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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

MAURICE BROWN,

Plaintiff,

v.

Case No: 6:18-cv-1234-Orl-40GJK

SECRETARY, UNITED STATES
DEPARTMENT OF
TRANSPORTATION,

Defendant.

_____ /

MEMORANDUM OPINION AND ORDER

This cause is before the Court following a one-day bench trial held on December 2, 2019. Having considered the pleadings, evidence, argument, and relevant legal authority, and having made determinations on the credibility of the witnesses, the Court hereby renders its decision on the merits of this case pursuant to Federal Rule of Civil Procedure 52.

I. BACKGROUND

Plaintiff Maurice Brown initiated this action against Defendant Secretary for the Department of Transportation, seeking damages under the Age Discrimination in Employment Act (“**ADEA**”), 29 U.S.C. § 621. Plaintiff alleged one count of age discrimination in connection with his nonselection in 2013 to an air traffic controller position with the Federal Aviation Administration (“**FAA**”) in Houston, Texas. (Doc. 1).

Defendant moved for summary judgment on Plaintiff’s age discrimination claim, which the Court denied on November 21, 2019. (Doc. 52). Thereafter, the parties litigated the claim in a bench trial before the Court on December 2, 2019. In the event the Court

found liability, the parties agreed to bifurcate the trial as to damages. As to the issue of liability, the parties submitted proposed findings of fact and conclusions of law for the Court's consideration. (Docs. 45, 73).¹

II. JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1331, as the case involves the alleged violation of the ADEA.

III. FINDINGS OF FACT

A. Houston Vacancies

1. Plaintiff was born in 1967 and worked as an air traffic controller with the FAA from 1989 through January 2016. (Doc. 71, 14:1–3, 14:18–24). During his 26-year tenure with the FAA, Plaintiff received all satisfactory and exceptional performance ratings. (*Id.* 14:25–15:3).
2. On June 20, 2013, the FAA posted a vacancy announcement for multiple Air Traffic Control Specialist (“**ATCS**”) positions at the Houston TRACON facility. (Joint Ex. 5). A TRACON (terminal radar approach control) facility is responsible for the final sequencing of airplanes approaching an airport. (Doc. 71, 16:10–21). The ATCS positions at Houston were non-supervisory, pay grade AT-12 positions—the highest grade designated to a TRACON facility. (Joint Ex. 5).

¹ Prior to the start of trial, both parties submitted Proposed Findings of Fact and Conclusions of Law. (Docs. 45, 47). However, only Defendant submitted an amended version after the close of trial. (Doc. 73). Therefore, the Court considers Plaintiff's original version (Doc. 45) and Defendant's amended version (Doc. 73).

3. The FAA needed to fill 16 vacancies out of the 80 total ATSC positions at the Houston TRACON. (Doc. 71, 156:5–13). The facility had been understaffed for quite a few years at this time. The large vacancy can be partly explained by a wave of retirements of controllers who were hired in the wake of the 1981 air traffic controller strike—when roughly 70 to 80 percent of controllers were fired. (*Id.* 176:24–16). The mandatory retirement age for air traffic controllers is 56 years old. (*Id.* 20:16–18). Accordingly, any controller who was at least 24 years old when they were hired in 1981 would have had to retire by 2013.
4. Plaintiff submitted his application for the Houston vacancy in June 2013. (*Id.* 17:7–9). As required by the announcement, Plaintiff submitted an FAA Form 43, titled “Rating of Air Traffic Experience for CPC Positions,” which outlines the experience of each candidate, including the ATC level of the facilities where they worked and if they certified. (Joint Ex. 3). At the time he applied, Plaintiff was working as an ATCS, pay grade AT-11, at the Orlando Central Florida TRACON facility. (Doc. 71, 15:15–16). Plaintiff’s Form 43 indicated that he had previously worked at the Atlanta TRACON, a level 12 facility, but the form does not show he certified at that location. Plaintiff’s Rating was 101 points out of a possible 132 points. Plaintiff’s age was not listed on the application. However, his college graduation year and years of experience with the FAA were listed on his application, so one could roughly deduce his age. Additionally, Plaintiff provided the name of Craig

Osekowski as his reference. (Joint Ex. 3). Osekowski was Plaintiff's first-line supervisor at the Orlando TRACON. (Doc. 71, 17:12–14).

5. The Human Resources office that served the Houston TRACON referred 93 applicants from the vacancy announcement, including Plaintiff. This applicant list was sent to Caroline Carey, the Air Traffic Manager for the Houston TRACON and selecting official for the vacancies. She was the Air Traffic Manager at the Houston TRACON from approximately 2011 until she retired in January 2014. At the time of her retirement, she had worked for the FAA for 34 years. She was born in 1956. (*Id.* 172:14–19, 183:7–8).

B. Delegating Reference Checks

6. Once Human Resources referred the applicant list, Carey met with three of her Operations Managers (“**OMs**”) to discuss the selection process—Karen Morgan, Roger Vorndran, and Michael Richardson. An OM is responsible for managing the flow of air traffic into the area covered by the TRACON and ensuring the facility is properly staffed. Carey asked them to check references for the applicants and then provide her with a list of recommended candidates. (*Id.* 148:6–18, 172:19–173:13). The dates of birth of the applicants were not listed on the Form 43s or applicant packages. (Joint Ex. 3 & 4).
7. Since 2018, Morgan has been the District Support Manager for Training at the Houston TRACON. Prior to that, she was an OM. Morgan was born in 1963. (Doc. 71, 146:14–147:9, 158:14–19).

8. Richardson is an OM at the Houston TRACON. He has worked at the facility since 2002 and has been with the FAA for over 30 years. He was born in 1964. (*Id.* 98:10–99:7). At the time of the Houston selections, Carey, Richardson, and Morgan were over the age of 40. (*Id.* 99:10–14, 158:16–19, 183:7–8).
9. Upon receipt of the applicant list, the OMs created a spreadsheet showing the facility, grade, and facility time for each applicant. They then divided up the applications for reference checks. They assigned the first-line supervisors at Houston to contact their counterparts at the facilities where the applicants worked for references. The OMs created a form entitled “CPC Selection Worksheet” to be completed by the person conducting the reference check to document the call. (*Id.* 148, 150:16–151:5, 160–163; Joint Exs. 10 & 11). The CPC Selection Worksheet included categories of conversation to discuss with references, such as the candidate’s ability to work on teams, communication skills and interactions with peers and management, and operational skill levels. (Joint Ex. 10).
10. The process of selecting candidates is time intensive and interrupts regular work duties, requiring frequent phone calls and coordination between the OMs and supervisors. There is a desire to complete the process quickly because the vacancies are only good for a set amount of time. This selection process took four weeks. During that time, Richardson was working six-day work weeks with ten-hour days. (Doc. 71, 74:1–21, 155:9–20).

C. Plaintiff's Reference Check

11. The OMs were having difficulty reaching Plaintiff's reference, Craig Osekowski. (*Id.* 148:19–149:3, 162:23–163:15). Osekowski recalls receiving a voice message from Houston, but never spoke to anyone about Plaintiff. (*Id.* 125:5–7, 128:13–19). Osekowski testified that if he was asked to give a recommendation for Plaintiff, he would have said Plaintiff was a good employee with an outstanding work ethic. (*Id.* 124:6–24, 125:20–25). At the time of the selection process, Morgan, Richardson, and Carey did not know Plaintiff and had never met him. (*Id.* 40:23–41:19, 98:3–9, 147:13–19, 171:20–172:22).
12. In 2013, John Ramirez was an OM at the Orlando TRACON and had worked with Plaintiff as both a peer and a supervisor. Ramirez is now the Acting Air Traffic Manager at Orlando. During the application process for the Houston vacancies, Ramirez happened to be visiting the Houston facility to express interest in applying for the OM position there. During that visit, Ramirez spoke to Richardson. (*Id.* 131:3–10, 137:5–10).
13. Richardson recalls that, during this conversation, he asked Ramirez about Plaintiff. Ramirez rated Plaintiff as an average controller who would not go above and beyond and therefore would not recommend him for the position. (*Id.* 76:16–21, 149:4–150:15). Richardson claims it was a brief conversation, and he did not ask about many of the categories outlined on the CPC Selection Worksheet. (*Id.* 77:1–21).

14. Ramirez disputes this recollection. He recalls being in Houston to inquire about job openings, and he also recalls having a conversation with Richardson. But Ramirez does not recall any discussions about Plaintiff. If Plaintiff's name had come up, Ramirez testified that he would have recommended Plaintiff for the position. (*Id.* 137:11–138:8). He believed Plaintiff was a solid, good employee and would be able to work at the Houston TRACON because he worked in Orlando, which is “a pretty complex facility.” (*Id.* 133:8–16).
15. Richardson did not complete a CPC Selection Worksheet documenting the conversation with Ramirez. (*Id.* 75:14–76:2). However, Richardson did document reference checks he performed for other candidates, and he produced CPC Selection Worksheets for those candidates. (*Id.* 70:7–13). The FAA's policy for performing reference checks is outlined in Human Resource Policy Manual (HRPM) Volume: 1 Employment EMP-1.8a Reference Checking. It describes a detailed procedure for conducting and documenting reference checks, which Richardson did not follow when conducting Plaintiff's reference check. (Joint Ex. 9).
16. Although he did not document the conversation with Ramirez, Richardson did verbally relay the conversation to Morgan and Vorndran. (Doc. 71, 149:4–150:15). By this time, the OMs had completed their review and vetting of the applications, and Plaintiff's was the last recommendation they needed to wrap up their work. (*Id.* 163:12–15).

17. Richardson also claims he later contacted a supervisor for Plaintiff over the phone and that supervisor gave a similar recommendation for Plaintiff as Ramirez purportedly gave. Richardson did not document this conversation and could not recall the name of the person he spoke to. (*Id.* 82:3–13).
18. The Court does not find Richardson's testimony about his conversation with Ramirez credible nor does it find his testimony about the unidentified supervisor credible. The Court finds Ramirez and Osekowski's testimony credible and therefore adopts their version of events—that neither of them gave a reference for Plaintiff to anyone at the Houston TRACON.

D. The OM Ranking Process

19. In June 2014, Richardson signed an affidavit during the investigation of Plaintiff's EEO complaint. In the affidavit, he stated that he met with Morgan and Vorndran as a group to review the applicants and prepare a list of candidates to recommend in ranked order for Carey. (Pl. Ex., pp. 75–76). Later, in his deposition and testimony at trial, Richardson maintained that he did not recall having a meeting with Morgan and Vorndran about ranking candidates. (Doc. 71, 89:19–24). The Court does not find Richardson's deposition or testimony at trial credible. His recollections in June 2014 were much closer in time to the selections and are consistent with Richardson's testimony that the OMs normally met as a group to rank the applicants. (*Id.* 110:4–111:17). Accordingly, the Court finds that Richardson, Morgan, and Vorndran met as a group without Carey to review the applicants and decide who to recommend to Carey.

20. When meeting as a group, the OMs chose which applicants to recommend to Carey based off those who received the best references. The OMs shared their notes with each other regarding the references they each respectively collected. (*Id.* 112:2–9). The OMs did not conduct interviews of the candidates and gave no consideration to the Form 43 scores, instead relying solely on the reference checks. (*Id.* 161:6–162:22). The OMs maintain that they did not discuss or consider the applicants' ages when ranking them.
21. There were 16 open ATCS vacancies for Carey to fill. (*Id.* 33:12–13). Based on the recommendations the OMs received for the applicants, they compiled a list for Carey, ranking their top recommendations from 1 to 26. The other applicants appeared on that list unranked; their names were just listed alphabetically. Plaintiff's name was not in the top 26 on the list the OMs provided to Carey. (Doc. 71, 154:9–155:8; Joint. Ex. 15).
22. Plaintiff was not put forward to Carey because Richardson told the OMs that he received a bad recommendation compared to the other applicants. (Doc. 71, 168:15–169:13; Pl. Ex., p. 76). If Plaintiff received a high recommendation, Richardson and Morgan stated that he would have put forward to Carey. (Doc. 71, 93:17–94:5, 153:15–25). Without the bad recommendation, Carey stated that Plaintiff was otherwise an ideal candidate for the position. (*Id.* 181:24–182:22). However, Carey—the ultimate decisionmaker—was totally uninformed as to Plaintiff at the time of selection beyond what the OMs provided her. (*Id.* 178–180).

E. The Ranked Applicants

23. The following chart provides the names, rank, ages, and highest level of ATSC facility for the 26 candidates recommended by the OMs:

Rank	First Name	Last Name	Age	Highest Facility Level
1	Randy L.	Moore	30	11
2	David A.	Fuller	34	12
3	Christian	Payne	34	10
4	Ryan P.	Warters	Unknown	11
5	Kaylin	Lopez	34	10
6	Starsky	Smith	30	10
7	Jeremy L.	Toche	38	12
8	Adam W.	Behrent	28	10
9	John C.	Howell	33	9
10	Michael K.	McCoy	46	9
11	Lucas	Miller	28	8
12	Roberts	Ryan	Unknown	9
13	Timothy	Roach	Unknown	9
14	Morgan B.	Lorch	30	9
15	Stephen	Macomber	Unknown	8
16	Chiumbo K.	James	40	9
17	Michael M.	Smith	31	12
18	Barry	Aurich	49	10
19	Michael R.	Schawinsky	30	9
20	Spencer	Hillis	33	8
21	Timothy	Lowther	Unknown	10
22	Kevin	Kitson	51	10
23	Johnnie D.	Jackson	Unknown	9
24	Michael A.	Citrolo	32	12
25	Matthew	Crist	46	8
26	Thomas F.	Drop	52	9

(Joint Exs. 7, 8, 14, 16).

24. As there were only 16 open vacancies, the top 16 applicants from this chart represent the “ideal list” from the OMs. (Doc. 71, 90:6–19). Only two applicants from the ideal list are at least 40 years old—McCoy (age 46, #10) and James (age 40, #16). The average age of the applicants from the ideal list was 33.75.² (Joint Exs. 7, 8, 14, 16).
25. Carey selected 16 applicants to fill the positions at the Houston TRACON. She did not make all her selections from the OMs’ ideal list because as the selecting official, she was able to choose whoever she wants from the referral list to fill the positions. As an Air Traffic Manager, she had other information about some of the applicants based on her interactions with managers of other facilities. (Doc. 71, 173:1–13, 183:21–185:1). The bolded names from the chart are the applicants selected by Carey, with the addition of Juan Pena who was 31 years old and worked at the 11-grade Orlando facility with 12 years of experience. The average rating from the selectees’ Form 43s was 57.5, with only two selectees having a higher rating than Plaintiff’s score of 101. The average age of the 16 selectees was 37.5 years old. Five of the selectees were over the age of 40—McCoy (age 46, #10); James (age 40, #16); Aurich (age 49, #18); Kitson (age 51, #22); and Drop (age 52, #26). (Joint Exs. 7, 8, 14, 16). Carey also offered the position to Crist (age 46, #25), but he declined. (Doc. 71, 55:18–56:1). If Carey had selected only from the OMs’ ideal list, Crist, Aurich, Drop, and Kitson would

² This average does not include the four applicants whose ages are unknown to the Court. Accordingly, the Court added the ages of the other 12 applicants and divided that total by 12.

not have been hired. Carey testified that she did not consider the age of the applicants when making her selections, and she did not discuss the ages of any of the applicants with the OMs. (*Id.* 183:9–20).

26. Aurich, Kitson, Crist, and Drop had supervisory experience at their respective TRACONS. (*Id.* 25:22–36:7; Joint Exs. 4, 15). However, the vacancies at Houston were not for supervisory jobs. (Doc. 71, 57:13–17).
27. Richardson conducted the reference check for Aurich. On Aurich’s CPC Selection Worksheet, Richardson wrote “thinks the move may be retirement driven.” (*Id.* 70:18–72:25; Joint Ex. 11). Richardson used to work at the same facility as Aurich in Salt Lake City, Utah. (*Id.*). Richardson also conducted the reference check for Adam Behrent, who appeared on the ideal list. On his CPC Selection Worksheet, Richardson stated “he is a Denver guy with family there. Mike is very surprised that he would want to come to Houston.” (Joint Ex. 11). Richardson interpreted this comment as meaning Behrent would likely prefer Denver over Houston. (Doc. 71, 72:11–19). On the CPC Selection Worksheets for two other individuals, Nicholas Ennis and Christopher Whicker, Richardson stated they had “lots of bids out.” (Joint Ex. 11). At trial, Richardson testified that people with lots of bids out may stay at facilities for a couple years and then look to move again. (Doc. 71, 73:10–21). Ennis and Whicker did not make the OMs’ ideal list. (Joint Exs. 7, 8, 14, 16).

F. Plaintiff’s Contact with the EEO

28. Plaintiff learned he was not selected for the Houston position in December 2013. (Doc. 71, 27:7–9). Around this time, Plaintiff was assigned to a detail where he traveled across the country implementing a new system. During this detail, he began to learn who was selected for the ATCS positions, and he noticed that almost all the individuals were much younger than him and far less experienced in terms of both years and grade. It was at this time that Plaintiff started to suspect he was a victim to age discrimination. (*Id.* 28:4–19).
29. On January 17, 2014, Plaintiff made his initial contact with an EEO counselor, and he filed a formal complaint on April 22, 2014. (*Id.* 29:4–11).
30. Plaintiff retired from the FAA in January 2016 at age 48. If he had been selected for the Houston position, Plaintiff stated he would have continued working for the FAA until the mandatory retirement age of 56. (*Id.* 39:5–16).

IV. CONCLUSIONS OF LAW

The ADEA “protect[s] a relatively old worker from discrimination that works to the advantage of the relatively young.” *Gen. Dynamics Land Sys., Inc. v. Cline*, 50 U.S. 581, 590–91 (2004). In an ADEA case, the burden of persuasion is on the plaintiff to show that age was the but-for cause of the adverse employment action. *Gloetzner v. Lynch*, 225 F. Supp. 1329, 1346 (N.D. Fla. 2016) (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)). Accordingly, the proscribed discriminatory animus must have had a determinative influence on the employer’s adverse decision. *Sims v. MVM, Inc.*, 704 F.3d 1327, 1335–36 (11th Cir. 2013).

A. Plaintiff Established His *Prima Facie* Case

To state a claim of age discrimination, the plaintiff must show: (1) that he was a member of the protected group of persons between the ages of 40 and 70; (2) that he was subject to adverse employment action; (3) that a substantially younger person filled the position that he sought; and (4) that he was qualified to do the job for which he was rejected. *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999).

Plaintiff established a *prima facie* case of age discrimination under the ADEA: (1) he was 46 years old when (2) he was not selected for the ATCS position; (3) 11 of the 16 selectees were younger than 40 years old; and (4) he was qualified for the position as evidenced by his Form 43 score—which was double the average score of selectees—and the FAA’s Rule 30(b)(6) deponent’s testimony that Plaintiff was a “highly qualified candidate.” *Damon*, 196 F.3d at 1359; (Joint Ex. 23).

B. Defendant’s Proffered Reason for Nonselection is Pretextual

The employer must then articulate a legitimate, nondiscriminatory reason for its actions. *Kragor v. Takeda Pharm. Am., Inc.*, 702 F.3d 1304, 1308 (11th Cir. 2012). “This burden is one of production, not persuasion” and is “exceedingly light.” *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142 (2000); *Meeks v. Comput. Assocs. Int’l*, 15 F.3d 1013, 1019 (11th Cir. 1994).

1. Contradicting Defendant’s Proffered Reason

If the employer produces evidence of a legitimate, nondiscriminatory reason for the adverse action, the plaintiff is afforded the opportunity to show that the employer’s stated reason is a pretext for discrimination. *Kragor*, 702 F.3d at 1308 (citing *Reeves*, 530 U.S. at 143). The plaintiff can do so by pointing to “weaknesses, implausibilities,

inconsistencies, incoherencies, or contradictions” in the proffered explanation. *Jackson v. Ala. State Tenure Comm’n*, 405 F.3d 1276, 1289 (11th Cir. 2005).

Defendant maintains that the reason for Plaintiff’s nonselection was that Carey and the OMs were looking for candidates with outstanding references from their supervisors, and according to Richardson, Plaintiff received average recommendations compared to the selectees. Since the Court does not find Richardson’s testimony about his conversation with Ramirez to be credible, Plaintiff has presented sufficient evidence to contradict Defendant’s articulated reason for Plaintiff’s nonselection.

2. *Additional Evidence of Discrimination*

In order to establish evidence of pretext, the plaintiff must do more than just reject the defendant’s proffered nondiscriminatory reason for the challenged action. In *Reeves*, the Supreme Court held that “[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.” 530 U.S. at 147. However, the Court went on to note that such a showing will not always be adequate. There will be instances where the plaintiff has established a *prima facie* case and set forth evidence to reject the defendant’s proffered explanation, yet no rational factfinder could conclude the challenged action was discriminatory. *Id.* at 148. In determining if judgment is appropriate, the Court listed several factors to consider, such as the strength of the plaintiff’s *prima facie* case, the probative value of the proof that the employer’s explanation is false, and any other evidence that supports the employer’s case. *Id.* at 148–49.

After *Reeves*, the Eleventh Circuit held that “[c]ontradicting the [defendant’s] asserted reason alone, though doing so is highly suggestive of pretext, no longer supports

an inference of unlawful discrimination.” *Flowers v. Troup Cty., Ga. Sch. Dist.*, 803 F.3d 1327, 1339 (11th Cir. 2015). Accordingly, the burden placed on plaintiffs to produce additional evidence suggesting discrimination after contradicting their employer’s stated reasons is “not great, but neither is it nothing.” *Flowers*, 803 F.3d at 1339.

a. Probative Value of the Proof of Falsity

There is significant probative value of the proof that Defendant’s explanation for Plaintiff’s nonselection is false. Richardson claimed that Ramirez described Plaintiff as an average employee who would not go above and beyond his duties. Despite FAA policy, Richardson did not document this conversation. Ramirez denied categorically that he made those statements to Richardson, and instead claims that Plaintiff was a good employee who he would recommend for the position. Richardson also testified that he spoke to another reference for Plaintiff who gave a similarly bad recommendation, but Richardson again did not document this conversation and could not remember who he spoke to. Osekowski, Plaintiff’s designated reference on his application, stated he never spoke to anyone at the Houston TRACON about Plaintiff, and if he had, he would have recommended Plaintiff for the position.

The Court finds Richardson to be entirely incredible with regards to his testimony about Plaintiff’s reference checks. Meanwhile, the Court finds Ramirez and Osekowski to be credible witnesses. Defendant’s sole explanation for Plaintiff’s nonselection was because he received average recommendations. Richardson is the only individual claiming that Plaintiff received these average recommendations. As stated, he is not a credible witness. Accordingly, the Court attaches significant probative value to the proof that Defendant’s explanation for Plaintiff’s nonselection is false, which supports Plaintiff’s

assertion of age discrimination. See *Reeves*, 530 U.S. at 148–49 (permitting courts to consider the probative value of the proof that the employer’s explanation is false when considering whether judgment is appropriate).

b. Desire for Continuity Within the FAA

Plaintiff presented additional, circumstantial evidence of age discrimination through the testimony regarding the desire for continuity at the FAA facilities. The mandatory retirement age for controllers is 56 years old. If the OMs recommend an applicant who is 46 years old, that applicant will necessarily have a shorter career at the Houston TRACON than an applicant hired in their thirties. Richardson and Carey testified that the applicant selection process is time-intensive and interrupts regular work duties, requiring frequent phone calls and coordination between the OMs and supervisors. This selection process took four weeks. During that time, Richardson testified that he was working six-day workweeks with ten-hour days. Selecting younger applicants eases the burden on OMs like Richardson by minimizing the number of times they must engage in the selection process because the younger applicants can remain at the TRACON for a long period of time.

Furthermore, at the time of the selection process, the Houston TRACON had been dealing with a staffing deficiency for quite some time. The OMs needed to fill 16 vacancies out of the 80 total ATSC positions at the Houston TRACON. The large vacancy can be partly explained by a wave of retirements of controllers who were hired in the wake of the 1981 air traffic controller strike. Given these staffing circumstances and Richardson’s testimony regarding the time-intensive process, the Court concludes that Richardson felt a desire for continuity in the staffing of the controllers.

This conclusion is consistent with Richardson's comments on the CPC Selection Worksheets. Richardson left numerous comments on his sheets that indicate he was paying attention to the likelihood an applicant would stay at the Houston TRACON. For instance, Richardson stated that "[Behrent] is a Denver guy with family there. Mike is very surprised that he would want to come to Houston." Richardson interpreted this comment as meaning Behrent would likely prefer Denver over Houston and may seek to return there. On the CPC Selection Worksheets for Ennis and Whicker, Richardson stated they had "lots of bids out." At trial, Richardson testified that people with lots of bids out may stay at facilities for a couple years and then look to move again.

The OMs' ideal list further exemplifies the need for continuity and the desire for younger applicants to fill the ATSC roles. Only two of the top 16 individuals were at least 40 years old—McCoy (age 46, #10) and James (age 40, #16). None of the top 16 applicants were older than Plaintiff. In fact, the average age of the applicants from the ideal list was 33.75—over 12 years younger than Plaintiff, who was 46 years old. Notably, 12 of the applicants from the ideal list were at lower-ranked facilities than Plaintiff. Only two of the applicants younger than Plaintiff were at higher-ranked facilities than him. Defendant responded at trial that people in the top 16 may have had outstanding recommendations, but Defendant did not introduce these alleged recommendations into the record. Although Defendant has no burden of proof, this does not alter the fact that the record before the Court merely shows a list of candidates with an age and facility level—most of whom are younger and at lower-ranked facilities than Plaintiff.

Defendant counters by pointing to the fact that Carey offered the position to six applicants over the age of 40—Crist (age 46); McCoy (age 46); Chiumbo (age 40); Aurich

(age 49); Kitson (age 50); and Drop (age 52). Defendant also argues that Richardson could not harbor a discriminatory animus toward old applicants because on Aurich's CPC Selection Worksheet, Richardson stated he "thinks the move might be retirement driven." Nevertheless, Aurich made the OMs list of recommended candidates. Defendant maintains that there is no evidence that Richardson harbored an age bias against Aurich, who was even older than Plaintiff.

The Court is not persuaded by Defendant's arguments regarding the over-40 candidates chosen by Carey because most of these candidates did not appear in the OMs' ideal top 16 list. Only two applicants were over 40 in the OMs' ideal list—less than 12.5 percent. Carey testified that she delegated the selection process to the OMs and relied on them to come up with the recommended list. She assigned this duty to them and then allowed them to divide the work amongst themselves, which they did. As established, the OMs conducted the reference checks and then got together to create the list with the rankings. If Carey had not deviated from the ideal list, only McCoy and Chiumbo would have been offered the positions. Aurich, Kitson, Crist, and Drop were all buried at the end of the list of 26 recommended candidates, appearing at spots #18, #22, #25, and #26, respectively. This weakens the significance of the fact that Carey eventually offered the positions to older applicants.

Similarly, although Aurich made the full list, he was outside the top 16 and would not have been selected but for Carey's deviation. Therefore, Defendant's argument regarding Richardson's comments about Aurich retiring do little to undermine the Court's finding that Richardson harbored a discriminatory animus against older candidates.

As previously discussed, the Court does not find Richardson to be credible or honest and does not believe his testimony regarding the alleged reference checks, which itself provides some evidence that Richardson discriminated against Plaintiff. See *Reeves*, 530 U.S. at 143 (“In appropriate circumstances, the [court] can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle that . . . a party’s dishonesty about a material fact [is] affirmative evidence of guilt.”). This finding, when combined with the evidence exhibiting a desire for continuity within the FAA, suggests that Richardson intentionally discriminated against Plaintiff because of his age. Accordingly, Plaintiff satisfied his burden to produce additional evidence suggesting age discrimination by Richardson. See *Flowers*, 803 F.3d at 1339 (“The burden placed on [] plaintiffs to produce additional evidence suggesting discrimination after contradicting their employer’s stated reasons is *not great*, but neither is it nothing.” (emphasis added)).

C. Age Discrimination is the But-For Cause of Plaintiff’s Nonselection

If Richardson had not discriminated against Plaintiff based on his age, the Court finds that Plaintiff would have been offered one of the 16 ATSC positions. Osekowski was listed as Plaintiff’s reference and he testified that if he was asked to give a recommendation for Plaintiff, he would have said Plaintiff was a good employee with an outstanding work ethic. (Doc. 71, 124:6–24, 125:20–25). Similarly, Ramirez testified that he would have recommended Plaintiff for the position if he was asked. (*Id.* 137:11–138:8). He believed Plaintiff was a solid, good employee and would be able to work at Houston TRACON because he worked in Orlando, which is “a pretty complex facility.” (*Id.* 133:8–16).

However, Plaintiff was not put forward to Carey because Richardson told the OM's that he received a bad recommendation compared to the other applicants—an excuse that the Court finds Richardson fabricated because of Plaintiff's age. (*Id.* 168:15–169:13; Pl. Ex., p. 76). If Plaintiff received a high recommendation, Richardson and Morgan stated that he would have been put forward to Carey. (Doc. 71, 93:17–94:5, 153:15–25). Without the bad recommendation, Carey—the ultimate decisionmaker—stated that Plaintiff was otherwise an ideal candidate for the position. (*Id.* 181:24–182:22).³ ⁴ Unfortunately for Plaintiff, Carey was totally uninformed as to his qualifications at the time of selection beyond what the OMs provided her. (*Id.* 178–180).⁵ Accordingly, but for Richardson's fabricated reference check resulting from age discrimination, Plaintiff would not have suffered the adverse employment action.

V. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

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- ³ The fact that the selectors—Carey, Richardson, Morgan, and Vorndran—were all over 40 cuts against an inference of discrimination. See *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (“[Plaintiff] faces a difficult burden here, because all of the primary players behind his termination . . . were well over age forty and within the class of persons protected by the ADEA.”). However, for the reasons stated above, the Court nevertheless finds that there is enough evidence of intentional age discrimination on behalf of Richardson.
- ⁴ Plaintiff's qualifications also help to bolster the strength of his *prima facie* case as it relates to the fourth prong, which the Supreme Court stated is a factor to consider in determining whether judgment is appropriate. See *Reeves*, 530 U.S. at 147; *Damon*, 196 F.3d at 1359.
- ⁵ Under the cat's paw theory of discrimination, “the recommender is using the decisionmaker as a mere conduit, or cat's paw, to give effect to the recommender's discriminatory animus.” *Godwin v. Wellstar Health Sys., Inc.*, 615 F. App'x 518, 528 (11th Cir. 2015) (cited as persuasive authority). Here, Plaintiff established that Carey followed a “biased recommendation” from Richardson without independent investigation of Plaintiff's references. Therefore, liability attaches.

1. The Court finds in favor of Plaintiff Maurice Brown for Count I of the Complaint (Doc. 1).
2. This Court retains jurisdiction of this matter for the purposes of resolving the issue of damages. The Court will schedule briefing and a hearing on the issue of damages in a separate order.

DONE AND ORDERED in Orlando, Florida on February 27, 2020.



PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties