UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEONARD E. DUNNING	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Case No. 13-959 (RJL)**
	)	
	)	
NANCY M. WARE, Director Court Services and Offender Supervision Agency,	)	
	)	
Defendant.	)	
	)	

FILED
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MEMORANDUM OPINION
(May 21, 2017) [# 36]

Plaintiff, Leonard E. Dunning ("Dunning" or "plaintiff"), filed the instant action alleging that defendant, Nancy M. Ware ("Ware" or "defendant"), in her capacity as director of the Court Services and Offender Supervision Agency ("CSOSA" or "the Agency") for the District of Columbia, discriminated against him in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq., respectively. Specifically, plaintiff alleges that CSOSA discriminated against him on the basis of his age when he was not selected for the position of Supervisory Offender Processing Specialist. This matter is now before the Court on Defendant's Motion for Summary Judgment [Dkt. # 36]. Upon consideration of the parties' submissions and the entire

Affidavit at 21. The second highest scoring candidate was Roselyn Brown ("Brown"), who scored 39 out of 60. *Id.* Plaintiff scored 19 out of 60, which placed him as the sixth highest scoring candidate out of seven applicants. *Id.* at 20. Defendant ultimately selected Campbell-Adams, the highest scoring candidate, for the vacant position. *See* Cole Affidavit at 31; Pl.'s Resp., Ex. 1 (Job Offer Confirmation Letter).

In June of 2013, Dunning filed a complaint against Ware, alleging age discrimination and retaliation for protected employment actions in violation of Title VII and the ADEA. Specifically, plaintiff alleged that his non-promotion was motivated by either age discrimination, or by a desire to retaliate against him for filing two prior discrimination complaints against his employer in 2001 and 2003. Compl. ¶¶ 19-21. He also alleged that defendant engaged in preselection of Campbell-Adams, before he ever applied for the vacant position, in a direct attempt to discriminate against plaintiff based on his age. *See id.* Defendant moved to dismiss plaintiff's retaliation claims on the ground that plaintiff did not exhaust his administrative remedies. *See* Def.'s Partial Mot. to Dismiss [Dkt. # 9]; Mem. of P. & A. in Supp. of Def.'s Partial Mot. to Dismiss ("Def.'s Mem.") [Dkt. # 9-1]. On February 7, 2014, this Court granted defendant's motion and dismissed plaintiff's retaliation claims for failure to exhaust. *See* Mem. Order [Dkt. # 12]. Presently before the Court is Defendant's Motion for Summary Judgment on plaintiff's remaining claims [Dkt. # 36].

STANDARD OF REVIEW

Defendant moves for summary judgment pursuant to Federal Rule of Civil Procedure 56. Under Rule 56, summary judgment shall be granted when the record demonstrates "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); s*ee also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding whether there is a disputed issue of material fact, the Court must draw all reasonable inferences in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Where the court finds that facts material to the outcome of the case are at issue, a case may not be disposed of by summary judgment. *Id.* at 248. If, however, the facts in dispute are "merely colorable, or . . . not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted). A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial."[1] *Id.* at

[1] Plaintiff moves separately for an extension of time to conduct additional discovery. *See* Plaintiff's Motion for Extension of Time to Complete Discovery [Dkt. # 42]. He also submits a Federal Rule of Civil Procedure 56(d) affidavit in conjunction with his Opposition, requesting discovery so that he may adequately respond to Defendant's Motion for Summary Judgment. *See* Dunning Rule 56(d) Affidavit at 1-3. Rule 56(d) states: "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Our Circuit has held that the party seeking discovery bears the burden of identifying the facts to be discovered that would create a triable issue and the reasons why the party cannot produce those facts in opposition to the pending motion for summary judgment. *See Byrd v. Envtl. Prot. Agency*, 174 F.3d 239, 248 n.8 (D.C. Cir. 1999). The party must also establish a "reasonable basis" to suggest that the requested discovery will reveal triable issues of fact. *Carpenter v. Fed. Nat'l Mortgage Ass'n*, 174 F.3d 231, 237 (D.C. Cir. 1999). Put simply, plaintiff has not satisfied this burden.

Plaintiff's Rule 56(d) affidavit alleges that he "do[es] not have all of the facts necessary to oppose the motion for summary judgment." Dunning Rule 56(d) Affidavit at 2. In particular, he seeks to depose Carlos Perkins, who plaintiff contends issued a letter to Campbell-Adams congratulating him on his new position before it was posted. *Id.* He also seeks to depose other unidentified witnesses who he believes

248; *see also Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150 (D.C. Cir. 1996).

ANALYSIS

At the summary judgment stage, where "an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not—*and should not*—decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*." *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). Rather, the Court must resolve one central question: "Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?" *Id.* The same approach applies in the context of age discrimination. *See Barnett v. PA Consulting Group, Inc.*, 715 F.3d 354, 358 (D.C. Cir. 2013) ("We consider [plaintiff's] age and sex discrimination claims in the same way we analyze Title VII claims.").

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have knowledge supporting his age discrimination claim. *Id.* But plaintiff has offered no valid justification for his failure to take these depositions during the discovery period in this case. Indeed, this is not a case where the defendant moved for summary judgment prematurely; plaintiff had nearly fourteen months to conduct discovery, and defendant moved for summary judgment nearly sixteen months after the deadline to complete discovery expired. *See* Scheduling Order, Dkt. No. 19; Minute Order, August 24, 2015; Def.'s Mot. for Summ. J., Dkt. No. 36. Furthermore, plaintiff does not even attempt to explain why he cannot, absent discovery, present by affidavit the facts he deems essential to justify his opposition. This Court therefore "act[s] within the bounds of its discretion in not granting a continuance for [plaintiff] to conduct discovery." *Strang v. U.S. Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989)

Defendant's burden on the issue of pretext is only one of production; defendant "need not persuade the court that [she] was actually motivated by the proffered reasons." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Plaintiff, however, "retains the burden of persuasion. . . . to demonstrate that the proffered reason was not the true reason for the employment decision." *Id.* at 256. Plaintiff may establish pretext either "directly by persuading the court that a discriminatory reason more likely motivated the employer[,] or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.*

Defendant here submits that the interview panel simply selected the highest scoring candidate for the vacant position, and that this justification satisfies her burden of asserting a non-discriminatory reason for the Agency's hiring decision. *See* Def.'s Mem. at 7. In particular, she identifies Campbell-Adams' supervisory experience as one of the reasons why he scored the highest in his interview. *See id.* at 8; Ashe Affidavit at 21 ("The panel members agreed that Mr. Campbell-Adams[']' interview was more impressive to the panel because he elaborated on more than just his job duties and work experience and this enhanced his competitiveness for a supervisory position."). Dunning, on the other hand, had no supervisory experience in his position as an offender processing specialist. *See* Dunning Dep. at 29:5-29:14.

Unfortunately for plaintiff, he provides no evidence to refute defendant's argument. To the contrary, in his deposition, Dunning conceded that he was not present for the other candidates' interviews and could not attest to the other candidates' performance. *See* Dunning Dep. at 54:5-54:21. Additionally, he acknowledged that he

had no supervisory experience in his role as an offender processing specialist. *See id.* at 29:5-29:14. And he also conceded that the Agency was permitted to make its hiring decision based on the candidates' interview performances. *See id.* at 56:21-57:4.

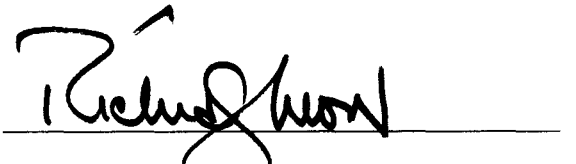
As such, Dunning merely relies on speculation that because a younger candidate was selected for the position, the hiring decision must have been based upon age discrimination. *See id.* at 74:10-74:23 ("I'm an older person; he's a younger person. On the outside, it look like age discrimination."). That, of course, is not good enough. Plaintiff's allegations must rise above a speculative level. To say the least, subjective assertions by a plaintiff that he was the best candidate for the job, without any evidence to support them, are insufficient *per se* to survive summary judgment. *See Short v. Chertoff*, 555 F. Supp. 2d 166, 171 (D.D.C. 2008).

Finally, Dunning's claim is further undercut by his failure to allege, let alone establish, that any member of the interview panel was ever aware of his age. *See* Dunning Dep. at 63:15-63:17 ("Q: Are you alleging that Mr. Ashe knew your age? A: No, I'm not alleging that."); *id.* at 64:17-64:19 (Q: Are you alleging that Ms. Cole knew your age? A: No, sir, I'm not alleging that."); *id.* at 65:8-65:10 (Q: Are you alleging that Ms. Powell knew your age? A: No, sir.").[2] Indeed, each panel member provided sworn testimony that they were unaware of plaintiff's age at the time of their hiring decision. *See* Ashe Affidavit at 21; Powell Affidavit at 27; Cole Affidavit at 32. The law

[2] Dunning similarly fails to allege that defendant was aware of his age. And defendant, as director of the Agency—and thus the person ultimately responsible for agency hiring—relied on the interview panel's ranking system in making the decision to hire Campbell-Adams. *See* Ashe Affidavit at 20.

is clear that an employer's knowledge of the impermissible factor upon which a discrimination claim is based is a necessary element of a discrimination claim. *See, e.g.*, *Washington v. Chao*, 577 F. Supp. 2d 27, 40 (D.D.C. 2008) ("It is axiomatic that a defendant cannot be found to have discriminated against a plaintiff on the basis of race where the defendant had no knowledge of the plaintiff's race."); *Pollard v. Quest Diagnostics*, 610 F. Supp. 2d 1, 22 (D.D.C. 2009) ("Under D.C. Circuit law, there can be no reasonable inference of racial discrimination where an individual just happens to be a member of a protected class—actionable discrimination only occurs when any employer acts 'because of' the plaintiff's status as a member of a protected class."). As such, the record is clear that *none* of the panelists were aware of plaintiff's age at the time of their hiring decision.

Because plaintiff has failed to refute the legitimate non-discriminatory reasons for CSOSA's decision, or even establish defendant's awareness of plaintiff's age, this Court can only conclude that no reasonable jury could find that defendant intentionally discriminated against Dunning on the basis of his age. Defendant's motion for summary judgment must therefore be GRANTED.



RICHARD J. LEON
United States District Judge