

matter on November 24, 2004. For the reasons that follow, defendant's motion for summary judgment will be granted.

II. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual 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." Celotex, 477 U.S. at 322, 106 S. Ct. at 2552.

Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255, 106 S. Ct. at 2513.

A. Legal Standard in Employment Discrimination Cases

In determining whether or not to grant summary judgment in an employment discrimination case, this Court must apply the burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973); Keller v. Orix Credit Alliance, 130 F.3d 1101, 1108 (3d Cir. 1997). In order to establish a prima facie case of age discrimination, the plaintiff must demonstrate the existence of four elements:

- (I) [that] the plaintiff was a member of the protected class, i.e., was 40 years of age or older (see 29 U.S.C. § 631(a)), (ii) that the plaintiff was discharged, (iii) that the plaintiff was qualified for the job, and (iv) that the plaintiff was replaced by a sufficiently younger person to create an inference of age discrimination.

Id. (citing Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995)).

To make out a prima facie case of race discrimination, a plaintiff must show: “(1) that he is a member of a protected class; (2) that he was qualified for the position; [and] (3) that he was either not hired or fired from that position[,] (4) under circumstances that give rise to an inference of unlawful discrimination such as might occur when the position is filled by a person not of the protected class.” Jones v. School District of Philadelphia, 198 F.3d 403, 410-11 (1999) (citing Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061 (3d Cir. 1996) (en banc)). The analysis for AEDA claims is identical except for the fourth prong, under which a plaintiff must show that “the employer retained unprotected workers.” Showalter v. University of Pittsburgh Medical Center, 190 F.3d 231, 234 (3d Cir. 1999).

If the plaintiff establishes a prima facie case, the burden shifts to the defendant to offer a

legitimate, non-discriminatory reason for the adverse employment action. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-56, 101 S. Ct. 1089, 1094-95 (1981). The Defendant satisfies its burden of production by introducing evidence, which, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision. Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). The defendant need not prove that the tendered reason actually motivated its behavior because the ultimate burden of proving intentional discrimination always rests with the plaintiff. Id.

If the defendant is able to come forward with a legitimate, non-discriminatory reason for its action, the plaintiff can defeat a motion for summary judgment by proffering evidence from which a factfinder could reasonably either (1) disbelieve the defendant's articulated legitimate reasons or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the defendant's action. Id. at 764. Therefore, a plaintiff may defeat a summary judgment motion by either "(I) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Id. However in discrediting the defendant's proffered reason, the plaintiff cannot simply show that the defendant's decision was wrong or mistaken because the factual dispute at issue is whether discriminatory animus motivated the defendant's actions. Id. at 765. What is at issue is the perception of the decision maker, not the plaintiff's view of her own performance. Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) (citations omitted); see also Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1993), cert. denied, 510 U.S. 826 (1993) (pretext turns on the qualifications and criteria identified by the employer,

not the categories the plaintiff considers important).

III. Background¹

Plaintiff alleges that she applied for, but was not selected for a merit promotion to the position of Senior Customs Inspector, Grade GS-11, in connection with Vacancy Announcement # AN 01890 (the “Vacancy Announcement”) because of her race (African-American), and her age (sixty years old during the time of the selection process).

A. Plaintiff’s Experience At Customs

Although there is no dispute as to plaintiff’s length of service at Customs, the parties disagree as to the exact details of plaintiff’s responsibilities during her tenure there. Plaintiff contends that her experience has been “long and varied” and that she performed “a wide range of duties and assignments.” (Pl’s Mot. Opp. S.J. at 2; Compl. at 4). Conversely, defendant characterizes plaintiff’s experience as “limited” to “routine and repetitive tasks.” (Def. Mot. for S.J at 4). For the purposes of this motion, the Court will accept as true plaintiff’s characterization of her work experience. It should be noted however, for reasons set forth in greater detail below, that the disparity in the parties’ perceptions regarding plaintiff’s work experience is not material to the disposition of the present motion.

B. Plaintiff’s Application For Promotion

The Vacancy Announcement was a Merit Promotion Announcement for Senior Customs

¹ The account contained in this section is comprised of plaintiff’s factual allegations, undisputed facts from defendant’s briefs, deposition testimony, and Rule 56 affidavits. The Court has also referred to several exhibits which defense counsel presented at oral argument, including a flow chart showing how the paperwork on the promotion at issue was conveyed through different supervisory levels, a summary of the disposition as to various candidates and an excerpt from the bubble answer sheet used for Plaintiff.

Inspector, GS01890-11, that opened on March 22, 2000, and closed on April 5, 2000. Pursuant to a memorandum issued jointly by the National Treasury Employees Union and the agency's Office of Human Resources Management, all applications for this Vacancy Announcement were processed under an automated system called the Microcomputer Assisted Rating System ("MARS").

1. First Line Supervisor Verifies the Bubble Answer Sheet

Under the MARS system, applicants answered a series of questions related to their work experience both within and outside of the agency. Many of the questions related to how often the applicant had performed a particular job or task within a set period of time. Applicants were given answer choices and recorded their answers on a four-page bubble sheet. (Pl's Ex. A.) Pursuant to the instructions for the MARS application, each applicant's answers were verified jointly by the applicant and their respective first line supervisors. (Dale Markowitz Dep., Def's Ex. B, 96:6-21.) If the applicant and supervisor disagreed about the answer to any question, the applicant could take the issue up with a mutually agreed upon supervisor, or with his or her second line supervisor. (Def's Ex. A, MARS application instructions, p. PG89; Markowitz Dep. 117:18-118:10; Heiss Dep. 40:4-41:20.) If any answers were changed on the bubble sheet, it could only be by agreement of both the employee and the supervisor. (Heiss Dep. 39:12-14.)

In this case, plaintiff prepared her MARS bubble answer sheet, then discussed each one of her answers with her first line supervisor, Dale Markowitz, during a meeting she had with him on April 18, 2000. (Markowitz Dep. 95:6-12; 116:13-20; Ex. H, Massey Dep. 90:18-23.) At their meeting, both plaintiff and Markowitz shared documentation supporting plaintiff's work history. (Markowitz Dep. 107:15-23; Pl's Dep. 87:15-24.) During the meeting, Markowitz

discussed with plaintiff her interpretation of some of the questions that related to how many times plaintiff had performed particular functions within a set period of time. (Pl's Dep. 100:1-16.) Markowitz thought that some of plaintiff's original answers needed to be changed to accurately reflect plaintiff's experience. (Pl's Dep. 93:8-14; 97:8-11). After discussion with plaintiff, some of the answers were changed to reflect that plaintiff had either more or less experience at particular tasks. (Pl's Dep. 100:17-20). Some of the changes resulted in higher value for the answer, and some of the changes resulted in lower value for the answer. (Pl's Dep. 93:19-23). Plaintiff does not disagree with the changes that resulted in her achieving a higher value. (Pl's Dep. 98:10-17). In each case where the answer was changed, whether up or down, Markowitz consulted first with plaintiff, then the documentation that plaintiff brought to the meeting, and finally the documentation that he had, to verify what the correct answer should be. (Markowitz Dep. 122:5-8).

2. Plaintiff Signs And Certifies Her MARS Bubble Answer Sheet

At the end of the meeting, plaintiff initialed the revised bubble answer sheet under penalty of perjury indicating that this was her application and the answers were true and correct. (Markowitz Dep. 94:1-95:1; Pl's Dep. 110:2-10; Def's Ex. I, Pl's MARS application). Plaintiff did not challenge any of the revised answers on the bubble sheet or seek review by a mutually agreed upon supervisor or seek review with her second line supervisor.

3. Second Line Supervisor Verifies the Bubble Answer Sheet

Once plaintiff had signed and certified her bubble answer sheet, the next step in the MARS process called for her second line supervisor to review the completed application and the first line supervisor's review. (Markowitz Dep. 97:2-17; Heiss Dep. 38:1-7.) Plaintiff's second

line supervisor, Robert Heiss, had known plaintiff in the workplace for over ten years at the time of her application. (Heiss Dep. 25:17-26:4.) Heiss reviewed and signed plaintiff's application after Markowitz presented it to him. (Ex. C, Heiss Dep. 36:15-37:9.)

4. Two Supervisors Do Not Recommend Plaintiff for the Position

After the first and second line supervisor reviews, the Assistant Port Director Martocci completed a Reference Check form for the plaintiff, based upon information supplied to him by the first and second line supervisors, as well as his own personal knowledge of the applicants and their duties and responsibilities. (Martocci Dep. 41:1-14; Knox Dep. 55:15-19.) The Reference Check form included a recommendation or a non-recommendation of the applicant for the position.

In this case, Assistant Port Director Martocci questioned Markowitz in connection with the Reference Check form that Martocci prepared for plaintiff. Martocci noted Markowitz's comments about plaintiff on the form, including the fact that Markowitz did not recommend plaintiff for the promotion. (Pl's Ex. C, Markowitz Reference Check Form; Martocci Dep. 26:1-23; 28:16-22). Markowitz rated plaintiff average or above on a series of work related characteristics. (Pl's Ex. C). Markowitz did not recommend plaintiff for promotion because he considered plaintiff's capabilities "limited" compared to the requirements for the position of a GS-11 inspector, including the leadership, training, and expertise expected of an inspector at the GS-11 level. (Pl's Ex. C)

Martocci also completed a second Reference Check form for plaintiff after speaking with plaintiff's second line supervisor, Robert Heiss. Heiss did not recommend plaintiff for the promotion either. (Pl's Ex. D, Heiss Reference Check Form; Martocci Dep. 51:23-52:3).

Heiss also rated plaintiff average or above on the series of work related characteristics (Pl's Ex. D), but did not recommend plaintiff for promotion because her "recent range of experience has been limited." (Pl's Ex. D).

5. Port Director Does Not Recommend Plaintiff

Once the applications were signed and certified by plaintiff and verified by the first and second line supervisors, and the Reference Check forms completed, this material was compiled and sent to the Human Resources Management department to prepare a Certificate of Eligibles that included the names, addresses, seniority, and MARS scores of the eligible applicants. (Knox Dep. 47:3-6; Barbour Aff., Def's Ex. F) Applicants were listed in rank order according to their respective MARS scores. (Def's Ex. E, Certificate of Eligibles) Based upon the MARS scores, plaintiff ranked fourteenth out of a total of fifteen candidates. (Def's Ex. E) The Human Resources Management department sent the Certificate of Eligibles to the Port Director, Mr. Lovejoy, for the Port of Philadelphia. (Knox Dep. 46:5-10) The Port Director then made his recommendations to the selecting official. (Knox Dep. 46:14-21.) The selecting official made his selections, and then forward the selections to the office of Human Resources Management for approval. (Martocci Dep. 49:7-15; Barbour Aff., Def's Ex. F) That office then approved or disapproved of the selections pursuant to the MARS selection approval formula. (Heiss Dep. 112:5-23; Barbour Aff., Def's Ex. F).

In this case, plaintiff was not recommended by Philadelphia Port Director Michael Lovejoy for selection. Lovejoy reviewed the Certificate of Eligibles prepared by the Human Resources Management department, and the Reference Check forms completed for the applicants, and found other candidates to be more qualified than plaintiff. (Lovejoy Dep.

48:22-49:8; 52:10-17.) Lovejoy did recommend one black female, and two persons over forty years old were ultimately selected. (Ex. L, Lovejoy Dep. 139:3-15). When Lovejoy forwarded his recommendations to the selecting official, Steven Knox, Knox did not select plaintiff for the promotion.

6. Human Resources Approves the Selections Made

The selection approval process employed by the Human Resources Management department was based upon an agreement between the National Treasury Employees' Union and the agency. (Barbour Aff., Def's Ex. F). By the terms of that agreement, selections could be made and approved only on the basis of a formula that included the number of selections to be made, the location of the applicants, and the applicants' relative MARS scores. (Barbour Aff., Def's Ex. F). The Certificate of Eligibles for the Vacancy Announcement indicates the original eight selections with an "S" noted next to the names of the selectees. (Ex. G, Certificate of Eligibles). Pursuant to the selection and approval criteria, the first selection had to be made from the first four listed applicants, unless any of the first four were located outside the commuting area. (Barbour Aff., Def's Ex. F). The group from which the first selection could be made was expanded by one for each applicant among the first four who was located outside the commuting area. (Barbour Aff., Def's Ex. F). As Daniel Gonzalez (the fourth name on the list) was located outside the commuting area, the requirement was relaxed so that the first selection had to be made from the first five listed applicants. (Def's Ex. F, Barbour Aff.). The second selection had to be made from the first six listed applicants; the third selection had to be made from the first seven listed applicants, and so on. (Barbour Aff., Def's Ex. F). Eight selections were made, therefore, the eight selections had to be made from the first twelve listed applicants. (Barbour

Aff., Def's Ex. F). No one whose name appears below that of Michael Perrault (the twelfth name) on the Certificate of Eligibles could be selected and approved when eight selections were made. (Barbour Aff., Def's Ex. F). As plaintiff's name appeared below that of Michael Perrault, she could not be approved for the promotion. Similarly, Susan Tracey, who was selected, could not be approved for the promotion. (Pl's Ex. E; Barbour Aff., Def's Ex. F).

IV. Discussion

A. Plaintiff Established A *Prima Facie* Case

The undisputed facts in the present case point to the conclusion that plaintiff has established a prima facie case for age discrimination and race discrimination. One, plaintiff, an African-American, was sixty years during the application for promotion. Two, defendant failed to promote her. Three, Plaintiff appears to have been minimally qualified for the position based on her experience and tenure. Four, several people selected for promotion were “unprotected”—i.e., six out of eight were non-minorities and seven out of eight were under the age of forty—which this Court finds sufficient to create an inference of age discrimination. See Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995) (setting forth the criteria by which to establish a prima facie case for age discrimination).

B. Defendant Proffers a Legitimate, Non-Discriminatory Motive, Rebutting Plaintiff's *Prima Facie* Case

In response to plaintiff's prima facie case, defendant asserts that plaintiff was not selected for the promotion because of her relative merit and experience as compared to the other candidates for the position. (Def's Mot. for S.J. at 10) defendants point to plaintiff's MARS score as evidence of the fact that plaintiff was objectively less qualified than those selected for

promotion. Id. It is undisputed that the plaintiff had a lower MARS score than any of the applicants selected for promotion. Plaintiff does not allege that the MARS system is inherently discriminatory. The Court therefore concludes that Defendant, by pointing to the undisputed fact that plaintiff received a relatively low score on her MARS evaluation, has established a legitimate, non-discriminatory justification for plaintiff's failure to receive the promotion for which she applied. See Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994) (setting forth the criteria for establishing a legitimate, non-discriminatory justification.).

C. Plaintiff Failed to Carry Her Burden of Showing that Defendant's Proffered Legitimate, Non-Discriminatory Reason was Fabricated or That Defendant's Actions Were More Likely Than Not Motivated by Discriminatory Animus

Under the third step of the McDonnell Douglas tripartite burden-shifting framework, once the defendant articulates a legitimate, non-discriminatory reason for the adverse employment action, the burden returns to the plaintiff to prove that this reason is pretextual. 411 U.S. at 804. In order to survive summary judgment, plaintiff may meet her burden of establishing pretext in one of two ways. She must point "to some evidence, direct or circumstantial, from, which a factfinder could reasonably either: (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Jones v. School District of Philadelphia, 198 F.3d 403, 413 (3d Cir. 1999) (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994) and Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1067 (3d Cir. 1996) (en banc)). See also this Court's decision in Andy v. United Parcel Service, Inc., 2003 WL 22697194, affirmed 111 Fed. Appx. 670 (2004).

1. Plaintiff Fails to Present Evidence that would Allow a Trier of Fact to Disbelieve Defendant's Legitimate, Non-Discriminatory Reasons

There was extensive discussion at oral argument about the record in this case and the inferences that could be drawn from the record. The plaintiff specifically admitted that there was no direct evidence of racial discrimination (Tr. at 7), and that the MARS testing system was not itself a pretext for discrimination (Tr. at 23). However, the plaintiff strongly asserted that there was circumstantial evidence of racial discrimination and also of age discrimination. Plaintiff further argued that certain documents were used, and the plaintiff's score on the MARS test was reduced, and that improprieties with regard to these procedures could give rise to an inference of racial and/or age discrimination.

After a careful review of the record, this Court concludes that plaintiff presents no evidence to create a genuine issue of material fact regarding the credibility of defendant's legitimate non-discriminatory reasons for failing to promote plaintiff. Plaintiff's factual contentions fail because: (1) plaintiff fails to point to any inconsistencies in defendant's proffered legitimate, non-discriminatory explanation strong enough to overcome the ample evidence that no discrimination occurred, and (2) they do not call into question the sincerity of his supervisors' perceptions.

To discredit an employer's legitimate, non-discriminatory justification, a plaintiff must "demonstrate such 'weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reason for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for [the asserted] non-discriminatory reasons.'" Brewer, 72 F.3d at 331 (quoting Fuentes, 32 F.3d at 765).

Moreover, in considering the dishonesty of an employer's decision, the Supreme Court has held, in a decision upholding a jury verdict for the plaintiff, that where appropriate,

“The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.”

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 517 (1993)).

The Court has carefully considered the evidence of record to determine whether plaintiff has carried her burden in creating a triable issue of material fact. Plaintiff has presented this Court with a prima facie case for age and race discrimination and has set forth some, but very few, purported contradictions and inconsistencies that cast doubt upon the credibility of defendant's legitimate, non-discriminatory explanation. However, the Supreme Court in Reeves made the following observation:

[A]n employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

530 U.S. at 147.²

² While Reeves considered the appropriateness of a Rule 50 motion for judgment as a matter of law, its analysis also properly applies to the present case, as the Supreme Court held that “the standard for granting summary judgment ‘mirrors’ the standard for judgment as a matter

In the present case, the alleged implausibilities and inconsistencies present little more than a “weak issue of fact” as to the credibility of defendant’s stated legitimate, non-discriminatory explanation of why plaintiff was not promoted. Plaintiff’s briefing on the present motion was voluminous, but after a careful reading of plaintiff’s allegations, along with consideration of averments made by plaintiff’s counsel at oral argument, the Court finds that plaintiff’s proof of pretext turns primarily on two assertions: (1) that Markowitz (plaintiff’s first line supervisor) improperly altered twenty-seven (27) of plaintiff’s responses to the MARS questionnaire, resulting in an overall MARS score that effectively disqualified her from consideration for the promotion (Pl’s Mem. Opp. S.J. at 20; Tr.³ at 62-63); and (2) that the Reference Check Form was improperly used as part of plaintiff’s application for promotion (Pl’s Mem. Opp. S.J. at 31-32, Ex. E; Tr. at 24, 32-33).

As to the first assertion, that Markowitz improperly lowered plaintiff’s MARS answers, the Court does not find a significant contradiction or inconsistency in this fact. Plaintiff concedes that she was not the only applicant to have scores lowered on their MARS questionnaire; indeed, it is undisputed that two out of the seven applicants who were promoted had their MARS answers lowered by a supervisor (Pl’s Mem. Opp. S.J. at 8). It is also undisputed that it is the job of the supervisor to verify each response provided on the MARS questionnaire. While it is true that plaintiff had a significantly greater number of her responses lowered by her supervisor compared to the above referenced two, (27 as compared to 6 and 11, respectively), this fact alone

of law, such that “the inquiry under each is the same.” Reeves, 530 U.S. at 150, 120 S. Ct. at 2110 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986)).

³ All references in this opinion to the Transcript refer to the transcript of the oral argument on defendant’s motion for summary judgment, held on November 24, 2004.

is not sufficient to give rise to an inference of pretext. Plaintiff repeatedly asserts that Markowitz did not have sufficient knowledge of plaintiff's work experience to justify the changes to her MARS questionnaire (Pl's Mem. Opp. S.J. at 14-16). Plaintiff clearly disagrees with the reductions made to her answers on the MARS questionnaire, and with the conclusions reached by defendant as to her merits, but nowhere in the record is there any evidence that casts doubt on the sincerity of Markowitz's belief that the changes he made accurately reflected plaintiff's experience and qualifications.⁴ See supra Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991); Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1993); see also Rabinowitz v. Pena, 89 F.3d 482, 487 (7th Cir. 1996) (An employee's "own opinions about his performance or qualifications give rise to a material factual dispute."). More fundamentally, there is no evidence that Markowitz took any action against plaintiff because of her race or age. (See discussion below concerning Markowitz and his Declaration).

At the oral argument, plaintiff's counsel presented detailed argument as to why the changes which Markowitz made on the plaintiff's score should give rise to a factual issue for trial as to discriminatory animus. See Tr. at 63, et seq. When plaintiff was asked how a fact issue about discriminatory animus would arise from the fact that Markowitz downgraded plaintiff's answers, plaintiff's counsel cited the plaintiff's own testimony that "she didn't agree with any of these changes or almost all of the changes . . . that's the evidence I have." (Tr. at 70). As noted above, at p. 4, the Third Circuit has consistently held that the plaintiff's own perception of her

⁴ At oral argument, plaintiff's counsel argued that Markowitz "did not follow the rules" when evaluating plaintiff's MARS questionnaire, "because he did not leave [answers] blank that he should have" (Tr. at 85). Notwithstanding the fact that it is undisputed that it is the function of the first line supervisor to review all the MARS responses for accuracy, plaintiff did not specify the "rules" to which counsel refers.

abilities is not relevant in determining whether there is a genuine issue of fact of pretext for trial. Plaintiff attempted to avoid this accepted legal principle by arguing that Markowitz did not have any personal knowledge of plaintiff's performance. The government's answer to these contentions is centered on the fact that plaintiff initialed, and therefore impliedly approved, Markowitz's changes to her answers at a meeting she had with Markowitz on April 18, 2000. See Ex. B, pp. 94-95. (Tr. at 72-73). See plaintiff's deposition, Ex. H, pp. 108, 110, 181, 182. In addition, Markowitz did have personal knowledge of plaintiff's work. See references to his deposition below. However, despite plaintiff's various arguments about inconsistencies and failure of the government witnesses to follow proper procedures, as the Court stated at the oral argument, the inconsistencies are not material and there is simply no evidence of discriminatory animus.

With regard to the second assertion, that the Reference Check Form (#360) was improperly used as part of plaintiff's application, the Court likewise finds that the use of the form does not constitute an inconsistency, contradiction or procedural irregularity sufficient to give rise to an inference of pretext under the first prong of Fuentes. Plaintiff concedes that the Reference Check Form was used for all of the applicants who were recommended for promotion as well as for plaintiff. (Tr. at 32). Plaintiff contends that because there were no Reference Check Forms used for the other two candidates not recommended for promotion that this presents an inconsistency that permits an inference of pretext, but she does not make any logical connection between these inconsistencies that in any way relates to race or age discrimination. (Tr. at 33-34).

Both counsel explained the process for the promotion. Plaintiff pointed out that at least

one of the reviewing supervisors, Mr. Lovejoy, considered the completion of the Reference Check Form #360 to have been important. (Tr. at 58). Plaintiff relied on the deposition of one supervisor, Ms. Mack (Tr. at 50-51), but it does not appear that she had personal knowledge of the process specifically used for the plaintiff. An undisputed fact is that the union contract specifying which employees were eligible for promotion controlled the process, and the restrictions imposed by the union contract, together with plaintiff's MARS score, precluded plaintiff from being promoted. Thus, the discussion as to whether the Reference Check Form #360 should have been considered is not material. (Tr. at 35-62).

The Court cannot give weight to plaintiff's arguments about the Reference Check Form, which are based on an inconsistency that is tenuous at best. Moreover, plaintiff has presented no evidence that the information about plaintiff conveyed on the Reference Check Form was in any way false. Lastly, it is important to note that the Reference Check Form could not have affected the outcome of her application, since her MARS score was too low to even qualify her for consideration on the List of Eligibles (Barbour Aff.). (Def's Ex. F, Tr. at 48-49).

Given the weakness of the inconsistencies pointed to by plaintiff and the ample uncontested evidence that discrimination did not play a role in defendant's decision, the Court cannot find that plaintiff succeeded in creating a material issue of fact sufficient to survive summary judgment.

2. Plaintiff does not Present any Evidence that Discrimination Was More Likely Than Not the Motivating Factor Behind Defendant's Decision to Terminate Plaintiff

Plaintiff concedes that there is no direct evidence of discriminatory intent on the part of defendant. Plaintiff also has no evidence that discrimination was more likely than not the

motivating factor driving its decision to deny plaintiff's application for promotion. Whether or not defendant reached an incorrect conclusion in declining to promote plaintiff is irrelevant.

“[P]laintiff cannot simply show that the defendant's decision was wrong or mistaken because the factual dispute at issue is whether discriminatory animus motivated the defendant's actions.”

Fuentes, 32 F.3d at 765. In deciding whether or not discriminatory animus played a role in the decision not to promote plaintiff, the Court must focus on the perceptions of plaintiff's supervisors. Billet, 940 F.2d at 825. However, plaintiff casts no doubt on her supervisors' contention that they acted only pursuant to their sincere beliefs regarding plaintiff's qualifications and the recommendations that were based largely on plaintiff's low MARS score.

The Court acknowledges the following assertions of discriminatory animus alleged in plaintiff's pre-trial memorandum (Doc. No. 16):

39. Dale Markowitz has a history at Customs of treating African-American Customs employees as lesser qualified, second (or even third) class citizens, than their white/caucasian counterparts.

40. Dale Markowitz would never recommend an African-American for promotion to a grade equal to or immediately below his grade, and during his tenure at the Philadelphia Port never recommended any African-American for promotion under any circumstance.

41. Dale Markowitz habitually performs his job at Customs with the intent to suppress African-Americans' station and position in their employment at Customs, both as a group and as individuals subordinate to him in their employment, particularly at grade level immediately below his.

(Pl's Pre-trial Mem. at 6).

Regarding these most serious allegations, the plaintiff has failed to present genuine issues of fact to support them in the summary judgment process. Plaintiff herself filed a Declaration by

Markowitz before the EEOC dated October 5, 2001, (Ex. F), in which he specifically denied considering plaintiff's race or sex. In an attempt to show an issue of fact concerning Markowitz's discriminatory intent, plaintiff asserted consistently that Markowitz did not have personal knowledge of her work so as to change her answers or otherwise set in motion a process which eventually resulted in her being denied the promotion. However, the record does show that Markowitz did have at least some personal knowledge about plaintiff's work, see Markowitz Dep., Def's Ex. B, pp. 75-82, 151-185. The fact noted above, that Markowitz downgraded the answers of other applicants, does not show that his downgrading of plaintiff's answers was unusual or discriminatory.

Although a plaintiff may demonstrate discriminatory motive by showing that an employer has a history of patterned discrimination against a protected class, Fuentes, 32 F.3d at 765, the above claims are bald assertions for which the plaintiff has not presented a scintilla of evidence in support thereof; "[i]t is well-established that a party cannot avoid summary judgment based on mere allegations." International Raw Materials, Ltd. v. Stauffer, 978 F.2d 1318, 1328 n.13 (3d Cir. 1992) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)); see also Tap Rock Industries, Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992) ("A non-moving party may not rest upon mere allegations, general denials, or vague statements.") (internal citations).

After a complete review of the record, the Court concludes that plaintiff fails to demonstrate discriminatory animus.

V. Conclusion

In determining that plaintiff does not present a genuine issue of material fact, the Court has carefully reviewed the record in light of the applicable standard set forth by the Third Circuit

in Fuentes. To rebut an employer's proffered legitimate, non-discriminatory explanation,

Fuentes requires a plaintiff to:

point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. In other words, because the fact finder may infer from the combination of the plaintiff's prima facie case and its own rejection of the employer's proffered non-discriminatory reasons that the employer unlawfully discriminated against the plaintiff and was merely trying to conceal its illegal act with the articulated reasons, a plaintiff who has made out a prima facie case may defeat a motion for summary judgment by either (I) discrediting the proffered reasons, either circumstantially or directly, or (I) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.

* * *

[T]o avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons, was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext).

32 F.3d at 764 (internal citations omitted).

Plaintiff has presented no evidence of disputed facts that would permit a jury to either disbelieve defendant's articulated legitimate reasons or believe that it is more likely than not that defendant acted with an invidious discriminatory intent. Consequently, the Court must grant Defendant's Motion for Summary Judgment.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DOLORES C. MASSEY,	:	
	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
	:	
	:	NO. 03-6590
UNITED STATES CUSTOMS	:	
AND BORDER PROTECTION,	:	
DEPARTMENT OF HOMELAND	:	
SECURITY, et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 28th day of December, 2004, it is hereby ORDERED that:

1. Defendants' Motion for Summary Judgment (Doc. No. 10) be GRANTED and Judgment is entered in favor of Defendants and against Plaintiff. The Clerk is directed to close this case.

BY THE COURT:

s/Michael M. Baylson

Michael M. Baylson, U.S.D.J.