No. 21-

IN THE

Supreme Court of the United States

GUY C. PATTERSON,

Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal employees' rights are determined under statutes which require that "all personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in Title 5 . . . shall be made free from any discrimination . . ." See 42 U.S.C. § 2000e-16(a) (race, color, religion, sex, or national origin); 29 U.S.C. § 633a(a) (age). Only last year, a commanding majority of this Court held that this language denoted Congress' intent to impose a "stricter standard" upon the Federal Government than upon private employers or state and local governments. *Babb v. Wilkie*, this Court held, without dissent, that Title VII permitted only "professionally developed ability tests" that were "job-related."

The question presented is:

Under the "stricter standard" applicable to the Federal Government, does an executive agency articulate a "legitimate, non-discriminatory reason" for its' employment action where its' proffered employment practice provides no rational basis for the action because it is neither professionally developed, based on a job analysis, nor statistically valid?

PARTIES TO THE PROCEEDING

The petitioner is Guy C. Patterson.

The respondent is Kilolo Kijakazi, Acting Commissioner, U.S. Social Security Administration.

RELATED CASES

Patterson v. Saul, No. 18-cv-00193, U.S. District Court for the Western District of Pennsylvania. Judgment entered February 13, 2020.

Patterson v. Commissioner Social Security, No. 20-2102, U.S. Court of Appeals for the Third Circuit. Judgment entered February 5, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Guy C. Patterson, *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The February 5, 2021 opinion of the court of appeals was not designated for publication but is available at 834 Fed. Appx. 737 (3d Cir. 2021) and is set out in the Appendix at pp. 1a-4a. The Third Circuit's denial of petitioner's motion for reconsideration and rehearing en banc is reproduced at Appendix 41a-42a. The opinion of the District Court for the Western District of Pennsylvania is available at 2020 U.S. Dist. LEXIS 25477 and is reproduced at Appendix 8a-40a. The District Court's opinion denying petitioner's motion to alter or amend judgment is reproduced at Appendix pp. 5a-7a.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The Court of Appeals entered judgment on February 5, 2021. The court denied a timely petition for rehearing and rehearing en banc on April 6, 2021. Petitioner has timely filed this petition for writ of certiorari within one hundred fifty (150) days of the Court of Appeals judgment in accordance with this Court's order dated July 19, 2021.

This case arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 , and the Age Discrimination

in Employment Act of 1967, 29 U.S.C. § 633a. Consequently, the District Court had jurisdiction of this case pursuant to 28 U.S.C. 1331 and the Third Circuit Court of Appeals had jurisdiction pursuant 28. U.S.C. § 1291.

STATUTES AND REGULATIONS INVOLVED

Section 703(h) of Title VII of the Civil Rights Act of 1964 (hereafter, "Title VII"), 42 U.S.C. § 2000e-2(h), provides in pertinent part:

"Notwithstanding any other provision of this subchapter, . . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

Section 717(a) of Title VII of the Civil Rights Act of 1964 (hereafter, "Title VII"), 42 U.S.C. § 2000e-16(a), provides in pertinent part:

"All personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."

Section 15(a) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 633a(a), provides in pertinent part:

"All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on age."

The U.S. civil service regulations that are relevant to this petition, 5 C.F.R. 300.101, 5 C.F.R. 300.102(c), 5 C.F.R. 300.103, and 5 C.F.R. 300.104(c)(1), 5 C.F.R. 335.103(b)(3), and 5 C.F.R. 720.206, are reprinted in Appendix D.

STATEMENT OF THE CASE

A. Factual Background

Petitioner is a fifty-six-year-old Caucasian male. Born in June 1965, Petitioner was forty-eight (48) to fifty-one (51) years of age at the time of the events at issue in this matter. A licensed attorney, Mr. Patterson possesses an undergraduate degree from the University of Virginia and a law degree, with honors, from the University of Pittsburgh School of Law. Petitioner began his employment with the U.S. Social Security Administration (hereinafter "SSA") in September 2003 and, apart from a period of employment with the Department of Veterans Affairs between October 2005 and October 2007, has been continuously employed by the agency since that time. In his more than seventeen (17) years with the agency, Petitioner has received nothing but "fully successful" performance appraisals. In addition, Petitioner has received numerous cash performance awards.

Between March 2014 and April 2017, Petitioner applied for a total of twenty-one vacancies. In each instance,

Petitioner was qualified for the position and was placed either on the SSA's "best qualified" list or upon a register of eligibles pursuant to 5 U.S.C. § 3313. In each instance, Mr. Patterson was not selected for the position. In each instance, SSA relied either in whole or in part on the results of its so-called "structured interview." In nineteen (19) of the twenty-one (21) vacancies, SSA selected candidates without Mr. Patterson's protected classes.

In March 2014, Petitioner applied for a GS-14 position as an Appeals Officer. Petioner was referred for an interview by SSA Office of Personnel. Petitioner was not selected. Instead, SSA selected sixteen (16) individuals, all of whom were more than five (5) years younger than Petitioner and all save one of whom were below the age of forty. SSA asserted the results of its structured interview as the reason for Petitioner's non-selection.

In March 2013, Petitioner applied for a position as an Administrative Law Judge (ALJ). Petitioner successfully completed the OPM competitive examination. In August 2016, Petitioner's name was forwarded to SSA for a structured interview. Once again, Petitioner was not selected. Instead, SSA selected, *inter alia*, an African-American woman who attended a non-ABA approved law school and received a deferred license suspension in 2008. SSA again asserted the results of its structured interview as the reason for Petitioner's non-selection. The District Court also noted that Petitioner's supervisor would not recommend him, but omitted mention of the fact the Petitioner had always received positive performance appraisals.[1]

1. The EEOC recently decided that a negative job recommendation coupled with a positive performance appraisal

Petitioner's name remained on OPM's register of eligibles and in February 2017 his name was again referred to SSA for consideration for an ALJ position. Once again, Petitioner was not selected. Instead, SSA selected two (2) individuals, both of whom were more than five (5) years younger than claimant.

Consequently, Petitioner has been frustrated in his efforts toward career advancement and has been deprived of opportunites for increased salary and benefits. Petitioner has also incurred substantial legal expenses.

B. Proceedings Below

After exhausting his administrative remedies, Petitioner Patterson commenced this action in the Western District of Pennsylvania, alleging that he was subject to discrimination and retaliation in violation of Title VII of the Civil Rights Act and the Age Discrimination in Employment Act of 1967. (Appendix, p. 2a).

After a period of discovery, the District Court granted SSA's motion for summary judgment on all of petitioner's claims. (Appendix, p. 39a). Curiously, despite the complete lack of record evidence that SSA complied with the regulation in the least degree, the District Court declined to decide the issue of SSA's compliance or noncompliance with 5 C.F.R. § 300.103, preferring to leave the matter an "unadjudicated possibility." (Appendix, pp. 7a, 29a-31a).

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was inconsistent, rendering the former unworthy of credence. *Bart M. v. Bernhardt*, 2021 EEOPUB LEXIS 74, 15-16 (E.E.O.C. January 14, 2021).

On appeal, Petitioner argued that the district court erred in granting summary judgment in several respects. First, the District Court erred in applying an incorrect legal standard to Petitioner's discrimination claims. Second, the District Court erred in applying an incorrect legal standard in determining SSA had articulated a legitimate, non-discriminatory reason. Finally, the District Court misapplied the law to the facts of Petitioner's retaliation claim. (Appendix, p. 3a, n.1).

With respect to the issues presented by this petition, the panel for the Third Circuit Court of Appeals affirmed the District Court. (Appendix, p. 4a).

The Third Circuit denied Petitioners' timely petition for panel rehearing or rehearing en banc. (Appendix, p. 41a-42a).

REASONS FOR GRANTING THE PETITION

I. THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

In finding Petitioner's claims to be without merit, the Third Circuit purportedly exempts the Federal Government, the nation's largest employer, from the operation of the Tower Amendment, an express provision of Title VII, as well as the operation of the civil service regulations. Consequently, this finding contravenes multiple decisions of this Court including *Babb v. Wilkie*, *St. Mary's Honor Ctr. v. Hicks*, and *Griggs v. Duke Power Co.*.

More than a half-century ago, this Court, without dissent, held that Title VII permits only a "professionally developed ability test" that is "job-related." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971). In so holding, the Court was well aware that the EEOC had interpreted the term "job-related" to require development by a person in the business of test development, a job analysis, and statistical validity. Decision of EEOC, CCH Empl. Prac. Guide, para. 17,304.53 (Dec. 2, 1966) *cited in Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n.6 (1971). Furthermore, Congress placed the burden of demonstrating job-relatedness upon employers. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."). Only last year, a clear majority of this Court held that the broad language of both Title VII and the ADEA, as applied to the federal sector, imposed a "stricter standard" upon the Federal Government than upon private employers and state and local governments. *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (Apr. 6, 2020).

Consistent with the foregoing, the civil service regulations provide that all employment practices of the individual federal agencies must be professionally developed, based upon a job analysis, and statistically valid. 5 C.F.R. § 300.103(a), (b)(1), (c). There is little doubt as to the meaning of the regulation. On July 31, 2020, the Acting Director of the U.S. Office of Personnel Management (hereinafter "OPM") issued a memorandum to the heads of the executive agencies reiterating that "[a]gencies are required to use validated (i.e. job-related) assessment tools when examining applicants for competitive service

positions."[2] OPM extended the requirements to other discriminatory bases as well as to positions covered by a promotion plan such as the Appeals Officer vacancies here at issue. 5 C.F.R. 300.102(c) (2021); 5 C.F.R. 335.103(b)(3) (2021). The express purpose of the regulation is to ensure the nondiscriminatory character of selection procedures in the civil service. 5 C.F.R. 300.102(c) (2021). Indeed, the regulation does little more than re-state the requirements of "job-relatedness" first articulated by the EEOC in 1966 and for the same reason: employment practices that are not job-related provide no rational basis for an agency's employment action. *Cf.* Decision of EEOC, CCH Empl. Prac. Guide, para. 17,304.53 (Dec. 2, 1966); 5 C.F.R. § 300.103(b)(1) (2021).

In *St. Mary's Honor Center v. Hicks*, a majority of this Court held that to constitute a "legitimate, nondiscriminatory reason" an employer's proffered reason must rebut the presumption of discrimination raised by a plaintiff's prima facie case. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-507 (1993). The regulation requires the demonstration of a rational relationship between performance in the position to be filled and the employment practice used, which "shall include" a showing that the employment practice was professionally developed. 5 C.F.R. § 300.103(b)(1) (2021).

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2. Available at:

https://www.chcoc.gov/sites/default/files/Implementation%20of%20E.O.%2013932%3B%20Determining%20Qualifications%20and%20the%20Use%20of%20Assessment%20Tools%20When%20Filling%20Positions%20%281%29.pdf

Last accessed on September 1, 2021.

As the District Court correctly found SSA's structured interviews were devised by groups of attorneys leavened by a single bureaucrat. Whatever else may be said of attorneys, they are not "in the business or profession of developing employment tests," but rather they are in the profession of practicing law. *See*, Decision of EEOC, CCH Empl. Prac. Guide, para. 17,304.53 (Dec. 2, 1966). Nevertheless, absent any evidence of a rational relationship between performance in the positions and the employment practice used, the District Court finds that SSA has articulated a "legitimate, non-discriminatory reason" for its employment action, which finding the 3d Circuit affirmed. In failing to give effect to the terms of 5 C.F.R. § 300.103, the 3d Circuit Court of Appeals permits the Federal Government to assert an employment practice bearing no rational relationship to job performance as a "legitimate, non-discriminatory reason" in contravention of this Court's holding in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-507 (1993).

The 3d Circuit then compounds its error by finding that Petitioner is unable to prove a causal connection with regard to his 2017 retaliation claim. With regard to that claim, SSA relied upon the so-called "three- strike rule" found at 5 C.F.R. § 332.405 (2021). The preceding regulation, however, requires that each consideration be based solely on merit and fitness. 5 C.F.R. § 332.404 (2021). A proferred reason bearing no rational relationship to performance in the job, by definition, is not based on merit and fitness and, therefore, is a legally insufficient justification for invocation of the "three-strike rule."

In failing to give effect to the terms of 5 C.F.R. § 300.103, the 3d Circuit Court of Appeals permits the

Federal Government to use pre-employment or promotion tests that are neither "professionally developed ability tests" nor "job-related" in contravention of this Court's holding in *Griggs* as well as the plain language of the statute. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971); 42 U.S.C. § 2000e-2(h) (2021).

Finally, in failing to give effect to the terms of 5 C.F.R. 300.103, the 3d Circuit Court of Appeals holds the Federal Government to a more lenient standard than that imposed upon state and local governments in contravention of this Court's holding in *Babb*. Babb v. Wilkie, 140 S. Ct. 1168, 1177 (2020). In one sense, however, the 3d Circuit's logic is unassailable: to the extent that the Federal Courts are unwilling or unable to decide issues presented to them, then it must follow, *a fortiori,* that Petitioner is unable to prove them. Such a rule, however, is scarcely in keeping either with this Court's holding in *Babb* or the plain language of the statutes. *Id.*; 29 U.S.C. 633a(a) (2021); 42 U.S.C. 2000e-16(a) (2021).

II. THE TOWER AMENDMENT AND THE REGULATION PERMITS A DISPARATE TREATMENT CLAIM.

Much of the 3d Circuit's cursory opinion is simply inscrutable, not in its findings, but in the reasons underlying them. Accordingly, Petitioner should like to address two (2) points raised by the District Court, which may have impacted the Court of Appeals' reasoning.

The District Court posits that "[a]bsent any suggestion that Defendant failed to follow the same selection process for each candidate, Plaintiff's Amended Complaint

appears to implicate disparate impact." With due respect to the District Court, its observation misunderstands both the plain language and the history of the statute.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)(internal quotation marks omitted). The introductory phrase preceding the Tower Amendment reads "Notwithstanding any other provision of this subchapter . . . ." The term "notwithstanding" means "in spite of" and denotes Congress' intent that what follows is intended to qualify other language within the statute. The American Heritage Dictionary of the English Language (3d. Ed.), 1238 (1992). Congress was equally clear with regard to the language to be qualified: "any other provision of this subchapter." Accordingly, the Tower Amendment qualifies not only the "otherwise adversely effect" language of § 703(a)(2) wherein this Court has grounded its "disparate impact" jurisprudence, but also the disparate treatment provisions of the statute as well. *Smith v. City of Jackson*, 544 U.S. 228, 234-238 (2005)[3]

Furthermore, the Tower Amendment was part of the original enactment of Title VII in 1964 and it is well-

3. It is true that Justice Scalia only concurred in Part III of the Court's decision in *Smith v. City of Jackson*, but it is equally true that in his concurrence he specifically stated "As to that Part [III], I agree with all of the Court's reasoning, but would find it a basis, not for independent determination of the disparate-impact question, but for deferral to the reasonable views of the Equal Employment Opportunity Commission. . . ." 544 U.S. at 243 (2005) (Scalia, J., *concurring in part and concurring in the judgment).*

settled that Title VII, as originally enacted, forbade only "disparate treatment" discrimination. *Cf.* 78 Stat. 257, § 703(h); *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)("As enacted in 1964, Title VII's principal nondiscrimination provision held employers liable only for disparate treatment."); *Lewis v. City of Chicago*, 560 U.S. 205, 211 (2010)("As originally enacted, Title VII did not expressly prohibit employment practices that cause a disparate impact."); *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 550 (2015) ("Under any fair reading of the text, there can be no doubt that the Title VII enacted by Congress did not permit disparate-impact claims.")(Thomas, J., dissenting). Consequently, between July 2, 1965, the effective date of Title VII, and March 7, 1971, the day prior to this Court's opinion in *Griggs*, the Tower Amendment necessarily described only a disparate treatment prohibition. *See, e.g.*, *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1233 (4th Cir. 1970)("The plaintiffs claim that tests must be job-related in order to be valid under § 703(h).") *reversed by* 401 U.S. 424 (1971); *United States by Clark v. H. K. Porter Co.*, 296 F. Supp. 40, 74 (N.D. Ala. December 30, 1968)([Attorney General Ramsey Clark] "further alleged during the trial that an aptitude test cannot be regarded as a professionally developed ability test within the meaning of section 703(h) of the title unless and until it has been test validated.") *vacated by* 491 F.2d 1105 (5th Cir. 1974). Nothing in either *Griggs* or its progeny indicates this Court's intention to supplant rather than to supplement the Amendment's original intention.

Finally, for the lower courts to ignore now the statute's original intent risks flouting the express will of Congress, allowing the Federal Government to give any test, "whether it was a good test or not, ... Discrimination

could actually exist under the guise of compliance with the statute." *Griggs*, 401 U.S. at 435, *citing* 110 Cong. Rec. 13504 (remarks of Senator Case). Such a holding further risks amending the statute outside of the normal legislative process reserved for Congress. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (U.S. 2020).

Even were it possible to read the Tower Amendment as limited to disparate impact claims, the regulation and its remedial provision are not so limited. *Cf.* 5 C.F.R. § 300.103 (2021); 5 C.F.R. § 300.104(c)(1) (2021).

III. THE STRUCTURED INTERVIEW IS A TEST.

The District Court theorizes, but does not find, that structured interviews are not a test. The District Court's suggestion ignores decades of precedent interpreting the regulation. Construing 5 C.F.R. § 300.101, the Federal Circuit has held that "[a]n employment practice is defined as any practice that affects "the recruitment, measurement, ranking, and selection of individuals for initial appointment and competitive promotion in the competitive service." *Chadwell v. MSPB*, 629 F.3d 1306, 1309 (Fed. Cir. 2010). See, also, *Dowd v. United States*, 713 F.2d 720, 723 (Fed. Cir. 1983)("The term itself, "employment practices," has a naturally broad and inclusive meaning. . . ."). Furthermore, the EEOC has defined a "test" to include "all . . . scored interviews" such as the interviews here at issue since August 1970. 35 *Fed. Reg.* 12,334 (August 1, 1970), § 1607.2. Finally, the OPM Memorandum of July 31, 2020, specifically includes "structured interviews" within the ambit of the regulation.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED FEBRUARY 5, 2021

UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

No. 20-2102

GUY C. PATTERSON,

Appellant,

v.

COMMISSIONER OF SOCIAL SECURITY.

Submitted Under Third Circuit L.A.R. 34.1(a)
January 29, 2021

On Appeal from the United States District Court
for the Western District of Pennsylvania.
(D.C. Civil Action No. 2-18-cv-00193) District Court
Judge: Honorable Donetta W. Ambrose

Before: MATEY and JORDAN, *Circuit Judges*,
BOLTON*, *Senior District Judge.*

February 5, 2021, Filed

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* The Honorable Susan Bolton, Senior United States District Judge for the District of Arizona, sitting by designation.

Appendix A

OPINION[**]

BOLTON, *Senior District Judge.*

We consider the claims of Guy C. Patterson, a 55-year-old white male, against the Social Security Administration ("Agency") alleging that, by failing to select him for three job openings, the Agency: (1) discriminated against him on the basis of his sex, race, and age, in violation of Title VII of the Civil Rights Act of 1964 and the federal-sector provision of the Age Discrimination in Employment Act ("ADEA"); and (2) took retaliatory action against him in violation of Title VII and the ADEA. Patterson filed his lawsuit in the District Court for the Western District of Pennsylvania. The District Court granted the Agency's motion for summary judgment and denied Patterson's cross-motion for summary judgment on all claims. It also denied Patterson's subsequent motion to alter or amend this judgment. Patterson timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

I. DISCUSSION

Patterson's claims fail as a matter of law. "We exercise plenary review over a district court's [order entered on motions for] summary judgment, and we apply the same standard as the district court." *Bletz v. Corrie*, 974 F.3d 306, 308 (3d Cir. 2020) (citation omitted). "Summary judgment is appropriate where, construing all evidence in

** This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (citations and internal quotation marks omitted). Applying those standards, we conclude that the record supports the District Court's judgment that the evidence is insufficient as a matter of law to prove any of Patterson's claims. Patterson argues that a recent Supreme Court case, *Babb v. Wilkie*, 140 S. Ct. 1168, 1177, 206 L. Ed. 2d 432 (2020), changes this result, but fails to offer evidence that meets even *Babb*'s lower causation standard. *Babb*, 140 S. Ct. at 1177-78 (but-for causation not required to establish liability for violation of ADEA's federal-sector provision).[1]

Patterson cannot establish a prima facie case of discrimination in violation of Title VII or the ADEA because he has insufficient evidence of discriminatory intent. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (burden-shifting framework requires plaintiff to establish prima facie case); *Sarullo v. U.S. Postal Serv.*, 352 F.3d 789, 797 (3d Cir. 2003) (explaining that a prima facie case of employment discrimination "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;

1. Patterson also raises the following issues: The District Court erred in failing to consider the applicability of *Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009) to his claims, and the Agency failed to comply with an Office of Personnel Management regulation, which Patterson argues is material to his employment discrimination claims. We find none of these arguments have merit.

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"). Even if he could make such a showing, the Agency has articulated legitimate, nondiscriminatory reasons for not selecting Patterson for each position, including lower interview scores. *See McDonnell Douglas Corp.*, 411 U.S.at 802 (burden-shifting framework requires employer to articulate legitimate, nondiscriminatory reason for adverse employment action). Patterson's evidence is insufficient to show that any of these reasons were pretextual. *See id.* at 804 (burden-shifting framework permits plaintiff opportunity to show pretext).

Patterson also fails to produce evidence sufficient to establish a causal connection between his non-selection and retaliatory animus. *See Moore v. City of Philadelphia*, 461 F.3d 331, 340-41 (3d Cir. 2006) ("To establish a *prima facie* case of retaliation . . . a plaintiff must tender evidence that: (1) [he] engaged in protected activity . . . ; (2) "the employer took an adverse employment action against [him]; and (3) there was a causal connection between [his] participation in the protected activity and the adverse employment action." (citation and internal quotation marks omitted)).

The District Court correctly granted summary judgment on all claims.

II. CONCLUSION

Because Patterson's evidence cannot prove his claims, we will affirm.

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, FILED APRIL 2, 2020

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 18-193

GUY C. PATTERSON,

Plaintiff,

v.

ANDREW M. SAUL,

Defendant.

MEMORANDUM ORDER

In this action, Plaintiff, an attorney proceeding *pro se*, brought claims pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* Plaintiff, a white male born in June, 1965, alleged that his non-selection for the positions of Appeals Officer and Administrative Law Judge were the result of illegal discrimination due to age, race, and sex, and retaliation for his protected activity. By Opinion and Order dated February 13, 2020, this Court granted Defendant's Motion for Summary Judgment, and denied

that of Plaintiff, and denied Plaintiff's request for a preliminary injunction. Before the Court are Plaintiff's Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e), Defendant's Response thereto, and Plaintiff's Reply Brief.

"A party moving to alter or amend a judgment pursuant to Rule 59(e) faces a difficult burden." *Anderson v. Bickell*, No. 14-1792, 2016 U.S. Dist. LEXIS 89510, at *2 (M.D. Pa. July 11, 2016). "A motion for reconsideration under Rule 59(e) must rely on one of three grounds: (1) an intervening change in the law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." *Cottrell v. Good Wheels*, 458 F. App'x 98, 101 (3d Cir. 2012). "Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." *Continental Casualty Co. v. Diversified Indus. Inc.*, 884 F. Supp. 937, 943 (E.D. Pa. 1995).

Presently, Plaintiff contends that this Court incorrectly considered the legal effect of 5 C.F.R. § 300.103 ("Section 100.103"), which led to incorrect findings of fact and law, and that the Court failed to consider the totality of the circumstances. Plaintiff's Amended Complaint alleged disparate treatment based on age, race, sex, and protected activity. His claims, and Defendant's Motion seeking judgment thereon, thus required this Court to consider the parties' claims and submissions in light of and in accordance with Title VII, the ADEA, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), Federal Rule of Civil

Procedure 56, and applicable caselaw. Upon doing so, and upon thorough consideration of all facts and argument presented – including the unadjudicated possibility that Defendant's hiring process failed, in some respect, to comply with Section 300.103 – the Court concluded that the entry of judgment was appropriate.

Plaintiff has not demonstrated that he is entitled to relief under Rule 59(e). Therefore, his Motion is denied. AND NOW, this 2nd day of April, 2020, IT IS SO ORDERED.

BY THE COURT:

/s/_____

Donetta W. Ambrose
Senior Judge, U.S. District Court

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, FILED FEBRUARY 13, 2020

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 18-193

GUY C. PATTERSON,

Plaintiff,

v.

ANDREW M. SAUL,

Defendant.

February 13, 2020, Decided
February 13, 2020, Filed

OPINION AND ORDER

SYNOPSIS

In this civil action, Plaintiff, an attorney proceeding *pro se*, brings claims pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* Plaintiff is a white male, born in June,1965, and currently in Defendant's employ as a Senior Attorney. Plaintiff's claims are based on his non-

selection for the position of Appeals Officer, in 2014, and for Administrative Law Judge ("ALJ") in 2016 and 2017.

Specifically, Plaintiff's Amended Complaint asserts the following: With respect to the Appeals Officer non-selection, he avers disparate treatment due to age, race, and sex. With regard to the 2016 ALJ non-selection, he alleges disparate treatment due to race and sex. With regard to the 2017 ALJ non-selection, he alleges disparate treatment due to age, race, and sex. His retaliation claims allege that Plaintiff was not selected for the 2016 and 2017 ALJ positions in retaliation for his Equal Employment Opportunity ("EEO") filings challenging his non-selections.

Before the Court are the parties' cross-motions for summary judgment on all Counts. In addition, Plaintiff has moved for a preliminary injunction, seeking, *inter alia*, to enjoin Defendant from filling any vacancies for ALJ and Appeals Officers positions pending final judgment in this suit. For the following reasons, Plaintiff's Motions will be denied, and Defendant's granted.

OPINION

I. SUMMARY JUDGMENT STANDARD

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 of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.

56(c). In considering a motion for summary judgment, the Court must examine the facts in a light most favorable to the party opposing the motion. *Marino v. Indus. Crating Co.*, 358 F. 3d 241, 247 (3d Cir. 2004); *International Raw Materials, Ltd. v. Stauffer Chem. Co.*, 898 F. 2d 946, 949 (3d Cir. 1990). The moving party bears the burden of demonstrating the absence of any genuine issues of material fact. *United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432 (3d Cir. 2004).

Rule 56, however, mandates the entry of judgment against a party who fails to make a 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. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The sum of the affirmative evidence to be presented by the non-moving party must be such that a reasonable jury could find in its favor; it cannot simply reiterate unsupported assertions, conclusory allegations, or suspicious beliefs. *Groman v. Township of Manalapan*, 47 F.3d 628, 633 (3d Cir. 1995); *Saldana v. Kmart Corp.*, 260 F.3d 228, 232, 43 V.I. 361 (3d Cir. 2001). A genuine issue for trial does not exist "unless the party opposing the motion can adduce evidence which, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor." *J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 618 (3d Cir. 1987) (Becker, J., concurring).

Importantly, "if the non-movant's evidence is merely speculative, conclusory, 'or is not significantly probative, summary judgment may be granted.'" *Raczkowski v.*

Empire Kosher Poultry, 185 Fed. App'x 117, 118 (3d Cir. 2006) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). "To withstand a properly supported motion for summary judgment, the nonmoving party must identify specific facts and affirmative evidence that contradict the moving party." *Jacobs v. Cumberland Cnty.*, No. 16-1523, 2019 U.S. Dist. LEXIS 92831, at *14-15 (D.N.J. May 31, 2019). Bald speculations, therefore, are insufficient. *Johnson v. St. Luke's Hosp.*, No. 06-3417, 2007 U.S. Dist. LEXIS 78746, at *25 (E.D. Pa. Oct. 23, 2007).

II. FACTUAL BACKGROUND[1]

A. Appeals Officer Position

Plaintiff is a white male, born in 1965. On March 3, 2014, Defendant[2] issued a vacancy announcement for

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1. Unless otherwise indicated, the facts stated in this Section and elsewhere in the Opinion are undisputed. The parties' factual statements have been considered pursuant to Local Rule 56.1, which provides as follows:

> Alleged material facts set forth in the moving party's Concise Statement of Material Facts...which are claimed to be undisputed, will for the purpose of deciding the motion for summary judgment be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement of the opposing party.

2. For ease of reference, Governmental offices and entities such as the Office of Personnel Management ("OPM") are encompassed by references to "Defendant." A particular office or entity, if pertinent, is specifically noted.

multiple Appeals Officer positions. Plaintiff applied to those positions on March 21, 2014. Defendant conducted oral interviews, or "structured oral interviews," for the position. The interviews were conducted by two-person panels, and all of the applicants referred by the Office of Personnel were interviewed, except for two applicants who withdrew or retired. The interviewers were given written guidance on explaining the competencies related to each question, as well as proficiency level examples, explaining what would be considered poor, acceptable, good, or excellent answers.

In June, 2014, Plaintiff was interviewed by Administrative Appeals Judge Crawford and Administrative Appeals Judge Gabriel DePass. For each interview, the panel asked the same series of scripted questions. Most of the questions asked candidates to identify knowledge, skills, or experience relevant to particular aspects or qualities of the Appeals Council and Appeals Officer position. Three of the questions were hypothetical questions, which asked the interviewee what he or she would do as an Appeals Officer in handling a hypothetical case or situation. At Plaintiff's interview, he was asked the same scripted questions as the other candidates. Plaintiff testified that he has no reason to believe that he was treated differently than other interviewees, in terms of the questions asked and the interview process. Plaintiff's overall interview score was 16 out of a possible 28, as he was graded as having no "excellent" answers, three "good" answers, three "acceptable" answers, and one "poor" answer. This score was within the bottom 23 of the 93 candidates for the position. Judge Crawford testified that Plaintiff's age,

race, and sex were not taken into account, which Plaintiff disputes.

Following 93 interviews, the Appeals Council compiled a spreadsheet of the candidates and their interview scores. It then continued the selection process for the 42 top-scoring interviewees, for whom it obtained references; each of them had interview scores of at least 20. As discussed *supra*, Plaintiff was not within that group. Defendant then selected 16 candidates,[3] who had interview scores higher than Plaintiff's, as well as strong references. Gerald Ray, the selecting officer, testified that Plaintiff's age, sex, marital status, parental status, and race were not taken into account. Plaintiff denies this claim, on grounds that the successful candidates all were more than five years younger than Plaintiff (and only one was over 40), 50/50 male/female, and "66/33 majority/minority." Plaintiff subsequently filed an EEO complaint, claiming that his non-selection for the Appeals Officer position resulted from discrimination because he was over 40, married, had children, and white.

B. 2016 ALJ Position

On or about March 5, 2013, Defendant issued a vacancy announcement for an ALJ position. Plaintiff applied to the position on March 15, 2013.

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3. It is unclear whether 14 or 16 candidates were initially selected. Defendant asserts, and Plaintiff does not dispute, that 14 were selected. Plaintiff asserts, and Defendant admits, that the position was offered to 16 candidates. For present purposes, the Court will accept Plaintiff's factual assertion of 16 candidates.

Appendix C

A lengthy process results in interview teams conducting interviews, completing a composite rating sheet, and assigning "not recommend," "recommend," or "highly recommend" to each candidate.[4] In addition, applicants underwent a three-phase Office of Personnel Management ("OPM") application process, which resulted in a numerical rating. Following the completion of interviews and background checks, a team of two Hearing Office Chief ALJs conducted "folder reviews," which involved reviewing all of the candidates' information, including application records, background checks, social media background checks, results of interviews, and criminal and credit histories. The "folder review" team then rated each candidate, as "not recommend," "borderline recommend," "recommend," or "highly recommend." The selecting official then considered all the information, and decided which candidate was best qualified for the vacancies. The selecting official made determinations in accordance with applicable rules and regulations, including the "rule of three," or the "three strike rule," which can apply to candidates who have been considered and not selected for three prior positions.[5]

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4. Plaintiff objects to consideration of the results of Defendant's hiring process, particularly the "structured oral interview. He objects that the evidence is irrelevant and therefore inadmissible. I reject this contention. There can be no question that interviewers' ratings are "relevant" within the meaning of Federal Rule of Evidence 401.

5. The "three strike rule," reflected in 5 C.F.R. § 332.405, states that an appointing officer is not required to consider an eligible who has been considered by him for three separate appointments.

Appendix C

Plaintiff was interviewed on August 18, 2016. Mark Sochaczewsky, a white male, was the selecting official for the pertinent vacancies in 2016. ALJs William Wallis and Kurt Schuman conducted twenty interviews at the time. ALJ Schuman was unaware of Plaintiff's age and EEO activity, and testified that Plaintiff's sex and race were not considered in the selection decision. ALJ Wallis also testified that Plaintiff's race, sex, age, and prior EEO activity were not considered in the interview process.

Ratings for candidates were based on numerical scores assigned by interviewers, after they discussed the interview and reached a consensus. Interview responses were weighed based on a set variety of factors, including relevance of response and whether the question was ultimately answered. ALJs Schuman and Wallis rated Plaintiff's verbal communication skills as "poor," indicating that he provided hesitant and unorganized responses, was aggressive and argumentative, and provided inappropriate emotional responses. Their overall impression of Plaintiff was "poor," noting that he took a long time to provide responses that were not often on point, and they had a hard time following him. Their composite rating fell into the "not recommended" category. Interviewer comments noted that Plaintiff was "arrogant," "verbose," and that he "did not provide meaningful or relevant answers to most questions." The "folder review" revealed that Plaintiff's supervisor stated that she would not recommend him; another reference stated that he had "rather rough interpersonal skills." Mr. Sochazewsky testified that he considered Plaintiff for the ALJ position in three geographical locations.

Plaintiff points to the notation "3C" next to his name for West Des Moines, IA and Morgantown, WV positions, and posits that the notation means that he was "three struck" and never considered for those positions. Selections took place in September, 2016, and Plaintiff learned of his non-selection on or about November 20, 2016.

Of the twenty candidates interviewed, Mr. Sochaczewsky selected Monica Jackson (an African-American female), Robert Kelly (a white male), and William Stanley (a white male) for the positions. These candidates' respective ages in 2016 were 46, 55, and 58. The interview evaluations and folder reviews of the successful candidates show that Ms. Jackson, and Messrs. Kelly and Stanley, all were placed in the "highly recommend" or "recommend" category; their various skills and overall impression were listed as "outstanding." The record reflects that the interviewers had many positive comments about these candidates. Mr. Sochaczewsky testified that Plaintiff's non-selection was based on reasons such as his "not recommended" rating, and lack of recommendation by the folder reviewers. He testified that he did not consider protected traits in his selection decisions.

On January 20, 2017, Plaintiff filed a formal agency complaint regarding the 2016 ALJ non-selection, which resulted in a finding of non-discrimination.

C. 2017 ALJ Position

Plaintiff remained eligible for future ALJ vacancies, because he had previously been placed on the register

of eligible candidates. In February, 2017, he was notified that his name had been referred for consideration as an ALJ. Defendant asserts that Mr. Sochaczewsky was the selecting official for this position, while Plaintiff notes that a selection document bears the signature of Kathleen Scully Hayes as the selecting official in March 2017.[6] Ms. Scully-Hayes became aware of Plaintiff's EEO activity on January 6, 2017, due to her participation in a mediation. Mr. Sochaczewsky testified that he became aware of Plaintiff's prior EEO activity when he received a witness letter dated February 23, 2017, after selecting for the 2016 ALJ position but prior to selecting for the 2017 ALJ position. Nonetheless, he testified that Plaintiff's age, sex, race, and prior EEO activity was not taken into account in the selection process. Instead, Mr. Sochaczewsky testified that Plaintiff's non-selection resulted from Plaintiff's prior consideration for three ALJ positions and the "three strike rule," as well as his prior lack of recommendation and OPM scores. Plaintiff became aware of his non-selection on April 20, 2017. Instead, Defendant selected Raymond Prybylski, a white male who was 45 in 2016, and Charles Belles, a white male who was 43 in 2016 (again, Plaintiff was 49 years old in 2016). Messrs. Prybylski and Belles were rated "recommended" and "highly recommended, respectively, and folder review results were "very good" or "outstanding."

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6. A "Certificate of Eligibles" with the notation "Issue Date 1/18/2017," bears Ms. Scully-Hayes' signature on the line "Selecting Official Signature," dated March 23, 2017. (Pl. App. 145-149).

III. APPLICABLE LAW

A. Title VII and ADEA

A failure to hire claim under Title VII involves the following proof: "a plaintiff must show that they (1) are a member of a protected class; (2) applied for a job for which they were qualified; and (3) were not hired for the job in question." *McEady v. Camden Cnty. Police Dep't*, No. 16-1108, 2019 U.S. Dist. LEXIS 173274, at *21 (D.N.J. Oct. 7, 2019). A disparate treatment claim, such as Plaintiff's, also requires proof of discriminatory intent. *See Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 69 (3d Cir. 2017). Thus, a *prima facie* case requires a showing that "the adverse employment action occurred under some circumstances that give rise to an inference of unlawful discrimination." *Robinson v. N. Am. Composites*, No. 15-8702, 2017 U.S. Dist. LEXIS 86223, at *13 (D.N.J. June 6, 2017).

A *prima facie* case of age discrimination requires a showing that Plaintiff is forty years of age or older; the defendant took an adverse employment action against him; he was qualified for the position in question; and he was replaced by another employee who was "sufficiently younger to support an inference of discriminatory animus." *Carter v. Mid-Atlantic Healthcare, LLC*, 228 F. Supp. 3d 495, 501 (E.D. Pa. 2017) (quoting *Burton v. Teleflex Inc.*, 707 F.3d 417, 426 (3d Cir. 2013)). In an ADEA case, the plaintiff must also demonstrate that age was the "but for" cause of the employer's adverse decision. *Id.*

To establish a retaliation claim under either Title VII or the ADEA, a plaintiff must demonstrate that he engaged in a protected activity; his employer took adverse action against him, either after or contemporaneously with his protected activity; and there was a causal connection between the protected activity and the adverse action. *Sylvester v. Unisys Corp.*, No. 97-7488, 1999 U.S. Dist. LEXIS 3607, at *33 (E.D. Pa. Mar. 25, 1999).[7]

In any discrimination case, "the Court's task ... is to evaluate claims of invidious discrimination — it 'is not to assess the overall fairness of [the] employer's actions.'" *Hernandez v. Borough of Fort Lee*, No. 9-1386, 2010 U.S. Dist. LEXIS 56622, at *20 (D.N.J. June 8, 2010) (quoting *Logue v. International Rehabilitation Associates, Inc.*, 837 F.2d 150, 155 n.5 (3d Cir. 1988)). Negligence, innocent error, or incompetence does not constitute discrimination. *See Chiang v. Schafer*, No. 2000-04, 2008 U.S. Dist. LEXIS 64654, at *122 (D.V.I. Aug. 20, 2008).

B. McDonnell Douglas

Plaintiffs' claims are subject to the burden-shifting scheme of *McDonnell Douglas Corp. v. Green*, 411

7. Plaintiff takes issue with Defendant's reference to the causation requirement identified in *University of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S 338, 133 S.Ct. 2517, 2530, 186 L.Ed.2d 503 (2013), as this case involves 42 U.S.C. 2000e-16 and 29 U.S.C. 633(a), rather than a private sector Title VII claim. I note that Courts within this District have relied on *Nassar* in Section 2000e cases. *Phillips v. Donahoe*, No. 12-410, 2013 U.S. Dist. LEXIS 160537, at *80 (W.D. Pa. Nov. 7, 2013)

U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Thereunder, a plaintiff bears the *prima facie* burden of demonstrating that he suffered an adverse employment action "under circumstances that give rise to an inference of unlawful discrimination." *Greenawalt v. Clarion County*, No. 11-2422, 459 Fed. Appx. 165, 2012 U.S. App. LEXIS 1696, at **5 (3d Cir. Jan. 30, 2012).

If the plaintiff meets his *prima faci*e case, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its conduct. *McDonnell Douglas*, 411 U.S. at 802. An employer satisfies its burden of production by introducing evidence that would permit the conclusion that there was a nondiscriminatory reason for its actions. *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994). The employer need not prove that the tendered reason actually motivated its behavior, and the Court must accept the proffer without measuring its credibility. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). The employer's burden is "relatively light." *Miller v. Patterson Motors*, No. 3:2007-33, 2009 U.S. Dist. LEXIS 24482, at *50 (W.D. Pa. Mar. 24, 2009).

Once an employer presents evidence of a legitimate reason for its actions, the burden shifts back to Plaintiff to show that the proffered reason is a pretext for discrimination. *Iadimarco v. Runyon*, 190 F.3d 151, 158 (3d Cir. 1999). To do so, a plaintiff must submit evidence from which a reasonable fact finder could either disbelieve

the employer's articulated legitimate reasons; or conclude that discrimination was more likely than not a motivating or determinative cause of the employer's action. *Carter*, 228 F. Supp. 3d at 506; *see also Fuentes*, 32 F.3d at 762. In other words, the plaintiff's evidence "must allow a factfinder to reasonably infer that each of the employer's proffered nondiscriminatory reason[] . . . was either a *post hoc* fabrication or otherwise did not actually motivate the employment action." *Fuentes*, 32 F.3d at 764 (citations omitted). "[T]o discredit the employer's proffered reason . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Id.* at 765. "[A]t the pretext stage .. the factual inquiry into the alleged discriminatory motives of the employer has risen to a new level of specificity." *Simpson v. Kay Jewelers*, 142 F.3d 639, 646 (3d Cir. 1998).

"Differential treatment is, of course, the *sine qua non* of a discrimination claim. Despite the burden-shifting paradigm at play in such a case, the ultimate burden of proving intentional discrimination rests, at all times, with the plaintiff." *Reynolds v. Port Auth.*, No. 8-268, 2009 U.S. Dist. LEXIS 54760, at *27 (W.D. Pa. June 26, 2009). Ultimately, therefore, the plaintiff must convince the factfinder "'both that the [employer's proffered] reason was false, *and* that discrimination was the real reason.'" *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 2754, 125 L. Ed. 2d 407 (1993).

Appendix C

IV. THE PARTIES' SUMMARY JUDGMENT MOTIONS

1. Disparate Treatment — Race and Sex 2016 and 2017 ALJ Positions and Appeals Officer Position

Plaintiff claims discrimination arising from disparate treatment based on race and sex, in the context of his non-selection for Appeals Officer, and both the 2016 and 2017 ALJ positions.

Plaintiff rests his Title VII discrimination claims, based on his status as a white male, on a theory of disparate treatment. Essential to Plaintiff's *prima facie* case is an inference of discrimination. *Mitchell v. Cmty. Educ. Ctrs., Inc.*, No. 14-5026, 2016 U.S. Dist. LEXIS 59105, at *19 (E.D. Pa. May 2, 2016). A plaintiff may raise an inference of discrimination "in a number of ways, including, but not limited to, comparator evidence." *Golod v. Bank of Am. Corp.*, 403 F. App'x 699, 702 n.2 (3d Cir. 2010). In order to demonstrate discrimination using comparator evidence, "comparator employees must be similarly situated in all relevant respects." *Mitchell*, 2016 U.S. Dist. LEXIS at *22 (quoting *Wilcher v. Postmaster Gen.*, 441 F. App'x 879, 882 (3d Cir. 2011)).

In this case, Plaintiff relies on comparator evidence. He avers that the Appeals Officer position was offered to sixteen people. Of the successful candidates, eleven were white, and eight were men (including six white men). Thus, 68.75% of the successful candidates were

white, and 50% were men. Two white men and one black woman were selected for the 2016 ALJ position; for the 2017 ALJ position, two white men were selected. These statistics patently do not raise an inference that Defendant discriminated against white men in selecting for these positions — indeed, without more, they do not indicate disparate treatment based on race or sex in the first instance.[8] "[T]he comparator employees are of multiple races and both genders, which does not support a claim that race and gender were motivating or determinative factors in the adverse employment actions." *Wilcher*, 441 F. Appx. at 882. To the extent that Plaintiff relies on his subjective assessment that he was more qualified than the successful candidates for each position, this is not persuasive. *Holmes v. FAA*, No. 98-5071, 1999 U.S. Dist. LEXIS 14955, at *27 (D.N.J. Sep. 29, 1999).

Furthermore, Plaintiff has not shown that the proffered comparators were similarly situated to Plaintiff.

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8. Plaintiff asserts that Mr. Sochazcewsky's selection history — reflecting the selection of 49% female, and 12 % black candidates — closely approximates the respective groups' representation in the general population. To Plaintiff, this is suspicious. To the contrary, "it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of racial or ethnic composition of the population ...." *See, e.g., Vuyanich v. Republic Nat'l Bank*, 505 F. Supp. 224, 345 (N.D. Tex. 1980) The Court notes that the record contains no information about the candidates who were not selected for the positions to which Plaintiff applied. General population statistics "lose their significance" when they are not "reasonable proxies for the applicant pool." *Reynolds v. Sheet Metal Workers*, 498 F. Supp. 952, 968 (D.D.C. 1980).

For each vacancy at issue, for example, Plaintiff was rated "not recommended", while other candidates — including white men -- were rated "recommended" or "highly recommended," based on a variety of factors. The record reflects other differences, as well. For example, one of the successful candidates' supervisors spoke highly of her, as noted in her folder review; Plaintiff's supervisor stated that she would not recommend him. Such factors further belie the allegation that Plaintiff was singled out for differential treatment because he was a white male. The mere fact that among the successful hires were women, including non-white women, is woefully insufficient to raise the required inference; the record is devoid of other supporting evidence. There is no evidence that calls into question the selecting and interviewing persons' testimony that Plaintiff's race and sex did not factor into the decisionmaking process.

Assuming that Plaintiff has made a *prima facie* case of race and sex discrimination, Defendant has met its burden to produce legitimate, nondiscriminatory reasons for Plaintiff's non-selection. As recited *supra*, Defendant proffers that Plaintiff was not selected for the Appeals Officer position because of his composite proficiency rating, which placed him in the bottom 20 of the 93 candidates interviewed. As regards the 2016 ALJ position, Defendant points to Plaintiff's lower interview ratings, and the results of his folder reviews. Further, Defendant proffers evidence that Plaintiff was not considered for the 2017 ALJ position as a result of his non-selection in 2016, both due to "three strikes" and the reasons underlying his 2016 non-selection. The interviewer's notes and guidelines

support Plaintiff's ratings. The successful candidates received higher ratings and more positive reviews than did Plaintiff. "Better performance in an interview is unquestionably a legitimate, nondiscriminatory basis to hire one candidate over another." *Formella v. Brennan*, 817 F.3d 503, 514 (7th Cir. 2016); *see also McCann v. Astrue*, 293 F. App'x 848, 851 (3d Cir. 2008). Likewise, the "three strike rule,"and the reasons underlying Plaintiff's non-selection in 2016, meet Defendant's burden. *Thompson v. Bridgeton Bd. of Educ.*, 613 F. App'x 105, 108 (3d Cir. 2015). Thus, the burden shifts again to Plaintiff, to show that Defendant's explanations are pretextual.

In order to show that Defendant's explanations regarding the 2017 ALJ position are pretextual, Plaintiff points to two facts specific to his non-selection for the that position: The notation "3C" next to his name, which he asserts indicates that he was not previously considered for three positions. This, he claims, demonstrates the falsity of Defendant's explanation that he was not selected due to the "three strike rule." He also points to the appearance of Ms. Scully-Hayes's name as selecting officer on the list of eligibles for that position, rather than Mr. Sochaczewsky's. The significance of the latter is unclear, as there is no particular evidence that suggests a nexus between either person and discriminatory intent; a dispute as to the identity of the selecting officer is not material in this context, and doesn't call Defendant's explanation into question. As to the former, Plaintiff does not explain why the "3C" notation contradicts Mr. Sochaczewsky's contention that he was "three-struck" for the 2017 ALJ position because he had already been considered for

three positions, including the two annotated with a "3C." Plaintiff points solely to the existence of the notations, and his own interpretation thereof. Further, the "three strike rule" was not the sole proffered basis for Plaintiff's non-selection; other reasons included the grounds for his initial non-selection for the same position in 2016. As discussed *supra*, Plaintiff has not demonstrated that those grounds were pretexts for race or sex discrimination. Plaintiff's showing is not sufficient under Rule 56, Local Rule 56.1, or *McDonnell Douglas*.

To support his claim, Plaintiff challenges only the qualifications of Ms. Jackson, the African-American female selected, along with two white males, for the 2016 ALJ position. He cites to *Hamilton v. Geithner*, 666 F. 3d 1344, 399 U.S. App. D.C. 77 (Fed. Cir. 2012), which indicates that disparities alone are sufficient to raise the required inference, *only* if the plaintiff is markedly, substantially, or significantly more qualified than the successful candidate. *Id.* at 1352. Plaintiff, for example, compares his 18 years of legal experience with Ms. Jackson's 16 years; his 13 years of civil service with her eight years; and his six performance awards with her five. These facts relate to a single comparator, ignore the contemporaneous white male hires, fail to account for other selection considerations, and do not, overall, represent marked disparities. Plaintiff also notes that Ms. Jackson attended a non-ABA approved law school, had a deferred license suspension in 2008, and that a year lapsed between her law school graduation and admission to the bar. Given the circumstances — including the outcomes of the interview and review process -- these alleged "flaws"

in Ms. Jackson's resume do not establish pretext on the basis of race or sex.

Plaintiff also points to his own purportedly superior qualifications. He suggests, for example, that his satisfactory performance appraisals and cash bonuses during his years of employment with Defendant suffice to demonstrate pretext. The mere existence of positive feedback, however, does not give rise to the inference that negative evaluations from another assessor were pretextual. *Hunter v. Rowan University*, 299 Fed. Appx. 190, 194-95 (3d Cir. 2008). A person may perform well at his job, but not be the preferred candidate for another, even without illegal motive on the part of the employer. Plaintiff asserts that the bulk of Ms. Jackson's experience was as a group supervisor, while his own was non-supervisory. Why this experience should be deemed material, however, is wholly unclear. Again, "the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Fuentes*, 32 F.3d at 765. To discredit an employer's explanation at the pretext stage, a plaintiff must do more than argue that the employer's action was wrong. *Wilcher*, 441 F. App'x at 881. Here, the record simply contains no suggestion of animus based on sex or race.

Finally, Plaintiff devotes much of his energy to challenging the manner in which Defendant developed its hiring process and the process itself.[9] Specifically, Plaintiff

9. Absent any suggestion that Defendant failed to follow the same selection process for each candidate, Plaintiff's Amended

objects to Defendant's use of a "structured oral interview." The essence of his argument is that Defendant concocted a "spurious selection procedure" in order to hire more female and black candidates. The process was spurious, he posits, because the "structured oral interview" did not comply with the policy that selection criteria be "job-related" and "professionally developed." Plaintiff argues as follows: "absent rigorous evidence of what, if anything, the process proves about future job performance [such as verbatim transcripts instead of interviewer notes], it is little more than a license to discriminate."

To the extent that Plaintiff suggests that the subjective components of the hiring process are dispositive, I reject that proposition. The mere presence of a subjective evaluation mechanism does not give rise to an inference of pretext. "Title VII does not eliminate any and all subjective considerations from employment decisionmaking." *Villarias v. Illinois*, No. 92 C 8420, 1995 U.S. Dist. LEXIS 11554, at *9 (N.D. Ill. Aug. 7, 1995). Instead, a plaintiff must show a link between the subjective mechanism and discriminatory intent.[10] *Whitaker v. TVA Bd. of Dirs.*, No. 3:08-1225, 2010 U.S. Dist. LEXIS 37177, at *21 (M.D. Tenn. Apr. 14, 2010). Certainly, subjective processes cannot be used to "cover up" illegal animus. It is undisputed here that the interviewers here asked the

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Complaint appears to implicate disparate impact. Plaintiff specifically disclaims a disparate impact claim, however.

10. In that vein, mere dislike does not "rise to the level of discrimination unless the disparate treatment is motivated by discrimination." *White v. Cleary*, No. 09-4324 (PGS), 2012 U.S. Dist. LEXIS 36694, at *22 (D.N.J. Mar. 16, 2012).

same scripted questions to all candidates, and were given written guidance regarding assessing the competencies related to each question. Upon scrutiny, there is no evidence suggesting a discriminatory motive on the part of Defendant or any of the participants in the interview process.

Next, I turn to Plaintiff's contentions that the hiring processes failed to comply with regulatory and policy requirements that they be "job-related" and "professionally developed." The applicable regulation reads as follows: "There shall be a rational relationship between performance in the position to be filled (or in the target position in the case of an entry position) and the employment practice used. The demonstration of rational relationship shall include a showing that the employment practice was professionally developed." 5 C.F.R. § 300.103.

Plaintiff has not identified any evidence to suggest that the alleged non-compliance of the facially neutral selection processes bears any relation to his claims of disparate treatment. It is undisputed that numerous attorneys and persons with experience related to the job positions were involved in developing the challenged processes. The involved persons included Defendant's Division Chief Judges and former Executive Director, as well as Jodie-Beth Galos, an attorney with 25 years of experience in employment law, as well as leadership experience in human resources. Plaintiff questions the expertise of the participants, but does not explain why it falls short. He cites to no authority supporting his interpretation of the regulatory phrase "professionally developed" as requiring

particular expertise in designing pre-employment selection procedures. Even if the interview development was somehow insufficiently "professional," the deficiency does not call Defendant's legitimate explanations into question.

Further, Plaintiff's assertion that the "structured oral interview criteria" bore no actual relationship to the employment at issue is not borne out by either the facts or common sense.[11] For example, it is undisputed that most of the questions "asked candidates to identify knowledge, skills, or experience relevant to particular aspects of the Appeals Council and Appeals Officer position," and that three of the questions asked candidates about handling a hypothetical case or situation reviewing an ALJ decision. Plaintiff acknowledged that the questions were "related to" the job, and were "on the nose as far as the position...." Plaintiff's demand for "rigorous" evidence of job-relatedness puts the cart before the horse. He explains neither his conclusory assertion of unrelatedness, nor its connection to his allegations of discriminatory motive. "[T]he mere fact that a different, perhaps better, method of evaluation could have been used is not evidence of

11. Outside of the context of Section 300.103, one court has noted: "The bulk of the cases which have addressed the requirement that hiring criteria be shown to be job-related have arisen in the context of a specific and usually inflexible requirement that an applicant pass a particular test or possess a particular degree or other objective measure of qualification." *Vuyanich v. Republic Nat'l Bank*, 505 F. Supp. 224, 369 (N.D. Tex. 1980). This is true, as well, in the Section 300.103 context. *See, e.g.*, Fox v. Washington, 396 F. Supp. 504, 507 (D.D.C. 1975).

pretext unless the method that was used is so deficient as to transgress the *Fuentes* standard." *Kautz v. Met-Pro Corp.*, 412 F.3d 463, 471 (3d Cir. 2005). The method used here was not "so deficient" in that regard.

The case of *McCann v. Astrue*, 293 F. App'x 848 (3d Cir. 2008), is generally instructive. There, our Court of Appeals considered the District Court's entry of judgment against a white man employed by the Social Security Administration, in a racial discrimination suit. *Id.* at 849. Plaintiff had not been selected for a promotion that he applied to, and a black man received the position, Id. at 851. The decisionmaker told plaintiff "that given his extensive experience and high performance, were he anything other than a white male, he would have been promoted long ago." *Id.* Plaintiff also produced evidence that in other hiring decisions, decisionmakers were told that they could not hire white candidates. *Id.* The defendant explained, *inter alia*, that plaintiff had performed poorly at his interview, and lacked leadership skills. *Id.* The successful candidate was selected, in part, because of his leadership ability. *Id.* at 852. At the pretext stage, the stray remark by the decisionmaker was deemed insufficient, and that decision was affirmed. *Id.* The present evidence is weaker than that presented in *McCann*, and the result in that case supports today's findings.

2. Age Discrimination — 2017 ALJ Position and Appeals Officer Position

I next address Plaintiff's ADEA Claims. In the first instance, if considered alone, I note concerns about

Plaintiff's *prima facie* case as to the 2017 ALJ position. "Although no uniform rule exists, it is generally accepted that when the difference in age between the fired employee and ... her replacement is fewer than five or six years, the replacement is not considered 'sufficiently younger,' and thus no prima facie case is made." *Gutknecht v. SmithKline Beecham Clinical Lab.*, 950 F. Supp. 667, 672 (E.D. Pa. 1996); *see also Carter*, 228 F. Supp. 3d at 502 (collecting cases). Both successful candidates for the 2017 ALJ position were white males, ages 45 and 43 in 2016; Plaintiff was 49 at that time. Nonetheless, I will proceed under the assumption that Plaintiff has met his *prima facie* case under the ADEA with respect to both the 2017 ALJ Position and the Appeals Officer position.

Because Defendant has proffered a legitimate explanation for Plaintiff's non-selection for both positions, the analysis moves to the pretext stage. Again, this requires Plaintiff to submit evidence from which a factfinder could reasonably either disbelieve Defendant's articulated reasons, or believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of Defendant's action. *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). "While plaintiff need not provide additional evidence to rebut an employer's proffered reasons for an adverse employment action, evidence previously used to establish a *prima facie* case must be sufficient to satisfy the 'more stringent question of whether the evidence is sufficient to establish pretext, rather than whether the evidence is sufficient to establish an inference of discrimination.'" *Boice v. SEPTA*, No. 05-4772, 2007 U.S. Dist. LEXIS 74566, at *38 (E.D. Pa.

Oct. 5, 2007) (quoting *Taylor v. Procter & Gamble Dover Wipes*, 184 F. Supp. 2d 402, 414 (D. De. 2002)).

As discussed *supra*, Plaintiff failed to demonstrate pretext in the context of his Title VII claim based on the 2017 ALJ position. If the alleged illegal motive is age, rather than race and sex, the outcome is the same.[12] In fact, it is not clear that the two selectees are appropriate comparators, and the previous year, Defendant selected two men older than Plaintiff for the same position. With respect to the Appeals Officer position, all but one of the 16 successful candidates were under 40 years of age, and the remaining successful candidate was 44. However, it is undisputed that Defendant conducted 93 interviews for the position, and then continued the process for 42 of those candidates. Sixteen of those 42 were selected. Plaintiff has not identified, for example, any information about the 77 other people who were not selected for the position; further, he has not offered material information about the qualifications of the successful candidates. There is no basis for assessing these people as appropriate comparators, and evidence about inappropriate comparators cannot establish pretext. *Jones v. Hosp. of Univ. of Pa.*, No. 03-CV-4938, 2004 U.S. Dist. LEXIS 15711, at *23 (E.D. Pa. Aug. 5, 2004). Ages of selectees alone, in a vacuum, are simply insufficient to show pretext.[13]

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12. The 2016 ALJ position, for which Plaintiff does not claim age discrimination, provides additional context: the three successful candidates for that position were 46, 55, and 58 years old in 2016, while Plaintiff was 49.

13. The fact that this selection event "ballooned" the percentage of under-40 employees in the work unit from 7.5% to

3. Retaliation — 2016 and 2017 ALJ Positions

Finally, Plaintiff claims that he was not selected for the 2016 and 2017 ALJ positions in retaliation for his EEO activity. It is undisputed that Mr. Sochaczewksy learned of Plaintiff's EEO activity by letter dated February 23, 2017. In addition, Ms. Scully-Hayes knew of his EEO activity, because she attended a mediation on January 6, 2017. Plaintiff suggests that the timing of this knowledge and his non-selection entitles him to judgment in his favor, and precludes judgment in favor of Defendant.

Mr. Sochaczewsky, the selection officer for the 2016 ALJ position, testified that he was unaware of Plaintiff's prior EEO activity at the time. Plaintiff has presented no evidence to contradict this testimony. "Activity about which defendant knows nothing cannot motivate it to take any action." *Graham v. Methodist Home for the Aging*, No. 11-1416, 2012 U.S. Dist. LEXIS 117194, at *64 (N.D. Ala. Aug. 20, 2012). This factor is fatal to Plaintiff's claim that his non-selection for the 2016 ALJ position was retaliatory.

In terms of the 2017 ALJ position, both Mr. Sochaczewksy and Ms. Scully-Hayes were aware of Plaintiff's EEO complaints prior to his non-selection. The mere fact that a defendant knew about a plaintiff's protected activity prior to the challenged action does not raise a genuine issue about whether that defendant acted with a retaliatory motive. *Macknet v. Univ. of Pa.*,

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30.9% does not raise the spectre of age discrimination. The age distribution in Defendant's work unit prior to the Appeals Office selection process is not suggestive of age discrimination.

No. 15-5321, 2017 U.S. Dist. LEXIS 148948, at *18-19 (E.D. Pa. Sep. 14, 2017). "Were the rule otherwise, then a disgruntled employee, no matter how poor his performance ... could effectively inhibit a well-deserved [adverse action] by merely filing, or threatening to file, a discrimination complaint." *Rolfs v. Home Depot U.S.A., Inc.*, 971 F. Supp. 2d 197, 217 (D.N.H. 2013) (quoting *Pearson v. Mass. Bay Transp. Auth.*, 723 F.3d 36, 42 (1st Cir. 2013)).

Plaintiff also points, however, to the temporal proximity between decisionmakers' awareness of his protected activity and his non-selection. Our Court of Appeals has made clear that "the mere fact that an adverse employment action occurs after a plaintiff engages in protected activity is insufficient to establish a causal link." *McCann*, 293 F. App'x at 852. Pertinent here, an employee may establish the required nexus if he shows "unusually suggestive" temporal proximity between the protected activity and the adverse action. *McEady v. Camden Cnty. Police Dep't*, No. 16-1108, 2019 U.S. Dist. LEXIS 173274, at *39 (D.N.J. Oct. 7, 2019). "[C]ases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie* case uniformly hold that the temporal proximity must be very close." *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001). Absent an "unusually suggestive" time frame, other circumstantial evidence must exist to support causation. *Thomas-Taylor v. City of Pittsburgh*, No. 13-164, 2014 U.S. Dist. LEXIS 114615, at *24 (W.D. Pa. Aug. 18, 2014), *aff'd*, 605 F.App'x 95 (3d Cir. 2015).

Again, Mr. Sochazcewsky became aware of Plaintiff's protected activity by letter dated February 23, 2017. Ms. Scully-Hayes became aware on January 6, 2017. Plaintiff's Amended Complaint alleges that he was notified that his name had been referred for the 2017 ALJ position, and he submitted requested paperwork, on February 13 and 17, respectively. Plaintiff's non-selection occurred on or about March 23 or 24, 2017. "The majority of the case law supports a conclusion that [a one-month gap] is not unusually suggestive." *Thomas-Taylor*, 2014 U.S. Dist LEXIS 114615, at *24. Moreover, I note that the time frame here was dictated by the parameters of the vacancy and hiring processes. The timing of an employer's decision to take adverse action, when wholly unfettered by externally imposed time constraints, presents a different and potentially more suspect situation. Again, Defendant proffers that Plaintiff was not selected based on his earlier non-selection for the 2016 ALJ position. The connection between Plaintiff's EEO activity and the non-selection is thus attenuated, and the timing is not "unusually suggestive" under the circumstances. Plaintiff offers no additional evidence causally connecting his non-selection to retaliatory animus.

Assuming that Plaintiff has succeeded in meeting his *prima facie* case, Defendant has proffered legitimate, non-discriminatory reasons for Plaintiff's non-selection, discussed *supra*. Thus, Plaintiff must demonstrate that Defendant's explanation was a pretext for retaliation. In a retaliation case, a Plaintiff has a lesser burden at the *prima facie* stage than at the pretext stage. *Macknet*, 2017 U.S. Dist. LEXIS 148948, at *29. Moreover, a Plaintiff

cannot rely solely on temporal proximity to establish pretext. *Pierce v. City of Phila.*, No. 17-05539, 2018 U.S. Dist. LEXIS 217216, at *41 (E.D. Pa. Dec. 28, 2018). The chronology here, absent more, neither calls into question Defendant's explanations nor suggests retaliatory motive under applicable standards. Plaintiff proffers no additional evidence that would permit a reasonable jury to find otherwise.

V. PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Before the Court is Plaintiff's Motion for Preliminary Injunction. Therein, Defendant contends that Defendant has solicited applications for fifteen Appeals Officer positions. Plaintiff seeks an injunction enjoining Defendant from filling any ALJ or Appeals Officer positions absent proof of compliance with 5 C.F.R. 300.103; from taking formal or informal disciplinary action against Plaintiff in retaliation for this litigation; and from "failing or refusing to treat Plaintiff in the manner in which his position and job performance warrant." Because summary judgment motions been adjudicated, no evidentiary hearing is required.

Our Court of Appeals has warned that "the dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat." *Holiday Inns of America, Inc. v. B & B Corp.*, 409 F.2d 614, 618, 7 V.I. 45 (3d Cir. 1969). As Plaintiff states, issuance of a preliminary injunction requires him to demonstrate: 1) a reasonable likelihood of success on the

merits; 2) a likelihood of irreparable injury; 3) whether an injunction would harm the defendant more than denying relief would harm the plaintiff; and 4) whether granting relief would serve the public interest. *K.A. ex rel. Ayers v. Pocono Mt. Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013). Given the outcome of the parties' summary judgment Motions, Plaintiff has not established a reasonable likelihood of success on the merits, and injunctive relief will be denied.

CONCLUSION

In conclusion, assuming that Plaintiff has met his *prima facie* case for all claims, he has not proffered evidence from which a reasonable fact finder could either disbelieve Defendant's articulated legitimate reasons, or conclude that an illegal animus was more likely than not a motivating or determinative cause of his non-selection for any position at issue. It may well be that Plaintiff would make an excellent ALJ or Appeals Officer, and that Defendant's failure to select Plaintiff for the three positions at issue was ill-advised. Even so, a court cannot rule on the wisdom of an employer's decisions. Instead, this Court's role is limited to assessing the presence of illegal discrimination. As Plaintiff points out, a desire for diversity is not a defense to a discrimination claim; nor does the mere presence of diversity, however, suggest discrimination.

Here, viewing the facts in the light most favorable to the non-moving parties, there is no genuine issue of material fact that precludes the entry of judgment in Defendant's favor, or entitles Plaintiff to judgment in his

favor. Plaintiff's Motion will be denied, and Defendant's granted as to all Counts. For similar reasons, Plaintiff's Motion for Preliminary Injunction will be denied. An appropriate Order follows.

BY THE COURT:

/s/ Donetta W. Ambrose
Donetta W. Ambrose
Senior Judge, U.S. District Court

Dated: February 13, 2020

Appendix C

ORDER OF COURT

AND NOW, this 13th day of February, 2020, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Summary Judgment is DENIED, and Defendant's is GRANTED, and that Plaintiff's Motion for Preliminary Injunction is DENIED.

BY THE COURT:

/s/ Donetta W. Ambrose
Donetta W. Ambrose
Senior Judge, U.S. District Court

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED APRIL 6, 2021

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2102

GUY C. PATTERSON,

Appellant,

v.

COMMISSIONER SOCIAL SECURITY.

(W.D. Pa. No. 2-18-cv-00193)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, *Circuit Judges*, and BOLTON*, *Senior District Judge*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all

* The Honorable Susan Bolton, Senior United States District Judge for the District of Arizona, sitting by designation. Judge Bolton's vote is limited to panel rehearing only.

the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATE: April 6, 2021

APPENDIX E — STATUTES AND OTHER REGULATORY PROVISIONS

5 C.F.R. 300.102(c) (2021).

This subpart is directed to implementation of the policy that competitive employment practices:

> **(c)** Be developed and used without discrimination on the basis of race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by the Age Discrimination in Employment Act of 1967, as amended), disability, genetic information (including family medical history), marital status, political affiliation, sexual orientation, labor organization affiliation or nonaffiliation, status as a parent, or any other non-merit-based factor, or retaliation for exercising rights with respect to the categories enumerated above, where retaliation rights are available.

Appendix E

5 C.F.R. 300.103 (2021):

(a) Job analysis. Each employment practice of the Federal Government generally, and of individual agencies, shall be based on a job analysis to identify:

(1) The basic duties and responsibilities;

(2) The knowledges, skills, and abilities required to perform the duties and responsibilities; and

(3) The factors that are important in evaluating candidates. The job analysis may cover a single position or group of positions, or an occupation or group of occupations, having common characteristics.

(b) Relevance.

(1) There shall be a rational relationship between performance in the position to be filled (or in the target position in the case of an entry position) and the employment practice used. The demonstration of rational relationship shall include a showing that the employment practice was professionally developed. A minimum educational requirement may not be established except as authorized under section 3308 of title 5, United States Code.

(2) In the case of an entry position the required relevance may be based upon the target position when

(i) The entry position is a training position or the first of a progressive series of established training and development positions leading to a target position at a higher level; and

(ii) New employees, within a reasonable period of time and in the great majority of cases, can expect to progress to a target position at a higher level.

(c) Equal employment opportunity and prohibited forms of discrimination. An employment practice must not discriminate on the basis of race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by the Age Discrimination in Employment Act of 1967, as amended), disability, genetic information (including family medical history), marital status, political affiliation, sexual orientation, labor organization affiliation or nonaffiliation, status as a parent, or any other non-merit-based factor, or retaliation for exercising rights with respect to the categories enumerated above, where retaliation rights are available. Employee selection procedures shall meet the standards established by the "Uniform Guidelines on Employee Selection Procedures," where applicable.

Appendix E

5 C.F.R. 300.104(c)(1) (2021):

(c) Complaints and grievances to an agency.

(1) A candidate may file a complaint with an agency when he or she believes that an employment practice that was applied to him or her and that is administered by the agency discriminates against him or her on the basis of race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by the Age Discrimination in Employment Act of 1967, as amended), disability, genetic information (including family medical history), or retaliation for exercising rights with respect to the categories enumerated above, where retaliation rights are available. The complaint must be filed and processed in accordance with the agency EEO procedures, as appropriate.

Appendix E

5 C.F.R. 332.404 (2021):

An appointing officer, with sole regard to merit and fitness, shall select an eligible for:

(a) The first vacancy from the highest three eligibles on the certificate who are available for appointment; and

(b) The second and each succeeding vacancy from the highest three eligibles on the certificate who are unselected and available for appointment.

Appendix E

5 C.F.R. 332.405 (2021):

An appointing officer is not required to consider an eligible who has been considered by him for three separate appointments from the same or different certificates for the same position.

Appendix E

5 C.F.R. 335.103(b) (2021):

(b) Merit promotion requirements —

> **(3)** Requirement 3. To be eligible for promotion or placement, candidates must meet the minimum qualification standards prescribed by the Office of Personnel Management (OPM). Methods of evaluation for promotion and placement, and selection for training which leads to promotion, must be consistent with instructions in part 300, subpart A, of this chapter. Due weight shall be given to performance appraisals and incentive awards.