



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Milwaukee Area Office

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[Redacted])
[Redacted])
[Redacted])
[Redacted])
Complainant)
and)
[Redacted])
[Redacted])
Department of [Redacted])
Agency)

EEOC No(s): [Redacted]
Agency No(s): [Redacted]

ORDER ENTERING JUDGMENT

For the reasons set forth in the enclosed Decision dated February 28, 2011, judgment in the above-captioned matter is hereby entered. A Notice To The Parties explaining their appeal rights is attached.

This office is also enclosing a copy of the hearing decision and/or transcripts for the agency and a copy for complainant and/or his/her representative.

This office will hold the report of investigation and the complaint file for sixty days, during which time the agency may arrange for their retrieval. If we do not hear from the agency within sixty days, we will destroy our copy of these materials.

It is so ORDERED.

For the Commission:

3-2-11 ✓
Date

[Signature]
Deborah J. Powers
Administrative Judge
(414) 297-3983
deborah.powers@eoc.gov

Enclosures

CERTIFICATE OF SERVICE

For timeliness purposes, the Commission will presume that the parties received the foregoing decision and/or transcripts within five (5) calendar days after the date they were sent via first class mail. I certify that on March 2, 2011, the foregoing copy of the decision and/or transcripts were sent via first class mail to the following:

Director (w/files)

Office of [REDACTED]

Dept. of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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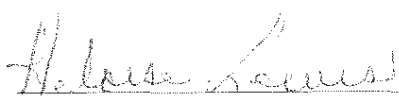
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



Heloise Lewis
Secretary

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
MILWAUKEE AREA OFFICE

[REDACTED])
)
Complainant,) EEOC Docket No.: [REDACTED]
v.)
) Agency No.: [REDACTED]
[REDACTED])
DEPARTMENT OF [REDACTED])
)
Agency.)

DECISION OF ADMINISTRATIVE JUDGE AFTER
HEARING PURSUANT TO 29 C.F.R. § 1614.109 (I)

COMPLAINANT'S REPRESENTATIVE:

[REDACTED]
[REDACTED]
[REDACTED]

COMPLAINANT:

[REDACTED]
[REDACTED]
[REDACTED]

AGENCY'S REPRESENTATIVE:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE JUDGE:

DEBORAH J. POWERS
Administrative Judge- EEOC
Milwaukee Area Office
310 W. Wisconsin Ave. Suite 800
Milwaukee, WI 53203

HEARING DATE:

February 9, 2011

I. INTRODUCTION

Pursuant to 29 C.F.R. § 1614.109, a hearing was held on February 9, 2011, regarding the complaint filed by [REDACTED] (“Complainant”), against the Department of the [REDACTED] (“Agency”). The undersigned Administrative Judge has reviewed the record in this matter and upon consideration of all the evidence issues the following ruling.

II. ISSUES

Whether the Complainant was discriminated against based on her national origin (Hispanic and Puerto Rico), disability, retaliation and age when:

- (1) Complainant was not selected for the position of Revenue Officer, External Vacancy Announcement No. 090G3-SBE0020-1169-07-JE;
- (2) Complainant was not selected for the position of Revenue Officer, External Vacancy Announcement No. 090G3-SBE0015-1169-07-DZ; and
- (3) Complainant was not selected for the position of Revenue Officer, External Vacancy Announcement No. 090G3-SBE0012-1169-07-DZ.¹

III. APPLICABLE LAW

The law governing this case is Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA) as amended, 29 U.S.C. § 621 *et seq.*, and the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 *et seq.* “The Rehabilitation Act was amended in 1992 to apply the standards of the Americans with Disabilities Act (ADA) to complaints of discrimination by federal employees or applicants for employment.” *Thomas v. Department of Transp.*, EEOC Appeal No. 01A33752 (March 24, 2005).

In analyzing a disparate treatment claim under the Rehabilitation Act, Title VII and the ADEA where there is no direct evidence of discrimination, as is the case here, the burden-shifting method of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is applied. *Whitt v. United States Postal Service*, EEOC Appeal No. 01A15035 (April 3, 2003); *Klein v. Department of Agriculture*, EEOC Appeal No. 0120061721 (October 7, 2008); *Muller v. Department of Agriculture*, EEOC Appeal No. 0120065071 (June 12, 2008). Under this analysis, complainant must first establish a *prima facie* case of unlawful discrimination by demonstrating that she was subject to an adverse employment action under circumstances that would support an inference of discrimination. *Donnelly v. Department of the Interior*, EEOC Appeal No. 0120063842 (November 29, 2007). The specific elements necessary to prove a *prima facie* case will vary depending on the facts of the particular case. *Id.*

¹ See the Hearing Transcript at pages 5-26, for a thorough discussion of the issues, pre-hearing motion practice, summary judgment, witnesses and exhibits.

To establish a *prima facie* case in a discriminatory non-selection claim, complainant must show that: (1) she is a member of a protected group; (2) she applied and was qualified for the position; (3) she was considered for and denied the position; and (4) another person, not a member of her protected group was selected for the position. *Klein v. Department of Agriculture*, EEOC Appeal No. 0120061721 (October 7, 2008). Generally, Complainant may also set forth evidence of acts from which, if otherwise unexplained, an inference of discrimination can be drawn. *Id.*

Once a *prima facie* case has been established, the burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. *Wilson v. United States Postal Service*, EEOC Appeal No. 0120064697 (April 3, 2008). For the Agency's reason to be legally sufficient, it must only be a "specific, clear, and individualized explanation for the treatment accorded complainant." *Gonzales v. Department of Justice*, EEOC Appeal No. 0120055228 (January 10, 2007) quoting *Miller v. United States Postal Service*, EEOC Appeal No. 01A55387 (June 9, 2006). This burden is one of production, not persuasion, and involves no assessment of the credibility of the agency's proffered reason. *Lynn v. Department of Defense*, EEOC Appeal No. 0120080044 (October 17, 2008).

After the agency has articulated such a reason, the burden of production then returns to the complainant to show that the agency's stated reason was a pretext for discrimination. *Koch v. Securities and Exchange Commission*, EEOC Appeal No. 01A03888 (December 21, 2001). Pretext can be demonstrated by showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. *Chavez v. USPS*, EEOC Appeal No. 0120055246 (January 5, 2007).

The established order of analysis in discrimination cases in which the first step normally consists of determining the existence of a *prima facie* case need not be followed in all cases. *Spriggs v. United States Postal Service*, EEOC Appeal No. 0120061698 (April 12, 2007); *Kopciowski v. United States Postal Service*, EEOC Appeal No. 0120071370 (July 11, 2008). Where the agency has articulated a legitimate, nondiscriminatory reason for the action, the factual inquiry can proceed directly to the ultimate issue of whether the Complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. *Id.*

IV. FACTS

During the course of the hearing eight individuals testified as follows: (1) Complainant; (2) [REDACTED] (3) [REDACTED] (4) [REDACTED] (5) [REDACTED] (6) [REDACTED] (7) [REDACTED]; and (8) [REDACTED]

Complainant was a GS-0318-05 Secretary (OA) with the [REDACTED] [REDACTED] Division. ROI, 131. Complainant's direct supervisor was [REDACTED] ROI, 132.

Complainant's national origin is Hispanic and Puerto Rican. ROI, 131. Complainant's date of birth is [REDACTED]

Complainant has an Associates Degree in Computer Networking Systems Technology from ITT Technical College. ROI, 457. Complainant also received her LAN Specialist Certificate regarding computer networking, and has a real estate license. ROI, 457; HT, 38-40. Complainant took a large variety of on-line training courses through the IRS/CPE training system. ROI, 457-458; HT, 47-49. Complainant spent three days shadowing different level Revenue Officers to observe their job duties and responsibilities. HT, 45-47.

Complainant described her job duties as:

I meet and greet taxpayers from the outside. I take taxpayer phone calls and inquiries and route their calls to the respective Bankruptcy Specialists. I do daily mail, incoming and outgoing. I file cases. I generate monthly and biweekly reports. I do time and attendance. I have held this position for about eight years.

ROI, 132.

[REDACTED] during the relevant time period was the Chief, Employment Section III, [REDACTED] Employment Branch, and was responsible for managing the staff that provided employment services to SBSE Collection Areas, including nationwide hiring of Revenue Officers ("Hiring Center"). ROI, 189. [REDACTED] was stationed in [REDACTED] ROI, 189. At the time the decisions were made regarding the qualification of Complainant for a GS-7 Revenue Officer position, [REDACTED] had never met the Complainant. HT, 173.

[REDACTED] testified that in the normal course of business the Hiring Center would issue an applicant a tentative notice of qualification. HT, 138-139. The tentative notice of qualification was based on the applicant's application, their answers to the questions and the results of the online assessment completed by the applicant during the application process. HT, 138-139, 163. When the tentative notice was sent, the Hiring Center had not yet independently reviewed the applicant's qualifications. HT, 138-139. The Hiring Center would often get hundreds or even thousands of applications for a posted position. HT, 139. To save time and resources, the Hiring Center would not independently review applicant's qualifications unless the Hiring Center was notified that an applicant had been selected by the Agency for interview. HT, 139.

[REDACTED] during the relevant time period was the Collection Territory Manager for [REDACTED] HT, 179. [REDACTED] national origin is Puerto Rico and at the time of the hearing he was [REDACTED] years old. HT, 180. [REDACTED] he was [REDACTED] and had participated in protected activity in the past when he submitted reasonable accommodation requests. HT, 180.

External Vacancy Announcement No. 090G3-SBE0020-1169-07-JE

On [REDACTED] Complainant submitted her final information to complete her on-line application for the position of Revenue Officer, announcement 090G3-SBE0020-1169-07-JE.

ROI, 326, 329. When Complainant applied for the Revenue Officer position, she indicated she was eligible for the Schedule A appointing authority for persons with mental retardation, severe physical disabilities or psychiatric disabilities. ROI, 332; HT, 88-89. On [REDACTED] Complainant received notice that based upon the results of her on-line job simulation assessments, she was tentatively qualified for the position of Revenue Officer, announcement 090G3-SBE0020-1169-07-JE. ROI, 325, 330. Complainant received a rating of "Category A" and was found eligible at a grade level 07. ROI, 330.

On J [REDACTED] Complainant received an e-mail requesting "proof of disability and certification of job readiness," to be provided "in the form of documentation obtained from licensed medical professionals, state or private vocational rehabilitation specialists, or any Government agency that issues or provides disability benefits." ROI, 332. Complainant was further notified that in order to be considered under Schedule A authority, the required documentation had to be submitted by [REDACTED] ROI, 332. Complainant did not provide the requested medical information. HT, 88-89. On [REDACTED] Complainant received notice that she was not selected for the position. ROI, 324.

[REDACTED] testified that he was responsible for filling the position of Revenue Officer in [REDACTED] HT, 181-182. The personnel office provided [REDACTED] a certificate that had over two hundred names on it to select for around ten or twelve positions. HT, 182. [REDACTED] testified that he decided which applicants to interview by the applicant's numerical ranking on the certification list, starting with the highest ranked applicant and then proceeding down the list in numerical order. HT, 182-184. [REDACTED] did not select Complainant for interview because he had enough qualified applicants to fill the open positions that were ranked numerically higher on the list than Complainant. HT, 182-185. [REDACTED] observed that Complainant was fifty or sixty on the list, and he only reached those names that were thirty or forty on the list. HT, 183-184.

External Vacancy Announcement No. 090G3-SBE0015-1169-07-DZ

Complainant properly applied for the position of Revenue Officer, External Vacancy Announcement No. 090G3-SBE0015-1169-07-DZ. ROI, Tab 18. On [REDACTED] Complainant was notified that based on her scores on the on-line simulation, she was tentatively qualified for the position, with a rating of Category A, and eligible at a grade level 07. ROI, 355. The notice informed Complainant that the determination was tentative based on final qualifications. ROI, 355. On May 30, 2009, Complainant was informed that "based upon review of your application, you were found to be ineligible because you did not meet the minimum education and/or experience requirements for the position." ROI, 336.

The vacancy announcement indicated that to be minimally qualified, applicants were required to meet A, B, C, or D as follows:

A. Superior Academic Achievement- A Bachelors degree...

OR

B. At least 1 academic year of graduate education ...

OR

C. At least 1 year of specialized experience equivalent to the GS-5 level that required one or more of the following: 1) Knowledge of business organization and commercial practices; 2) knowledge of investigative techniques and methods, and the ability to apply such techniques to the analysis of business and financial matters; 3) Practical knowledge of business law, including laws governing fraudulent transfers, secured and unsecured debts, negotiable instruments, business corporations and survivorship rights and titling instruments; 4) Knowledge of delinquent loan collection processes and techniques; 5) Working knowledge of accounting principles and practices; 6) Knowledge of Internal Revenue Code and related Federal tax regulations and procedures. Examples of specialized experience include: experience that demonstrates knowledge of business organization and commercial practices; knowledge of investigative techniques and methods, and the ability to apply such techniques to the analysis of business and financial matters; practical knowledge of business law, including laws governing fraudulent transfers, secured and unsecured debts, negotiable instruments, business corporations, and survivorship rights and titling instruments; knowledge of delinquent loan collection processes and techniques; working knowledge of accounting principles and practices; knowledge of the Internal Revenue Code (IRC) and related Federal tax regulations and procedures. Examples of qualifying experience include: reviewing financial documents to determine a business' financial condition and its ability to pay debt; evaluating income assets, equity and credit to collect delinquent payments; investigating or tracing financial transactions such as a real estate broker or insurance broker; establishing or operating a small business that included administering a budget, defining operating procedures and understanding tax consequences of business actions; counseling taxpayers on tax filing and paying obligations; or dealing with the effects of various legal instruments such as leases, wills, deeds and trusts.

OR

D. At least 1 year of combined graduate education and experience as defined in paragraphs B and C above.

ROI, 344-345.

External Vacancy Announcement No. 090G3-SBE0015-1169-07-DZ was processed by Kennedy's staff, and it was determined that Complainant was not eligible because she did not meet the educational requirements, nor did she have the work experience needed to meet the specialized experience requirement. ROI, 189, 191; HT, 140-143, 169. ██████████ testified that the types of work experience that would deem an applicant eligible includes work as an accountant, assisting customers with preparation of their tax returns, reviewing business documents, determining the financial standing of a business and reviewing assets. HT, 141.

Training, unless it resulted in a recognized degree, would not assist an applicant in meeting the eligibility requirements. HT, 175. The applicant must have actual qualifying work experience. HT, 140-141, 175-176.

External Vacancy Announcement No. 090G3-SBE0012-1169-07-DZ

Vacancy announcement 090G3-SBE0012-1169-07-DZ specifically states that “individuals applying for this announcement are required to complete and submit an on-line application through the Office of Personnel Management (OPM) USAJOBS website.” ROI, 419. [REDACTED] testified that Complainant did not submit an on-line application, only a faxed application which can only be used for internal vacancies. ROI, 386; HT, 156-157. [REDACTED] testified that a record of the on-line applications can be found on the Career Connector system, and both she and her assistant searched the system but could not find any record that Complainant had applied for vacancy announcement 090G3-SBE0012-1169-07-DZ on-line through USAJOBS. ROI, 191; HT, 143, 152-153, 161, 166.

Complainant testified that she applied for this position both on-line and by sending in a fax of her supporting documentation. ROI, 123, 388-405; HT, 55, 57. Complainant noted that at the time she applied for this position, USAJOBS did not have the capability of uploading all the supporting documentation required for the application, so in addition to the on-line application and simulations, the applicants were required to send via facsimile all supporting documentation. HT, 57. Complainant notes that proof she applied on-line can be found in the fact that she printed out the announcement and made a handwritten notation that she applied on [REDACTED] [REDACTED] [REDACTED] ROI, 408; HT, 57-58. Complainant printed out her job application history from the USAJOBS web-site, and there was no record that she applied for vacancy announcement 090G3-SBE0012-1169-07-DZ. ROI, 406-407.

V. ANALYSIS

Complainant alleges that she was treated disparately and not hired for three positions because of her disability, national origin, age and in retaliation for her filing of multiple EEOs. Although the initial inquiry of discrimination usually focuses on whether the complainant has established a *prima facie* case, following this order is unnecessary when the Agency has articulated a legitimate, nondiscriminatory reason for its actions. In such cases, the inquiry can shift directly to whether Complainant has demonstrated by a preponderance of the evidence that the Agency’s reasons for its actions merely were a pretext for discrimination. In the current case, after a careful analysis of each incident of alleged discrimination, it can be seen that Complainant has failed to meet her burden to prove by a preponderance of the evidence that the Agency’s legitimate, nondiscriminatory reasons for its actions were pretext for discrimination.

External Vacancy Announcement No. 090G3-SBE0020-1169-07-JE

The Agency claims that Complainant was not selected for this position because she was not ranked high enough on the certification list. R [REDACTED] [REDACTED] credibly testified that he decided which applicants to interview by the applicant’s numerical ranking on the certification list, starting with the highest ranked applicant and then proceeding down the list in numerical order.

██████████ did not select Complainant for interview because he had enough qualified applicants to fill the open positions that were ranked numerically higher on the list than Complainant.

As a threshold issue, it should be noted that the selecting official, ██████████ was in all the same protected categories as the Complainant, and, as to age, he was older than the Complainant. While I recognize that just because the alleged discriminating official is in the same protected groups as the Complainant is not determinative of whether discrimination did or did not occur, it can be considered relevant, especially when other evidence to support an inference of discrimination is not present. *Turner v. United States Postal Service*, EEOC Appeal No. 01930672 (February 12, 1993). In addition, ██████████ worked at a different location than Complainant in a different state, and there is no evidence he ever met the Complainant or had any knowledge of her membership in her protected categories.

Complainant did not present any evidence that contradicted ██████████ explanation that he did not interview Complainant because her name was too far down on the certification list. Rather, Complainant claims evidence of pretext can be seen in the fact that although she had applied for many Revenue Officer positions in the past, for the first time with this application she was asked for information regarding her disability, and when she refused to provide the information she was not hired. However, in proffering this theory of pretext, what Complainant fails to take into consideration is that she applied for this position under Schedule A authority for individuals with severe disabilities. Thus, the reason she was asked for information regarding her disabilities was not because of discriminatory animus, but because she voluntarily requested to be considered for hire under Schedule A, and the Agency had the right to ask for verification of those disabilities. Given these facts Complainant has not met her burden to demonstrate pretext.

External Vacancy Announcement No. 090G3-SBE0015-1169-07-DZ (ROI 1b)

The Agency claims Complainant was not selected for this Revenue Officer position because she was found ineligible due to her failure to meet the minimum education or work experience required for the position. Complainant disagrees with the Agency's assessment of her qualifications and argues that evidence of pretext can be found in the fact that she was found eligible with a Category A ranking, the highest rating, and then subsequently the eligibility decision was reversed.

During her testimony, ██████████ explained how Complainant could be found eligible at a Category A, and then subsequently found ineligible. Kennedy noted that for any given external announcement, the Hiring Center could receive hundreds, sometimes even thousands, of applications. Given the volume of applications and the resources needed to process them, the qualification process is broken down into two steps. The first step of the qualification process involves a tentative assessment of qualification. The tentative qualification is based solely on the applicant's self-report of his or her past work experience and education, as is reflected in the resume and his or her responses to the on-line assessment. No independent verification of the applicant's information is conducted at this time. Based on the self-reported information, each

applicant is given a qualification rating, and is notified that the rating is tentative subject to verification.

Once the preliminary list of qualified applicants is generated, the management officials at the hiring location select those applicants they are interested in interviewing, and notify the Hiring Center. Step two of the qualification process then begins. After the Hiring Center receives the names of those individuals selected for interview, the staff conducts an independent review of the applicant's qualifications. If the review verifies what was self-reported during the application process, the applicant continues on for interview. However, if the independent review reveals that the self-report information did not rise to the level necessary for qualification, then the applicant is notified that he or she is not qualified and is not sent for interview.

In this case, there is no dispute that Complainant received a tentative qualification with a Category A rating, and that after independent review the rating was reversed and she was found unqualified. Complainant argues this demonstrates pretext. However, a close look at the evidence supports the Hiring Center's conclusion that Complainant was not qualified as a Level 7 Revenue Officer, and the decision to find Complainant unqualified was not based on discrimination, but on valid qualification standards.

Complainant's job for the Agency was as a Level 5 secretary. Complainant described her job duties as administrative in nature, including greeting taxpayers from the outside, routing phone calls, processing incoming and outgoing mail, filing, generating reports and processing time and attendance. As far as education is concerned, Complainant has earned an Associates Degree relating to computers, and a certification in LAN, also related to computers. Complainant also completed a large variety of IRS sponsored training courses, and spent three days shadowing different level Revenue Officers. Based on this work experience, education and training, Complainant believes she is qualified for a Level 7 Revenue Officer position.

However, when Complainant's work experience and education is compared to the requirements for a Level 7 Revenue Officer as those requirements are specifically listed on the job announcement, it can be seen that a reasonable interpretation is that Complainant is not qualified. To qualify for a Level 7 Revenue Officer, an applicant must either have a Bachelors Degree or higher level of education or relevant work experience or a combination of the education and work experience. There is no dispute that Complainant did not meet the educational requirements since her level of education is an Associates Degree, not the higher level Bachelors Degree. As such, Complainant must qualify for the position based on her work experience.

The position description indicated that a qualified applicant must have knowledge of business and commercial organization, accounting, investigative techniques regarding analysis of business and financial matters, practical knowledge of business law, knowledge of delinquent loan collection processes and techniques or knowledge of Internal Revenue Code and related Federal tax regulations and procedures. The vacancy announcement also indicated that examples of qualifying experience included: reviewing financial documents to determine a business' financial condition and its ability to pay debt; evaluating income assets, equity and credit to collect delinquent payments; investigating or tracing financial transactions such as a real estate

broker or insurance broker; establishing or operating a small business that included administering a budget, defining operating procedures and understanding tax consequences of business actions; counseling taxpayers on tax filing and paying obligations; or dealing with the effects of various legal instruments such as leases, wills, deeds and trusts.

Complainant did not have any of the qualifying experience as listed in the vacancy announcement. Complainant was a secretary for the Agency, and performed administrative tasks, not business and financial tasks as is required for the position. It is true Complainant took a large variety of training courses, but as was indicated by [REDACTED] in her testimony, training alone is not enough, the applicant must have actual work experience. Given these facts, the Hiring Center's assessment that Complainant was not qualified for the position was reasonable, and not so outrageous as to evidence discriminatory intent.

Complainant also argues that pretext can be seen in the fact that she has applied for many Revenue Officer positions in the past, yet she has always been denied, despite the fact that she was ranked highly qualified at the GS-7 level. However, there is no evidence to support Complainant's contention that she was ever qualified at the GS-7 level. It is true Complainant was found qualified and given a Category "A" rating, but the rating was tentative and based only on Complainant's self reported information, not based on any independent evaluation. Once Complainant's qualifications were independently evaluated she was found not to be qualified, as was already discussed at length above. Complainant's argument refuses to recognize that the initial eligibility finding was tentative, as was clearly stated on the notices Complainant received, and subject to verification. The bottom line is Complainant is not qualified as a GS-7 Revenue Officer, and if she continues to apply for a GS-7 Revenue Officer position with the same work experience and education, she will continue to be found unqualified. This is not evidence of discrimination, but rather evidence of a business standard being consistently applied. Given these circumstances, it cannot be concluded that multiple rejections equates to discriminatory intent.

There is no dispute that the decision as to whether Complainant was qualified was made by the Hiring Center. The Hiring Center was located in [REDACTED]. Thus, the staff at the Hiring Center did not work at the same location as Complainant, nor did they work at the same location as any of the management officials who were allegedly discriminating against Complainant. There is no credible evidence in the record that the staff at the Hiring Center was discriminating against the Complainant. Complainant may not agree with the Hiring Center's assessment as to what work experience would qualify her for a GS-7 Revenue Officer position, but that does not prove that the staff at the Hiring Center made the decision based on discriminatory animus.

Proof of pretext is not satisfied by Complainant's disagreement with the Agency's business judgment regarding the necessary qualifications or prerequisites for the position. *Cowell v. Department of the Navy*, EEOC Appeal No. 0120065336 (July 25, 2008). Employers generally have broad discretion to set policies and to carry out personnel decisions, and should not be second guessed by the reviewing authority absent evidence of unlawful motivation. *Carmona v. Department of the Treasury*, EEOC Appeal No. 0120071402 (May 30, 2007). There is no such evidence of "unlawful motivation" here. Accordingly, a finding of no discrimination is appropriate.

External Vacancy Announcement No. 090G3-SBE0012-1169-07-DZ (ROI 1e)

The Agency argues that the reason it did not select Complainant for this position was because she did not apply on-line through USAJOBS as is required for all applicants. The Complainant argues that evidence of pretext can be seen in the fact that she did apply properly on-line, and the Agency is not being truthful in its contention that she did not.

Even assuming that Complainant did properly apply on-line, standing alone, this is not evidence of pretext. Something obviously happened to the application in the USAJOBS computer system. Kennedy testified she could not find any record of an application from Complainant for this vacancy, and Complainant herself printed out a job history from the USAJOBS website and the application did not show up. Complainant could not have been considered and then discriminatorily not selected for a position for which there was never an application in the system.

Nor was there any evidence presented by Complainant that [REDACTED] or her staff had somehow purposely deleted or tampered with the application. As already discussed, the hiring center is located in [REDACTED] and therefore the staff does not work at the same location as Complainant. There is no evidence that the Hiring Center staff harbored any discriminatory animus toward Complainant, or that they had even met her, and there certainly is no evidence that anyone deleted the application. Mistakes happen, computers have glitches. A mistake does not equate to discrimination. Ultimately, bare assertions that essentially amount to nothing more than Complainant's opinion will not meet her burden. *Chavez v. United States Postal Service*, EEOC Appeal No. 0120055246 (January 5, 2007)(subjective belief, however genuine, does not constitute evidence of discrimination). Overall, the evidence indicates that Complainant was not hired for this position because her application was never received by the Hiring Center, not because of discrimination.

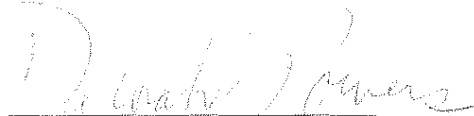
VI. CONCLUSION

Complainant has failed to meet her burden to prove by a preponderance of the evidence that the Agency's articulated, non-discriminatory reasons for not selecting Complainant for the position of Revenue Officer were pretext for discrimination. Accordingly, I make a finding of no discrimination on all issues.

February 28, 2011

Date

For the Commission:



Deborah J. Powers
Administrative Judge

NOTICE TO THE PARTIES

TO THE AGENCY:

Within forty (40) days of receiving this decision and the hearing record, you are required to issue a final order notifying the complainant whether or not you will fully implement this decision. You should also send a copy of your final order to the Administrative Judge.

Your final order must contain a notice of the complainant's right to appeal to the Office of Federal Operations, the right to file a civil action in a federal district court, the name of the proper defendant in any such lawsuit, the right to request the appointment of counsel and waiver of court costs or fees, and the applicable time limits for such appeal or lawsuit. A copy of EEOC Form 573 (Notice of Appeal/Petition) must be attached to your final order.

If your final order does not fully implement this decision, you must simultaneously file an appeal with the Office of Federal Operations in accordance with 29 C.F.R. 1614.403, and append a copy of your appeal to your final order. See EEOC Management Directive 110, November 9, 1999, Appendix O. You must also comply with the Interim Relief regulation set forth at 29 C.F.R. § 1614.505.

TO THE COMPLAINANT:

You may file an appeal with the Commission's Office of Federal Operations when you receive a final order from the agency informing you whether the agency will or will not fully implement this decision. 29 C.F.R. § 1614.110(a). From the time you receive the agency's final order, you will have thirty (30) days to file an appeal. If the agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the agency's (40) day period for issuing a final order. See EEO MD-110, 9-3. In either case, please attach a copy of this decision with your appeal.

Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Office of Federal Operations at the address set forth below, and you must send a copy of your appeal to the agency at the same time that you file it with the Office of Federal Operations. In or attached to your appeal to the Office of Federal Operations, you must certify the date and method by which you sent a copy of your appeal to the agency.