No.

IN THE

Supreme Court of the United States

SHARON A. FINIZIE

Petitioner

v.

SECRETARY UNITED STATES DEPARTMENT OF VETERANS AFFAIRS

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit Affirming the Judgment of the United States District Court for the Eastern District of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Did the decision of the of the United States Court of Appeals for the Third Circuit constitute erroneous factual findings and/or misapplication of a properly stated rule of law?

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

Equal Employment Opportunity Commission, *Finizie v. Shulkin*, EEOC Hearing No. 530-2014-00076X, Agency Case No. 200H-0642-2013100, decision issued April 30, 2019.

Equal Employment Opportunity Commission, *Finizie v. Shulkin*, EEOC Hearing No. 530-2016-00273X, Agency Case No. 200H-0642-2015105, decision issued April 30, 2019.

United States District Court for the Eastern District of Pennsylvania, *Finizie v. McDonough*, No. 20-6513, decision issued June 17, 2022.

United States Court of Appeals for the Third Circuit, *Finizie v. DVA*, No. 22-2292, decision issued May 15, 2023.

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Petitioner Sharon Finizie respectfully asks that a Writ of *Certiorari* issue to review the Opinion of the United States Court of Appeals for the Third Circuit [hereinafter the "Third Circuit"] filed on May 15, 2023.

OPINIONS BELOW

The Opinion of the Third Circuit, filed May 15, 2023, is attached hereto as Appendix "A."

The Order of the United States District Court for the Eastern District of Pennsylvania [hereinafter the "District Court"], issued June 17, 2022, is attached hereto as Appendix "B."

The Decision of the Equal Employment Opportunity Commission [hereinafter the "EEOC"], issued April 30, 2019, is attached hereto as Appendix "C."

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C § 1253. The decision of the Third Circuit was issued on May 15, 2023. This petition is being filed within ninety (90) days of the decision of the Third Circuit, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND POLICIES AT ISSUE

5 U.S.C. § 2302(a)(2)(A)-(B), 5 U.S.C. § 2302(b)(8), and 5 U.S.C. § 7703 (c) (all of which are attached hereto as Appendix "F."

STATEMENT OF THE CASE

Petitioner, Sharon Finizie [hereinafter "Petitioner"], was employed as a registered nurse by Respondent, Secretary United States Department of Veterans Affairs' [hereinafter "Respondent"], at its Philadelphia Medical Center.

From August 22, 2012, through September 19, 2012, Respondent posted a vacancy under Job Announcement YB-12-JHO-729540, for the position of Registered Nurse-Infection Control, also referred to as an Infection Preventionist. The posting listed Preferred Qualifications as: (1) Infection Control Practitioner Certification [hereinafter "CIC"]; (2) Demonstrated ability to gather, track, analyze and interpret data; (3) Knowledge and skills to perform surveillance; and (4) Demonstrated ability to provide related education to interdisciplinary members of the healthcare team. The vacancy announcement also contained language that the applicant should have current infection control experience. Petitioner applied for the Registered Nurse-Infection Control position.

Susan Blake, the Selecting Official responsible

for choosing a candidate, indicated[1] that she was seeking an applicant who was certified in infection control through the CBIC board and held a certification in CIC. She was also seeking an applicant who had a master's degree in nursing or in a related field and had current experience in the role. Petitioner was certified in CIC and held a master's degree in nursing. Petitioner had approximately twelve-and-one-half (12½) years of experience as an infection preventionist with Respondent.

Ms. Blake and the Infection Control Manager assisting her in selecting a candidate to hire, Cheryl Ciocca, identified four (4) candidates who would be interviewed for the Infection Control Nurse position: Sharon Alexander, Suma Joe Chacko, Carol Clark, and Mary Fornek. The applicants who were selected for an interview all were identified as having "Preferred Experience"; however, while Ms. Chacko had recent Infection Control experience, she was not CIC certified nor did she have a master's degree in nursing. Of the four (4) candidates named above, Ms. Alexander, Ms. Chacko, and Ms. Clark were all granted an interview. Petitioner was not interviewed, much less selected, for the position.

Petitioner should have been interviewed according to the selection criteria; however, Ms.

[1] All references herein to statements made by and / or quotations of various individuals are taken from either discovery or testimony elicited in the lower-level proceedings, and which will be supplied as part of a brief if the instant petition is granted.

Blake noted that while Petitioner held a master's degree in nursing, had quality management experience, and was CIC certified, she did not have so-called "current experience" in infection prevention. Unlike the top four (4) candidates selected for an interview, Petitioner was not identified on the list of eligible applicants as having "Preferred Experience," and was not selected for an interview for the Infection Control Nurse position.

Ms. Blake specifically indicated that Petitioner was not selected for an interview because she did not have "current experience." On January 11, 2013, Respondent issued Ms. Alexander a letter officially notifying her that she was selected for the Registered Nurse-Infection Control position at Respondent's Philadelphia Medical Center effective February 25, 2013. Due to information uncovered during these proceedings, Petitioner understands that this offer was made prior to the completion of Ms. Alexander's background check.

From June 30, 2015 through July 15, 2015, Respondent posted a vacancy notice for the position of Registered Nurse, Infection Preventionist, at Respondent's Philadelphia VA Medical Center. The posting identified the Preferred Experience Qualifications as: (1) Infection Control Practitioner certification; (2) current infection control experience in a tertiary care facility; (3) demonstrated ability to gather, track, analyze and interpret data; and (4) knowledge and skills to perform surveillance. The vacancy announcement also contained language that

the applicant should have current infection control experience. Suzanne Fritz was preselected for the position as Ms. Blake called Ms. Fritz and asked her to apply for the vacancy and told her she would be selected for it.

Ms. Blake asked Ms. Alexander to assist her with the application review process for the Infection Preventionist position. Ms. Alexander indicated that for this vacancy, Ms. Blake did not necessarily require the applicant to be certified in infection control or have a master's degree, but each criterion was allocated a score. It should be noted that Ms. Blake devised a method of evaluation that deliberately favored Ms. Fritz's application, the person eventually selected.

Ms. Alexander recalled that the applicants chosen for interviews had the highest tallied scores using Ms. Blake's method of evaluation. Out of approximately 106 applicants, the following three (3) applicants were selected for interviews: Ms. Fritz, Jenny Hayes, and Kellianne Riches. Petitioner was not selected for an interview despite being eminently qualified. After the interview process, Respondent selected Ms. Fritz for the Registered Nurse, Infection Preventionist position.

On January 21, 2013, Petitioner filed a formal complaint of discrimination against Respondent in which she alleged that she had been discriminated against in reprisal for her prior Equal Employment Opportunity [hereinafter "EEO"] activity, when, on

October 31, 2012, she was not selected for the position of Registered Nurse – Infection Control, under Vacancy Announcement YB-JHO-729540 (the administrative identifiers for this formal complaint are EEOC No. 530-2014- 00076X and Agency Case No. 200H-0642-2013100942) [hereinafter "First Complaint"].

On October 19, 2015, Petitioner filed another formal complaint of discrimination against Respondent, in which she alleged that she had been discriminated against in reprisal for her prior EEO activity, when, on August 4, 2015, she became aware that she had not been selected for the position of Registered Nurse – Infection Preventionist, under Vacancy Identification No. 1444472, Announcement No. PHL-15-JHo-1444472, Control No. 408346500 (the administrative identifiers for this formal complaint are EEOC No. 530-2016-00273 and Agency Case No. 200H-0642-2015105432) [hereinafter "Second Complaint"].

At the EEO level of the instant matter, it was discovered that both individuals responsible for screening applications for the positions described above, Ms. Ciocca and Ms. Blake, were aware of Petitioner's prior EEO activity. Petitioner avers that Ms. Blake harbored a retaliatory animus toward Petitioner because Petitioner challenged several prior non-selections. As a result, Petitioner suggested that Ms. Blake changed the position requirements to "recent experience" only to exclude Petitioner from the process. In addition, Ms. Ciocca has never held

the position of Infection Preventionist and arguably was not qualified to screen applicants like Petitioner. Respondent's interview questions for the applied-for positions were not related to the duties and responsibilities of the position, thus making the process disingenuous and designed to exclude Petitioner from the process. Petitioner was subjected to an adverse action when she was not selected for an interview for either position and subsequently not selected for the positions.

The First Complaint and the Second Complaint were consolidated by an EEOC Administrative Judge. On or about April 30, 2019, the Administrative Judge rendered a decision of no discrimination.

After exercising her administrative appeal / review rights pursuant to 29 C.F.R. 1614, Petitioner brought a Complaint against Respondent in the District Court pursuant to 42 U.S.C § 2000e-16(c) seeking judicial review and a trial *de novo* of the EEOC decision**.**

On or about March 30, 2022, Respondent filed a Motion for Summary Judgment and, on or about June 17, 2022, the Court issued an Order and Judgment granting the said Motion for Summary Judgment and enter judgment in favor of Respondent and against Petitioner.

On or about July 14, 2022, Petitioner appealed the said decision of the District Court to the Third

Circuit, and, on or about May 15, 2023, the Third Circuit issued a decision affirming the June 17, 2022 Order and Judgment of the District Court.

REASONS WHY *CERTIORARI* SHOULD BE GRANTED

I. Review is warranted because the Opinion of the Third Circuit constitutes erroneous factual findings and/or misapplication of a properly stated rule of law.

The Third Circuit's decision to affirm the District Court's granting of the Respondent's Motion for Summary Judgment is clearly erroneous and/or misapplies properly stated rules of law.

A. Summary Judgment

The Third Circuit's review of a grant of summary judgment is plenary, and it should apply the same test that the District Court used in determining whether summary judgment was properly granted. *Giles v. Kearney*, 571 F.3d 318, 322 (3d Cir. 2009). Summary judgment is appropriate only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment in its favor as a matter of law. Fed. R. Civ. P. 56(a). A genuine dispute exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A factual dispute is 'material' if it 'might affect the

outcome of the suit under the governing law.'" *Cridland v. Kmart Corp.*, 929 F.Supp. 2d 377, 384 (E.D.Pa. 2013) (*quoting Anderson*, 477 U.S. at 248). In considering a motion for summary judgment, "a court does not resolve factual disputes or make credibility determinations and must view facts and inferences in the light most favorable to the party opposing the motion." *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995). The moving party bears the burden of proving that no genuine issue of material fact is in dispute. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). A genuine issue is established if a reasonable jury could return a verdict for the non-moving party based on the evidence presented. *Anderson*, 477 U.S. at 248-49. In ruling on motions for summary judgment, courts must determine "the range of permissible conclusions that might be drawn" from the evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1986).

A party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying the aspects of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the party makes this initial showing, the burden shifts to the non-moving party to demonstrate that there is a genuine issue of material fact. *United States v. 107.9 Acre Parcel of Land in Warren Twp.*, 898 F.2d 396, 398 (3d Cir. 1990). In meeting its burden, the non-moving party is entitled to all reasonable inferences

in its favor. *Pignataro v. Port Auth. of N.Y. & N.J.*, 596 F.3d 265, 268 (3d Cir. 2010). Indeed, in determining the existence of a genuine issue as to any material fact, the "court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994). The court must resolve all doubts as to whether a genuine issue of material fact exists in the non-moving party's favor. *Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001). "If reasonable minds can differ as to the import of proffered evidence that speaks to an issue of material fact, summary judgment should not be granted." *Gelover v. Lockheed Martin*, 971 F.Supp. 180, 181 (E.D.Pa. 1997).

B. Discrimination

In cases sounding in discrimination, the complainant bears the initial burden of demonstrating a *prima facie* case of discrimination. *McDonnell Douglas Corp.v. Green*, 411 U.S. 792, 802 (1973). To establish a *prima facie* case of discrimination based on sex or age, the complainant must establish that she is in the protected group(s) and was treated less favorably than other similarly situated employees outside her protected groups. *Davis v. Brown*, Appeal No. 01941843 (1995). Once the complainant meets this requirement, the burden then shifts to the employer to articulate "some legitimate, nondiscriminatory reason for the" employer's (in)actions. *McDonnell Douglas Corp.* 411

U.S. at 802. If the employer satisfies this burden, the burden then returns to the complainant to show that the employer's stated reason for the adverse employment (in)action is pretext. *Id* at 804. In a pretext analysis for summary judgment purposes, when an employer has articulated a legitimate, nondiscriminatory reason for its action, a complainant may submit either direct or circumstantial evidence, "from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Simpson v. Kay Jewelers, Div. of Sterling*, *Inc.*, 142 F.3d 639, 644 (3d Cir.1998) (*quoting Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)). The complainant "need not always offer evidence sufficient to discredit all of the rationales advanced by the employer" because "the rejection of some explanations may so undermine the employer's credibility as to enable a rational factfinder to disbelieve the remaining rationales, even where the employee fails to produce evidence particular to those rationales." *Tomasso v. Boeing Co.*, 445 F.3d 702, 707 (3d Cir. 2006). Additionally, "if the [complainant] has pointed to evidence sufficient[ ] to discredit the Respondent's proffered reasons, to survive summary judgment the [complainant] need not also come forward with additional evidence of discrimination beyond his or her *prima facie* case." *Iadimarco v. Runyon*, 190 F.3d 151, 166 (3d Cir. 1999) (*quoting Fuentes*, 32 F.3d at 764).

To establish a *prima facie* case of reprisal, the complainant must show that: (1) she engaged in Title VII protected activity; (2) the agency was aware of her protected activity; (3) subsequently, she was subjected to adverse treatment by the agency; and, (4) the adverse treatment occurred within such a period of time and in such a manner that reprisal motivation may be inferred. "The causal connection [between the protected activity and the adverse action] may be shown by evidence that the adverse action followed the protected activity within such a period of time and in such a manner that a reprisal motive is inferred." *Simens v. Reno*, Appeal No. 01941293 (1996).

Additionally, to be actionable under Title VII, a complainant must state a claim in which she suffered from an adverse employment action. An adverse employment action is an action in which an employee suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. *Meredith v. Ashcroft*, Appeal No. 01A14290 (2002); *Harmon v. Runyon*, Appeal No. 01963903 (1996) (*citing Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)); *see Cardenas v. Massey,* 269 F.3d 251, 263 (3d Cir. 2001).

C. Argument

Petitioner has demonstrated below that the Third Circuit's affirmation of the District Court's entry of summary judgment in favor of Respondent

should be reversed because genuine issues of material fact exist; therefore, the Third Circuit committed a reversible error when it affirmed the District Court's grant of Respondent's Motion for Summary Judgment.

Contrary to Respondent's assertions that no genuine issues of material facts exist, Petitioner can point to ample evidence of the same.

Petitioner, in her applications, has met all the basic and preferred qualifications of the positions for which she applied. Petitioner was, in fact, the only fully qualified in-house candidate to apply for either of the two (2) positions. Despite this, Petitioner did not receive "first consideration," a mandatory requirement under the controlling labor / management agreement between the Respondent's and Petitioner's union, the American Federation of Government Employees [hereinafter "CBA"]. Petitioner should have been given greater consideration for the positions for which she applied as she is a candidate who was within the bargaining unit covered by the CBA. Pursuant to the Agreement, Article 23(8)(B), "[p]rior to considering candidates from outside the bargaining unit, the Department agrees to first consider internal candidates for selection." Petitioner was not given the benefit of Article 23(8)(B) despite being clearly qualified for the positions described above, as she was passed over for both of them despite being a qualified internal candidate from within the bargaining unit.

Respondent contends that it had a non-discriminatory reason for not offering either the 2012 or the 2015 positions to Petitioner, despite her ample qualifications and the clear language of the CBA: specifically, the fact that Petitioner lacks "recent experience." Petitioner's supposed non-discriminatory reason is transparent. The recent experience requirement was completely discredited as a legitimate screening tool by Ms. Blake herself at her deposition. Ms. Blake failed to rationally explain how recent experience in any way related to any candidate's ability to demonstrate that he or she is the best qualified candidate for the position.

When screening the potential applicants for the 2012 vacancy, Ms. Blake and Ms. Ciocca considered three (3) factors that applicants must meet before being considered for interviews: they must (1) be certified in CIC, (2) be a master's degree prepared nurse, and (3) have current experience in infection control. These factors were determined arbitrarily by Ms. Blake and Ms. Ciocca. Despite establishing these three (3) essential criteria, Ms. Blake and Ms. Ciocca arbitrarily decided not to follow their own arbitrary self-created criteria and opted to interview Ms. Chacko, who did not possess a master's degree. Petitioner, who like Ms. Chacko, possessed two (2) of the three (3) criteria, was not granted an interview.

When screening candidates for the 2015 position, Ms. Blake, was assisted by Ms. Alexander, whom she, with Ms. Ciocca, helped to select in 2012.

For this vacancy, Ms. Blake and Ms. Alexander arbitrarily adopted a wholly new approach: instead of setting absolute criteria which all applicants—except Ms. Chacko, apparently—must meet, each criterion was allocated a score. The applicants who tallied the highest scores were selected for interviews. The job ultimately was offered to Ms. Fritz, who, as was noted earlier herein, was Ms. Blake's preferred candidate for the position.

A look at Respondent's hiring practices for both the 2012 and 2015 vacancies show a system defined by arbitrariness and capriciousness. Both vacancies were for the same position—Registered Nurse-Infection Control—but in each case, Respondent used a different system to determine which candidates it would consider. Respondent insists that it did not hire Petitioner because Petitioner did not possess recent infection control experience, yet, in 2012, it considered a candidate lacking a master's degree—something it established as an essential criterion—and, in 2015, it downgraded recent experience from an essential requirement to something merely suggested in Ms. Blake's arbitrary points system. Accordingly, there is little basis to conclude why Respondent did what it did.

On the other hand, the record contains ample material evidence, not discredited by Respondent as being objectively untrue, supporting Petitioner's claim that her well-known and recent prior EEO activity was a motivating factor in Respondent's

decision not to select her.

Both Ms. Blake and Ms. Ciocca knew of Petitioner's previous EEO activity, which resulted in Ms. Blake harboring a retaliatory animus toward Petitioner. Due to this animus, Ms. Blake deliberately employed two (2) different standards in reviewing applicants for both positions, a decision that Petitioner contends was deliberately designed to exclude her. Additionally, through information gathered during the proceedings in this matter, Petitioner has come to understand that Ms. Blake had actually pre-selected candidates for both positions.

The adverse and malicious designs of Respondent against Petitioner are perhaps best personified by Stacey Conroy, Esquire, staff attorney for Respondent. Ms. Conroy was deposed in this matter on January 27, 2022 and was rude, combative, and uncooperative (as illustrated below). Throughout her deposition, she offered duplicitous and contentious testimony that reveals Respondent's underlying bias against Petitioner.

For example, Ms. Conroy was unable to testify honestly, and without ambiguity, about something as simple as how long she has worked for Respondent. Ms. Conroy testified that she has been employed by Respondent for seventeen (17) years in the same position (which means she was hired sometime in 2005) (App. D at 86); however, in conflict with the above, Ms. Conroy also testified

that she did not start working for Respondent until 2015. App. D at 87 and 89–90. As a point of fact, the government's records clearly indicate Ms. Conroy has been with Respondent since 2005.

Ms. Conroy attempted to obfuscate the details of her employment to avoid any questions about Petitioner and incredibly claim her ignorance regarding Petitioner's claims. Despite this, however, unbeknownst to Ms. Conroy, Deputy Chief Counsel Kathleen A. Merkl, Esquire, in an email regarding a separate matter, disclosed that "Stacey Conroy is now handling any remaining matters involving Ms. Finizie." App. E at 96.

Needless to say, Ms. Merkl's unsolicited comment regarding Ms. Conroy's involvement with Petitioner runs directly counter to Ms. Conroy's insistence throughout her deposition that she was largely ignorant of Petitioner's claims. Ms. Merkl's comment is clearly inconsistent with Ms. Conroy's sworn testimony at her deposition when she testified to the following:

- "No, I never handled her cases… I have no reason to handle this or see this." App. D at 85.

- "I never handled any of her cases. I know nothing about them." App. D at 86.

- "No. Never handled any of her cases... No, I have no reason to [talk to people about her]." App. D at 87.

- "I knew that she filed but I never handled them and I never cared to know what they were about. I wasn't handling them. I had enough work… I don't know what she does. I honestly don't know anything about your client." App. D at 88–89.

- "Nothing involving her, no [*i.e.*: she's never had a case with Petitioner]… No [she's never heard from anyone or see any complaints that Petitioner's prior counsel submitted regarding Petitioner's detail and permanent reassignment." App. D at 90–91.

- "Yes. Because I was assigned this [case at the court level] and another case when Lauren Russo left." App. D at 92.

- "I'm not handling [this case] anymore, no. Colin is." App. D at 92.

- "No [she was not involved in any EEO complaint filed by Petitioner]." App. D at 93.

- "EEO complaints, yes. I've handled EEO complaints. But none for Ms. Finizie." App.

D at 94.

Even through its staff attorney, Respondent is entirely incapable of treating Petitioner in a fair and unbiased way. It is Petitioner's contention that this sort of bias and malice toward her is endemic within Respondent and is the reason for her being denied the positions for which she applied.

All the foregoing—Respondent's arbitrary, ever-evolving ad hoc hiring process and its blatant hostility and bias towards Petitioner—could, at an absolute minimum, allow a reasonable factfinder to disbelieve that Respondent articulated "legitimate reasons" for not hiring Petitioner, or for it to conclude that an "invidious discriminatory reason was more likely than not a motivating or determinative cause" of Respondent's decision. *See Simpson*, 142 F.3d at 644 (*quoting Fuentes*, 32 F.3d at 764). The fact that a reasonable factfinder could conclude that discrimination was motivating cause, means that there is an issue of genuine material fact and, as a result, the trial court should not have granted Respondent's motion for summary judgment.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant his Petition for Writ of *Certiorari*.

Respectfully submitted,

/s/ Faye Riva Cohen
Faye Riva Cohen, Esquire
Counsel for Petitioner

Dated: August 1, 2023

Appendix "A"

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2292

SHARON A. FINIZIE
Appellant

v.

SECRETARY UNITED STATES DEPARTMENT
OF VETERANS AFFAIRS

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2-20-cv-06513)
District Judge: Honorable John M. Younge

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
on April 14, 2023

Before: CHAGARES, *Chief Judge*, SCIRICA, and
AMBRO, *Circuit Judges*.

(Filed: May 15, 2023)

OPINION*

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

SCIRICA, *Circuit Judge*

In 2012 and 2015, Sharon Finizie applied to be an Infection Control Nurse ("ICN") at the Philadelphia Veterans Affairs Medical Center ("VAMC"). She was not selected for the position either time. As a result, Finizie sued the Secretary of the United States Department of Veterans Affairs ("VA"), alleging that she was not selected for the positions as retaliation for previously filing complaints of discrimination against the VA with the Equal Employment Opportunity Commission ("EEOC"). The VA moved for summary judgment on Finizie's retaliation claims, and the District Court granted that motion. Finizie now appeals that decision. We will affirm.

I.

Because we write primarily for the parties, we recite only the facts essential to our decision.

From February 1981 to May 1993, Finizie worked as an ICN at the Philadelphia VAMC. In May 1993, she was removed from her ICN position, and she was subsequently reassigned to a quality management position at the Philadelphia VAMC.

Over the succeeding years, Finizie regularly applied—unsuccessfully—for ICN positions at the Philadelphia VAMC whenever they became available. When she was not selected for a position, Finizie would file a complaint with the EEOC. She filed one such complaint with the EEOC in December 2010.

On August 22, 2012, the VA posted a new vacancy for an ICN at the Philadelphia VAMC. The job posting listed five preferred qualifications for

applicants: (1) "Infection Control Practitioner Certification," (2) "Current infection control experience in a tertiary care facility," (3) "Demonstrated ability to gather, track, analyze and interpret data," (4) "Knowledge and skills to perform surveillance," and (5) "Demonstrated ability to provide related education to interdisciplinary members of the healthcare team." SAppx174. Finizie applied for the position, but she was neither interviewed nor selected for the position. Unlike the applicants who were interviewed, Finizie lacked current infection-control experience, a qualification that the selecting officials considered "really absolutely necessary" and "paramount" for the position, SAppx283:20–284:5. Finizie subsequently filed a complaint with the EEOC, alleging that the

VA's decision not to select her was in retaliation for her previous complaints to the EEOC.

On June 30, 2015, another ICN position became available at the Philadelphia VAMC. The posting identified four preferred qualifications, which largely mirrored those included in the 2012 posting: (1) "Infection Control Practitioner Certification," (2) "Current infection control experience in a tertiary care facility," (3) "Demonstrated ability to gather, track, analyze and interpret data," and (4) "Knowledge and skills to perform surveillance." SAppx517. Even though Finizie still did not have current infection-control experience, she applied for the position. To screen applicants for this position, the selecting official used a standardized rubric to assign a score to each applicant based on his or her qualifications. For instance, ICN certification was

awarded 10 points, as was current infection control experience. Finizie's final score was 45. Because that was not among the top three highest scorers—who received scores of 60, 50, and 50, respectively—Finizie neither received an interview nor an offer for the position. She subsequently filed another complaint with the EEOC, alleging that she was not selected for the position as retaliation for her previous complaints.

The EEOC consolidated Finizie's complaints regarding the 2012 and 2015 ICN positions. After holding hearings at which Finizie and others testified, an Administrative Judge found that the VA did not retaliate against her. She appealed the Administrative Judge's decision, and the EEOC affirmed the finding of no retaliation. It also denied her request for reconsideration. Finizie subsequently

filed suit in federal court, alleging that the VA did not select her for the 2012 and 2015 ICN positions as retaliation. Following discovery, the VA moved for summary judgment on Finizie's claims, which the District Court granted. Finizie timely appealed.

II.[1]

[1] The District Court had subject matter jurisdiction under 28 U.S.C. § 1331, 42 U.S.C. § 2000e-5(f)(3), and 42 U.S.C. § 2000e-16(d). We have jurisdiction under 28 U.S.C. § 1291. "This Court exercises plenary review over a district court's grant of summary judgment, applying the same standard employed by the district court." *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 134 (3d Cir. 2013). "Summary judgment should only be granted where, after the close of discovery and viewing the evidence in the light most favorable to the non-moving party, the movant establishes that no genuine issue of material fact remains." *Jensen v. Pressler & Pressler*, 791 F.3d 413, 417 (3d Cir. 2015). "If the evidence [in favor of the non-movant] is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986) (internal citations omitted)

Finizie appeals the District Court's order granting summary judgment in favor of the VA. She contends the District Court erred in granting summary judgment because "genuine issues of material fact exist" regarding whether the VA did not interview or select her for the ICN positions because she previously filed complaints with the EEOC.[2] Appellant's Br. 13. In particular, Finizie points to three primary pieces of evidence: (1) the fact that, according to her, she was "the only fully qualified in-house candidate to apply" for the

[2] In her brief, Finizie frames the issue presented as whether "the District Court err[ed] in granting [the VA's] Motion for Summary Judgment and dismissing [her] claims of discrimination on the basis of age, gender, and prior EEOC activity." Appellant's Br. 1. Because she did not present claims of age or gender discrimination to the District Court—and also failed to develop any argument regarding them in her brief to us—we will not address such claims here.

positions, *id*., (2) the different approaches the VA used to screen applicants for the 2012 and 2015 positions, and (3) the "duplicitous and contentious" deposition testimony of a staff attorney for the VA, *id*. at 17. Because this evidence does not establish a prima facie case of retaliation, we will affirm. To survive the VA's motion for summary judgment on her retaliation claims, Finizie must establish a prima facie case of retaliation. *See Moore v. City of Phila.*, 461 F.3d 331, 340–41 (3d Cir. 2006). To do so, a plaintiff must tender evidence showing that "(1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal connection between the participation in the protected activity and the adverse action." *Carvalho-Grevious v. Del. State Univ.*, 851 F.3d 249, 257 (3d Cir. 2017) (citing *Moore*, 461 F.3d at 340–41). A

plaintiff may establish the requisite causal connection by showing "temporal proximity 'unusually suggestive of retaliatory motive'" or "a pattern of antagonism" during the period between the protected activity and the adverse action. *Carvalho-Grevious*, 851 F.3d at 260 (citation omitted). Moreover, a plaintiff may also establish causation through "other types of circumstantial evidence, such as inconsistent reasons given by the employer for [the adverse action], that give rise to an inference of causation when considered as a whole." *Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 302 (3d Cir. 2007).

Here, it is undisputed that Finizie engaged in protected activity when she filed complaints with the EEOC and that she suffered adverse employment actions when she was not selected for the ICN

positions in 2012 and 2015. But she has failed to establish the requisite causal link between her complaints and the VA's decisions not to interview or hire her for the ICN positions. First, the time periods between her protected activities and the adverse employment actions were not "unusually suggestive of retaliatory motive." *See Carvalho-Grevious*, 851 F.3d at 260 (citation omitted). Although it is not stated in Finizie's complaint or brief, it appears that, before she was passed on for the ICN position in 2012, her most recent complaint to the EEOC was filed in December 2010. Likewise, before she was not selected for the ICN position in 2015, it appears her most recent complaint to the EEOC was filed in January 2013. These two-year gaps between protected activity and adverse employment action are too long to be unusually suggestive of a

retaliatory motive. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 233 (3d Cir. 2007) ("Although there is no bright line rule as to what constitutes unduly suggestive temporal proximity, a gap of three months between protected activity and the adverse action, without more, cannot create an inference of causation and defeat summary judgment."); *Andreoli v. Gates*, 482 F.3d 641, 650 (3d Cir. 2007) (holding that a five-month period was insufficient).

Moreover, Finizie has not pointed to any evidence of a pattern of antagonism during the periods between her complaints and when she was not selected for the ICN positions. Similarly, she has not presented any evidence that the VA has been inconsistent in its stated reasons for why she was not selected for the ICN positions. Indeed, the VA has

consistently maintained that Finizie was not selected because she lacked recent infection-control experience and, in 2015, did not score as highly as other applicants on the VA's screening tool.[3]

Furthermore, the circumstantial evidence that Finizie has produced falls far short of what would permit a reasonable jury to infer that she was not interviewed or selected for the ICN positions because

[3] Finizie has not demonstrated that the VA's stated, non-retaliatory reasons for not selecting her for the ICN positions are merely a pretext. Accordingly, even if she established prima facie cases of retaliation, her claims would still fail as a matter of law. *See Canada v. Samuel Grossi & Sons, Inc.*, 49 F.4th 340, 346 (3d Cir. 2022) (explaining that if, after the plaintiff establishes a prima facie case of retaliation, the employer "present[s] a legitimate, non-retaliatory reason for having taken the adverse action," "the burden then shifts back to the plaintiff to demonstrate that the employer's proffered explanation was false, and that retaliation was the real reason for the adverse employment action" (internal citations and quotation marks omitted)).

of her previous complaints to the EEOC. First, Finizie's assertion that she was "the only fully qualified in-house candidate to apply" for the ICN positions is belied by the evidence. Appellant's Br. 13. Specifically, as Finizie acknowledges, both positions listed "[c]urrent infection control experience in a tertiary care facility" as a preferred qualification, SAppx173–74, SAppx514–17, and Finizie lacked such experience. Accordingly, contrary to her contention, Finizie was not fully qualified for the ICN positions.[4]

[4] Finizie contends that the fact an individual who also lacked a preferred qualification— Infection Control Practitioner Certification—was interviewed for the 2012 ICN position is evidence of retaliation. But, unlike Finizie, that individual had recent infection-control experience—which was "absolutely necessary" and "really paramount" for the position, SAppx283:20–284:5—and, ultimately, was not even selected for the position.

Second, Finizie's assertion that the VA's decision to change the manner in which it screened applicants for the 2015 ICN position demonstrates its retaliatory motive is similarly unavailing. Specifically, the change does not create a genuine issue of material fact because it is highly likely that, even if the VA had not changed its manner of screening applicants, Finizie still would not have been selected for the ICN position in 2015. Indeed, at that time, she continued to lack recent infection-control experience, to repeat, an "absolutely necessary" and "really paramount" qualification for the position, SAppx283:20–284:5. Accordingly, under either screening method, the outcome would have almost certainly been the same, with Finizie not interviewed or selected for the position.

Third, Finizie points to a VA staff attorney's

"duplicitous and contentious" deposition testimony in this litigation as evidence of the VA's "underlying bias against [her]." Appellant's Br. 17. It is true that the staff attorney's answers regarding how long she has worked at the VA and her knowledge of Finizie's case were inconsistent with evidence in the record.[5] But such inconsistencies—occurring several years after Finizie was not selected for the ICN positions, from an individual who was not one of the VA's

[5] For instance, the staff attorney testified that she started working for the VA in 2015, but there is evidence that she has been working at the VA since 2005. Similarly, the staff attorney testified that she had little knowledge or involvement with Finizie's case, *see, e.g.,* A156:17–18 ("I honestly don't know anything about [Finizie]."); A164:4 ("I'm not handling [this case] anymore, no."), but an email from the VA's deputy chief counsel, sent shortly after the staff attorney's deposition, indicated that the staff attorney was "handling any remaining matters involving Ms. Finizie," A188.

selecting officials, and about matters wholly unrelated to the VA's motives for not selecting Finizie—shed little light on the reasons why Finizie was not selected for the ICN positions in 2012 and 2015.

Accordingly, Finizie is left with her own subjective belief that she was not selected for the ICN positions because of her previous protected activity. Because speculation and conjecture are insufficient to defeat a motion for summary judgment, the District Court did not err in granting summary judgment in favor of the VA. *See Ramara, Inc. v. Westfield Ins. Co.*, 814 F.3d 660, 666 (3d Cir. 2016).

III.

For the foregoing reasons, we will affirm the judgment of the District Court.

Appendix "B"

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

SHARON A. FINIZIE	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 20-6513
DENIS MCDONOUGH, SECRETARY, U.S. DEPARTMENT OF AFFAIRS[1]	:	

ORDER

AND NOW, this 17th day of June, 2022, upon consideration of Defendant's Motion for Summary Judgment (ECF No. 21), and all documents submitted in support thereof and in opposition thereto, it is

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Denis McDonough, the current Secretary of the Department of Veterans Affairs ("VA"), is automatically substituted for the former VA Secretary, Robert Wilkie, named in Plaintiff's Complaint.

ORDERED that Defendant's Motion is **GRANTED**.[2] Plaintiff's claims are **DISMISSED WITH PREJUDICE**.

[2] We note that the instant suit is in a long line of other, similar lawsuits that Plaintiff has filed against her former employer alleging retaliation in their hiring practices. Plaintiff Sharon Finzie served as an infection control nurse at the Philadelphia DVA Medical Center ("Philadelphia VA") from approximately February 1981 to May 1993. (Defendant's Motion for Summary Judgment ("DMSJ"), ECF No. 21, Exhibit A at 12:16.) In May 1993, Plaintiff was reassigned to a Quality Management Specialist position at the Philadelphia VA. (*Id*. at Exhibit E.) Plaintiff maintained that position from 1993 until her retirement in October 2018. (*Id*.) Plaintiff became certified in Infection Control, but never again held an infection control nurse position after May1993. (*Id*. at Exhibit A, 23:20-25.)

In 2010, Plaintiff filed an EEO complaint alleging she had been discriminated against by the Philadelphia VA in reprisal for prior EEO activity when she was not selected for a position. Later, in 2012, Plaintiff applied internally for the position of Registered Nurse – Infection Control ("2012 vacancy"). (*Id*. at Exhibit B, VA00166.) Plaintiff was included amongst several applicants who met the minimum qualifications. (*Id*. at 4.) However, Plaintiff

did not have recent infection control experience, which the hiring panel deemed as "absolutely necessary." Plaintiff's application did not move forward. (*Id.* at Exhibit D, VA00481.) The candidate who was ultimately chosen for the position had close to twenty years of experience in an infection control position. (*Id.* at 5.) Plaintiff filed a complaint with the EEOC regarding the Philadelphia VA's failure to choose her for the 2012 vacancy. (*Id.* at Exhibit B, VA00003.) Two years later, Plaintiff applied for another internal position, this time for Registered Nurse – Infection Preventionist ("2015 vacancy"). (*Id.* at 7.) The position required the applicant to have current infection control experience. (*Id.* at Exhibit D, VA00536.) The hiring panel reviewed all applications, and each applicant was assigned a score based upon certain criteria. (*Id.* at 7.) The three applicants with the highest scores were chosen for an interview. (*Id.*) Plaintiff was not amongst the three highest scoring applicants and thus did not receive an interview. (*Id.* at 8.) The applicant who eventually filled the vacancy had more than ten cumulative years of infection control experience, as well as the infection control certification. (*Id.*)

Plaintiff filed this suit in December of 2020. (Complaint ("Compl."), ECF No. 1.) In it, she alleges two counts of discriminatory conduct based on the Philadelphia VA's allegedly retaliatory actions in failing to hire her for the 2012 vacancy and the 2015 vacancy. (Compl. at ¶ 11-12, 13- 14.) Plaintiff alleges she did not move forward in the application process in retaliation for her EEO activity. (*Id.*) Defendant

answered Plaintiff's complaint on March 4, 2021, denying Plaintiff's contentions. (ECF No. 5.) Prior to discovery, Defendant moved for summary judgment, arguing that Plaintiff cannot, as a matter of law, prove she was not chosen for the 2012 vacancy and 2015 vacancy based on any prohibited reason. (ECF No. 21).

A court can properly grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable jury could return a verdict for the non-moving party. *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id*. (citing *Anderson*, 477 U.S. at 248). Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255. The movant bears the initial responsibility for informing the Court of the basis for the motion for summary judgment and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After the moving party has met the initial burden, the non-moving party must set forth specific facts showing that there is a genuinely disputed factual issue for trial by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information,

affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute." Fed. R. Civ. P. 56(c). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Absent direct evidence of discrimination and/or retaliation, a plaintiff may prove her claims "by applying the familiar *McDonnell Douglas* burden-shifting framework." *Carvalho-Grevious v. Del. State Univ.*, 851 F.3d 249, 257 (3d Cir. 2017) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Under this framework, the plaintiff must first establish a *prima facie* case of discrimination. *Id.* "To establish a *prima facie* case of retaliatory conduct, [a plaintiff] must show 1) she engaged in a protected activity; 2) after or contemporaneous with engaging in that protected activity, she was subjected to an adverse employment action; 3) the adverse action was "materially adverse;" and 4) there was a causal connection between her protected activity and the adverse employment action. *Hare v. Potter*, 220 Fed. Appx. 120, 128 (3d Cir. 2007). Once the plaintiff establishes a *prima facie* case, the burden shifts to the defendant "to provide a legitimate non-retaliatory reason for its conduct." *Id.* Finally, if the defendant articulates a nondiscriminatory reason for its adverse actions, the burden shifts back to the plaintiff to show

that the employer's proffered explanation is pretextual. *See id*.

We agree with Defendant that Plaintiff has failed to provide any indication she was not hired in retaliation for her EEO activity. Plaintiff cannot overcome the strong non-discriminatory reasons she was not offered either position listed in the 2012 vacancy or the 2015 vacancy. Plaintiff fails to establish a causal connection between her protected activity and the allegedly adverse employment action. In both circumstances complained of, nearly two years had passed between Plaintiff's EEOC filing and the allegedly retaliatory failure to hire. Considering Plaintiff had no other complaints of discriminatory treatment, the length of time between complaint and adverse action is such that the discriminatory nature of Defendant's intent is dubious. *See Motto v. WalMart Stores E., LP*, 563 Fed. Appx. 160, 164 (3d Cir. 2014) (eleven-day period not unusually suggestive of retaliation); *see also Selvato v. Septa*, 143 F.Supp.3d 257, 270) (E.D. Pa. 2015) (adverse action began weeks after EEO activity not found to be unusually suggestive of retaliation). Moreover, Plaintiff offers no evidence other than her subjective belief that she was passed over for the positions. *See Jones v. School District of Philadelphia*, 198 F.3d 403, 414 (3d Cir. 1999) (concluding no evidence of pretext where allegation based on plaintiff's subjective feeling); *see also Elliott v. Group Medical & Surgical Service*, 714 F.2d 556 (5th Cir. 1983). She claims infection control experience was emphasized with the purpose of excluding her from the position, but she offers no

It is also ordered that Plaintiff's Unopposed Motion to Stay Trial and Pretrial Deadlines (ECF No. 25) is **DENIED AS MOOT**.

IT IS SO ORDERED.

BY THE COURT:

/s/ John Milton Younge
JUDGE JOHN MILTON YOUNGE

evidence in support of her contention. Since Plaintiff is unable to establish either a *prima facie* case, or alternatively establish that her former employer's non-discriminatory reasons for their actions were pretextual, we grant Defendant's motion for summary judgment.

Appendix "C"

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PHILADELPHIA DISTRICT OFFICE
801 Market Street, Suite 1300, Penthouse
Philadelphia, PA 19107

Sharon Finizie	:	EEOC Hearing No.
Complainant,	:	530-2014-00076X
	:	530-2016-00273X
v.	:	
	:	Agency Case No.
David Shulkin, Secretary	:	200H-0642-2013100
Department of Veterans	:	942
Affairs	:	200H-0642-2015105
Agency.	:	432
	:	

ORDER ENTERING JUDGMENT

For the reasons set forth in the Decision, judgment in the above-captioned matter is hereby entered. A Notice to the Parties explaining their appeal rights is attached.

It is so ORDERED
April 30, 2019

For the Commission:

/s/ Dawn M. Edge
Administrative Judge

Telephone No. (267)
589-9770
dawn.edge@eeoc.gov

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PHILADELPHIA DISTRICT OFFICE
801 Market Street, Suite 1300, Penthouse
Philadelphia, PA 19107

	:	
Sharon Finizie	:	EEOC Hearing No.
Complainant,	:	530-2014-00076X
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Affairs	:	200H-0642-2015105
Agency.	:	432
	:	

DECISION[1]

I. INTRODUCTION

This matter came before the U.S. Equal

HT -	Hearing, December 13, 2018
HT2 -	Hearing, March 9, 2019
ROI-5432-	Agency Investigative File No. 200H-0642-2015105432
ROI-0942-	Agency Investigative File No. 200H-0642-2013100942
Ex.	Hearing Exhibtis

Employment Opportunity Commission (the "EEOC") pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), *et seq.,* as amended. Sharon Finizie (hereinafter the Complainant), a retired Quality Management Specialist at the Philadelphia VA Medical Center, timely contacted an EEO Counselor in both the above referenced Agency cases that both allege that the Agency subjected Complainant to reprisal for prior EEO activity when, in 2012 and 2015, the Agency failed to select her for the position of Infection Preventionist, Registered Nurse.

After all necessary Agency procedures were exhausted in both cases, the Complainant requested a hearing before an Administrative Judge appointed by the EEOC in accordance with the regulations. This Judge was assigned to preside

over the case and a hearing was subsequently scheduled.

The hearing in this matter was conducted on December 13, 2018, and reconvened on March 19, 2019.

On December 13, 2018, the following individuals testified at the hearing: Cheryl Ciocca; Sharon Alexander; and, Complainant, Sharon Finizie. On March 19, 2019, Susan Fritz testified at the reconvened hearing.

II. CLAIM PRESENTED

Agency Case No. 200H-0642-2013100942

Whether the Agency subjected the Complainant to reprisal (for prior EEO activity) when, on October 31, 2012, Complainant was not selected for the position of lnfection Control Nurse, Vacancy Announcement No. YB-JHO-729540.

Agency Case No. 200H-0642-2015105432

Whether the Agency subjected the Complainant to reprisal (prior EEO activity) when, on August 4, 2015, Complainant became aware that she was not selected for the position of Registered Nurse, Infection Preventionist, under vacancy announcement number PHL-15-JHO-1444472.

III. FACTUAL BACKGROUND

Complainant, a retired Quality Management Specialist, was employed with the Philadelphia VA Medical Center for approximately forty-one years. (HT p. 92-93; ROI-5432, p. 5).

From in or about February 1981 to May 1993, the Complainant held the position of Infection Control Nurse. (HT 93; ROI-0942, p. 183). From May 1993 until her retirement, Complainant held the position of Quality Management Specialist. Id.

In or about 1991, the Complainant became Certified in Infection Control ('CIC Certification'),

which required her to have two years prior experience as an Infection Control professional prior to becoming certified. (HT p. 96). Despite leaving her Infection Control position in May 1993, the Complainant testified that she continued her infection control education by attending annual conferences with the Association of Professionals in Infection Control and Epidemiology ('APIC') and, since 1994, was a permanent member of the Infection Control Committee (HT p. 95, 107-110).

During Complainant's employment, she filed several prior EEO complainants, including approximately twenty claims for nonselections. (HT p. 94, 133).

Infection Control Nurse, Vacancy Announcement No. YB-JHO-729540 (2013) (ROI-0942)

From August 22, 2012, through September 19, 2012, the Agency posted a vacancy under Job Announcement YB-12-JHO-729540, for the position of Registered Nurse-Infection Control, also referred to as an Infection Preventionist. (ROI-0942, p. 152-1571; Ex. C1, p. 42)). The posting listed Preferred Qualification as: (1) Infection Control Practitioner Certification (' CIC'); (2) Demonstrated ability to gather, track, analyze and interpret data; (3) Knowledge and skills to perform surveillance; and, (4) Demonstrated ability to provide related education to interdisciplinary members of the healthcare team. (HT p. 35; ROI-0942, p. 153).

Generally, an Infection Control Nurse is charged with the surveillance and remediation of protentional infection microorganism threats to

inpatients, staff and visitors. (ROI-0942, p. 113).

Complainant testified that the vacancy announcement also contained language that the applicant should have current infection control experience. (HT p. 95). Complainant further testified that from 1994 to 2010 she had not worked in the field of Infection Prevention. (HT p. 138). Complainant applied for the Registered Nurse-Infection Control position and was identified on the Agency's List of approximately sixty-six (66) Eligibles. (ROI-0942, p.166- 174).

Director of Quality Management, Susan Blake, was the selecting official for the posted Registered Nurse-Infection Control position. (HT p. 136; Ex. C2, p. 44; ROI-0942, p. 115). Prior to becoming the Director of Quality in or about November 2012, selecting official Blake previously

held the position of Infection Control Nurse at the Philadelphia VA Medical Center that was posted under the recent vacancy after Blake left the position. (HT 19, 21; Ex. C1, p. 5- 6; Ex. C2, p. 43-44; ROI-0942, p. 115, 152-157).

As the selecting official, Director Blake declared that she was seeking an applicant who was certified in infection control through the CBIC board and held a certification in CIC. (ROI- 0942, p. 116). She was also seeking an applicant who had a master's degree in nursing or in a related field and had current experience in the role. Id. at 117-119.

Selecting official Blake asked Infection Control Manager, Cheryl Ciocca, to assist and serve as an interview panelist for the newly vacant Infection Control Nurse position. (HT 22, 33; Ex.

C2, p. 60-61; 0.ROI-0942, p.130). Director Blake and Cheryl Ciocca met together to screen a list of approximately 100 applicants who were identified on the List of Certified applicants who were minimally qualified for the Infection Control Nurse position. (HT p. 23-24, 30; Ex. C2., p. 45, 51-52). Blake and Ciocca considered the following three (3) factors when screening the applicants to be considered for interviews: (1) Certified in Infection Control ("CIC Certification"); (2) master's degree prepared nurse; and, (3) current experience. (HT 25-26, 34; Ex. Cl p. 480).

Ciocca testified that both she and Blake felt that "recent experience" for each applicant was important and "absolutely necessary" in Infection Control Nurse position. (HT 40). Ciocca stated that as an Infection Control Nurse, the selectee

needed to be able to do current surveillance, work with epidemiologists and be ready to perform their duties with the current state of the affairs in infection control. (HT 40-41). Ciocca rioted that because healthcare changes over five (5) years, current experience in the field was an absolute. Id. Ciocca also noted that while CIC certification was a plus, experience was paramount. Id.

After analyzing the List of Eligibles, Blake and Ciocca decided who would be interviewed based on whether the candidate met the selection criteria. (HT 26; ROI-0942, p. 119). Ciocca made notations on the List of Eligibles indicating whether the candidates satisfied any of the interview criteria. (Ex. Cl, Document Request #11). Blake and Ciocca identified the following top four candidates who would be interviewed for the

Infection Control Nurse position: Sharon Alexander, Suma Joe Chacko, Carol Clark and Mary Fomek. (HT 39, Ex. Cl, Document Request #11; Ex. C1(transcript) p. 56-57, 59). The applicants who were selected for an interview all were identified as having "Preferred Experience". (HT p. 39-40; Ex. Cl, Document Request #11). However, while applicant Suma Joe Chacko had recent Infection Control experience, she was not CIC certified nor did she have master's in nursing. (Ex. C1, Document Request #11).

As for Complainant, selecting official Blake noted that while she held a master's in nursing, had quality management experience, and was CIC certified, she did not have current experience in infection prevention. (Ex. Cl (transcript), p.52-53). Unlike the top four candidates selected for an

interview, Complainant was not identified on the List of Eligibles as having "Preferred Experience" and was not selected for an interview for the Infection Control Nurse position. (HT p. 125; Ex. Cl, Document Request #11; ROI-0942, p. 116).

Selecting official Blake specifically indicated that Complainant was not selected for an interview because she did not have current experience. (ROI-0942, p. 121).

At the time of the selection process, applicant Sharon Alexander held certifications in Infection Control and Epidemiology, was master's prepared and had experience in infection prevention which spanned from 1994 to 2012, with a few months breaks in employment while seeking other employment in or about 1997 and 2011. (HT p. 44, 70-71; ROI-0942, *p.* 178-182). Applicant

Suma Joe Chacko's employment history showed that she held the position as an Infection Control Specialist from July 2008 to December 2009, and again in January 2010 to the present. (HT p. 46, 50-51; ROI-0942 p. 200-202). Applicant Carol Clark held a Master's in Health Law and her infection prevention experience was from January 2011 to February 2012. (HT 45-46; ROI-0942, p. 197-199). Alexander, Chacko and Clark were all granted an interview.

On January 11, 2013, the Agency issued Sharon Alexander a letter officially notifying her that she was selected for the Registered Nurse-Infection Control position at the Agency's Philadelphia Medical Center effective February 25, 2013. (HT p. 47; ROI p. 203).

Registered Nurse, Infection Preventionist

(Vacancy Announcement PHL-15-JHo-1444472) (2015) (ROI-5432)

From June 30, 2015, through July 15, 2015, the Agency posted a vacancy notice for the position of Registered Nurse, Infection Preventionist at the Agency's Philadelphia Medical Center. (ROI-5432, p. 94-101). Director Blake was also the selecting official for the 2015 Registered Nurse, Infection Preventionist position. (HT p. 136; ROI-5432, p. 51).

The posting identified the Preferred Experience/Qualifications as: (1) Infection Control Practitioner Certification; (2) Current infection control experience in a tertiary care facility; (3) Demonstrated ability to gather, track, analyze and interpret date; and, (4) Knowledge and skills to perform surveillance. (ROI-5431, p. 97).

Complainant testified that the vacancy announcement also contained language that the applicant should have current infection control experience. (HT p. 95).In addition to the posted vacancy notice, in or about 2015, selecting official Blake, notified a group of Infection Preventionists at an Association for Professionals in Infection Control ('APIC') conference of the posted vacancy at the Agency's Philadelphia location. (HT2 p. 8). The conference was attended by approximately 5,000 people. Id.

Director Blake asked Infection Preventionist, Sharon Alexander, selectee from the 2013 Registered Nurse-Infection Control position, to assist her with the application review process for the Infection Preventionist position. (HT p. 58-59). Alexander assisted Blake by scribing notes

dictated by Blake after Blake reviewed the applicants' resumes. (HT p. 59). Alexander recalled Blake using a scoring grid that Blake developed which attributed a score to various components identified on the applicants' resumes. (HT 76-77; ROI-5432 p. 177-191). Alexander testified that for this vacancy, Blake did not necessarily require the applicant to be certified in infection control or have a master's degree, but each criterion was allocated a score. (HT p. 77).

The rating grid included the following criteria: (1) Veteran; (2) VA Experience; (3) Master's Prepared; (4) CIC Certification; (5) years of Infection Control Experience with points for varying years of experience; (6) Data Collection Prep and Analysis; (7) Currently in an Infection Preventionist (IP) Role; (8) Hand Hygiene

Program Management; (9) Management/Supervisor Experience; and, (10) Project Management Experience. (HT p. 80; ROI-5432 p. 177-191).

Alexander recalled that the applicants chosen for interviews had the highest tallied scores from the scoring grid. (HT 77, 80). Out of approximately 106 applicants the following three (3) applicants were selected for interviews: Susan Fritz (score 60), Jenny Hayes (score 50) and Kellianne Riches (score 50). (HT 83-89; ROI-5432, p. 171, 175, 177-191). Complainant had a total score of 45 and was not selected for an interview. (ROI-5432, p. 179, 186). Alexander testified that the Agency did not interview anyone who scored less than 50 and therefore Complainant was not afforded an interview. (HT p. 78, 90).

After the interview process, the Agency selected applicant Susan Fritz for the Registered Nurse, Infection Preventionist position. (HT 139; ROI-5432, p.51).

IV. APPLICABLE LAW AND REGULATIONS

The burdens of proof in discrimination cases are generally allocated according to the standard established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). This case set forth a three-tier test for determining whether there has been discrimination in violation of Title VII. The Complainant has the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not such actions were based on discriminatory criteria. *See Texas Department of Community Affairs v. Burdine,* 450

U.S. 248 (1981); *McDonnell Douglas Corp. v. Green, supra.*

If a *prima facie* case of discrimination has been established, the burden shifts to the Agency to articulate a legitimate, non-discriminatory reason for the challenged action. *Burdine* at 253-4; *McDonnell Douglas* at 802. The Complainant may then show that the legitimate reason offered by the Agency was not the true reason, but merely a pretext for discrimination. *Burdine* at 256; *McDonnell Douglas* at 804. *See also St. Mary's Honor Center v. Hicks,* 113 S.Ct. 2742 (1993).

Complainant can establish a *prima facie* case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. *Shapiro v. Social Security Admin.,* EEOC Request No. 05960403 (December

6, 1996) *(citing McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973)). Specifically, in a reprisal claim, and in accordance with the burdens set forth in *McDonnell Douglas, Hochstadt v. Worcester Foundation for Experimental Biology,* 425 F. Supp. 318,324 (D. Mass.), *affd,* 545 F.2d 222 (1st Cir. 1976), and *Coffman v. Department of Veteran Affairs,* EEOC Request No. 05960473 (November 20, 1997), a Complainant may establish a *prima facie* case of reprisal by showing that: (1) Complainant engaged in a protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, Complainant was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. *Whitmire v. Department of the Air Force,* EEOC Appeal No.

01A00340 (September 25, 2000).

V. ANALYSIS AND FINDINGS

Prima Facie Case

I find that the Complainant has failed to establish a *prima facie* case of reprisal. Specifically, the Complainant has failed to put forth evidence showing a nexus between her protected activity and the Agency's failure to select her for an interview for either of the two posted positions. I also find that the Complainant failed to put forth evidence establishing an inference of reprisal.

The Complainant testified that she filed several prior EEO complainants, and Selecting Official Blake declared that she was aware of Complainant's prior EEO activity because she was named as a Responsible Management Official

('RMO') in the prior complainants. (HT p. 94, 133; ROI-5432, p. 50). Cheryl Ciocca, who assisted in reviewing the applications in the 2012 vacancy, asserted that she was also aware of Complainant's prior EEO complaints. (ROi0942; p. 133). However, Sharon Alexander, who scribed for the 20I5vacancy, testified that she had not learned of Complainant's prior EEO until in or about March 2016 when she testified in another matter. (HT 58). Finally, the record shows that Complainant was subjected to an adverse action when she was not selected for an interview for either position and subsequently not selected for the positions.

Despite establishing these elements of a *prima facie* case of reprisal, Complainant fails to articulate or put forth evidence establishing a nexus between her protected activity and the

Agency's failure to select her for an interview. Knowledge of Complainant's EEO activity, without more does not rise to discrimination.

However, the Complainant attempts to show an inference of reprisal by arguing that Selecting Official Blake harbored a retaliatory animus toward Complainant because she challenged several prior nonselections. (HT p. 116-117; 117, 121-132). Complaint suggests that Blake changed the position requirement to "recent experience" only to exclude Complainant from the process. Id. Blake, however, asserted that she included "recent experience" as a criterion based upon her own prior experience as an Infection Control Nurse. (ROI -0942, p. 119). Blake further asserted that the role of infection control evolves on a daily basis and has grown "three-fold." Id. at 117-188. Blake

noted that there is new development in the field each day in microorganisms and methods of mitigating risk. Id. at 118. In addition, Ciocca testified that healthcare changes over five years and current experience in this field is a must. (HT p. 40- 41).

Despite Complainant's contention that the Agency harbored a discriminatory animus toward her, Complainant testified that she had not worked in the filed since 1993. ((HT p. 93; ROI-0942, p. 183). Black and Ciocca credibly testified that the field of Infection Control is a fluid profession that requires current experience. I find that Complainant's contentions are pure conjecture and she failed to put forth any evidence to establish an inference of retaliatory motive.

Complainant also argues that Ciocca, who

assisted with the 2103 application review, never held the position of Infection Preventionist and arguably was not qualified to screen the applicants. (HT p. 25). However, the record shows that Ciocca supervised the Infection Prevention Practitioners and was Blake's former supervisor in the Infection Control department. (HT p. 42; ROI-0942, p. 130). Despite Complainant's contentions, I find that the record shows that Ciocco was qualified to assist in the application review process.

The Complainant further contends that the Agency's interview questions for the 2013 position were not related to the duties and responsibilities of the position thus making the process disingenuous and designed to exclude the Complainant from the process. (HT p. 126). I find

that the interview process is irrelevant to the analysis of whether Complainant was subjected to reprisal. The evidence shows that Complainant was not selected to be interviewed for either position.

Finally, regarding the 2015 position, Complainant suggests that selecting official Blake preselected selectee Susan Fritz by encouraging her to apply for the position but not encouraging the Complainant. (Ex. Cl, p. 44). On the contrary, selectee Fritz testified that she learned of the position at an APIC conference when Blake made the announcement of the posted vacancy during conference that was attended by approximately 500 people, including a group of Infection Preventionists. (HT2 p. 8). I find that the evidence does not show that Blake preselected

selectee Fritz for the position because the announcement was made to a number of potential applicants.

Based upon the above, I find that the Complainant has failed to establish a *prima facie* case of reprisal.

Agency Legitimate Nondiscriminatory Reasons

The Agency contends that selecting official Blake was seeking an applicant with "current experience" in the field of Infection Prevention for both the 2012 and 2015 positions. In fact, the Complainant testified that both vacancies contained language that the applicant should have current infection control experience, to which I find the Complainant did not possess. (HT p. 95). Complainant testified that she left her

position as Infection Control Nurse in May 1993, and from 1994 to 2010 she was not working in the field of Infection Prevention. (HT 93, 138; ROI-0942, p. 138).

Despite Complainant's argument that she continued her infection control experience by participating in infection control conferences and committee participation, the evidence shows that she had not practiced in the field since 1993.

As for the 2012 vacancy posting, the record shows that the applicants selected for interviews had the following recent infection control experience: (1) Sharon Alexander's (selectee) experience was from 1994 to 2012; (2) Suma Joe Chacko's experience was from 2008 to 2012; and, (3) Carol Clark's experience was from 2011 to 2012. (ROI-0942, p. 178-182, 197- 199, 200-202).

As for the 2015 posting, the record shows that Complainant did not have the requisite attributes to afford her a score need to qualify for an interview.

I find that the Complainant has failed to present evidence that refutes the Agency's reasons for not selecting her for an interview because she failed to have current experience in the field of infection control.

Conclusion

Given these reasons, I ultimately find that Complainant has failed to establish a *prima facie* case of reprisal or present evidence showing an inference of discrimination. I also find that Complainant failed to set forth evidence or refute the credible testimony to establish a pretext with regard to the issue in this case. Wherefore, based

on the foregoing, I find that Complainant has failed to establish by a preponderance of the evidence that the Agency unlawfully discriminated against her in reprisal for her prior EEO activity.

I therefore find in favor of the Agency. While all other matters appearing in the record of the complaint and hearing testimony were considered, they played no part in this decision b/c they could not be adequately established as facts or were irrelevant to the accepted claim or lacked probative value.

For the Commission:

/s/ Dawn M. Edge
Administrative Judge
Telephone No. (267) 589-9770
dawn.edge@eeoc.gov

Appendix "D"

EXCERPTS FROM THE JANUARY 27, 2022 DEPOSITION OF STACEY CONROY

Stacey Conroy

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

SHARON A. FINIZIE	:	NO. 20-6513
Plaintiff(s),	:	
	:	
–vs–	:	
	:	
DENNIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS, DEPARTMENT OF VETERANS AFFAIRS,	:	
Defendants(s).	:	

– – –

JANUARY 27, 2022

– – –

Remote videoconference examination of STACEY CONROY, held on the above date, commencing at 1:09 p.m., before Donna M. Bittner,

Certified Professional Reporter.

KAPLAN, LEAMAN AND WOLFE
Registered Professional Reporters
230 South Broad Street
Suite 1303
Philadelphia, PA 19102
(215) 922-7112

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…

10 Q. So document one is the Eastern District of PA
11 complaint and an attachment, which was the EEO decision
12 and request for reconsideration dated 9/29/2020. That
13 was from Mr. Friedman. Have you seen this document?
14 A. Yep. I'm sorry? Did I see this before?

15 Q. Yes.

16 A. No, I never handled her cases.

17 Q. All right.

18 A. I have no reason to handle this or see this.

…

Page 14

…

15 Q. Okay. Do you recall ever seeing any other

16 documents other than this complaint about these

17 particular issue, which were selection processes for

18 two infection preventionist positions in 2012 and 2018.

19 Do you ever see –

A. I never handled any of her cases. I know nothing about them.

…

Page 15

…

Q. What is your current position?

A. Staff attorney with the department of Veterans Affairs Office of General Counsel.

Q. And how long have you worked for the VA?

A. Seventeen years.

…

Page 16

Q. So around 2012 and 2015 what were your duties?

A. I wasn't with the VA. I started – oh,

yeah,

10 I started in 2015. I don't know anything about 2012.

11 I wasn't here.

…

Page 17

…

17 Q. Have you ever been involved in any matters

18 involving Sharon Finizie?

19 A. No. Never handled any of her cases.

20 Q. And have you talked to people about her

21 professionally, even though you haven't handled her

22 cases?

23 A. No, I have no reason to.

24 Q. Did you before aware at some point that

Sharon

25 Finizie had filed one or more formal employment

1 complaints

2 A. I knew that she filed but I never handled them

3 and I never cared to know what they were about. I

4 wasn't handling them. I had enough work.

5 Q. Were you aware at some point that Sharon

6 Finizie had been moved to the quality management

7 department?

8 MR. CHERICO: Objection. Objection.

Moved when?

MS. RIVA COHEN: Well I can get more specific. I was just going to ask her that in general.

All right. I'll rephrase then.

THE WITNESS: I don't know where she was. I don't know where she is.

BY MS. RIVA COHEN

Q. Do you know that she retired?

A. I don't know what she does. I honestly don't know anything about your client.

Q. Okay.

MR. CHERICO: Ms. Cohen, can I interject for one second? And this can be either on the record or off the record. But, Stacey, when

did

23 you say – when did you get to the VA? Because I think

24 I might have heard two different things.

25 THE WITNESS: 2015.

…

Page 24

3 Q. Have you ever had any dealings with Dennis

4 Friedman, Sharon's prior attorney?

5 A. I had cases with him involving other

6 employees.

7 Q. Have you had cases with him involving Sharon?

8 A. Nothing involving her, no.

…

13 Q. Did you ever hear from anyone or see

any

14 complaints that Dennis had submitted regarding Sharon's

15 detail and permanent reassignment?

16 A. No.

…

Page 25

…

14 Q. Do you know approximately how many EEO

15 complaints Sharon has submitted during her employment

16 at the VA?

17 A. I have no idea.

18 Q. Where you aware that she submitted any VA

19 complaints?

20 A. Yes. Because I was assigned this and another

21 case when Lauren Russo left.

…

Page 26

…

3 Q. So are you currently assigned to this case?

4 A. I'm not handling it anymore, no. Colin is.

…

Page 31

…

19 Q. How many EEO complaints you were involved that

20 involved Sharon.

21 A. That she filed?

22 Q. Yes.

23 A. None.

24 Q. None of them were assigned to you?

25 A. No.

17 Q. So I just want to make clear. If I worked for

18 the VA and I filed an EEO, would you have been assigned

19 to anyone's EEO claim when you joined in 2015?

20 A. No. We all had our own caseload. Everyone

21 here has their own caseload.

22 Q. Right. But would that have been part of a

caseload, the EEO complaints

A. EEO complaints, yes. I've handled EEO complaints. But none for Ms. Finizie.

Appendix "E"

From: Merkl, Kathleen (OGC) <Kathleen.Merkl@va.gov>
Sent: Monday, March 21, 2022 3:57 PM
To: James W. Cushing, Esquire
Cc: Ciucci, Lauren (OGC)
Subject: RE: [EXTERNAL] RE: Finizie case-FAD inquiry
Attachments: SFinizie105356I+ - FO.pdf; 2021-0702_Finizie_VA_DMSJ_entered.pdf

Mr. Cushing,

I reached out to VA's Office of Employment Discrimination Complaint Adjudication (OEDCA) this morning regarding your inquiry. As I believe Ms. Ciucci has previously advised, she is no longer working in this district and is no longer associated with these actions. She also ceased to be VA attorney of record and Stacey Conroy is now handling any remaining matters involving Ms. Finizie.

…

Regards,

Kathleen A. Merkl
Deputy Chief Counsel
OGC North Atlantic District
800 Poly Place, Building 14
Brooklyn, New York 11209
Tel: (718) 630-2908/ (202) 738-2980
Email: Kathleen.Merkl@va.gov

The contents of this message should be considered confidential legal advice between the sender, an attorney with the VA Office of the General Counsel, and recipient(s) of this message as specified above. It should not be forwarded to any other individual, including other employees of the Department, without the express written permission of the sender.

Appendix "F"

5 U.S.C. § 2302(a)(2)(A)-(B)

For the purpose of this section—

(A) "personnel action" means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vi) a reemployment;

(vii) a performance evaluation under chapter 43 of this title or under title 38;

(viii) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion,

performance evaluation, or other action described in this subparagraph;

(ix) a decision to order psychiatric testing or examination;

(x) the implementation or enforcement of any nondisclosure policy, form, or agreement; and

(xi) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

5 U.S.C. § 2302(b)(8)

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

…

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences;

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs."

5 U.S.C. § 7703(c)

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.