12-1819

To Be Argued By:
DAVID C. NELSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-1819

JOHN SETEVAGE,
Plaintiff-Appellant,

-vs-

DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, FEDERAL AIR MARSHAL SERVICE,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Fitzsimmons, M.J.) had subject matter jurisdiction over this civil case brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*, pursuant to 28 U.S.C. § 1331. The district court entered final judgment for the defendants on all claims on March 30, 2012. Defendants' Appendix ("DA__") 8, DA473. On April 29, 2012, the plaintiff filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). DA8. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issue Presented for Review

The Age Discrimination in Employment Act requires a claimant to exhaust his administrative remedies prior to filing a suit in district court. A claimant may exhaust his administrative remedies by filing a notice of intent to sue with the Equal Employment Opportunity Commission within 180 days of the alleged discriminatory act. The plaintiff claims on appeal that he did not learn of the alleged discriminatory act until October 2007, and thus his February 6, 2008 notice of intent to sue was timely. In his pleadings below, and in his deposition testimony, however, the plaintiff admitted that he knew of the alleged discriminatory act on June 29, 2007. On this record, did the district court properly conclude that the plaintiff's notice of intent to sue was untimely?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-1819

JOHN SETEVAGE,
Plaintiff-Appellant,

-vs-

DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, FEDERAL AIR MARSHAL SERVICE,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In this case brought under the Age Discrimination in Employment Act, the plaintiff-appellant, John Setevage, challenges the district court's conclusion that his notice of intent to sue, submitted to the Equal Employment Opportunity Commission, was untimely, even if equitable

tolling were applied in his case. Setevage applied for a position as a federal air marshal in 2005. He was notified that he did not get the position in October 2006, and the vacancy announcement for the position closed in June 2007. Over seven months after the position closed, Setevage filed a notice of intent to sue with the Equal Employment Opportunity Commission

The district court entered summary judgment in favor of the defendants, finding that Setevage had not filed his notice of intent to sue within 180 days of the allegedly discriminatory practice as required by statute. Further, the district court held that even if the deadline was equitably tolled to June 29, 2007—the date that Setevage admitted he knew he had not been selected for the position—his notice was still untimely. As set forth below, because there was no material dispute on these findings, the district court properly granted summary judgment for the defendants.

Statement of the Case

On October 28, 2008, Setevage brought this action as a disparate treatment claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.*, against the defendants (Department of Homeland Security, Transportation Security Administration, and Federal Air Marshal Service) as his potential employer. DA3, DA10. The parties consented to

proceed before a United States Magistrate Judge, and the case was assigned to Magistrate Judge Holly B. Fitzsimmons. DA3-4, DA52.

The district court granted the defendants' motion for summary judgment on March 29, 2012, and entered final judgment in favor of the defendants on March 30, 2012. DA8, DA473. Setevage filed a timely notice of appeal on April 29, 2012. DA8.

Statement of Facts and Proceedings Relevant to this Appeal

A. Setevage applies for a job as a federal air marshal but is denied employment.

In 2005, the Federal Air Marshal Service ("FAMS")[1] sought to hire additional federal air marshals. DA103. Setevage, who was already working as a senior investigator for the Office of Personnel Management, applied for the position on December 2, 2005. DA108-09. On January 30, 2006, FAMS sent Setevage a tentative offer letter entitled "Conditional Offer of Employment – FAM Service." DA124. The letter stated that Setevage had "been identified to receive a *condi-*

[1] Much like a matryoshka doll, FAMS is part of the Transportation Security Administration, which in turn is part of the Department of Homeland Security, which is part of the Executive Branch of the United States Federal Government.

tional offer of employment," with the offer conditioned on Setevage successfully completing the following processes: verification of his qualifications for the position; panel interview; medical examination; psychological assessment; physical training assessment; background investigation; and a final hiring decision. DA124. The offer was further conditioned on the availability of "sufficient authorized positions and funding." DA124.

Setevage progressed through the various required stages. DA131. His application however, was rejected by the Quality Review Board ("Board"). DA196-97, DA223-24, DA131. The Board was a panel of high-level representatives from each office in FAMS. DA151, DA204-05. The members collectively brought to bear knowledge and experience accumulated over decades-long careers in law enforcement. DA181, DA212-13, DA226-27, DA156. The function of the Board was to identify the best-qualified applicants for the federal air marshal position. DA204-05, DA220, DA251, DA181, DA156, DA153, DA159.

The Board took a flexible approach to evaluating the candidates, but a candidate's military or armed patrol officer training and experience, especially if recent, were viewed as a plus. DA214, DA216, DA159, DA156, DA198. The Board appeared to be concerned with experience in stressful situations; as one member noted:

> We also hired people from the military who had put rounds downrange on bad guys in Iraq and Afghanistan, so that was an important consideration for us.
>
> I guess you have to kind of understand the job that we're putting these people into at 30,000 or 35,000 feet when there's only them and the bad guys up there and they can't get on their radio and call for backup.

DA237-38.

In rejecting Setevage's application, one member of the Board summarized his views as follows:

> As I'm doing my mental checklist that I used to do, no true law enforcement experience. No military experience. College education; that's on the positive side, that's good. Good work history; that's on the positive side, that's good. Poor KSAs.[2] Not highly recommended by the [regional interview] panel. Not highly recommended by the [Special Agent in Charge].

DA246. Another member noted, "What stands out to me in his application materials was that

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[2] "KSAs" stands for "Knowledge, Skills, and Abilities," which are a series of questions tailored to the position in question. KSAs commonly appear in employment applications in federal employment.

his law enforcement experience was limited to that of a background investigator, not an armed patrol officer or servicemember, whose experience is more closely akin to that of a federal air marshal." DA156.

FAMS sent Setevage a rejection letter. DA132. The letter, entitled "Better Qualified Applicant" letter, was dated October 19, 2006. DA132. The letter stated that "[w]e regret to inform you that, at this phase of the assessment process, better qualified applicants are being considered for Federal Air Marshal vacancies." DA132. The letter also stated that "[n]o further action will be taken on your application for this position." DA132.

Setevage admitted receiving the FAMS letter on or about October 19, 2006. DA272-73. Despite receiving this letter, Setevage testified that he did not believe that FAMS had actually rejected him until the application for the job posting closed, which occurred on June 29, 2007. DA429, DA277-78, DA103.

On December 13, 2007, Setevage sought "EEO counseling" with the Equal Employment Opportunity office. DA429, DA137. On February 6, 2008, Setevage's attorney filed a "Notification of Intent to Sue" letter with the Equal Employment Opportunity Commission. DA429, DA133-34. On March 15, 2008, Setevage was notified that he could file a formal complaint of discrimi-

nation, but he did not file a formal complaint of discrimination with the EEO office. DA145-47.

B. The district court grants summary judgment to the defendants.

Setevage filed suit against the defendants on October 28, 2008, alleging that they discriminated against him on the basis of his age in violation of the ADEA. DA10.

By a ruling dated March 29, 2012, the district court granted the defendants' motion for summary judgment on Setevage's ADEA claim. Although the defendants raised three arguments in their motion, the district court only addressed one argument, in which it concluded that Setevage failed to timely exhaust his administrative remedies. DA464-72.

The district court first observed that "[e]xhaustion of administrative process is a condition precedent to the initiation of a civil action in federal court on a claim of age discrimination in federal employment." DA468 (citing 29 U.S.C. § 633a(d)). The district court then noted that there are two routes to pursue an ADEA claim: (1) a plaintiff may file a formal complaint with the Equal Employment Opportunity Commission ("EEOC") and then file a complaint with the district court if he is unsatisfied with the resolution of that complaint, or (2) a plaintiff may file a notice of intent to sue with the EEOC, after which the plaintiff may file a suit in federal court.

DA468-69. The district court noted that Setevage "never filed a formal complaint with the EEOC, electing to file an intent to sue with the EEOC and pursue the ADEA claim directly in federal district court." DA469. Thus, option one was foreclosed to Setevage.

The district court then turned to option two. The district court explained that "[p]ursuant to the statute, [Setevage] was required to file a timely notice of intent to sue with the EEOC, within 180 days of the alleged discriminatory practice. *See* 29 U.S.C. § 633a(d)." DA469. The district court found that it was "undisputed" that Setevage filed his notice of intent to sue on February 6, 2008. DA469. The district court then addressed the question of when the alleged discriminatory act took place.

The district court found that Setevage received the rejection letter on October 19, 2006, DA469, and that he "realized he would not be selected when the vacancy announcement closed on June 29, 2007," DA469-70. Having established the relevant dates, the district court concluded as follows:

> Applying either date, [Setevage]'s notice of intent to sue was provided to the EEOC well in excess of the 180 day requirement. Here, there is no evidence that [Setevage] either filed a formal administrative complaint or gave the EEOC timely notice pri-

> or to filing suit. . . . Accordingly, the ADEA claim must be dismissed.

DA470.

The district court then took up Setevage's argument that the deadline should be equitably tolled. The district court rejected the equitable tolling argument because, by Setevage's own admissions, equitable tolling would not save his ADEA claim. DA470-72. The district court noted that "[Setevage] admits he was aware that he had not been selected for the position when the vacancy announcement was closed on June 29, 2007." DA471. Rejecting the equitable tolling argument, the district court reasoned that "[c]alculating 180 days from June 29, 2007, the notice of intent to sue was due by December 26, 2007. Thus, [Setevage]'s February 6, 2008, notice of intent to sue was filed untimely." DA471-72. Further, because Setevage had made no argument for tolling the 180-day deadline beyond June 29, 2007, the court concluded that his claim must be dismissed for failure to satisfy the requirements for bringing suit under the ADEA. DA472.

Summary of Argument

Setevage failed to exhaust his administrative remedies. Setevage could have exhausted his administrative remedies in two different fashions: (1) file a formal EEO complaint or (2) file a notice of intent to sue. Setevage did not file a

formal EEO complaint. And although he filed a notice of intent to sue, he filed it beyond the statutory deadline. Setevage, therefore, failed to properly exhaust his administrative remedies.

Further, equitable tolling cannot save Setevage's claims. He does not meet the requirements for equitable tolling. Moreover, he is bound by the numerous judicial and factual admissions he made in the district court concerning the date he knew that he would not be hired by FAMS. Accordingly, even if the deadline were tolled to June 29, 2007, his notice of intent to sue would still be untimely.

Argument

I. Setevage failed to timely exhaust administrative remedies before filing his ADEA suit in federal court.

A. Governing law and standard of review

1. The standard of review

This Court reviews *de novo* a district court's grant of summary judgment. *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 46 (2d Cir. 2007) (citing *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 85 (2d Cir. 2006)).

2. The law governing summary judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall render summary judgment when a review of the entire record demonstrates "'that there is no genuine issue as to any material fact.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (quoting rule). The relevant question is not whether the non-moving party has provided any evidence, but

> whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict—whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (internal quotation marks omitted). In determining whether there is a genuine issue of material fact, the court must resolve ambiguities and draw factual inferences in favor of the non-moving party. *Id*. at 255.

Although the court has a duty to resolve ambiguities in favor of the non-moving party, "[a] defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial." *Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100, 111 (2d Cir. 2001). When the moving party points to an absence of evidence regarding an essential element, the non-moving party must "show the presence of a genuine issue by coming forward with evidence that would be sufficient, if all reasonable inferences were drawn in his favor, to establish the existence of that element at trial." *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 100 (2d Cir. 1998).

On summary judgment, the court's "obligation to draw all reasonable inferences in favor of plaintiffs does not mean [the court] must credit a version of the facts that is belied by the record." *Tabbaa v. Chertoff*, 509 F.3d 89, 93 n.1 (2d Cir. 2007). "The Supreme Court held in *Anderson* . . . that a plaintiff may not defeat summary judgment by merely asserting that the jury might, and legally could, disbelieve the defendant's denial." *LaFrenier v. Kinirey*, 550 F.3d 166, 167 (1st Cir. 2008) (citing *Anderson*, 447 U.S. at 252). As such, summary judgment is appropriate "'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'"

Lujan v. National Wildlife Federation, 497 U.S. 871, 884 (1990) (quoting *Celotex*, 477 U.S. at 322).

3. The law governing exhaustion under the ADEA

The ADEA is an antidiscrimination statute that aims to eliminate discrimination against people over the age of 40. Suits involving federal employment are governed by § 633a of the ADEA. *See* 29 U.S.C. § 633a. Section 633a allows suits in district court but it requires that plaintiffs exhaust their administrative remedies prior to instituting such suits. 29 U.S.C. § 633a(c)-(d).

There are two alternative methods open to individuals to exhaust their administrative remedies. First, "[a]n individual may invoke the EEOC's administrative process and then file a civil action in federal district court if he is not satisfied with his administrative remedies." *Stevens v. Department of Treasury*, 500 U.S. 1, 5-6 (1991). Second, an individual may present the claim to a district court after giving the EEOC a notice of intent to sue. 29 U.S.C. § 633a(d).

Concerning the second option, § 633a(d) sets forth an important time limit:

> When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this

> section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. *Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred.* Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(emphasis added). The Supreme Court has interpreted this section to mean that a potential plaintiff must file notice of intent to sue within 180 days of the alleged discriminatory act, and thereafter must wait at least 30 days prior to bring suit in district court. *Stevens*, 500 U.S. at 6-7.

This Court has also clearly explained the process to exhaust administrative remedies under the ADEA:

> A federal employee claiming age discrimination has the option of bringing suit in federal court in the first instance, or of pursuing administrative remedies before the EEOC and then suing in federal court if not satisfied with the administrative results. *See* 29 U.S.C. § 633a(b) and (c). With respect to civil actions brought directly to federal court, the federal employee must give the EEOC notice of intent to sue with-

> in 180 days of the alleged discriminatory conduct, and then must wait 30 days before filing the suit. *Id.* § 633a(d).

Long v. Frank, 22 F.3d 54, 56 (2d Cir. 1994). Bolstering all of these statements is the applicable regulation, which states that "[s]uch notice must be filed . . . . within 180 days of the occurrence of the alleged unlawful practice." 29 C.F.R. § 1614.201(a). The time limits to exhaust an ADEA claim are considered to be akin to a statute of limitations. *Dillman v. Combustion Engineering, Inc.*, 784 F.2d 57, 59 (2d Cir. 1986); *see also Holowecki v. Federal Express Corp.*, 440 F.3d 558, 565 (2d Cir. 2006) (ADEA time limits are not jurisdictional).

B. Discussion

1. Setevage failed to exhaust his administrative remedies in a timely manner.

As described above, a plaintiff has two options for pursuing a claim under the ADEA. He may file a formal complaint with the EEOC and file suit if dissatisfied with the results, or, alternatively, file suit in federal court *after* providing the EEOC with a notice of intent to sue. The undisputed record shows that Setevage did not file a formal complaint, and failed to file a timely notice of intent to sue.

a. Setevage did not file a formal complaint with the EEOC.

Setevage did not file a formal complaint of discrimination with the EEOC or pursue his administrative remedies. In the district court, Setevage claimed that he had filed a formal complaint, *see* DA430, but he identified no record support for this assertion. Rather, in support of this claim, Setevage cited the complaint he filed in federal district court. DA430. Setevage has no evidence, and there is no evidence in the record, that supports the contention that he filed a formal administrative complaint with the EEOC. The evidence in the record, in fact, supports the opposite conclusion. In a July 3, 2008 letter, the Transportation Security Administration's Office of Civil Rights and Liberties noted that "[o]n March 7, 2008, [this office] issued Mr. Setevage a Notice of Right to File a Formal Complaint of Discrimination . . . . As of the date hereof, Mr. Setevage has not filed a formal complaint of discrimination." DA144.

Because Setevage did not pursue a formal complaint of discrimination, he cannot take advantage of the first option to exhaust his administrative remedies. *Stevens*, 500 U.S. at 5 ("An individual may invoke the EEOC's administrative process and then file a civil action in federal district court if he is not satisfied with his administrative remedies."). *See also* DA469 ("[Setevage] never filed a formal complaint with

the EEOC, electing to file an intent to sue with the EEOC and pursue his ADEA claim directly in federal district court.”).

Notably, Setevage also missed the deadline to even begin the EEO process. Under the applicable regulation, “[a]n aggrieved person *must* initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, *in the case of personnel action, within 45 days of the effective date of the action*.” 29 C.F.R. § 1614.105(a)(1) (emphasis added). This regulation applies to ADEA claims against the federal government. *See, e.g.*, *Belgrave v. Pena*, 254 F.3d 384, 386 (2d Cir. 2001) (applying 29 C.F.R. § 1614.105 to Title VII and ADEA claims against the Department of Energy). Setevage sought EEO counseling on December 13, 2007. DA429 (¶ 53), DA137. Unfortunately for Setevage, 45 days from October 19, 2006, DA132; is December 3, 2006.[3] Thus, to pursue the formal complaint option, he would have needed to seek EEO counseling by December 3, 2006. He did not seek counseling until December 13, 2007, so he was one year too late.

[3] A table of relevant dates is included in the Addendum.

b. Setevage did not file a notice of intent to sue within the time limit.

Because Setevage did not file a formal complaint and utilize the first option to exhaust his administrative remedies, he was left with only the second option. To exhaust his administrative remedies under the second option, Setevage needed to file a notice of intent to sue with the EEOC within 180 days of the alleged discriminatory act. 29 U.S.C. § 633a(d); *Long*, 22 F.3d at 56. Setevage did not file his notice of intent to sue within 180 days.

Setevage filed his notice of intent to sue with the EEOC on February 6, 2008. DA429 (¶ 52), DA133. The record demonstrates, however, that on October 19, 2006, FAMS informed Setevage that it had rejected his application. DA132. Setevage admitted receiving this letter around the time it was sent. DA272-73. Accordingly, Setevage missed the time period to file the notice because 180 days from October 19, 2006 is April 17, 2007. Thus, using the October 19, 2006 date, Setevage was approximately ten months late.

2. Equitable tolling does not save Setevage's claim.

a. Even with application of equitable tolling, Setevage's notice of intent to sue was still untimely.

The deadline for filing a notice of intent to sue under the ADEA may be equitably tolled under appropriate circumstances. *Paneccasio v. Unisource Worldwide, Inc.*, 532 F.3d 101, 112 (2d Cir. 2008). *See also Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 94-5 (1990). To obtain the benefit of equitable tolling, a plaintiff must prove two elements: "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.'" *A.Q.C. v. United States*, 656 F.3d 135, 144 (2d Cir. 2011) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). "Equitable tolling requires a party to pass with reasonable diligence through the period it seeks to have tolled." *Johnson v. Nyack Hospital*, 86 F.3d 8, 12 (2d Cir. 1996). Moreover, "[e]quitable tolling applies only in the rare and exceptional circumstance." *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (per curiam) (internal quotation marks omitted).

The doctrine of equitable tolling does not help Setevage, however. Setevage has not demonstrated that an extraordinary circumstance prevented him from understanding that the FAMS rejection letter meant what it said. DA132. Nor has he demonstrated that he had been diligently

pursuing his rights when he let months pass by without contacting FAMS. Putting aside these failures, even if the Court applied equitable tolling, it would not save Setevage's claims.

Setevage did not file a formal administrative complaint with the EEOC, thus, equitable tolling is irrelevant to that unexplored method of exhaustion.

Setevage did, however, file a notice of intent to sue with the EEOC on February 6, 2008. DA429 (¶ 52), DA133. The time to file the notice of intent should have started running October 19, 2006, the day of the rejection letter, DA132; Setevage had 180 days to file from that date, 29 U.S.C. § 633a(d); *Long*, 22 F.3d at 56. He missed that deadline.

Setevage admitted that by June 29, 2007, expiraton of the vacancy announcement, he knew that FAMS had rejected his application. DA429 (¶ 51), DA277-78, DA103. If the Court applied equitable tolling and used the June 29, 2007 date (giving Setevage nine additional months), Setevage would still have failed to timely exhaust his administrative remedies. Setevage would need to have filed his notice of intent to sue by December 26, 2007, because December 26, 2007 is 180 days after June 29, 2007. Thus, working from the June 29, 2007 date, even with equitable tolling, the required notice was approximately three months too late because he

did not file his notice of intent to sue until February 6, 2008. DA429 (¶ 51), DA133-34.

b. Setevage's newly proposed equitable tolling date, October 19, 2007, is unsupported by the record and contradicts factual and judicial admissions.

In his appellate brief, Setevage now argues that the Court should disregard his deposition testimony and admissions below. In particular, for the first time on appeal, he claims that he did not learn that he failed to get the position as a federal air marshal until "some point between September 19, 2007 and October 19, 2007." Plaintiff's Br. at 23.

In support of this later date, Setevage argues that he was confused during his deposition and that the Court should therefore rely on a letter he wrote to the EEOC instead of his own sworn testimony.[4] *See* Plaintiff's Br. at 19-24. The record evidence is solidly against Setevage on this argument, however.

For example, the deposition transcript belies Setevage's claim of confusion. The following exchange concerns the date that he "discovered" that FAMS was not going to hire him:

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[4] Setevage refers to this letter in his pro se filings as Exhibit 16. It can be found at DA386-87.

> Q: And I'm trying to get a time frame on this. Your testimony a moment ago was that this would have been this effort would have started in July of 2007?
>
> A: It would have started not in July, but at some point shortly after July, because the job announcement, as I recall—and we can verify that from our pile of files here—was closing or had closed in and around July—well, is it says application deadline—application deadline June 29, 2007.
>
> So, I suppose somewhere beginning in and around July and/or August is when I would have started to try to figure out what I had to do and how to go about doing it.
>
> Q: And so your recollection of that time frame then is based on your understanding of when the vacancy announcement closed?
>
> A: The—yes. The closings of the vacancy announcement was one of the major triggers. So, it would have been starting somewhere around July.

DA277-78. Setevage had the benefit of an attorney at his deposition.[5] He had the right to re-

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[5] It was only on the day before his appellate brief was due that Setevage elected to proceed pro se. Un-

view the transcript of his deposition and to make necessary changes. Fed. R. Civ. Pro. 30(e). The transcript does not reflect that Setevage was confused or overwhelmed when he was responding to questions. To the contrary, his admission was the result of reasoned consideration of the facts.

Setevage's sworn deposition testimony is sufficient to establish the facts. Federal Rule of Civil Procedure 56(c)(1)(A) specifically allows parties and courts to rely on deposition testimony at summary judgment. The district court, however, did not need to rely on Setevage's deposition testimony alone. Neither does this Court: Setevage confirmed the substance of his deposition testimony when he filed pleadings that admitted that he knew that he was not selected for the position on June 29, 2007, when the vacancy announcement closed.

Setevage's statement of material facts not in dispute, submitted to the district court under Local Civil Rule 56(a)2, responded to the defendants' assertion that Setevage knew he was not selected by June 29, 2007 by admitting that statement. The full quotation (beginning with the defendants' assertion #51 regarding the June 29, 2007 date) was as follows:

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til that point, he had been represented by Dickie, McCamey & Chilcote, P.C., both before the district court and on appeal.

> 51. According to Plaintiff, he first realized that he had not been selected when the vacancy announcement closed on June 29, 2007. Plaintiff's Dep. at 95-96.
>
> RESPONSE: *Admitted*. Plaintiff admits that between October 19, 2006 when he received the [better qualified applicant] letter and June 29, 2007 when the vacancy closed, he continued to receive inquiries concerning his application and requests to recertify his application. (PCSMF ¶ 39).

DA429 (emphasis added). Similarly, in Setevage's own "Counter Statement of Material Facts Not In Dispute," he made the following admission: "Plaintiff realized that he would not be hired as a federal air marshal when the vacancy announcement closed on or about June 29, 2007. (Exhibit 1 – Plaintiff's Dep. p. 96; Exhibit 5 – Bates 100-104)." DA296.

Setevage is bound by these admissions made in his pleadings. "A party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding." *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528 (2d Cir. 1985). Moreover, Setevage's complaints about his attorney, *see, e.g.*, Plaintiff's Br. at 24, are unavailing; as this Court has noted, "all litigants are bound by the concessions of freely retained counsel." *Bergerson v. New York State Office of Mental Health*, 652 F.3d 277, 289 (2d Cir. 2011) (internal quota-

tions omitted); *see also Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962) (party who voluntarily chooses an attorney cannot "avoid the consequences of the acts or omissions of this freely selected agent").

Setevage's desire to unmake the facts of the case on appeal is contrary to both the jurisprudence of this Court and the record below. The Court should reject his argument that the facts below, which came from his deposition testimony and admissions, are inaccurate.

Setevage had two options to exhaust his administrative remedies. He did not file a formal EEO complaint and, in any event, he missed the deadline to begin the EEO process. He filed his notice of intent to sue too late. Because he has missed the applicable deadlines, the district court properly granted summary judgment in favor of the defendants. This Court should affirm the district court's decision.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: May 1, 2013

Respectfully submitted,

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UNITED STATES ATTORNEY
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DAVID C. NELSON
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Addendum

Table of Relevant Dates

Event	Date	45 days (if applicable)	180 days (if applicable)
Rejection letter.	October 19, 2006. DA132.	December 3, 2006	April 17, 2007
Date Setevage admits knowing that he was rejected.	June 29, 2007. DA429; DA277-78; DA103.	August 13, 2007	December 26, 2007
Date Setevage claims on appeal that he knew he was reject-ed.	October 19, 2007. Plaintiff's Br. pg. 23.	December 3, 2007	April 16, 2008
Setevage begins (but does not complete) EEO pro-cess.	Decem-ber 13, 2007. DA429 (¶ 53); DA137		
Setevage files notice of intent to sue.	February 6, 2008. DA429 (¶52); DA133.		

29 U.S.C. § 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected. All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission [Postal Regulatory Commission], in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office [Government Accountability Office], and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Civil Service Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of

discrimination; exemptions: bona fide occupational qualification. Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall--

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service

Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief. Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices. When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged un-

lawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official. Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc. Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of sections 7(d)(3) and 12(b) of this Act [29 USCS §§ 626(d)(3) and 631(b)] and the provisions of this section.

(g) Study and report to President and Congress by Civil Service Commission; scope.

(1) The Civil Service Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 12(b) of this Act, as added by the Age Discrimination in Em-

ployment Act Amendments of 1978 [29 USCS § 631(b)].

(2) The Civil Service Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

29 C.F.R. § 1614.201 Age Discrimination in Employment Act.

(a) As an alternative to filing a complaint under this part, an aggrieved individual may file a civil action in a United States district court under the ADEA against the head of an alleged discriminating agency after giving the Commission not less than 30 days' notice of the intent to file such an action. Such notice must be filed in writing with EEOC, at P.O. Box 77960, Washington, DC 20013, or by personal delivery or facsimile within 180 days of the occurrence of the alleged unlawful practice.

(b) The Commission may exempt a position from the provisions of the ADEA if the Commission establishes a maximum age requirement for the position on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

(c) When an individual has filed an administrative complaint alleging age discrimination that is not a mixed case, administrative remedies will be considered to be exhausted for purposes of filing a civil action:

(1) 180 days after the filing of an individual complaint if the agency has not taken final action and the individual has not filed an appeal or 180 days after the filing of a class complaint if the agency has not issued a final decision;

(2) After final action on an individual or class complaint if the individual has not filed an appeal; or

(3) After the issuance of a final decision by the Commission on an appeal or 180 days after the filing of an appeal if the Commission has not issued a final decision.

29 C.F.R. § 1614.105 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

(b)(1) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing or an immediate final decision after an investigation by the agency in accordance with § 1614.108(f), election rights pursuant to §§ 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to § 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the claims raised in precomplaint counseling (or issues or claims like or related to issues or claims raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

(2) Counselors shall advise aggrieved persons that, where the agency agrees to offer ADR in the particular case, they may choose between participation in the alternative dispute resolu-

tion program and the counseling activities provided for in paragraph (c) of this section.

(c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling.

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the aggrieved person chooses an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person contacted the agency's EEO office to request counseling. If the matter has not been resolved, the aggrieved person shall be informed in writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the

agency is informed immediately if the complainant retains counsel or a representative.

(e) Prior to the end of the 30-day period, the aggrieved person may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in paragraph (d) of this section shall be issued.

(f) Where the aggrieved person chooses to participate in an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the pre-complaint processing period shall be 90 days. If the claim has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

(g) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter.