

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

JOHN A. GALANTE, Plaintiff,	:	CIVIL ACTION
	:	NO. 05-6739
	:	
v.	:	
	:	
CHRISTOPHER COX, Chairman UNITED STATES SECURITIES & EXCHANGE COMMISSION, Defendant.	:	
	:	
	:	
	:	

MEMORANDUM AND ORDER

Stengel, J.

October 25, 2006

In this employment discrimination action, John A. Galante ("Plaintiff") alleges that his former employer, the United States Securities and Exchange Commission (the "SEC"), discriminated against him in violation of the Age Discrimination in Employment Act (ADEA) by refusing to rehire him. Presently before the Court is a motion for summary judgment filed by Defendant Christopher Cox, Chairman of the SEC ("Defendant").

In his complaint, Plaintiff alleged seventeen instances of discriminatory non-selection by the SEC. In May 2006, the Court partially granted Defendant's motion to dismiss, dismissing all but four of these instances as untimely because Plaintiff failed to exhaust administrative remedies. See Galante v. Cox, No. 05-6739, 2006 U.S. Dist. LEXIS 30208 (E.D. Pa. May 16, 2006).

When evaluating Plaintiff's remaining claims, the Court noted that "[w]hile it does

not appear that Plaintiff has alleged or demonstrated sufficient facts to save these remaining claims, I will allow Plaintiff a limited period of discovery to investigate the facts substantiating his claims.” *Id.* at *16. After months of additional discovery, Plaintiff has not produced sufficient facts to establish a *prima facie* case of age discrimination claim. Specifically, Plaintiff is unable to establish he was qualified for the jobs he applied for or that the positions remained opened.¹ Plaintiff does little more than point to positive job evaluations from his previous tenure at the SEC, completely ignoring the Defendant’s argument that Plaintiff lacked relevant experience for the positions in question. Plaintiff’s argument boils down to this sentiment: “I have applied to a total of 20 job listings with the SEC in the last 3 years; I cannot believe, based on my experience, that I have not been selected for any of these many positions.” Decl. Galante ¶ 22. Plaintiff has not met his burden by setting forth specific facts showing there are material facts in dispute regarding Plaintiff’s non-selection. For the reasons that follow, I will grant Defendant’s motion.

I. BACKGROUND

Plaintiff was born on April 18, 1947 and is fifty-nine years old. Compl. ¶ 7.

Plaintiff worked in the SEC's Philadelphia District Office (the "PDO") for two separate

¹After months of discovery, Plaintiff supports his response in opposition to Defendant’s Motion for Summary Judgment with a single seven page self-declaration. *See* Decl. Galante. Plaintiff’s declaration does not focus on the four instances of non-selection at issue. In fact, it is difficult to determine when portions of the declaration discuss the four job vacancies in question. The declaration does little more than assert that Plaintiff was qualified and that the SEC hired people younger than him for the position. Plaintiff does not allege that these younger individuals were not qualified for the position. I have construed the declaration in a light most favorable to the Plaintiff whenever possible.

periods of time before he commenced this action. The SEC originally hired Plaintiff as a securities compliance examiner in the PDO's Broker-Dealer (B-D) Examination Unit in July of 1973. Def's Mot. Summ. J. Ex. 1. ¶ 2. Larry Ehrhart headed this unit, which investigated registered broker-dealers for violations of the Securities Exchange Act of 1934 ("the 1934 Act"). Id.

Plaintiff left this position with the SEC in December of 1978 to work at the Philadelphia Stock Exchange. Id. at ¶ 1. In September of 1992, Plaintiff left his position at the Philadelphia Stock Exchange and Mr. Ehrhart rehired him as a securities compliance examiner, again in the PDO's Broker-Dealer Examination Unit. Id. at ¶¶ 1, 4. Plaintiff later became a staff accountant for the SEC in 1995, but resigned a second time to work for a financial consulting firm in December of 2000. Id. At the time of his resignation, Plaintiff was a GS-14, Step 8 team leader in the PDO's Broker-Dealer Examination Unit. Id. at ¶ 5.

During his career with the SEC in the B-D unit, Plaintiff received many written accolades, outstanding performance evaluations, and the Agency twice nominated him as examiner of the year. Decl. Galante ¶ 17. However, Plaintiff had no experience working for the Investment Company/Investment Advisor (IC/IA) Examination Unit, a division that investigates violations of the Investment Company Act of 1940 ("the 1940 Act."). Def's Mot. Summ. J. Ex. 1. ¶ 5; Ex. A. pp. 8-9; Ex. 2. Pl's Resps. Def's Req. Admis. ¶ 15. Defendant asserts that the work performed in the IC/IA unit is distinct from the B-D

unit. This is because the units enforce different securities statutes and different knowledge is required to conduct examinations under the 1934 Act as compared to the 1940 Act. Id. at ¶ 8. Plaintiff contests Defendant's assertion by stating that he knows of four individuals who successfully switched between the B-D unit and IC/IA unit at the direction of Mr. Meck or Mr. Ehrhart. Decl. Galante ¶ 28. Plaintiff names these four people but does not provide affidavits or deposition testimony to further support this assertion that he was similarly situated and would have succeeded if hired in the IC/IA unit.

Although Plaintiff never worked in the IC/IA unit, he states that he had experience doing Investment Advisor examinations. Decl. Galante ¶ 27. However, in his deposition, Plaintiff admits that he had only dealt with the 1940 Act during one or two investigations. Def. Mot. Summ. J. Ex. A. p. 9. Even in these instances, other people with specific 1940 Act expertise would write the 1940 Act portion of the report and Plaintiff's role was limited to making sure that portion complied with the 1934 Act. Def. Mot. Summ. J. Ex. A. p. 9.

Plaintiff left his position with the financial consulting firm after approximately three months and reapplied to the Agency. Id. at ¶ 1. Plaintiff filed the instant action on December 27, 2005, alleging a violation of the Age Discrimination in Employment Act

of 1967, 29 U.S.C. § 621 *et seq.* (the "ADEA").² Defendant filed a motion to dismiss or, in the alternative, for partial summary judgment on February 27, 2006. On May 16, 2006 the Court partially granted and denied Defendant's motion for summary judgment and provided for a limited period of discovery for the parties to investigate the facts substantiating the claims.³

Only the four following job vacancies are at issue for the purposes of this motion for summary judgment:

(1) The ESHA 001 Vacancy in the PDO's IC/IA Examination Unit.

This June 2003 job posting sought multiple staff accountants, at grade 9 through 13, nationally in either a B-D Unit or an IC/IA Examination Unit depending on the needs of each location. Def. Mot. Summ. J. Ex. 1 ¶ 6. Plaintiff was eligible for this position based on his prior experience in the B-D Examination Unit at the PDO and his application was forwarded to the PDO for consideration in July 2003. *Id.*

The application review committee, including Senior Assistant Director

²The complaint appears to allege that Plaintiff seeks relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* ("Title VII"). See Compl. ¶ 2. The complaint also alleges that the SEC discriminated against Plaintiff based on his age. See Compl. ¶ 12 (stating that the SEC "engaged in a systematic pattern of discrimination against [Plaintiff] on the basis of his age"). See also Compl. ¶ 14 ("[Plaintiff . . . requests . . . a trial *de novo* . . . on all issues in his complaint of discrimination based on age") (emphasis in original). In fact, the complaint does not allege that the SEC discriminated against Plaintiff based on anything *other* than his age. Title VII by its terms does not apply to age. See 42 U.S.C. 2000e *et seq.* See also *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 586-87 (2004) ("Congress chose not to include age within [the] discrimination forbidden by Title VII of the Civil Rights Act of 1964 . . ."). Accordingly, I will read the complaint to allege an age discrimination claim under the ADEA and not a claim under Title VII.

³Plaintiff applied for a total of seventeen job vacancies at the SEC between 2001 and 2004. Only four vacancies and instances of non-selection are at issue in this motion for summary judgment. The rest have been dismissed. See *Galante v. Cox*, No. 05-6739, 2006 U.S. Dist. LEXIS 30208 (E.D. Pa. May 16, 2006).

Administrator for the IC/IA Examination Unit William Meck and IC/IA Branch Chiefs Margaret Jackson, Steve Diddert, Mark Dowdell, and Frank Thomas, did not consider Plaintiff an attractive applicant for several reasons. Id. ¶ 8. First, Plaintiff had no experience in the IC/IA Examination Unit conducting examinations under the 1940 Act. Id. Second, the committee was concerned that Plaintiff had resigned from the SEC on two previous occasions and felt that if returned again, it would only be for a short period of time. Id. ¶ 9. Third, Plaintiff was not viewed as a strong writer but as one whose work needed to be heavily edited. Id. ¶ 10. Fourth, the committee had many performance concerns including Plaintiff's tendency to jump to conclusions, tardiness, and an inappropriate sexual comment to a female co-worker. Id. ¶¶ 11-14. Additionally, recent pay parity legislation passed by Congress had induced many high quality applicants to apply. Id. ¶ 15. Plaintiff was not interviewed for the position due to his lack of IC/IA experience, prior resignations, past disciplinary problems, and the availability of many quality applicants. Id. ¶ 16.

The PDO hired two applicants to fill these staff accountant positions. Id. ¶ 17. Both applicants were from the IC/IA Examination Unit and were certified public accountants: CJL, age 33, and SFL, age 29. Id. ¶¶ 18-19. In contrast, Plaintiff is not a CPA and had no previous experience with the IC/IA Examination Unit. Id. ¶ 19. The PDO did not hire any staff accountants for the B-D Examination Unit. Def's Mot. Summ. J. p. 15. At no time during the hiring process did anyone on the application review

committee discuss or consider the age of the applicants. Id. ¶ 20.

Plaintiff argues that the PDO's hiring process was discriminatory because the PDO hired two younger individuals who had limited industry experience compared to his background, which included setting up the Investment Advisor Program for a large bank and completing Investment Advisor examinations. Decl. Galante ¶ 27.

(2) **The ESHA 001 Vacancy in the Office of Compliance Inspections and Examinations (OCIE) in Washington, D.C.**

The OCIE posted for staff accountants under the ESHA 001 job vacancy listing. Branch Chief Laura Magyar and two other managers interviewed Plaintiff for this position. Def. Mot. Summ. J. Ex. 1 ¶ 20. In accordance with standard practice, Assistant Director Richard Hannibal spoke with PDO Assistant District Administrator Larry Ehrhart about Plaintiff's previous employment to determine his strengths and weaknesses as a candidate. Id. ¶ 21. Mr. Ehrhart reported that while Plaintiff had decent 1934 Act examination skills, he had difficulty writing reports. Id.

The OCIE did not hire any staff accountants under this posting for the B-D Examination Unit. Id. ¶ 22. In fact, no candidates with Plaintiff's qualifications were hired. Id. The OCIE did hire a staff accountant with 1940 Act experience at the SK-9 level for the IC/IA Examination Branch. Id. ¶ 23. As noted above, Plaintiff's past experience at the PDO did not qualify him for a position in the OCIE IC/IA Examination Branch and the Agency did not consider him for this position. Moreover, the Agency

would not consider hiring a candidate who had Plaintiff's grade (SK-14) but lacked significant 1940 Act experience for this position because "such a candidate would not have the skills necessary to lead a large, complex 1940 Act investigation." Id. ¶ 23.

Plaintiff contends that the supervisors who interviewed him were impressed with his qualifications and writing samples of two examination reports he did while at the B-D unit. Decl. Galante ¶ 12. He also alleges, for the first time, that Mr. Ehrhart discriminated against him because of his age by giving him a negative evaluation during the job interview process. Id. ¶¶ 16-18. Plaintiff alleges that Mr. Ehrhart never gave him verbal or written reprimands for lateness and gave him eight years of outstanding review while employed by the PDO. Id. Plaintiff asserts that the vacancy was never filled "because of discriminatory reasons, as I was probably the most qualified for the position." Id. ¶ 23.

(3) **ESHA 04-001 MB Vacancy in the Division of Market Regulation Office of Risk Assessment.**

This position, posted in January 2004, required specialized experience in either "risk management functions for an end-user or dealer in financial derivatives, or front office, middle office or back office functions relating to the trading of financial derivatives." Def's Mot. Summ. J. Ex. G. ¶ 10. Plaintiff applied for this posting on January 25, 2004 with a generic application identical to the one submitted for other announcements. Id. Ex. 1 ¶ 30. His application did not address the specialized requirement for this position and only noted that Plaintiff won awards for a SEC study of

derivative products. Id. ¶ 25. Plaintiff did not make the certificate of eligibles because his application did not show that he had the required experience for the position. Id. ¶ 26. In contrast, the successful applicant’s cover letter detailed his extensive experience with over-the-counter derivatives and risk assessment. Id. ¶ 30.

Plaintiff responds by contesting the terms of the job description and denying that “specialized experience required certain experiences” and that he had “specialized experience in option trading, bond trading and in options and derivative products.” Def’s Mot. Summ. J. Ex. 2. Pl’s Resps. Def’s Req. Admis. ¶ 22. (emphasis in the original)

(4) ESHA 03-020 MB Vacancy in the PDO.

This July 2003 posting was for multiple grade 14 level staff accountants in the PDO. Def’s Mot. Summ. J. Ex. 1 ¶ 32. However, after the PDO hired two staff accountants under ESHA 001, the Agency withdrew ESHA-03-020-MB as unnecessary and no one was selected for this posting. Id. ¶ 33.

Plaintiff repeats the same arguments he made about the ESHA 001 posting. Plaintiff alleges that the PDO’s hiring process was discriminatory because the two younger individuals who were hired had limited industry experience compared to his experience setting up the Investment Advisor Program for a large bank and doing Investment Advisor examinations in the past. Decl. Galante ¶ 27. Plaintiff does not acknowledge that the Agency withdrew the posting.

II. STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party initially bears the burden of showing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial Celotex burden can be met simply by demonstrating "to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. A fact is "material" only when it could affect the result of the lawsuit under the applicable law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non[-]moving party." Id. The moving party must establish that there is no triable issue of fact as to all of the elements of any issue on which the moving party bears the burden of proof at trial. See In re Bessman, 327 F.3d 229, 237-38 (3d Cir. 2003) (citations omitted).

After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); see also Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A motion for summary judgment looks beyond the pleadings and factual specificity is required of the party opposing the motion. Celotex, 477 U.S. at 322-23. In other words, the non-moving party may not merely

restate allegations made in its pleadings or rely upon "self-serving conclusions, unsupported by specific facts in the record." Id. Rather, the non-moving party must support each essential element of its claim with specific evidence from the record. See id.

A district court analyzing a motion for summary judgment "must view the facts in the light most favorable to the non-moving party" and make every reasonable inference in favor of that party. Hugh v. Butler County Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005) (citations omitted). Summary judgment is therefore appropriate when the court determines that there is no genuine issue of material fact after viewing all reasonable inferences in favor of the non-moving party. See Celotex, 477 U.S. at 322.

III. DISCUSSION

The ADEA protects workers over the age of 40 from employment discrimination based on their age. See 29 U.S.C. § 621 *et seq.* Specifically, the ADEA establishes that "it shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to her compensation, terms, conditions, or privileges of employment, because of such individual's age." Id. at § 623(a)(1). In order to prevail on an ADEA claim, a plaintiff must show that her age actually motivated and had a determinative influence on the employer's discriminatory conduct. Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 141 (2000).

To show that age was a motivating factor in the employment decision, a plaintiff must point to direct or circumstantial evidence of discrimination. Direct evidence is sufficient evidence for a jury to find that a decision maker expressed and acted on substantial negative bias regarding the plaintiff's age when making the employment decision. Fakete v. Aetna, Inc., 308 F.3d 335, 338 (3d Cir. 2002). Plaintiff concedes that he has no direct evidence of age discrimination. Def's Mot. Summ. J. Ex. 2. Pl's Resps. Def's Req. Admis. ¶ 2.

Without direct evidence of age discrimination, the Court must analyze the circumstantial evidence using the burden-shifting procedure set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-4 (1972). Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000). A plaintiff asserting a claim of age discrimination bears the burden of initially establishing a *prima facie* case of discrimination by a preponderance of the evidence. Sarullo v. United States Postal Serv., 352 F.3d 789, 797 (3d Cir. 2003). To establish a *prima facie* case for failure to hire because of age discrimination, a plaintiff must demonstrate that (1) he is over forty, (2) is qualified for the position in question, (3) suffered an adverse employment decision, and (4) that after his rejection, the job remained open and the defendant continued to seek candidates with similar qualifications to the plaintiff. Id.

If the plaintiff makes its initial showing, the burden shifts to the defendant to articulate some legitimate and nondiscriminatory reason for the employer's decision.

Sarullo, 352 F.3d at 797. The defendant only has a burden of production and the ultimate burden of persuasion that the defendant intentionally discriminated remains with the plaintiff at all times. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). Should the defendant meet its burden of production, the presumption of a discriminatory action raised by the *prima facie* case is rebutted. 352 F.3d at 797. The plaintiff must then demonstrate by a preponderance of the evidence that the employer's articulated reason was merely a pretext for discrimination and not the actual motivation behind its decision. Id.

A. Plaintiff cannot establish a *prima facie* case for the four positions in question.⁴

Defendant takes issue with the second and fourth elements of Plaintiff's *prima facie* case for each of the jobs in question. I will analyze each of Defendant's arguments and Plaintiff's responses to determine whether Plaintiff has met his burden of establishing a *prima facie* case for each job position in question.

(1) Plaintiff was not qualified for the positions.

The Third Circuit has noted that "if a plaintiff is not qualified for the job he seeks, we can reject a discrimination claim without the heavy lifting that is required if a *prima facie* case is made out." Dorsey v. Pittsburgh Assocs., 90 Fed. Appx. 636, 639 (3d Cir.

⁴Defendant only disputes the second and fourth elements of Plaintiff's *prima facie* case. Defendant does not dispute the first element (that Plaintiff is over 40 years old) or the third element (that Plaintiff suffered an adverse employment decision by not being hired for these positions).

2004)(citing Pivrotto v. Innovative Sys., Inc., 191 F.3d 344, 352 n.4 (3d Cir. 1999).

Objective job qualifications can be evaluated at the *prima facie* case phase while subjective qualities such as management or leadership skills should be evaluated during the pretext analysis, since “subjective evaluations are more susceptible of abuse and more likely to mask pretext.” Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 938-939 (3d Cir. 1997)(citations omitted). If a plaintiff cannot show he is objectively qualified for the job, summary judgment is appropriate. See Perry v. Jackson Nat’l Life Ins. Co., 54 F. Supp.2d 473, 477 (E.D. Pa. 1999)(finding that plaintiffs could not establish they were qualified through “bald unsubstantiated assertions” that younger employees were unqualified and therefore summary judgment was appropriate).

Defendant argues that it did not hire Plaintiff for the positions in question because Plaintiff lacked necessary objective job qualifications. These qualifications are appropriately evaluated during the Plaintiff’s *prima facie* case because only objective job requirements, not subjective traits, are at issue.

(a) Plaintiff was not qualified for either the ESHA 001 positions or the ESHA 02-020-MB position because he was not experienced in performing 1940 Act examinations.

ESHA 001 and ESHA 03-020-MB were general postings for staff accountants for either B-D and IC/IA Examination Units, depending on the need of each location.

Plaintiff's experience with the B-D Examination unit investigating broker-dealers for violations of the 1934 Act initially qualified him for the postings.

However, the Agency did not hire any personnel for the B-D Examination Unit. Instead, Defendant hired two individuals to work in the IC/IA Examination Unit who had prior 1940 Act experience. The Agency has shown that the 1940 Act has a unique set of rules and regulations and therefore, the knowledge needed to conduct examination under the 1940 Act is different than the knowledge needed to conduct examinations under the 1934 Act in the B-D Unit.

Plaintiff is unable to dispute that the 1940 Act required specialized experience and therefore, cannot make out a *prima facie* case that he was qualified for positions requiring this experience. First, Plaintiff tries to show he meets this qualification. However, in his deposition, Plaintiff concedes he had little experience with the 1940 Act.⁵ Second, Plaintiff relies on bald assertions that he was more qualified than younger workers who had more limited industry experience than he did. Pl.'s Decl. ¶ 27. Plaintiff is not permitted to substitute a general requirement such as "industry experience" for a specific skill in a job description that he lacks. Martinez v. Quality Value Convenience, Inc., 37 F. Supp.2d 384, 387 (E.D. Pa. 1999) (noting that while the establishment of a *prima facie* case is not onerous, it "does not allow a would-be employee to substitute

⁵Upon questioning, Defendant admitted that he only applied the 1940 Act during one or two investigations and that even in these instances, other people with specific 1940 Act expertise would write up this portion of the report and his role was limited to making sure this portion was in compliance with the 1934 Act. Def. Mot. Summ. J. Ex. A. p. 9.

qualifications—however similar— for those an employer has established.”) Third, Plaintiff alleges that four other individuals transferred from the B-D unit to the IC/IA unit. However, Plaintiff does not support this assertion with specific facts, through affidavits or deposition testimony, that he is similarly situated to these individuals and could have successfully transferred as well.

To successfully oppose a motion for summary judgment, Plaintiff must support essential elements of his claim with specific evidence and cannot merely restate allegations from earlier pleadings or rely on self-serving and unsupported conclusions. Factual specificity is required of the party opposing the motion. Celotex, 477 U.S. at 322-23. Plaintiff has not met this burden. Plaintiff lacked an objective qualification for these positions, knowledge of the 1940 Act, and therefore cannot meet the second element of the *prima facie* case.

(b) Plaintiff was not qualified for the ESHA 04-001-MD position because his application did not state that he had specific experience with risk management functions or trading financial derivatives.

The ESHA 04-001-MD position required specialized experience in either “risk management functions for an end-user or dealer in financial derivatives, or front office, middle office or back office functions relating to the trading of financial derivatives.” Def’s Mot. Summ. J. Ex. G. ¶ 10. Plaintiff submitted a generic application for all the vacancies in question. Def’s Mot. Summ. J. Ex. A. p. 83-85. This application did not show Plaintiff was minimally qualified for this position. In fact, Plaintiff’s application

only make a passing reference to derivatives. Therefore, Plaintiff did not make the certificate of eligibles.

Plaintiff once again attempts to show he was qualified for the job by challenging the job description and denying that “specialized experience required certain experiences” while asserting that he had “specialized experience in option trading, bond trading and in options and derivative products.” Def’s Mot. Summ. J. Ex. 2. Pl’s Resps. Def’s Req. Admis. ¶ 22. (emphasis in the original). Plaintiff cannot establish a *prima facie* case that he is qualified for this position by substitute qualifications he has for those specified in Defendant’s job description. Martinez, 37 F. Supp.2d at 387.

- (2) **Plaintiff cannot satisfy the fourth element of the *prima facie* case for either the ESHA 001 positions or the ESHA 03-020-MB position because Defendant did not seek candidates with experience similar to Plaintiff after Defendant rejected Plaintiff’s application.**

To make out the fourth element of a *prima facie* case of age discrimination, a plaintiff must “show that the employer continued to seek out individuals with similar qualifications after refusing to rehire the plaintiff under circumstances that raise an inference of unlawful discrimination.” Sarullo v. United States Postal Serv., 352 F.3d 789, 798 (3d Cir. 2003)(citing Pivrotto v. Innovative Sys., 191 F.3d 344 (3d Cir. 1999)). This burden is not met if a plaintiff cannot produce a “scintilla of evidence that anyone was hired to fill these positions or that they remained open after [the plaintiff] was rejected.” Sylvester v. Unisys Corp., No. 97-7488, 1999 U.S. Dist. LEXIS 3607 at *44-

45 (E.D. Pa. 1999). Plaintiff cannot establish the fourth element of his *prima facie* case because after Defendant rejected Plaintiff for the ESHA 001 and ESHA 03-0202-MB postings, Defendant either closed these postings without hiring anyone or did not hire anyone with Plaintiff's experience.

The ESHA 001 job posting was a general umbrella posting under which the Agency sought multiple staff accountants in grades 9-13 depending on the needs of each location. The Agency deemed Plaintiff eligible for consideration based on his previous B-D unit experience. For the ESHA 001 PDO posting, only the IC/IA unit hired staff accountants. The B-D unit did not hire any staff accountants. The two successful candidates had 1940 Act experience and were CPA's. Plaintiff did not have a CPA and lacked substantial 1940 Act experience. After hiring two candidates, the Agency did not continue to seek individuals with the Plaintiff's qualifications for this posting. In fact, filling the ESHA 001 posting led Defendant to cancel the ESHA 03-020-MB posting.

Similarly, under the ESHA 001 posting for the OCIE, the Agency did not hire any staff accountants for the B-D office. Only the IC/IA Examination Unit hired a staff accountant. After filling this position, the OCIE did not seek applicants with similar qualifications to Plaintiff. Therefore, Plaintiff fails to support a *prima facie* case for these job positions because Defendant did not continue to seek individuals with qualifications similar to the Plaintiff after deciding not to hire him.

B. Defendant has established a legitimate, non-discriminatory reason for not hiring Plaintiff.

Even if Plaintiff had established a *prima facie* case of age discrimination, Defendant has legitimate, non-discriminatory reasons for not hiring Plaintiff for each of the four positions in question.

(1) The ESHA 001 Vacancy in the PDO's IC/IA Examination Unit.

The first and most convincing non-discriminatory reason for failing to hire Plaintiff for this vacancy is that none of the people on the application review committee considered Plaintiff qualified because he lacked prior IC/IA and Act 1940 experience. See Section A (1)(a) *supra*. Second, the committee questioned Plaintiff's commitment to working for the Agency because Plaintiff had previously resigned on two prior occasions and the committee felt he would only work for the Agency until a better job came along. Third, the committee was concerned with Plaintiff's history of conduct and performance problems during his prior positions at the PDO. See Vilchock v. Procter & Gamble Paper Prods., 868 F. Supp. 659, 663-64 (M.D. Pa. 1993)(finding that plaintiff's history of performance problems constituted legitimate non-discriminatory reasons for his discharge). Fourth, since more qualified applicants applied for staff accountant positions after Congress passed pay parity legislation, "the PDO did not feel the need to hire a former employee with Plaintiff's skill level and employment track record." Def's Mot. Summ. J. p. 11. Finally, after hiring two candidates, the OCIE did not continue to seek staff accountants with qualifications similar to the Plaintiff's. See Section A (2) *supra*.

(2) The ESHA 001 Vacancy in the Office of Compliance Inspections and Examinations (OCIE) in Washington, D.C.

Similar to the ESHA 001 position in the PDO, the OCIE filled this position for the IC/IA unit with a staff accountant who had experience conducting examinations under the 1940 Act and therefore, Plaintiff was not qualified for the position. See Section A (1)(a) *supra*. Specifically, the OCIE did not feel that a grade 14 candidate with no 1940 Act experience would have the skills required to lead large and complex 1940 Act examinations. Second, although the OCIE interviewed Plaintiff for the position, subsequent conversations with Plaintiff's previous supervisor at the PDO revealed that Plaintiff struggled as a writer and had difficulty preparing reports. Finally, after hiring one candidate for the IC/IA unit, the OCIE did not continue to seek staff accountants with qualifications similar to the Plaintiff's. See Section A (2) *supra*.

(3) ESHA 04-001 MB Vacancy in the Division of Market Regulation Office of Risk Assessment.

The Agency did not consider Plaintiff for this position because his application did not show that Plaintiff was qualified because he lacked the specialized experience the position required. See Section A (1)(b) *supra*.

(4) ESHA 03-020 MB Vacancy in the PDO.

The PDO management withdrew this posting as unnecessary after it hired two staff accountants under the ESHA 001 posting at lower grade levels. Therefore, the PDO did not seek candidates with similar qualifications to the Plaintiff's. See Section A (2) *supra*.

C. Plaintiff's self-serving assertion that he is a superior candidate does not establish pretext and therefore Plaintiff cannot prove that age was a motivating factor in the SEC's decision not to hire him.

Once Defendant produces a legitimate, non-discriminatory reason, the burden shifts to the Plaintiff to demonstrate by a preponderance of the evidence that the Defendant's articulated reasons for failing to hire him are a pretext for discrimination. Hicks, 509 U.S. at 507. Therefore, "to 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)." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). Specifically, Plaintiff must cast substantial doubt on a number of Defendant's legitimate non-discriminatory reasons by demonstrating weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions. Id. at 765. Admittedly, this standard places a difficult burden on employment discrimination plaintiffs. Id. at 765. Plaintiff fails to meet the difficult burden of establishing pretext by casting doubt on Defendant's non-discriminatory reasons for failing to hire him for the four positions in question.

In sum, Plaintiff fails to show that age motivated Defendant's decision not to hire him and therefore cannot prevail on this claim. Reeves, 530 U.S. at 141. The Third Circuit has specifically noted that a plaintiff cannot show pretext by arguing he is the superiorly qualified candidate or by ignoring an employer's assertion that they relied on

other factors in making the hiring decision. See Dunleavy v. Mount Olive Township, No. 05-3922, 2006 U.S. App. LEXIS 13673 at *4-5 (3d Cir. June 1, 2006). This is precisely how Plaintiff tries to prove his case. Plaintiff simply speculates that based on his prior experience and positive performance reviews from the B-D unit, he could not have been passed over for other job opportunities absent age discrimination. See Decl. Galante ¶ 22, “I have applied to a total of 20 job listings with the SEC in the last 3 years; I cannot believe, based on my experience, that I have not been selected for any of these many positions.”

Plaintiff’s self-serving Declaration does nothing to weaken Defendant’s assertion that Plaintiff was not qualified for positions in the IC/IA unit because he lacked 1940 Act experience. Instead, Plaintiff concludes that Defendant discriminated because the Agency hired younger individuals who had more limited industry experience. Decl. Galante ¶ 27. Plaintiff does not provide any evidence showing Defendant hired younger accountants who had equal qualifications compared to him. While the younger employees hired by the Agency might have had more limited experience than Plaintiff, this does not mean that they lacked the specific expertise required for positions in the IC/IA unit—expertise Plaintiff did not have.

The Agency argues that it did not hire Plaintiff because it filled positions with candidates with different qualifications than Plaintiff or it withdrew the postings. Plaintiff responds by concluding that positions were “pulled back because of

discriminatory reasons, as I was probably the most qualified.” Decl. Galante ¶ 23. This conclusion does not establish pretext.

Plaintiff also tries to point to “smoking gun” evidence that the Agency discriminated by introducing a totally irrelevant email about the hiring practices of the Vanguard Group. Discriminatory statements by decision makers that relate to an employment decision can be used to show pretext. Take, for example, a direct supervisor’s remark to the plaintiff that the new management would not be favorable to plaintiff and plaintiff would be unhappy in the future because management was “looking for younger single people that will work unlimited hours.” Fakete v. Aetna, Inc., 308 F.3d 335, 336-37 (3d Cir. 2002). The Third Circuit held that this remark constituted direct evidence that the plaintiff’s “age was more likely than not a substantial factor” in the decision to fire because it was made by the supervisor who decided to fire the plaintiff. Id. at 339. In doing so, the court distinguished this case from one where “the plaintiff relies on statements by a person not involved in the allegedly unlawful decision.” Id. at 339 n.4 (citations omitted).

In contrast to the plaintiff in Fakete, this email does not show that age was a motivating factor in the Agency’s decision not to hire Plaintiff. This email, while circulated by Arthur Gabinet, District Administrator at the PDO, refers to an attorney at The Vanguard Group who is looking for a “top quality relatively young (think –late thirties, early 40’s) lawyer” to fill her former job as securities counsel. Decl. Galante ¶

30, Ex. C. This email has absolutely no relevance to Plaintiff's age discrimination claim against the Agency. Plaintiff is not a lawyer and did not attempt to apply for a position at the Vanguard group. Therefore, this email cannot establish pretext behind the Agency's decision not to hire him.

IV. CONCLUSION

For the reasons stated above, I will grant Defendant's motion.

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

JOHN A. GALANTE,
Plaintiff,

v.

CHRISTOPHER COX, Chairman
**UNITED STATES SECURITIES &
EXCHANGE COMMISSION,**
Defendant.

: CIVIL ACTION
: NO. 05-6739
:
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ORDER

AND NOW, this 25th day of October, 2006, upon consideration of Defendant's Motion for Summary Judgment (Document No. 14) and Plaintiff's response thereto, it is hereby **ORDERED** that the motion is **GRANTED**. The Clerk of the Court is directed to mark this case as closed for statistical purposes.

BY THE COURT:

/s/ Lawrence F. Stengel

LAWRENCE F. STENGEL, J.