

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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JANICE L. FIELDS,

Plaintiff,

v.

TIMOTHY GEITHNER,

Defendant.

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Civil Action No. 03-1035 (RWR)

MEMORANDUM OPINION

Plaintiff Janice Fields, an employee of the Bureau of Alcohol, Tobacco, and Firearms ("ATF") at the times relevant to this action,<sup>1</sup> has sued the Secretary of the Treasury,<sup>2</sup> seeking damages under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., alleging that the ATF discriminated against her because of her age and race and retaliated against her by denying her a promotion for which she had applied. The Secretary moves to dismiss Fields' amended complaint or for summary judgment. Because it is undisputed that

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<sup>1</sup>In 2002, the ATF was divided into two separate and distinct bureaus: the Alcohol and Tobacco Tax and Trade Bureau ("TTB") in the Department of the Treasury, and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE") in the Department of Justice. While Fields is employed by the BATFE, her complaint arises from her non-selection for positions that are under the Department of the Treasury's control in the TTB.

<sup>2</sup> Secretary of the Treasury Timothy Geithner is substituted as the defendant under Federal Rule of Civil Procedure 29(d).

Fields failed to exhaust her administrative remedies regarding her claim of disparate impact and presents no prima facie evidence of that claim, and because Fields fails to rebut the defendant's legitimate, non-discriminatory reasons for its personnel decision, the defendant's motion will be granted and judgment will be entered in favor of the Secretary.

#### BACKGROUND

Fields, a black woman, was hired by the ATF in 1987. In 2001, when the events giving rise to this cause of action took place, Fields was employed in the Firearms Branch of ATF at the GS-9 level. (Def.'s Stmt. of Mat. Facts Not in Dispute ("Def.'s Stmt.") ¶¶ 1-2.)

In 2000, the ATF published vacancy announcement No. 00-489 ("Vacancy 00-489") for a position involving contact with the public regarding the Department of the Treasury's alcoholic beverage laws and regulations. (Pl.'s Opp'n, Stmt. of Genuine Issues ("Pl.'s Stmt.") at 6 ¶ 1.) Fields and a white woman born in 1970 named Marsha Heath applied for Vacancy 00-489. (Def.'s Mem. in Supp. of Mot. to Dismiss or for Summ. J. ("Def.'s Mem."), Ex. 4 at 13.) Fields was given a score of 62 and placed on the best qualified list, while Heath was given a score of 57 and was not placed on the best qualified list. (Pl.'s Stmt. at 6-7 ¶¶ 2-4, 10.)

In 2001, the ATF published a vacancy announcement for an ATF Specialist, Customer Service, GS-1854-11/12, in the Alcohol Labeling and Formulation Division ("Vacancy 01-006"). (Def.'s Mem. Ex. 1.) The announcement asked for a supplemental experience statement, consisting of a detailed explanation of the applicant's work experience, training, awards, volunteering experience, and hobbies as they related to the following knowledge, skills, and abilities ("KSAs"):

1. Knowledge of (1) Federal laws and regulations governing the beverage alcohol industry and (2) industry operations, processes, and procedures.
2. Ability to communicate in person in order to resolve customer complaints, present management with recommendations for change, interview, negotiate, etc.
3. Ability to communicate in writing in order to prepare a variety of written documents.
4. Ability to research, analyze, evaluate, draw conclusions, and provide recommendations on a variety of issues.

(Def.'s Mem. Ex. 1.)

Fields, who had four years of experience as a labeling specialist within the Alcohol Labeling and Formulation Division of the ATF at that time, and Heath, who had two years of experience as a specialist on the customer service team in that alcohol labeling division, timely applied for Vacancy 01-006. In the portion of Fields' application where she explained her KSAs, she stated that she acquired knowledge of federal laws and regulations both through her experience from 1990 to 1994 in the alcohol labeling division, and through a four-week training

course she participated in Georgia in 1990. Fields also stated that her position as a labeling specialist required her to be able to communicate effectively, both in person and in writing and forced her to engage in research, evaluation, and coordination when the alcohol labeling division decided that a label or formula did not meet federal guidelines. (Def.'s Mem. Ex. 3 ("Fields App.") at 38-40.)

Marsha Heath's application explaining her KSAs stated that in her position as a specialist on the customer service team of the alcohol labeling division, she daily applied the Federal Alcohol Administration Act, the Code of Federal Regulations, and the Internal Revenue Code, when an industry member or an inspector asked her to answer a question regarding case markings, labels, standards of identity, and tax classification of alcoholic beverages. Heath's application also explained that she prepared both formal correspondence to industry members regarding their beverage labels and correction sheets for label applications. Heath also claimed to have approved or denied requests for label use-ups and prepared e-mail responses. At the time of her application, she was the Contracting Officers' technical representative for the division, which required her to create monthly reports and proposals to the Finance Office in order to maintain the contract and to make written recommendations to the Contracting Officer in order to make

changes to the Statement of Work. Heath's application also explained her background as an Administrative Assistant, and how that would assist her in the position. (Def.'s Mem. Ex. 4 ("Heath App."), at 9-13.)

Because they were both deemed qualified, Fields' and Heath's applications were referred to a rating and ranking panel consisting of Di'Anne Fletcher, Linda Wade Chapman, and G. Craig Sabo. (Def.'s Stmt. ¶¶ 7-8.) Fletcher was also on the panel that evaluated Fields and Heath for Vacancy 00-489. (Pl.'s Stmt. at 7 ¶ 6.) The panel for Vacancy 01-006 did not designate Fields on the "Best Qualified" list. Heath was the only candidate designated on the "Highly Qualified" list. (Id. at 7 ¶¶ 9-11.) According to Chapman, Heath's responses to questions that sought to gauge the applicants' KSAs went into greater detail and were more closely aligned with the duties and responsibilities of the job than Fields' were, and Heath better demonstrated knowledge of and the ability to apply the applicable federal laws and regulations. (Id. at 8 ¶ 13.) Sabo also believed that Heath demonstrated more knowledge of, and a better ability to apply, the relevant regulations and laws. (Id. at 8 ¶ 15.) Fletcher, Chapman, and Sabo were unaware of Fields' previous EEO activity at the time they served on the rating and ranking panel. (Id. at 8-9 ¶¶ 19-21.) On October 15, 2001, Heath was selected for the Vacancy 01-006 position.

On October 16, 2001, Fields filed with the Treasury Department an administrative complaint alleging that she was discriminated against because of her race, color, sex, and age, and in retaliation for prior involvement in the EEO process when she was not selected for Vacancy 00-489 position. It stated that Fields applied for the position listed in Vacancy 00-489 and that she made the best qualified list, but that another candidate was selected for the position. Fields learned that the selected applicant did not accept the position, and the position was cancelled. Fields' administrative complaint stated that Fields "sincerely believes that [her non-selection] was just another one of management's orchestrated games in retaliation for her participation in the complaint process." (Def.'s Mem. Ex. 13.) On March 22, 2002, Fields amended her administrative complaint to include not being selected for Vacancy 01-006. (Def.'s Stmt.

¶ 26.) The Treasury Department accepted for investigation

[w]hether [Fields] was discriminated against because of her race (African American), color (black), sex (female), age (DOB: August 28, 1949(52)) and retaliated against her for prior involvement in the EEO process (filed formal complaints) when on October 25, 2001, management allegedly failed to advance her career to the position of Alcohol Tobacco Firearms Specialist, GS-1854-11/12 under Vacancy Announcement Number G01-006.

(Def.'s Mem. Ex. 14.) Fields did not allege in either her original or her amended administrative complaint that the ATF's selection procedures produced a disparate impact that adversely

affected black applicants. On August 8, 2002, at Fields' request, her administrative complaint was transferred to the Equal Employment Opportunity Commission ("EEOC").<sup>3</sup> (Def.'s Mem. Ex. 15.)

Fields' amended complaint filed in this court alleges five counts: disparate treatment based on race and age when Fields was denied the promotion for Vacancy 01-006 (Counts One, Two, and Four); race discrimination based on disparate impact through the selection procedures used to judge the applications for Vacancy 01-006 (Count Three); and retaliation (Count Five). (Am. Compl. ¶¶ 10-19.)

Discovery has been completed, and the Secretary moves to dismiss Fields' amended complaint or for summary judgment. He argues that Fields failed to exhaust her administrative remedies for her claim in Count Three of discrimination based upon disparate impact, and that as to the remainder of the complaint, Fields failed to rebut the legitimate non-discriminatory reasons for not selecting Fields for Vacancy 01-006. Fields opposes the Secretary's motion, arguing that she timely exhausted her administrative remedies regarding Count Three and that the evidence in the record creates a genuine issue of material fact

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<sup>3</sup> The parties' filings do not reveal the outcome of the EEOC proceeding.

as to whether the defendant's legitimate, non-discriminatory reasons for not promoting Fields were pretext.

#### DISCUSSION

"Summary judgment is appropriately granted when the moving party demonstrates that there is no genuine issue as to any material fact and that moving party is entitled to judgment as a matter of law." Winston v. Clough, 712 F. Supp. 2d 1, 6 (D.D.C. 2010) (citing Moore v. Hartman, 571 F.3d 62, 66 (D.C. Cir. 2009) (citing Fed. R. Civ. P. 56(c) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986))). "In considering a motion for summary judgment, [a court is to draw] all 'justifiable inferences' from the evidence . . . in favor of the nonmovant." Winston, 712 F. Supp. 2d at 6 (quoting Cruz-Packer v. Dist. of Columbia, 539 F. Supp. 2d 181, 189 (D.D.C. 2008) (quoting Anderson, 477 U.S. at 255); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986))). "The court must determine 'whether there is a need for trial - - whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" Winston, 712 F. Supp. 2d at 6 (quoting Citizens for Responsibility and Ethics



in Wash. v. Bd. of Governors of the Fed. Reserve, 669 F. Supp. 2d 126, 129 (D.D.C. 2009)(internal quotation omitted)).<sup>4</sup>

#### I. DISPARATE IMPACT

Count Three alleges that Fields was "the victim of disparate impact, on the basis of her race," because the rating and ranking panel used "subjective selection procedures which slanted the results of the selection process to favor white employees irrespective of the qualifications of the Black applicant[.]"<sup>4</sup> (Am. Compl. ¶ 15.) The Secretary argues that the claim is unexhausted since at no time during the administrative proceedings or before the EEOC did Fields allege a claim of disparate impact. (Def.'s Mem. at 12, 14.) He adds that Fields' administrative complaint did not put the agency on reasonable notice to investigate a charge of disparate impact because her claims were focused on disparate treatment (id. at 13-14), and that, in any event, Fields failed to present statistical evidence that the challenged practice of using subjectively determined criteria in the selection process adversely affected a protected

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<sup>4</sup> While the defendant seeks dismissal of Count Three under Rule 12(b), he alternatively seeks summary judgment on that and all other counts. (Def.'s Mem. at 2, 16.) Discovery has been completed and all counts may be assessed for summary judgment. Thus, the standards governing motions to dismiss under Rule 12(b) need not be discussed.

<sup>4</sup> This allegation undermines the Secretary's argument that Fields failed to identify the specific employment practice that she is challenging in Count Three. (Def.'s Mem. at 16.)

group (id. at 15-16). Fields counters that the deadline for contacting the EEO counselor regarding her claim of disparate impact should be tolled because the Secretary deliberately concealed the fact that subjective criteria were used by the rating and ranking panel. (Pl.'s Opp'n at 33-34.)

An administrative complaint must contain enough specificity to put an agency on notice of a potential unlawful employment practice that the agency must investigate and correct where warranted. See Hopkins v. Whipple, 630 F. Supp. 2d 33, 41 (D.D.C. 2009) ("[t]he allegations in an administrative complaint must be sufficiently specific to give a federal agency the opportunity to handle the matter internally"). The complainant must exhaust administrative remedies before bringing an action in district court.

"Before filing a Title VII suit, a federal employee must timely pursue her administrative remedies, following the requirements set forth in 29 C.F.R. § 1614." Hines v. Bair, 594 F. Supp. 2d 17, 22 (D.D.C. 2009). . . . [T]he employee may file a civil action once the agency issues an adverse final decision or 180 days elapse without a decision, whichever happens first. See 42 U.S.C. § 2000e-16(c). The procedural requirements governing a plaintiff's right to bring a Title VII claim in court are not treated as mere technicalities, because it is "part and parcel of the Congressional design to vest in the federal agencies and officials engaged in hiring and promoting personnel 'primary responsibility' for maintaining nondiscrimination in employment." Patterson v. Johnson, 391 F. Supp. 2d 140, 145 (D.D.C. 2006) (quoting Kizas v. Webster, 707 F.2d 524, 544 (D.C. Cir. 1983)).

Winston, 712 F. Supp. 2d at 7. Requiring specificity in a charge enforces more than a "mere technicality," and plaintiffs must comply with all administrative procedures and deadlines. Park v. Howard Univ., 71 F.3d 904, 908-909 (D.C. Cir. 1995) (ruling that a Title VII plaintiff had not exhausted her administrative remedies because her administrative complaint did not contain the allegation of hostile work environment that appeared in the complaint before the court); see also Lane v. Hilbert, No. 03-5309, 2004 W.L. 1071330, at \*1 (D.C. Cir. May 12, 2004) (affirming dismissal where plaintiff's district court complaint alleged disparate treatment on account of sex, but her administrative complaint did not).

"A disparate impact claim is distinct from the disparate treatment claims [Fields] has alleged, and requires distinct elements of proof." Hopkins, 630 F. Supp. 2d at 40. "Disparate impact claims arise from employment practices that are facially neutral in their treatment of different groups, but that fall more severely on one statutorily protected group than another in practice, and which a defendant cannot justify by business necessity." Id. (citing Smith v. City of Jackson, 544 U.S. 228, 241 (2005)).

Fields did not comply with Title VII's administrative requirements for Count Three. It is undisputed that Fields' original and amended administrative complaints of discrimination

did not raise a disparate impact claim identifying the Secretary's employment policies, and there was no discussion of a disparate impact claim in any of the other administrative documents. Fields argues that the deadline should be tolled because she learned only through the Secretary's belated discovery production that the rating panel awarded points for training taken only in the prior five years, a practice she claims penalized older workers whose relevant training occurred earlier than the cut-off point. (Pl.'s Opp'n at 33-34.) However, Count Three alleges racial discrimination, not age discrimination, and Fields does not sufficiently explain the nexus between the points system and the racial discrimination she complains of in Count Three to toll the deadline.

Even if Fields had exhausted her administrative remedies regarding Count Three, the Secretary is still entitled to judgment on that claim. "To make a prima facie showing of disparate impact discrimination, the plaintiff must produce sufficient evidence to allow a reasonable trier of fact to conclude that a 'facially neutral employment practice had a significantly discriminatory impact.'" Menoken v. Berry, 408 Fed. Appx. 370, 372 (D.C. Cir. 2010) (quoting Connecticut v. Teal, 457 U.S. 440, 445 (1982)), citing Anderson v. Zubieta, 180 F.3d 329, 338-39 (D.C. Cir. 1999)). In general, plaintiffs make such a showing by submitting statistical evidence showing that

the challenged practice causes significant disparities. See, e.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988); Aliotta v. Bair, 614 F.3d 556, 565 (D.C. Cir. 2010) (noting that in the context of a claim of disparate impact under the ADEA, to demonstrate a prima facie case of disparate impact, the plaintiff was required to "offer statistical evidence of a kind and degree sufficient to show the employment decision disproportionately impacts older employees" (citing Krodel v. Young, 748 F.2d 701, 709 (D.C. Cir. 1984)));<sup>5</sup> Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 382 (2d Cir. 2006) (stating that "a plaintiff must [] produce statistical evidence showing that the challenged practice 'causes a disparate impact on the basis of race, color, religion, sex, or national origin'" (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i))); Onyewuchi v. Mayorkas, 766 F. Supp. 2d 115, 133 (D.D.C. 2011). If a plaintiff makes that showing, "the burden shifts to the employer to 'demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.'" Anderson, 180 F.3d at 339 (quoting 42 U.S.C. 2000e-2 (k)(1)(A) (i)).

Fields has not presented any statistical evidence showing that the challenged practice deleteriously affected black applicants. Because there is no genuine dispute about the fact

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<sup>5</sup> Plaintiff's reference to two affected older employees (Pl.'s Opp'n at 36 and n.17) would not likely satisfy that standard.

that Count Three alleges an unexhausted claim and Fields has presented no prima facie case of racially disparate impact discrimination, judgment will be entered for the Secretary on Count Three.

## II. DISPARATE TREATMENT AND RETALIATION

In Counts One, Two and Four of the amended complaint, Fields alleges that she suffered discrimination based on race in violation of Title VII, and discrimination based on age in violation of the ADEA, when she applied for a promotion to the Vacancy 01-006 position, but was not placed on the best qualified list and thus not selected for the position. She alleges that the position was offered to Heath, a white woman under 40 years of age, because the defendant accorded white applicants and people under the age of 40 more favorable treatment in the selection process. (Am. Compl. ¶¶ 11, 13, 17.) In Count Five of the amended complaint, Fields alleges that the Secretary denied her request for a promotion in retaliation for engaging in prior protected activity. (Am. Compl. ¶ 19.) The Secretary argues that judgment should be entered in his favor on these four counts because Fields fails to rebut the Secretary's legitimate, non-discriminatory reasons for not placing Fields on the best-qualified list for Vacancy 01-006 - - that Heath's application, and specifically her description of her KSAs, more closely matched the Secretary's need for the position than did Fields'

application - - and because Fields' qualifications were not substantially better than Heath's qualifications. (Def.'s Mem. at 17-20.) Fields disagrees, and argues that the Secretary's reasons are pretext because when both Heath and Fields applied for Vacancy 00-489, Fields made the best qualified list and Heath did not, and because a comparison of Heath's qualifications and KSAs and Fields' qualifications and KSAs shows that Fields was a much more qualified candidate than was Heath. (Pl.'s Mem. at 8, 14.)

"Under Title VII, it is an 'unlawful employment practice' for employers 'to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" Downing v. Tapella, 729 F. Supp. 2d 88, 93 (D.D.C. 2010) (quoting 42 U.S.C. § 2000e-2(a)(1)). Generally, proof of discrimination and retaliation claims is governed by the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). That procedure requires the plaintiff to prove a prima facie case, the employer to then produce evidence of a legitimate, nondiscriminatory reason for the adverse action, and the plaintiff to then show that the reason offered was a pretext for discrimination. Id. at 802-04. However,

[t]he court of appeals has explained that "'the prima facie case is a largely unnecessary sideshow'" once an

employer asserts a legitimate, nondiscriminatory reason for an adverse employment action. Adeyemi v. Dist. of Columbia, 525 F.3d 1222, 1226 (D.C. Cir. 2008) (quoting Brady v. Office of the Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008)). If an employer has offered a legitimate, nondiscriminatory reason for the alleged adverse action taken, "the district court must conduct one central inquiry in considering an employer's motion for summary judgment . . . whether the plaintiff produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason [for an adverse action] was not the actual reason and that the employer intentionally discriminated against the plaintiff on a prohibited basis." Id. at 1226. In determining whether a plaintiff has provided sufficient evidence of discrimination, a court may consider "(1) the plaintiff's prima facie case; (2) any evidence the plaintiff presents to attack the employer's proffered explanations for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff (such as independent evidence of discriminatory statements or attitudes on the part of the employer).'" Dunaway v. Int'l Bhd. of Teamsters, 310 F.3d 758, 763 (D.C. Cir. 2002) (quoting Waterhouse v. Dist. of Columbia, 298 F.3d 989, 993 (D.C. Cir. 2002)).

Iweala v. Operational Techs. Servs., 634 F. Supp. 2d 73, 81-82 (D.D.C. 2009).

In a non-promotion case, a plaintiff can satisfy her burden of persuasion if she can point to evidence in the record showing that "a reasonable employer would have found the plaintiff to be significantly better qualified for the job." Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998). "[A] plaintiff [alleging disparate treatment for a promotion] must present evidence of 'stark superiority of credentials over those of the successful candidates.'" Hopkins, 630 F. Supp. 2d at 39 (quoting



Stewart v. Ashcroft, 352 F.3d 422, 429-30 (D.C. Cir. 2003)

(internal quotations omitted)); see also Jackson v. Gonzales, 496 F.3d 703, 707 (D.C. Cir. 2007) ("in order to justify an inference of discrimination, the qualifications gap must be great enough to be inherently indicative of discrimination"); McIntyre v. Peters, 460 F. Supp. 2d 125, 136 (D.D.C. 2006).

[P]ointing to differences in qualifications that merely indicate a "close call" does not get [plaintiff] beyond summary judgment. This Court will not reexamine governmental promotion decisions where it appears the Government was faced with a difficult decision between two qualified candidates, particularly where there is no other evidence that race played a part in the decision.

Stewart, 352 F.3d at 430.

The elements of a claim of retaliation are that the plaintiff engaged in a statutorily protected activity, the employer treated the plaintiff adversely, and a causal connection existed between the two. Wiley v. Glassman, 511 F.3d 151, 155 (D.C. Cir. 2007); see also Rochon v. Gonzales, 438 F.3d 1211, 1216-20 (D.C. Cir. 2007); Iweala, 634 F. Supp. 2d at 83 (quoting Brown v. Brody, 199 F.3d 446, 452 (D.C. Cir. 1999) (internal quotation marks omitted)). "'Temporal proximity' between a complaint of discrimination and an adverse action, such as termination, can 'support a jury's finding of a causal link.'" Iweala, 634 F. Supp. 2d at 83 (quoting Patterson v. Johnson, 505

F.3d 1296, 1299 (D.C. Cir. 2007)) (quoting Sparrow, 216 F.3d at 1115).<sup>6</sup>

Fields' arguments fall short. The record here shows two qualified candidates without stark differences between them in relevant qualifications for Vacancy 01-006 and the written narratives included in their applications. Fields' arguments may show, at best, that the rating and ranking panel could have given Fields a score somewhat higher than the score she received given her breadth of experiences gained over her lengthier employment history. That is not enough to show that the Secretary's proffered non-discriminatory reason was pretext, particularly with no further evidence of bias such as discriminatory statements or attitudes by agency officials. See Jackson, 496 F.2d at 708 (stating that the plaintiff's evidence showing that he had more experience than another applicant "at most show[ed] that the evaluators could have given him somewhat higher scores and [the selected employee] somewhat lower scores than they did. That is not enough, however, to demonstrate that the [defendant's] reliance on comparative qualifications was a pretext for discrimination"). Objectively, Fields' application

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<sup>6</sup> Fields alleges that the Secretary retaliated against her because of the numerous administrative complaints of employment discrimination that she has filed since 1994. (See Am. Compl. ¶ 2; Def.'s Stmt. ¶ 3.) However, she provides no evidence of temporal proximity between any prior complaint and the October 15, 2001 adverse decision regarding Vacancy 01-006.

was not so vastly better than Heath's for Vacancy 01-006 that it supports the inference that the Secretary's non-discriminatory rationale was a dishonest fabrication, and that the underlying motive for Fields' non-selection was race or age discrimination or retaliation. See Desmond v. Mukasey, 530 F.3d 944, 964 (D.C. Cir. 2008) (noting that "it will not do for the plaintiff to show that the employer's stated reason was false if the employer believed it in good faith; the plaintiff must establish a basis to conclude that the employer has lied about the reason"); Hammond v. Chao, 383 F. Supp. 2d 47, 58 (D.D.C. 2005) (respecting the employer's discretion to choose among qualified candidates).

CONCLUSION

Fields failed to exhaust her administrative remedies regarding her claim of disparate impact and presented no prima facie evidence of that claim. She also failed to rebut the defendant's legitimate, non-discriminatory reasons for its decision not to promote her. No genuine material issues remain and the defendant is entitled to judgment as a matter of law. Therefore, judgment will be entered for the Secretary. An appropriate order accompanies this memorandum opinion.

SIGNED this 6th day of January, 2012.

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/s/  
RICHARD W. ROBERTS  
United States District Judge