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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

Ronald L. Pronechen,	)	CV 06-01726 LEW
	)	
Plaintiff,	)	<b>RULING AND ORDER</b>
	)	
v.	)	
	)	
Secretary of U.S.	)	
Department of Homeland	)	
Security,	)	
	)	
Defendant.	)	
	)	

In this Action, Plaintiff Ronald L. Pronechen ("Plaintiff") alleges that Defendant Secretary of U.S. Department of Homeland Security (the "Secretary") discriminated against him in violation of the federal sector Age Discrimination in Employment Act ("ADEA") when it did not hire him for either a GS-7/9/11/12 Physical Security Specialist ("PSS") position in San Diego, California or a GS-13 Supervisory PSS position in Phoenix, Arizona, which were advertised in job announcements 0392184 and 0392144 respectively. The

1 issues for Trial were whether Plaintiff's claims under  
2 the ADEA were time-barred and whether Plaintiff's non-  
3 selection for both the San Diego and Phoenix positions  
4 were the result of intentional discrimination based on  
5 age. The Court having considered all of the arguments,  
6 evidence, testimony, and exhibits presented during the  
7 Court Trial, **NOW FINDS AND RULES AS FOLLOWS:**

8 **I. EQUITABLE TOLLING**

9 Plaintiff bears the burden of proving facts to  
10 support equitable tolling. Vaughn v. Teledyne, Inc.,  
11 628 F.2d 1214, 1218 (9th Cir. 1980). The Court finds  
12 that Plaintiff Pronechen has not met his burden of  
13 establishing that the 45-day time limit to contact an  
14 EEO counselor should be equitably tolled.

15 Under the ADEA, a federal employee who wants to  
16 assert an age discrimination claim may pursue the  
17 complaint administratively before the EEOC and appeal  
18 any loss in federal court. 29 C.F.R. § 1614.407.  
19 Moreover, the federal employee is required to "initiate  
20 contact with a counselor within 45 days of the date of  
21 the matter to be discriminatory or, in the case of  
22 personnel action, within 45 days of the effective date  
23 of the action." 29 C.F.R. § 1614.105(a)(1). Failure to  
24 initiate contact with an EEO counselor within 45 days  
25 requires dismissal of an EEO complaint absent waiver,  
26 estoppel, or equitable tolling. Id. §§ 1614.107(a)(2),  
27 1614.604(c).

28 Under federal law, an employment discrimination

1 claim accrues upon awareness of the actual injury,  
2 i.e., the adverse employment action, and not when the  
3 plaintiff suspects a legal wrong. Lukovsky v. City and  
4 County of San Francisco, 535 F.3d 1044, 1049 (9th Cir.  
5 2008). If a reasonable plaintiff would not have known  
6 of the existence of a possible claim within the  
7 limitations period, then equitable tolling will serve  
8 to extend the statute of limitations for filing suit  
9 until the plaintiff can gather what information he  
10 needs. Johnson v. Henderson, 314 F.3d 409, 414 (9th  
11 Cir. 2002).

12 However, equitable tolling does not apply where a  
13 plaintiff knew or reasonably should have known of the  
14 possible existence of a claim within the limitations  
15 period. Id. See also Lukovsky, 535 F.3d at 1051.  
16 Furthermore, "the doctrine [of equitable tolling] 'is  
17 not available to avoid the consequence of one's own  
18 negligence.'" Hensley v. U.S., 531 F.3d 1052, 1058 (9th  
19 Cir. 2008) (quoting Lehman v. U.S., 154 F.3d 1010, 1016  
20 (9th Cir. 1998). It does not apply when a late filing  
21 is due to a claimant's failure to exercise due  
22 diligence in preserving his legal rights. Scholar v.  
23 Pac. Bell, 963 F.2d 264, 268 (9th Cir. 1992).

24 The Court finds that Plaintiff failed to exercise  
25 due diligence in preserving his legal rights with  
26 regard to his ADEA claim. Specifically, the evidence  
27 at Trial established that for every non-selection  
28 during 2003 and up to January 14, 2004, Plaintiff

1 suspected that he had been discriminated against based  
2 on his age. The evidence presented at Trial further  
3 established that Plaintiff knew during this time that  
4 discrimination based on age was not tolerated by the  
5 Federal Protective Service ("FPS") and that he should  
6 contact an EEO counselor to complain of discrimination.  
7 However, the evidence at Trial established that  
8 Plaintiff did not contact an EEO counselor until March  
9 30, 2004 regarding his non-selection for various  
10 federal job announcements, particularly the San Diego  
11 and Phoenix job announcements at issue in this case.  
12 [Plaintiff's Exhibit 5A].

13 Specifically, the evidence established that posters  
14 with EEO information were placed in a General Services  
15 Administration ("GSA") break room where, or adjacent to  
16 where, FPS had a mailbox from which Plaintiff, along  
17 with other FPS employees, would retrieve GSA mail,  
18 notices, and memoranda addressed to GSA. Witness  
19 testimony also established that Plaintiff contacted his  
20 congressman in June 2003 complaining about the  
21 non-selections at issue here and indicating that they  
22 were based on his age.

23 Furthermore, the Court finds Plaintiff's argument  
24 that he did not have knowledge of the 45-day time limit  
25 unpersuasive. The Court finds the testimony of Lois  
26 Allmon and Richard Riccio particularly instructive with  
27 regard to this finding. The evidence at Trial  
28 established that Plaintiff attended an EEO/Sexual

1 Harassment training on April 18, 2000 in San Francisco,  
2 California. [Defendant's Exhibit A]. While Plaintiff  
3 testified that he could not remember one way or the  
4 other whether the 45-day time limit was taught at the  
5 April 18, 2000 training, both Lois Allmon and Richard  
6 Riccio testified that the 45-day time limit was  
7 discussed at the training. Richard Riccio testified  
8 that he specifically remembered the 45-day rule as a  
9 topic of discussion in the April 18, 2000 training  
10 because he himself had contemplated filing a claim but  
11 realized that his filing would be time-barred after  
12 learning about the 45-day time limit at the training  
13 session. Moreover, Lois Allmon testified that it was  
14 her standard practice to discuss the 45-day time limit  
15 at the nine or ten training sessions she taught during  
16 her ten year career as both an EEO Specialist and  
17 Counselor.

18       The Court finds that the testimony of these  
19 witnesses lends significant credibility to the  
20 Secretary's position that Plaintiff was aware of the  
21 45-day time limit to contact an EEO counselor.  
22 Additionally, evidence at Trial established that the  
23 GSA sent orders and memoranda for distribution to all  
24 FPS employees informing them of the 45-day time period  
25 during the time in which Plaintiff was employed as a  
26 Physical Security Specialist for FPS. [Defendant's  
27 Exhibits B, C, C1]. The evidence established that some  
28 of these orders were placed in a GSA Order Book in the

1 FPS office, in which Plaintiff worked and had access  
2 to. The Court also heard testimony that Plaintiff,  
3 along with other FPS Physical Security Specialists, was  
4 responsible for routinely updating the GSA Order Book.

5 While Plaintiff claims that he should be entitled  
6 to equitable tolling because he applied for the two  
7 positions at issue in this case as an outside applicant  
8 and therefore had no knowledge of the 45-day time  
9 limit, the Court finds that such argument lacks merit.  
10 It is undisputed that Plaintiff worked for FPS as a  
11 Physical Security Specialist for ten years before he  
12 retired in 2000. Moreover, Plaintiff testified that  
13 during his ten years of employment with FPS, he was  
14 generally aware of EEO policies and procedures. As  
15 such, the Court finds that because of Plaintiff's  
16 significant background in federal employment,  
17 Plaintiff's assertion that he was unaware of the 45-day  
18 time limit lacks credibility. Moreover, the Court  
19 finds that the overall evidence presented at Trial  
20 consistently established that Plaintiff was on notice  
21 with regard to the EEO 45-day time limit.

22 Accordingly, the Court finds that Plaintiff has not  
23 exercised due diligence in preserving his legal rights  
24 with regard to his ADEA claim and has not met his  
25 burden of proof to establish equitable tolling. As  
26 such, the Court finds that Plaintiff's age  
27 discrimination claim under the ADEA regarding both the  
28 San Diego and Phoenix positions is time-barred.

1 Nevertheless, the Court will also address the merits of  
2 Plaintiff's age discrimination claim.

3 **II. MERITS OF PLAINTIFF'S AGE DISCRIMINATION CLAIM**

4 The Court finds that Plaintiff has failed to  
5 establish by a preponderance of the evidence that the  
6 Secretary discriminated against him based on his age  
7 when it did not select him for either the GS-7/9/11/12  
8 PSS position in San Diego or the GS-13 Supervisory PSS  
9 position in Phoenix.

10 Under the ADEA, a plaintiff makes out a prima facie  
11 case of intentional discrimination if he demonstrates  
12 that he was within the protected class of individuals  
13 between forty and seventy years of age, that he applied  
14 for a position for which he qualified, and that a  
15 younger person with similar qualifications received the  
16 position. Establishing a prima facie case raises an  
17 inference of discrimination which the employer can  
18 rebut by demonstrating that it had a legitimate, non-  
19 discriminatory reason for its decision. The plaintiff  
20 then must come forward with evidence that the  
21 employer's reason is a mere pretext to conceal its  
22 discriminatory motive. Cotton v. City of Alameda, 812  
23 F.2d 1245, 1248 (9th Cir. 1987). See Coleman v. Quaker  
24 Oats Co., 232 F.3d 1271, 1280-81 (9th Cir. 2000).

25 As a preliminary matter, the parties do not dispute  
26 that Plaintiff has established a prima facie case for  
27 an ADEA claim. Therefore, the Court will only address  
28 the latter two requirements of whether the Secretary

1 has established legitimate, non-discriminatory reasons  
2 for Plaintiff's non-selection for both the San Diego  
3 and Phoenix positions and whether Plaintiff can show  
4 that the Secretary's legitimate, non-discriminatory  
5 reasons are pretextual.

6 **A. The Court Finds That The Secretary Has**  
7 **Established Legitimate, Non-Discriminatory**  
8 **Reasons for Plaintiff's Non-Selection For Both**  
9 **The San Diego And Phoenix Positions.**

10 The Court finds that the evidence presented at  
11 Trial established that the Defendant had legitimate,  
12 non-discriminatory reasons for Plaintiff's non-  
13 selection for both the GS-7/9/11/12 PSS position in San  
14 Diego and the GS-13 Supervisory PSS position in  
15 Phoenix.

16 I. San Diego Position

17 With regard to the San Diego position, the Court  
18 heard testimony from selecting official Anna Hughes.  
19 Anna Hughes testified that she recommended selectee  
20 R.S. for the panel interview because of his  
21 qualifications, including his law enforcement and  
22 physical security experience and training.  
23 Furthermore, Anna Hughes testified that she did not  
24 take an applicant's age into consideration, nor did she  
25 have access to such information, when deciding to  
26 advance a particular applicant to the panel interview.  
27 Equally compelling to the Court was Ms. Hughes's  
28 testimony that selectee R.S. was strongly recommended



1 to her by a colleague whom she knew and trusted.

2       Moreover, Stella Meyerhoff, who was on the  
3 interview panel for the San Diego job, testified that  
4 R.S. performed exceptionally well during his panel  
5 interview, and had the proper qualifications of law  
6 enforcement and physical security experience demanded  
7 by the PSS position. Therefore, based on the witness  
8 testimony presented at Trial, the Court finds that the  
9 Secretary had legitimate non-discriminatory reasons for  
10 hiring R.S. for the San Diego position. The Court  
11 finds both Anna Hughes and Stella Meyerhoff as credible  
12 witnesses and that their testimony supports the finding  
13 that the Secretary had legitimate, non-discriminatory  
14 reasons for Plaintiff's non-selection for the GS-  
15 7/9/11/12 PSS position in San Diego.

16               ii. Phoenix Position

17       With regard to the Phoenix position, the Court  
18 heard testimony from selecting official Russell Oase.  
19 Russell Oase testified that he selected D.H. over  
20 Plaintiff for the Phoenix job because D.H. had a  
21 bachelor's degree, a master's degree, and relevant  
22 experience given that selectee D.H. was, at that time,  
23 acting as a GS-13 Acting Area Commander. Furthermore,  
24 Mr. Oase testified that he never considered age as a  
25 factor in trying to hire someone to fill the Phoenix  
26 position. Rather, Mr. Oase testified that what was  
27 important to him was an applicant's education because  
28 it showed motivation and that such an applicant would

1 be a better writer, which was particularly important  
2 given that the supervisory job entailed a writing  
3 component. Furthermore, Mr. Oase testified that both  
4 Plaintiff and selectee D.H. were equally experienced  
5 for the position, but selectee D.H. was superior to  
6 Plaintiff with respect to education. The Court heard  
7 testimony from Mr. Oase that education was important to  
8 FPS and therefore D.H. was selected for the position  
9 over Plaintiff because of that criteria. The Court  
10 finds Mr. Oase's testimony regarding his decision for  
11 hiring D.H. on the basis of education particularly  
12 credible.

13 Based on the witness testimony presented at Trial,  
14 the Court finds that the Secretary had legitimate non-  
15 discriminatory reasons for hiring D.H. for the Phoenix  
16 position. Accordingly, the burden rests on Plaintiff  
17 to show through specific evidence that the legitimate,  
18 non-discriminatory reasons were pretext and that the  
19 real reason that Plaintiff was not hired for either the  
20 San Diego or Phoenix positions was because of his age.

21 **B. The Court Finds That The Plaintiff Has Not**  
22 **Met His Burden To Prove That The Secretary's**  
23 **Legitimate, Non-Discriminatory Reasons For**  
24 **Plaintiff's Non-Selection For Both The San**  
25 **Diego and Phoenix Positions Were Pretextual.**

26 The Court finds that the evidence presented by  
27 Plaintiff at Trial was factually deficient with regard  
28 to his assertion that the Secretary's legitimate, non-

1 discriminatory reasons for Plaintiff's non-selection  
2 were pretextual. To show pretext, Plaintiff must prove  
3 by a preponderance of the evidence that the Secretary's  
4 legitimate, non-discriminatory reasons are false and  
5 that the real reason that Plaintiff was not hired was  
6 because of Plaintiff's age. See St. Mary's Honor Ctr.  
7 v. Hicks, 509 U.S. 502, 515 (1993). See also Steckl v.  
8 Motorola, Inc., 703 F.2d 392, 392-93 (9th Cir. 1983).

9 At Trial, Plaintiff argued pretext through  
10 reference to FPS's desire to obtain law enforcement  
11 retirement eligibility status, and that because  
12 Plaintiff was rated as "best qualified" and in the  
13 higher echelon of the applicant pool for each position,  
14 his non-selection for both the San Diego and Phoenix  
15 positions were solely because of his age. The Court  
16 finds that such evidence presented by Plaintiff was  
17 insufficient to prove pretext pursuant to applicable  
18 case law. Steckl, 703 F.2d at 392-93.

19 With regard to the San Diego position, the Court  
20 finds that Plaintiff has not met his burden of  
21 demonstrating with sufficient evidence that DHS's  
22 reasons for hiring selectee R.S. were pretextual and  
23 that intentional age discrimination was the true reason  
24 for Plaintiff's non-selection for the San Diego  
25 position. The evidence at Trial established  
26 legitimate, non-discriminatory reasons for the  
27 selection of R.S., including, but not limited to, a  
28 strong positive recommendation, R.S.'s law enforcement

1 and physical security training, and R.S.'s strong  
2 performance during the panel interview. In fact, the  
3 Court finds that the evidence at Trial, specifically  
4 the testimony of Clara Rye, Anna Hughes<sup>1</sup>, and Stella  
5 Meyerhoff, consistently established that age was not  
6 taken into account by either the panel or the selecting  
7 official with regard to the GS-7/9/11/12 PSS position  
8 in San Diego. Based on the evidence presented at  
9 Trial, the Court finds that the Secretary adequately  
10 met its burden to prove legitimate, non-discriminatory  
11 reasons for Plaintiff's non-selection for the San Diego  
12 position, while Plaintiff failed to meet his burden to  
13 prove pretext. The Court finds that Plaintiff did not  
14 meet his burden to prove that the reasons proffered by  
15 the Secretary were false and that the real reason for  
16 Plaintiff's non-selection for the San Diego position  
17 was because of his age.

18 With respect to the Phoenix position, the Court

19 \_\_\_\_\_  
20 <sup>1</sup> Plaintiff argued at Trial that he was never  
21 interviewed by Anna Hughes for the San Diego PSS  
22 position despite scheduling a telephonic interview with  
23 her for December 02, 2003 at 1:00 p.m. The Plaintiff  
24 offered into evidence his time sheet in support of his  
25 contention that he could not have received the call  
26 from Ms. Hughes because he was working that day as a  
27 Court Security Officer. [Plaintiff's Exhibit 14].  
28 However, the Secretary offered into evidence Ms.  
Hughes's appointment calendar to prove that Ms. Hughes  
did in fact complete the telephonic interview with  
Plaintiff. [Defendant's Exhibit U]. The Court finds  
the Secretary's evidence as well as Anna Hughes's  
testimony more credible with regard to this issue.

1 finds that Plaintiff has not met his burden of  
2 demonstrating with specific evidence that DHS's reasons  
3 for hiring selectee D.H. were pretextual and that  
4 intentional age discrimination was the true reason for  
5 Plaintiff's non-selection for the Phoenix position.  
6 The Court finds that the evidence at Trial established  
7 legitimate, non-discriminatory reasons for the  
8 selection of D.H., including, but not limited to,  
9 D.H.'s college and post-graduate degrees, D.H.'s law  
10 enforcement and physical security experience, and the  
11 fact that D.H. had already occupied a supervisory  
12 position with FPS.

13 The evidence at Trial established that Mr. Oase  
14 did not take age into account in selecting D.H. The  
15 Court finds that the evidence at Trial established  
16 that, during the relevant time period of 2002-2004, FPS  
17 hired individuals of ages comparable to that of  
18 Plaintiff. [Defendant's Exhibit N].

19 Furthermore, the Court also finds that Plaintiff  
20 has produced insufficient evidence to show that FPS's  
21 long-established desire to obtain law enforcement  
22 retirement eligibility status for its workforce was  
23 evidence of pretext. The witness testimony of Anna  
24 Hughes, Stella Meyerhoff, and Russell Oase was  
25 particularly instructive to the Court in making this  
26 finding. All of these witnesses testified that FPS's  
27 efforts to obtain "6C" retirement eligibility status  
28 for its employees did not impact each selecting

1 officials' decision to not hire Plaintiff for either  
2 the San Diego or the Phoenix positions.

3       Additionally, the Court finds that Plaintiff's  
4 claim of age discrimination on the basis of his non-  
5 selection for both the San Diego and Phoenix positions,  
6 despite being rated as "best qualified," is without  
7 merit. The Court finds that Plaintiff's beliefs  
8 regarding his own qualifications and how that compares  
9 with the qualifications of the selectees is not  
10 evidence of age discrimination. The Court finds that  
11 Plaintiff's own opinion about his qualifications for  
12 the two jobs at issue here does not sufficiently prove  
13 that the Secretary's non-discriminatory reasons for  
14 Plaintiff's non-selections were pretextual.

15       Rather, Plaintiff has a duty to put forth evidence  
16 that the Secretary's legitimate, non-discriminatory  
17 reasons are false and that the real reason that  
18 Plaintiff was not selected for either position was  
19 because of his age. The Court finds that Plaintiff has  
20 failed to meet this burden. Furthermore, the Court  
21 finds that the Plaintiff's opinion of the relative  
22 merits of his credentials as opposed to those of the  
23 selectees is insufficient evidence of pretext in  
24 advancing his claim for age discrimination under the  
25 ADEA. While Plaintiff disagrees with DHS's decision to  
26 not hire him for either the San Diego or Phoenix  
27 positions, this is not evidence of age discrimination.  
28 Accordingly, the Court finds that Plaintiff has failed

1 to establish a claim for age discrimination under the  
2 ADEA regarding both the San Diego and Phoenix positions  
3 at issue in this case.

4 For the reasons stated above, the Court finds in  
5 favor of Defendant Secretary of U.S. Department of  
6 Homeland Security in this Action. Moreover, given that  
7 the Court finds in favor of the Defendant, the Court  
8 need not address the issue of Plaintiff's damages.

9  
10 DATED: January 24, 2011

11 **IT IS SO ORDERED.**

12 

13 \_\_\_\_\_  
14 **HONORABLE RONALD S.W. LEW**  
15 Senior, U.S. District Court Judge