

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

MICHAEL J. MCGINTY, JR.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 04-cv-01821
	:	
JOHN W. SNOW, SECRETARY,	:	
DEPARTMENT OF THE TREASURY,	:	
AGENCY,	:	
	:	
Defendant.	:	

MEMORANDUM

Presently before the Court is Defendant’s unopposed Motion for Summary Judgment. For the reasons set forth below, this motion will be granted and summary judgment will be entered in favor of the Defendant.

I. BACKGROUND

Plaintiff filed a complaint in this matter alleging Defendant engaged in employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Age Discrimination in Employment Act (“ADEA”) by failing to select him for several promotions for which he applied. Plaintiff was employed by the Internal Revenue Service Agency (“IRS”) from 1971 until September 30, 2001, when he took a Voluntary Early Retirement. From February 14, 2000 until the date of his retirement, he unsuccessfully applied for five (5) separate positions as a Territory (Senior) Manager within the Agency.

- a. On September 20, 2000 Plaintiff learned he was not selected for a GS 526-15 SPEC Territory Manager position.
- b. On September 20, 2000 Plaintiff learned he was not selected for a GS-15 SB/SE TEC Territory Manager position.
- c. On February 23, 2001 Plaintiff learned he was not selected for a GS-15 TE/GE

Territory Manager position.

- d. On April 26, 2001 Plaintiff learned he was not selected for a GS-15 SB/SE TEC Territory Manager position.
- e. On June 25, 2001 Plaintiff learned he was not selected for a GS-15 LMSB Program Manager position.

On or about November 13, 2000, Plaintiff sought EEO counseling for a class complaint against the IRS brought on behalf of a group of IRS managers over forty 40 years of age.¹ Plaintiff first sought EEO counseling for the employment actions underlying the present matter on or about July 9, 2001.

Plaintiff filed this complaint on April 27, 2004. He alleges he was denied promotion on the basis of his race (Caucasian), color (white), sex (male), age (DOB 9/22/49), and in retaliation for his prior EEO activity. Accordingly, he claims that each instance of non-selection set forth in his complaint constitutes employment discrimination in violation of Title VII and the ADEA.

II. DISCUSSION

A. Summary Judgment

Summary judgment shall be granted 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). Pursuant to Rule 56(e):

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but 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. If the adverse party does not so respond, summary judgment, if appropriate, shall be

¹On October 17, 2001 an EEO Administrative Judge issued correspondence indicating the complaint was withdrawn and closed.

entered against the adverse party.

B. Exhaustion of Administrative Remedies

It is a basic tenet of administrative law that a plaintiff must exhaust all required administrative remedies before bringing a claim for judicial relief. Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997). The purposes of the exhaustion requirement are to promote administrative efficiency, respect executive autonomy by allowing an agency the opportunity to correct its own errors, provide courts with the benefit of an agency's expertise, and serve judicial economy by having the administrative agency compile the factual record. Id. In Title VII actions, failure to exhaust administrative remedies is an affirmative defense in the nature of statute of limitations. Williams v. Runyon, 130 F.3d 568, 573 (3d Cir. 1997).

Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, proscribes federal employment discrimination and establishes an administrative and judicial enforcement system. Brown v. General Services Administration, 425 U.S. 820, 829 (1976). Section 717(a) provides that all personnel actions affecting federal employees and applicants for federal employment "shall be made free from any discrimination based on race, color, religion, sex, or national origin." Id. at 829-830. Section 717(c) permits an aggrieved employee to file a civil action in a federal district court to review his claim of employment discrimination. Id. at 832. Similarly, the Age Discrimination in Employment Act prohibits the federal government from taking personnel actions based on age (against employees who are at least 40 years of age) and allows aggrieved parties to bring an action in federal district court. 29 U.S.C. § § 633a(a), (d). Federal sector employees alleging employment discrimination under Title VII or the ADEA are required to follow identical administrative procedure before filing a civil action in federal district court. Pursuant to the Code of Federal Regulations, federal employees who believe they have been discriminated against on the basis of race, color, religion, sex, national origin,

age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter. 29 C.F.R. § 1614.105(a). The complainant must initiate contact with a Counselor within 45 days of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action. 29 C.F.R. § 1614.105(a)(1).

In the instant matter, Plaintiff cannot pursue a remedy in federal district court for four of the five adverse employment actions because he failed to comply with mandatory pre-complaint administrative procedure. From September 20, 2000 to April 26, 2001, Plaintiff learned he had not been selected for four separate GS-15 positions. However, he did not seek EEO counseling for *any* of the employment actions set forth in his complaint until July 9, 2001. Accordingly, Plaintiff failed to seek counseling within 45 days of any denial of promotion that he discovered on or before April 26, 2001. Since he did not properly exhaust his administrative remedies regarding these four employment actions, he cannot proceed with a civil action arising from them in this Court.

C. Parties' Burdens in Title VII and ADEA Actions

Although Plaintiff appears to have fulfilled his administrative requirements regarding the fifth denial of promotion set forth in his complaint, his cause of action for this final employment action still cannot withstand summary judgment. Parties' burdens in establishing and defending claims under the ADEA and Title VII are determined by the procedure set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000). A plaintiff alleging employment discrimination in violation of either act bears the initial burden of establishing a prima facie case by a preponderance of the evidence. Sarullo v. United States Postal Service, 352 F.3d 789, 797 (3d Cir. 2003). When the plaintiff makes this initial showing, the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason for the employee's rejection. Id. If the defendant meets this burden,

the presumption of discriminatory action raised by the prima facie case is rebutted. Id. The plaintiff then must establish by a preponderance of the evidence that the employer's proffered reasons were merely a pretext for discrimination, and not the real motivation for the unfavorable job action. Id.

The existence of a prima facie case of employment discrimination is a question of law that must be decided by the Court. Id. It requires a showing that: (1) the plaintiff belongs to a protected class; (2) he/she was qualified for the position; (3) he/she was subject to an adverse employment action despite being qualified; and (4) under circumstances that raise an inference of discriminatory action, the employer continued to seek out individuals with qualifications similar to the plaintiff's to fill the position. Id.² To establish a prima facie case arising from a denial of promotion, the plaintiff must prove by a preponderance of the evidence that he or she applied for an available position for which he or she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

It is also unlawful for an employer to discriminate against an employee because the employee made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII. 42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation, a plaintiff must show that: (1) he/she engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action.

Weston v. Commonwealth of Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001)

Once the plaintiff has set forth his or her prima facie case, the burden shifts to the

²In the Third Circuit, a plaintiff is not required to prove he was replaced by someone outside the protected class to establish a prima facie case of discrimination. Sarullo, 352 F.3d at 797 n. 7. The plaintiff must show only 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. Id.

defendant to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.

Burdine, 450 U.S. at 254. At this stage, the defendant need not persuade the court that it was actually motivated by the proffered reasons:

It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.

Id. at 254-255.

Once the defendant has met its burden of production, the plaintiff must have the opportunity to demonstrate that the proffered legitimate reason was not the true reason for the employment decision. Id. at 255. This burden merges with the ultimate burden of persuading the court that the he or she has been the victim of intentional discrimination. Id. The plaintiff may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Id.

In the instant matter, Plaintiff has failed to meet his evidentiary burdens relating to the fifth and final denial of promotion. Plaintiff alleges he was not selected for the position of GS-15 LMSB Program Manager on the basis of his race, color, sex, age and as reprisal for prior EEO activity. However, the candidate ultimately selected for this position was white, Caucasian and older than Plaintiff. Accordingly, because the selected candidate is the same color and race of the Plaintiff and is older than him, there is no basis on which to infer Plaintiff was discriminated against on the basis of race, color, or age.

Because the candidate selected for the GS-15 LMSB Program Manager position was female and because Plaintiff engaged in EEO counseling in a separate matter, he has arguably

set forth a prima facie case of employment discrimination on the basis of sex and retaliation. In response to this initial showing, however, Defendant has provided evidence to support his claim that the adverse employment action was made for legitimate, non-discriminatory reasons. Plaintiff was interviewed for the final position by a three-member panel. In unsworn declarations accompanying this motion, each panel member claimed to be unaware of Plaintiff's prior EEO involvement. Generally, they assert that Plaintiff was not recommended for the position because the competing candidates had superior qualifications and interviews. Additionally, the IRS employee who made the final hiring decision provided an unsworn declaration in which he stated he had no knowledge of Plaintiff's prior EEO activity and that the successful candidate was picked on the basis of her background and experience, an internal ranking process and interview feedback. In sum, Defendant has met its initial evidentiary burden by providing evidence that the hiring decision was based upon legitimate factors, not upon gender or retaliatory motives.

By failing to oppose this motion, Plaintiff has not attempted to demonstrate that Defendant's proffered reasons for the employment action were not the true reasons. Accordingly, he cannot prevail on his cause of action arising from the fifth instance of non-promotion. Consequently, the Court grants Defendant's Motion for Summary Judgment.

An appropriate order and judgment follow.

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

MICHAEL J. MCGINTY, JR.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 04-cv-01821
	:	
JOHN W. SNOW, SECRETARY,	:	
DEPARTMENT OF THE TREASURY,	:	
AGENCY,	:	
	:	
Defendant.	:	
	:	

ORDER

AND NOW, this 23rd day of March 2005, upon careful and independent consideration of Defendant's unopposed Motion for Summary Judgment, **IT IS HEREBY ORDERED** that Defendant's Motion is **GRANTED**.

BY THE COURT:

CLIFFORD SCOTT GREEN