

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

CAROL OLEKSIK,	:	
Plaintiff	:	
	:	CIVIL ACTION
v.	:	NO. 04-4723
	:	
JO ANNE B. BARNHART,	:	
Commissioner Social Security	:	
Administration,	:	
Defendant	:	

MEMORANDUM OPINION AND ORDER

RUFE, J.

November 10, 2005

This is an employment discrimination case against the Social Security Administration (“SSA”). Plaintiff alleges that the SSA did not give her application for promotion within the agency fair consideration. Rather, Plaintiff alleges that the SSA misapplied the Federal Merit Promotion Program standards¹ and/or engaged in age, gender, and race based discrimination.² As a result, she alleges lost earnings and opportunities for advancement. Before the Court is Defendant’s Motion for Summary Judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to 1995, Plaintiff worked as a coordinator for the Environmental Protection Agency at grade eleven. In 1995, Plaintiff began working as a claims clerk for the SSA. She remained in that position in July 1998 at grade four. At that time, the SSA posted a vacancy announcement for twenty benefits authorizer (“BA”) positions. BA positions can be grade five, six

¹ 5 C.F.R. § 335.103.

² It is not clear whether Plaintiff filed a grievance with the SSA or the Office of Personnel Management, as required under the regulations governing the federal merit system. Plaintiff did file a timely discrimination complaint with the EEOC. The EEOC issued its final order on July 14, 2004, giving Plaintiff the right to sue in federal court. This suit was filed on October 7, 2004.

or seven. Plaintiff, along with 190 other applicants, applied for the position. Of the total applicants, 174, including Plaintiff, met the minimal eligibility requirements for the position and advanced to the next level of review.

Plaintiff was considered through the competitive merit promotion process, and was not offered the position. She alleges that she should have been considered for the position on a non-competitive basis, because she had previously worked at a higher grade level for the EPA. Defendant agrees, for the sake of this motion, that Plaintiff should have been placed on the non-competitive list, but states that competitive and non-competitive applicants were later placed on the same list and were not distinguished or treated differently in the selection process. In fact, only one employee of the thirteen on the non-competitive list was chosen, whereas 20 of the 161 competitive employees were chosen. Mathematically, the non-competitive applicants were selected at a *lower* rate than competitive employees.

Plaintiff also alleges race, gender, and age based discrimination. She alleges that all but one of the selected applicants were African-American, and all were younger than Plaintiff. Sixteen of the twenty-one individuals selected were women. The SSA alleges that all but two of the selected applicants were African-American, and acknowledges that all those selected were younger than Plaintiff, but notes that nine selected applicants were between the ages of forty and fifty-two, and that three of the selected applicants were over the age of forty-eight.³ Plaintiff was fifty-five years old at the time she applied for the position.

According to Defendants, the selection process was conducted as follows: once Operation Manager Genevieve Fardella received the list of 174 minimally qualified individuals, she

³ The age of two selected employees is unknown.

sorted the list by supervisor. Competitive and non-competitive candidates were mixed and re-sorted together. The candidates' names were forwarded to their supervisors, who were asked to rate each applicant in six areas: 1) oral communication; 2) written communication; 3) reliability/dependability; 4) potential technical ability; 5) current performance; and 6) initiative. These ratings were placed in a grid. Then, a team of supervisors and operation managers from each of the four process areas met to rank each applicant within their process areas. At this stage, Plaintiff was ranked sixteenth out of the twenty-six applicants in her process area. Her oral and written communication skills, initiative, and current performance were rated highly, but her attendance was noted to be unstable. Additionally, her supervisor only noted that Plaintiff was "probably" able to handle the technical aspects of the position. Then, the grids and rankings were forwarded to the four operations managers, who selected the thirty best candidates from the 174 applicants. Plaintiff was not selected in this group. Finally, twenty-one of the top thirty applicants were selected based on consensus of the operations managers. Candidates' sex, race, and age do not appear on any of the documents that were used during the selection process, and Defendants allege these factors were not discussed during the selection meetings.⁴

Plaintiff alleges that Linda Preston was selected despite submitting an application dated one year prior to the opening date of the vacancy announcement for this position, and without an original signature. Plaintiff points to Preston's application to support her contention that younger, African-American applicants were given preferential treatment in this process. Defendant notes that her application was date stamped as received during the application period for this

⁴ The demographic data on the selected candidates cited by the parties appears to come from an EEOC investigator's report, generated in response to Plaintiff's EEOC complaint. See Plaintiff's Exhibit 3 [Doc. # 25].

position, was signed in blue ink (denoting an original signature), and the incorrect date on the application was considered a typographical error.

Plaintiff points to Brian Wilkinson, a younger African-American male selectee whom Plaintiff alleges failed to meet the minimum qualification for the position, as further evidence of Defendant's preference for younger, African-American applicants. Specifically, she alleges that he had only two years of experience with the SSA, and not the three years of "general experience" required for the promotion. Defendant notes that the vacancy announcement does not require "general experience" to be in federal employment, and further notes that Wilkinson had several years of non-federal employment prior to being hired by the government.

Finally, Plaintiff alleges that her supervisor made unfounded negative remarks about her attendance on the "grids," and another supervisor with less personal knowledge of Plaintiff made unfounded negative comments about her ability during the EEOC investigation. Plaintiff alleges that these remarks are evidence of race, sex, or age based discrimination.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), the Court may grant summary judgment "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 judgment as a matter of law."⁵ To avoid summary judgment, the non-moving party must come forth with admissible factual evidence establishing a genuine issue of material fact.⁶ In

⁵ Celotex Corp. v. Catrett, 447 U.S. 317, 322 (1986).

⁶ Id.

deciding a motion for summary judgment, the Court must construe the facts and inferences in a light most favorable to the non-moving party,⁷ but need not consider unsupported assertions, speculation or conclusory allegations.⁸ The Court must determine whether there are any genuine issues for trial.⁹

DISCUSSION

The SSA raises the following issues: 1) the Court has no jurisdiction over Plaintiff's claims under the Federal Merit Promotion System, except to the extent that Plaintiff claims the Defendant's application of the system is evidence of discrimination; 2) Plaintiff was not entitled to consideration for promotion on a non-competitive basis, and furthermore she was not injured by Defendant's failure to consider her application on a non-competitive basis; and 3) Plaintiff cannot rebut Defendant's legitimate non-discriminatory reason for her non-selection, and therefore cannot survive summary judgment on her discrimination claims.

1. Jurisdiction over Plaintiff's Claims Regarding her Right to be Considered on a Non-Competitive Basis

As Defendant correctly notes, to the extent that Plaintiff simply seeks judicial review of the SSA's application of civil service rules and regulations, this Court lacks jurisdiction.¹⁰ The Office of Personnel Management ("OPM") regulations allow for review only through an internal

⁷ EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 216 (3d Cir. 1983).

⁸ Easton v. Bristol-Meyers Squibb Co., 289 F. Supp. 2d 604, 609 (E.D. Pa. 2003).

⁹ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

¹⁰ Although this claim is set forth in Plaintiff's Complaint, Plaintiff failed to address this argument in her response to Defendant's Motion for Summary Judgment.

grievance process.¹¹ Specifically, employees may challenge the procedures used by an agency to identify and rank qualified individuals to the OPM.¹² There is no right to appeal an OPM decision.¹³ Therefore, the Court must dismiss this claim for lack of jurisdiction.

2. Defendant's Failure to Consider Plaintiff on a Non-Competitive Basis as Evidence of Discrimination

To the extent that Plaintiff claims that SSA's violations of the merit promotion system are evidence of *discrimination*, Defendant addresses the claims. Specifically, Defendant addresses Plaintiff's entitlement to be considered for the position on a non-competitive basis. Defendant argues that it was under no legal obligation to place her on the non-competitive list or select her over all other minimally qualified applicants.¹⁴ The agency determined that Plaintiff's prior employment with the EPA at a higher grade¹⁵ did not provide her with any knowledge of the policies and procedures of the SSA; therefore, her grade at the EPA was not considered sufficient to put her on the merit-exempt list for the benefits authorizer position. Plaintiff has not addressed this argument in her response.

Furthermore, Defendant argues, even if it had a legal obligation to consider Plaintiff's

¹¹ 5 C.F.R. § 335.103.

¹² Id.

¹³ Id.

¹⁴ See, 5 C.F.R. §§335.102-103.

¹⁵ Plaintiff also states that no other candidate had previously held a position at or above the level of her position at the EPA (grade 11). Plaintiff cites to no documentary evidence for this assertion. In fact, the only document before the Court which indicates the applicants' grade levels states that Plaintiff was currently a grade 4 and eligible to be a grade 5. The selected applicants were all at grades ranging from 4 to 8. Plaintiff provides no evidence that her co-applicants had never worked at or above their current grade.

application for BA as a non-competitive employee, Plaintiff suffered no injury from exclusion from the non-competitive list. Plaintiff's claim rests on the assumption that she would have been promoted had Defendant placed her on the non-competitive list. However, of the thirteen employees on that list, only one was selected for the promotion. As noted above, the method of selection did not distinguish competitive from non-competitive employees, and overall competitive employees actually had a slightly higher rate of selection than the exempt employees. Therefore, even reading the facts in the light most favorable to Plaintiff, the Court finds no genuine issue of material fact as to Plaintiff's injury from her treatment as a competitive employee.

Defendant also argues that Plaintiff has put forth no evidence that her exclusion from the non-competitive list was motivated by discriminatory animus. In fact, Defendant points out that Plaintiff did not respond to Defendant's Motion for Summary Judgment on this issue, and has not established any genuine issues for trial on this claim, and therefore summary judgment should be entered as a matter of law.

3. Plaintiff's Discrimination Claims

Claims for employment discrimination are governed by the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, a plaintiff must establish a *prima facie case* of discrimination. Then, the burden shifts to the defendant to offer a legitimate, non-discriminatory reason for the employment decision.¹⁶ If the defendant offers a valid reason, the burden shifts back to the plaintiff to prove that the stated reason is merely pretext for illegal discrimination.

¹⁶ McDonnell Douglas, 411 U.S. at 802.

A. Plaintiff's Prima Facie Case

To establish a *prima facie* case of employment discrimination, Plaintiff must show that she: 1) was a member of a protected class; 2) was qualified for the position; 3) did not get the position; and 4) the position was given to a person or persons not in the protected class. In this case, Plaintiff can establish a *prima facie* case for race, as she has demonstrated that only one or two of the twenty people selected were Caucasian. However, she cannot establish a *prima facie* case for sex, as sixteen of the twenty candidates selected were women. Half of the selected candidates were over forty, although none were Plaintiff's age (age 55), so her *prima facie* case on age discrimination is slim, but for the sake of this Motion the Court will assume she has met her *prima facie* burden.

B. Defendant's Legitimate, Non-discriminatory Explanation.

Defendant asserts that it rated all 174 minimally qualified applicants on six important categories, and then selected the twenty-one best applicants from the pool. For example, in Plaintiff's unit there were twenty-six applicants, of which she was ranked sixteenth based on the six relevant criteria. Only the four highest ranked individuals in her unit were selected for promotion. Although Plaintiff was ranked highly on several of the six categories, it was noted that her attendance was unreliable and her supervisor could not say with certainty that she had the technical skills for the position. The selected candidates, on the other hand, including those singled out by Plaintiff in her response to Defendant's motion, all received very high ratings across the categories.

Defendant asserts that race, sex, and age were never discussed during the selection process, and the documents produced for the purposes of selection do not note race, sex or age on them.

There is no doubt that Defendant has articulated a legitimate, non-discriminatory basis

for not selecting Plaintiff for the BA position.

C. Plaintiff's Offered Evidence of Pretext and Defendant's Responses

To survive summary judgment, Plaintiff must now point to evidence that Defendant's reason for failing to promote her is merely pretext for discrimination. At trial, she must both prove that the reason Defendant offered was false, and that the true reason was discrimination.¹⁷ To defeat summary judgment, Plaintiff:

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 motive was more likely than not a motivating or determinative cause of the employer's action.¹⁸

For summary judgment to be denied, the evidence must show 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.¹⁹

Plaintiff argues that several younger, African-American women were non-competitively or competitively promoted to the position, whereas she, a 55-year-old Caucasian woman, was not promoted. She points out that only one Caucasian man and no Caucasian women were promoted, and that she was older than each of the selected candidates.

As to the specific comparison applications Plaintiff cites to advance her argument of discrimination, Roslyn Johnson was the only candidate selected from the non-competitive list, and Plaintiff provides no evidence that Johnson was the youngest candidate or the only African-

¹⁷ Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).

¹⁸ Fuentes, 32 F.3d at 764.

¹⁹ Id.

American candidate on that list. Further, Plaintiff fails to demonstrate that Johnson's application was otherwise given any preferential treatment in the selection process. On the six criteria, Johnson received comments such as excellent and outstanding across the categories.

Plaintiff alleges that another selectee, Linda Preston, an African-American woman who is younger than Plaintiff, did not submit a timely application. This allegation is based on the date next to Preston's signature, July 23, 1997, which was a year before the position was posted. However, the document is date stamped July 27, 1998, and, despite Plaintiff's claims to the contrary, there is no evidence that Preston did not submit the document, with an original signature, on that date. Therefore, there is no evidence that Preston was given preferential treatment for any reason, much less for being a younger, African-American woman. Her work was rated highly across the six categories, and it was noted that her current performance and technical skills were outstanding.

Plaintiff alleges that a third selected candidate, Brian Wilkinson, an African-American man, also younger than Plaintiff, was selected despite lacking the required three years of experience. The vacancy announcement for the BA position required three years of general experience, or one year of specialized experience. The announcement did not specify that experience had to be gained through government employment. Plaintiff acknowledges that Wilkinson had two years experience with the SSA at the time of his application for BA. Defendant notes that Wilkinson also had prior, general experience in non-government employment. While the Court must construe the facts favorably to Plaintiff, she points to no evidence that Wilkinson had not acquired an additional year of general experience outside of the SSA. And more importantly, she points to no evidence indicating that Wilkinson received preferential treatment based on age, race, or sex. Furthermore, Wilkinson was ranked outstanding or above average in all categories, with the

exception of “written communications,” an area in which his performance had not been observed.

Plaintiff also argues that her direct supervisor’s comments about her unreliable attendance record are evidence of discrimination. While the Court accepts for the purpose of this motion that the supervisor’s adverse comments were untrue, Plaintiff puts forth no evidence of discriminatory animus.

Similarly, Plaintiff asserts that Genevieve Fardella, one of the selecting officials, made untruthful comments about her personal knowledge of Plaintiff during the EEOC investigation, during which she indicated that Plaintiff failed to distinguish herself from better candidates.²⁰ Again, even if Ms. Fardella did not have personal knowledge of Plaintiff, there is no evidence that discriminatory motives impacted on her evaluation of Plaintiff during the selection process.

Finally, Plaintiff argues that the agency allegedly evaluated each candidate on six criteria, but that her investigation revealed that not every candidate was evaluated on each criteria. It is true that some selected candidates were not rated in the area of written communications, but the selection committee’s decision to select some candidates without a rating in this area does not alone constitute evidence of bias or discrimination. Plaintiff puts forth no evidence that these candidates were treated differently on the basis of race, age, or sex.

Plaintiff does not convincingly allege, much less prove, that any *inconsistencies* in the process led to discrimination, intentional or otherwise, nor does she point to any evidence of intentional discrimination. Plaintiff fails to discredit Defendant’s proffered reasons for its decisions, and fails to produce any direct or circumstantial evidence that discrimination was more likely than

²⁰ Dec. of Carol Oleksiak, ¶ 26; Aff. of Joseph Ponisciak, ¶ 11. Plaintiffs did not provide Ms. Fardella’s affidavit, which was reviewed by the EEOC, to the Court.

not a motivating or determinative factor in the adverse employment decision. She has not shown weakness, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate reasons for its actions. She has put forth no specific facts showing there is a genuine issue for trial. Plaintiff clearly was not among the twenty-one most outstanding candidates, based on ratings by her direct supervisor; the same process was applied to Plaintiff as to all other candidates for the position; and the evidence suggests that Defendant actually relied upon the stated promotion criterion.

For the reasons set forth above, Plaintiff has failed to establish a genuine issue of material fact as to her discrimination claims, and her Federal Merit Promotion System claim is dismissed for lack of jurisdiction.

An appropriate order follows.

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

CAROL OLEKSIK,	:	
Plaintiff	:	
	:	CIVIL ACTION
v.	:	NO. 04-4723
	:	
JO ANNE B. BARNHART,	:	
Commissioner Social Security	:	
Administration,	:	
Defendant	:	

ORDER

AND NOW, this 10th day of November, 2006, upon consideration of Defendant's Motion for Summary Judgment [Doc. # 16, 25], Plaintiff's Responses thereto [Doc. # 23, 24, 25, 30], and Defendant's Reply [Doc. #32], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that Defendant's Motion is **GRANTED**.

Plaintiff's Complaint against Defendant is **DISMISSED** with prejudice.

Judgment is entered in favor of Defendant.

The Clerk of Court shall mark this case **CLOSED** for statistical purposes.

It is so **ORDERED**.

BY THE COURT:

CYNTHIA M. RUFÉ, J.