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See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.

United States Court of Appeals,
Fifth Circuit.

Sharon BOLTON, Plaintiff–Appellant,
v.
CITY OF HATTIESBURG, Defendant–Appellee.

No. 17-60474 Summary Calendar
Filed November 10, 2017
Appeal from the United States District Court for the
Southern District of Mississippi, No. 2:17-CV-41

Attorneys and Law Firms

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Plaintiff-Appellant
Clark Hicks, Hicks Law Firm, P.L.L.C., Hattiesburg,
MS, for Defendant-Appellee
Before HIGGINBOTHAM, JONES, and SMITH,
Circuit Judges.

Opinion

PER CURIAM:*

Sharon Bolton sued her employer, the City of Hattiesburg, for sex, race, and age discrimination because of a promotion that was not offered to her. As explained in a succinct but comprehensive

Memorandum Opinion and Order, the district court granted summary judgment for the city and dismissed.

We agree with the district court's analysis. It recognized that although a plaintiff may be relieved of the requirement that she formally applied for a position, she still must show that she expressed interest in it. As the district court explained, “Because Plaintiff never applied to nor communicated any interest in the Crew Supervisor position to any of her superiors, she cannot show that she was qualified for the position she sought because she *never sought* the position” (citing cases). The court further reasoned that even if, *arguendo*, Bolton had established a *prima facie* case, the city offered a legitimate, non-discriminatory reason for its decision not to promote Bolton: the disciplinary actions that had been taken against her. And finally, as the court observed, any claim of race discrimination fails because the person who was promoted was of her race.

AFFIRMED.

Footnotes

*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

United States District Court,
S.D. Mississippi, Eastern Division.

Sharon BOLTON, Plaintiff

v.

CITY OF HATTIESBURG, Defendant
CIVIL ACTION NO. 2:17-CV-41-KS-MTP
Signed 05/30/2017

Attorneys and Law Firms

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Clark Hicks, Robert Lane Dossett, Hicks Law Firm,
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MEMORANDUM OPINION AND ORDER

KEITH STARRETT, UNITED STATES DISTRICT
JUDGE

This matter is before the Court on the Motion for Summary Judgment [49] filed by Defendant City of Hattiesburg. After considering the submissions of the parties, the record, and the applicable law, the Court finds that this motion is well taken and should be granted.

I. BACKGROUND

On June 16, 2016, Plaintiff Sharon Bolton (“Plaintiff”) filed this action against Defendant City of Hattiesburg (the “City”), alleging discrimination under Title VII and the Age Discrimination in Employment Act (“ADEA”). Plaintiff is a 53-year-old African-American

female and is employed by the City's Hub City Transit. Her claims are based on the City's hiring of Reggie Smith, a 37-year-old African-American male, for the newly-created position of Crew Supervisor in September 2015, for which she claims she should have been considered.

II. DISCUSSION

A. Standard of Review

Federal Rule of Civil Procedure 56 provides that “[t]he court shall grant 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). “Where the burden of production at trial ultimately rests on the nonmovant, the movant must merely demonstrate an absence of evidentiary support in the record for the nonmovant's case.” *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 812 (5th Cir. 2010) (citation and internal quotation marks omitted). The nonmovant must then “come forward with specific facts showing that there is a genuine issue for trial.” *Id.* “An issue is material if its resolution could affect the outcome of the action.” *Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P.*, 627 F.3d 134, 138 (5th Cir. 2010) (quoting *Daniels v. City of Arlington, Tex.*, 246 F.3d 500, 502 (5th Cir. 2001)). “An issue is ‘genuine’ if the evidence is sufficient for a reasonable [fact-finder] to return a verdict for the nonmoving party.” *Cuadra*, 626 F.3d at 812 (citation omitted).

The Court is not permitted to make credibility determinations or weigh the evidence. *Denville v.*

Marcantel, 567 F.3d 156, 164 (5th Cir. 2009) (citing *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007)). When deciding whether a genuine fact issue exists, “the court must view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party.” *Sierra Club*, 627 F.3d at 138. However, “[c]onclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial.” *Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002) (citation omitted). Summary judgment is mandatory “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 at trial.” *Brown v. Offshore Specialty Fabricators, Inc.*, 663 F.3d 759, 766 (5th Cir. 2011) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986)).

B. Discrimination Claims

Plaintiff brings two claims of discrimination under Title VII for sex and racial discrimination, and one claim under the ADEA for age discrimination. These claims are all analyzed under the same burden-shifting framework from *McDonnell Douglas*. See, e.g., *Brown v. Bunge Corp.*, 207 F.3d 776, 781 (5th Cir. 2000). First, Plaintiff must establish her prima facie case by showing that:

- (1) [s]he was not promoted, (2) [s]he was qualified for the position [s]he sought; (3) [s]he fell within a protected class at the time of the

failure to promote, and (4) the defendant either gave the promotion to someone outside of that protected class or other failed to promote the plaintiff because of [her membership in a protected class].

Autry v. Fort Bend Indep. Sch. Dist., 704 F.3d 344, 346–67 (5th Cir. 2013) (citing *Price v. Fed. Exp. Corp.*, 283 F.3d 715, 720 (5th Cir. 2002)). The City argues that Plaintiff has not established her prima facie case because she fails to show that she sought and applied for a promotion. Plaintiff argues that, because the job was never posted, she does not have to show that she applied for the promotion to establish her prima facie case.

Plaintiff supports her argument with case law from multiple courts; however, though the cited precedent may relieve Plaintiff of the requirement to show to she formally applied for a promotion, it requires that she show that she expressed general interest in the position. *See, e.g., Abrams v. Baylor Coll. of Med.*, 581 F.Supp. 1570, 1579 (S.D. Tex. 1984), *affirmed in part and reversed in part on other grounds*, 805 F.2d 528 (5th Cir. 1986) (the fact that plaintiffs' desire for sought after positions “was informally communicated to those in charge” was sufficient to defeat summary judgment). Plaintiff does not argue that she at any time communicated her interest in the newly created Crew Supervisor position. Instead, she claims that she meets this requirement because the City did not post the position and solicit applications in violation of its own policies. This argument, however, is unpersuasive.

Because Plaintiff never applied to nor communicated any interest in the Crew Supervisor position to any of her superiors, she cannot show that she was qualified for the position she sought because she *never sought* the position. *See Autry*, 704 F.3d at 346–67 (citing *Price*, 283 F.3d at 720); *see also Woodson v. Miss. Space Servs./Computer Scis. Corp.*, 1:05–CV–426–WJG–JMR, 2007 WL 2012809, at *4 (S.D. Miss. July 6, 2007) (holding that the plaintiff did not establish her prima facie case where she did not apply for the promotion, despite no job opening being posted). By never seeking or expressing interest in the position, Plaintiff never gave the City an opportunity to discriminate against her based on a protected characteristic. The fact that the City never posted the position does not satisfy this element of Plaintiff's prima facie case because, by not posting the position, the City in effect discriminated against all potential applicants regardless of whether they were members of a protected class. Therefore, the Court must find that Plaintiff has not established her prima facie case for any of her discrimination claims¹ and that summary judgment is warranted.

Even assuming *arguendo* that Plaintiff could establish a prima facie case on any of her discrimination claims, the City would still be given the opportunity under the *McDonnell Douglas* burden-shifting analysis to come forward with a legitimate, non-discriminatory reason for its actions. *See Brown*, 207 F.3d at 781. The City has given a legitimate, non-discriminatory reason for its decision not to promote Plaintiff in the form of the disciplinary actions taken against her prior to Smith's appointment to Crew Supervisor.² (*See* March Corrective Disciplinary Form [49–12]; July Corrective Disciplinary Form [49–13].) Therefore, even if the

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Court found that Plaintiff has established her prima facie case, which it does not, her claims would still fail. The Court therefore finds that the Motion for Summary Judgment [49] should be **granted**, and Plaintiff's claims will be **dismissed with prejudice**.

III. CONCLUSION

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion for Summary Judgment [49] is **granted**. SO ORDERED AND ADJUDGED, on this, the 30th day of May, 2017.

All Citations

Slip Copy, 2017 WL 4485879

Footnotes

1Additionally, the Court would note that Plaintiff's claim of racial discrimination would fail regardless, as the person actually promoted was of her same race.

2The City also questions whether Plaintiff was actually qualified for the Crew Supervisor position.