the average, on each of the eight rating factors.⁹ There was evidence that BARS evaluations are likely to impact on the evaluations used in ranking applicants in the Competitive Selection Process. This evidence does not aid Mr. Mullen's individual claims, however. First, the record does not indicate how Mr. Mullen fared under the BARS system. His claim of disparate treatment is that he was individually discriminated against. If, for example, he was evaluated higher than the average younger worker, the general statistical analysis would not support a finding of discrimination against him. Second, the evaluations analyzed were for 1982, after all of the positions Mr. Mullen aspired to were filled.

Disparate Impact on Older Employees

In addition to his specific claims of individual discrimination in promotions and compensation, Mr. Mullen contends that certain personnel policies or practices have a disparate impact on older employees. A prima facie case of discrimination on the basis of age is established when it is shown that an employer uses a selection standard which, while neutral on its face with regard to age, has the effect of treating older employees within the protected age group less favorably than younger employees.

Mr. Mullen's argument that the Competitive Selection Process itself results in disproportionately low promotion rates for older employees was considered and rejected in the discussion above concerning his individual claims of discriminatory treatment. There is just no evidence in the record that the operation of the CSP results in lower promotion rates for older employees who apply for vacancies under that system. A prima facie case has not been established.

Mr. Mullen also argues that EMD has a practice of favoring "old line GAO'ers" (those hired at lower grades and promoted through the ranks) over "upper level outside hires" (those hired at GS-13, 14 or 15) in making employment decisions. He contends that upper level outside hires tend to be older employees, and that this alleged practice constitutes a facially neutral standard which has a disparate impact on older employees. The evidence does not establish, however, that upper level outside hires are significantly older on average than "insiders" employed in comparable GS-13, 14 or 15 positions in EMD.¹⁰ Thus, assuming that outside hires are treated differently in certain respects than insiders, I cannot conclude on the basis of the record that any such differential treatment results in age discrimination.

Prohibited Personnel Practice

The General Counsel alleges that EMD discriminates against "upper level outside hires" in both performance appraisals and promotions. Such actions, he argues, constitute prohibited personnel practices in violation of 5 U.S.C. §2302(b)(6). That section provides:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -- ... grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner or competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment ...

In large part, the General Counsel bases his allegation on a statistical analysis of the ratings received in 1982 by upper level employees in EMD under the BARS performance appraisal system.¹¹ Appraisals representing approximately 120 "inside hires" (those hired by GAO at the GS-12 level or below) and 10 outside hires were analyzed.¹² BARS rates employees in eight categories. The analysis shows that the average score of inside hires was higher than the average score of outside hires for every category in each of the rating periods examined. This data suggests that application of BARS has a disparate impact against upper level outside hires, although it is certainly not conclusive. For example, a very small number of outside hires (five) were evaluated during each period. For most of the rating comparisons, a poor score by just one outside hire would significantly lower the average outside hire score even if the scores of each of the other four were equal to the average score of the insiders. If that occurred (for whatever reason, whether a poor employee or a less than objective supervisor), then application of BARS itself would not have a disparate impact on outside hires.

In any event, assuming a disparate impact, that is not enough to establish a violation of 5 U.S.C. §2302(b)(6). That section requires that the lower BARS scores be given "for the purpose" of improving or injuring the employment prospects of a particular employee.¹³ Although statistical analysis may permit me to infer improper motive, it does not compel it. The BARS ratings in question were given by a number of EMD managers, ranging from GS-14 through supergrade positions. Indictment of application of BARS as a whole would require me to infer that all or most of these managers (individually or in collaboration) intentionally gave lower ratings to outside hires in order to harm their employment prospects. On the evidence before me, I do not make such inference. The General Counsel has not established, therefore, a prima facie case of a prohibited personnel practice under 5 U.S.C. §2302(b)(6).

Conclusion

I do not want to minimize the difficulties or frustrations that outside hires, including Mr. Mullen, may experience at GAO. Testimony and documentation indicate that they exist. Nor do I mean to indicate that evaluation and promotion practices are ideal. All that I have found is that the record here does not establish that age discrimination was practiced against Mr. Mullen or that the alleged prohibited personnel practice occurred.

Notes

1. See 31 U.S.C. §732(f) for application of that provision to GAO.
2. See 31 U.S.C. §732(b)(2) for application of that provision to GAO.
3. This 30-day period is consistent with the time period for bringing EEO complaints in the executive Branch. 29 C.F.R. §1613.214(a).
4. Mr. Mullen contends that he would have received more points from the selection panel, and would therefore have made the best qualified list, if he had received an award for a report he prepared or had been placed in an acting capacity in the job (as Ms. Milans was) prior to the position being advertised and filled permanently. First, there simply is no evidence that he was denied awards because of his age. Second, I find no evidence that Mr. Mullen was not named "acting" head of the Fossil Fuels Branch because of his age. Interestingly, the record shows that Mr. Mullen in fact was not really interested in the job at all; he applied only to see how he would fare under the Competitive Selection Process. (Investigative Report, Tab 3B, p.4.).
5. The extended evidentiary debate over the relative qualifications of Ms. Milans and Mr. Mullen was unfortunate. The evidence convinces me that both are quite qualified and talented. That evidence does not lead me in the least to infer that the selection panel's rankings were in any way influenced by age.
6. In contrast to Mr. Mullen's single application, the Investigative Report (Tab 16) shows that all of the successful applicants for GS-15 positions in EMD had previously applied unsuccessfully for one or more other GS-15 vacancies. One had applied 16 other times.
7. All seven of these vacancies were filled by persons under 40 years of age. This fact alone does not serve to indicate a pattern of age discrimination in EMD, however, for there is no evidence as to the identity and ages of the unsuccessful applicants for the positions.
8. Nor is there evidence that the division directors in general did so. The total number of applicants and their ages are not in the record. We do know, however, that 29 of the 48 names forwarded by the directors were over forty.
9. 1981 was also included, but the number of employees evaluated that year was de minimis.
10. The only definitive evidence in this regard appears at Tab 14 of the Investigative Report. Data there indicates that of all GS-14 and 15 employees in EMD in August 1981, the seven upper level outside hires averaged 42.7 years old, and the 35 insiders averaged 39.3 years old.

11. 1981 was also included, but, as stated previously, the number of employees evaluated that year was extremely small and not susceptible to meaningful analysis.

12. The actual number of inside and outside hires was less; the analysis includes individuals who received more than one BARS appraisal during the time period examined.

13. See Baum v. Dept. of the Treasury, 83 FMSR . 5026; Price v. Dept. of the Army, 82 FMSR . 5510; Wellman v. Dept. of Commerce, 82 FMSR . 5150.