

motion with the hands. (Def's Mot. Dismiss Ex. 3.) The Postal Service provided Ms. Senior with a position, Modified General Clerk, that accommodated her restrictions.

At least twice between July 2000 and February 2004, Ms. Senior was detailed to an Injury Compensation Specialist ("Specialist") position to fill temporary vacancies in the Injury Compensation office. (Def's Mot. Dismiss Ex. 6 at 51-52.) The Specialist position is the liaison between the Postal Service and the Department of Labor with respect to workers' compensation claims. In December 2003, a permanent vacancy in the Injury Compensation office arose, and Ms. Senior applied for the position. Applicants were to be selected for the position based on a written application and a personal interview. Four applicants, including Ms. Senior, were interviewed for the position. Karen Kormelink ("Ms. Kormelink"), then the Acting Manager of the Injury Compensation Office, was the selecting official for the position; Michael Masko ("Mr. Masko"), the previous Manager of the Office, was also present during the interviews. On February 13, 2004, Ms. Kormelink selected Stacia Pate ("Ms. Pate") and Kathleen Reilly ("Ms. Reilly") to fill the two open positions.

Ms. Senior was notified by Ms. Kormelink that she had not been selected for the position. When she asked why, Ms. Kormelink reportedly told her that it was because Ms. Senior's written application (PS Form 991) was "riddled with misspellings, incomplete sentences and other grammatical errors." (Def's Mot. Dismiss Ex. 7 at 11, 13.)

On February 17, 2004 Ms. Senior contacted the Postal Service's EEO Dispute Resolution office with regard to her nonselection for the Specialist vacancy. Ms. Senior alleged that she was discriminated against "when she was informed that she was not selected to the position of EAS-16 Injury Compensation Specialist," and further alleged that Mr. Masko's decision to provide training to Ms. Reilly and Ms. Pate, but not Ms. Senior, in the Specialist position,

constituted discrimination. (Def's Mot. Dismiss Ex. 18.) In her formal EEO complaint, filed April 27, 2004, Ms. Senior alleged that she was not selected for the Specialist position, and also that Mr. Masko had told her to seek career advancement opportunities outside the Injury Compensation Office,¹ that he had taken away tasks that Ms. Senior had previously performed when detailed as a Specialist, and that he provided training to Ms. Pate but not to her. (Def's Mot. Dismiss Ex. 19 at 3-4.) On July 24, 2006, the Administrative Law Judge entered judgment in favor of the Postal Service, finding that the Postal Service had a legitimate, non-discriminatory reason for not selecting Ms. Senior, and that Ms. Senior had not met the burden of establishing that the reason was pretextual. (Def's Mot. Dismiss Ex. 23 at 8.) Specifically, Ms. Senior had failed to show that her qualifications were observably superior to the selected candidates'. (*Id.*) The Postal Service issued its final decision on August 3, 2006.

In her complaint before this court, Ms. Senior alleges the following acts of discrimination: her nonselection to the Injury Compensation Specialist position; a comment by Mr. Masko advising her to seek career opportunities outside the Injury Compensation Office; a 2003 denial of a detail to Injury Compensation Specialist; and the denial of daily training in the duties of Injury Compensation Specialist. Mr. Potter has moved to dismiss the complaint, alleging that all claims but nonselection are barred for lack of exhaustion and that Ms. Senior cannot make out a *prima facie* case of disability discrimination.

¹ This claim was dismissed on the ground that Ms. Senior had failed to bring it to the attention of the EEO counselor within 45 days, and because Ms. Senior had "failed to show how the alleged discriminatory action caused a loss or harm with respect to a term, condition, or privilege of her employment with the Agency." (Def's Mot. Dismiss Ex. 20 at 3-5.) Ms. Senior was given the opportunity to challenge the dismissal of this claim after her hearing before an EEOC Administrative Judge. (Def's Mot. Dismiss Ex. 21.) She did not do so; the only issue addressed at the administrative level was Ms. Senior's nonselection to the Specialist position.

ANALYSIS

Motion to Dismiss

Following the Supreme Court’s ruling in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), “[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” 127 S. Ct. at 1965. “Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Id.* at 1969 (quoted in *Goodman v. PraxAir*, 494 F.3d 458, 466 (4th Cir. 2007)). Moreover, the “plaintiff’s obligation to provide the ‘grounds’ of his ‘entitl[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 1964-65.² Rule 12(b)(6) motions to dismiss may also properly raise statute of limitations defenses. *Wright v. United States Postal Serv.*, 305 F. Supp. 2d 562, 563 (D. Md. 2004) (citing *Pantry Pride Enterprises, Inc. v. Glenlo Corp.*, 729 F.2d 963, 965 (4th Cir. 1984)).

Federal regulations dictate the procedure by which a federal employee who believes she has been the victim of illegal discrimination may seek redress. 29 C.F.R. § 1614.105. Specifically, before filing a complaint, “[a]n aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.” *Id.* at § 1614.105(a)(1). Failure to comply with this requirement precludes a federal employee from maintaining a discrimination suit against the government agency for which she worked. *See Zografov v. V.A. Medical Center*, 779 F.2d 967, 970 (4th Cir. 1985).

²To the extent there is any question whether the *Bell Atlantic* standard applies in discrimination cases, the court notes that the result in this case would be the same under *Conley v. Gibson*, 355 U.S. 41 (1957).

Here, the only claim that Ms. Senior timely raised with an EEOC counselor was her nonselection for the Specialist position. (Def’s Mot. Dismiss Ex. 18.) The claim that Ms. Senior was denied a Specialist detail in 2003 was properly dismissed by the ALJ as untimely for failure to bring it to the attention of an EEOC counselor within the 45-day time period. (Def’s Mot. Dismiss Ex. 23 at 8.) Additionally, Ms. Senior did not timely seek EEOC counseling for her claim that, in December 2002, she was told to seek career opportunities outside the Injury Compensation office; her first contact with the EEOC occurred on February 17, 2004 and she has not alleged that this was a continuing violation.³ Ms. Senior was given the opportunity to challenge the scope of the issue accepted for investigation; she did not. Significantly, in her opposition to Mr. Potter’s motion, Ms. Senior does not appear to protest the dismissal of the other claims. As such, the only issue remaining before this court is whether the Postal Service discriminated against Ms. Senior when she was not selected for the Specialist position.

Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

³To the extent Ms. Senior claims that the denial of training and of the 2003 detail were part of an “unlawful chain of events” culminating in her non-selection, this argument must be rejected. The denial of training, the denial of a 2003 detail, and Ms. Senior’s nonselection are discrete allegations of discrimination that must be separately exhausted. *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) (termination and failure to promote acts are discrete acts requiring exhaustion). For this reason, the allegation that Ms. Senior was denied the “daily, specialized training in the duties of an Injury Compensation Specialist” that was allegedly provided to Ms. Pate during Ms. Pate’s detail to the Injury Compensation office in May 2003 also must be dismissed for untimeliness.

The Supreme Court has clarified that this does not mean that any factual dispute will defeat the motion:

By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, (1986) (emphasis in original).

“A party opposing a properly supported motion for summary judgment ‘may not rest upon the mere allegations or denials of [his] pleadings,’ but rather must ‘set forth specific facts showing that there is a genuine issue for trial.’” *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 525 (4th Cir.2003) (alteration in original) (quoting Fed.R.Civ.P. 56(e)). The court must “view the evidence in the light most favorable to ... the nonmovant, and draw all reasonable inferences in her favor without weighing the evidence or assessing the witness’ credibility,” *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 644-45 (4th Cir.2002), but the court also must abide by the “affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial.” *Bouchat*, 346 F.3d at 526 (internal quotation marks omitted) (quoting *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir.1993), and citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)).

In order to establish a violation of the Rehabilitation Act, Ms. Senior must show the following: first, that she has a disability; second, that she was otherwise qualified for the job; and third, that she was not selected for the position solely because of her disability. *Doe v. Univ. of Md. Medical Sys. Corp.*, 50 F.3d 126, 1264-65 (4th Cir. 1995); *see also Baird v. Rose*, 192 F.3d 462, 467 (4th Cir. 1999). For the purposes of the Rehabilitation Act, a disabled individual is defined as one who

- (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;
- (ii) has a record of such an impairment; or
- (iii) is regarded as having such an impairment.

29 U.S.C. § 705(20)B.

The Supreme Court has held that the "substantially limits" requirement indicates that an impairment must interfere with a major life activity "considerabl[y]" or "to a large degree," *Toyota Motor Mfg., Inc., v. Williams*, 534 U.S. 184, 196-97 (2002), and that the "impairment's impact must also be permanent or long-term." *Id.* at 198 (internal citations and quotations omitted). "The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 35.104. *See also Bragdon v. Abbott*, 524 U.S. 624, 638-39 (1998). Thus, to be "substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Toyota*, 534 U.S. at 198. "When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." *Davis v. Univ. of North Carolina*, 263 F.3d 95, 1000 (4th Cir. 2001) (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (2000)).

Here, Ms. Senior has not sufficiently demonstrated either that she was disabled, or that she was regarded as disabled by the Postal Service. Her limitations (no lifting over 20 pounds, frequently; no lifting 20-40 pounds, intermittently; and no sustained or repetitive use of her hands) did not preclude her from working as either a Modified General Clerk, or as an Acting Injury Compensation Specialist. The Fourth Circuit has concluded that restrictions similar to

Ms. Senior's do not constitute a substantial impairment in a major life activity. *See Williams v. Channel Master Satellite Sys.*, 101 F.3d 346, 349 (4th Cir. 1996) (holding that, "as a matter of law, that a twenty-five pound lifting limitation -- particularly when compared to an average person's abilities -- does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity.")

Although it is a closer question, Ms. Senior has not demonstrated that she was regarded as disabled by the Postal Service. Ms. Senior notes that she never informed Ms. Kormelink, the selecting official for the Specialist vacancy, as to her condition, but that Ms. Kormelink "had to have . . . found out through Mr. Masko." (Def's Mot. Dismiss Ex. 6 at 37.) Ms. Kormelink, however, avers that she did not have any knowledge of "any specific disability or how it could potentially impact [Ms. Senior's] ability to perform in the position." (Def's Mot. Dismiss Ex. 7 at 3-5.) In his deposition, Mr. Masko claims that although he had "advised [Ms. Kormelink] that Gwen [Senior] was a rehab employee" when Ms. Kormelink arrived in the office as a manager, he never told her that he had declined to detail Ms. Senior to a temporary Specialist vacancy because he was afraid her physical restrictions might prevent her from doing the work.⁴ (Pl's Opp'n Ex. 5 at 86.) Similarly, Mr. Masko claims that he "never considered that [Ms. Senior] had a disability," and that on her Injury Compensation details, Ms. Senior was "doing work that was consistent with restrictions provided by her physician." (Def's Mot. Dismiss Ex. 8 at 19.)

⁴ Mr. Masko stated that the Specialist position "requires computer input, typing and filing that would be in violation of [Ms. Senior's] restrictions." (Pl's Opp'n Ex. 7 at 2.) On previous details, he noted, he "had asked her to do more filing to help the other Specialists and she indicated that she was unable to perform that duty because it hurt her hands." (*Id.*)

In *Wooten v. Farmland Foods*, 58 F.3d 382 (8th Cir. 1995), the Eighth Circuit held that the employer did not regard the employee's carpal tunnel syndrome as a disability under the ADA, because the employer's perception of the employee's impairment was based upon doctor-imposed physical restrictions, not "speculation, stereotype, or myth." *Id.* at 386. Moreover, those restrictions only precluded the employee from performing a narrow range of meatpacking jobs. Similarly, in *Davis*, the Fourth Circuit held that even despite evidence on the part of the Dean that he believed the plaintiff was "in a general sense" disabled by her disorder, the plaintiff had not sufficiently demonstrated that the University regarded her as substantially limited in a major life activity, because she was not barred from a class of jobs. *Davis*, 263 F.3d at 100. The Postal Service may have believed that her physical restrictions somewhat limited Ms. Senior's ability to work, but she has not demonstrated that it believed she was substantially limited.

Even assuming that the Postal Service did regard Ms. Senior as disabled for purposes of the Rehabilitation Act, it had a very good reason for not selecting her to fill the Specialist vacancy: her written application was "riddled" with misspellings and grammatical errors. If the employing agency provides a legitimate, non-discriminatory reason for its actions, the burden shifts back to the plaintiff to show that the agency's proffered reason was merely a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973). Here, the Postal Service has offered just such a legitimate reason: the fact that Ms. Senior's written application for the Specialist position was "riddled with misspelling, incomplete sentences and other grammatical errors." (Def's Mot. Dismiss Ex. 7 at 3).⁵ It may be true that Ms. Senior, Ms. Reilly and Ms. Pate had all acquired experience in the Specialist position, but the written applications of Ms. Pate and Ms. Reilly suffered no such defects. Given that the duties of the

5A review of Ms. Senior's application supports Ms. Kormelink's evaluation.

Specialist position include communication with other agencies, attorneys, physicians and employees, (Def's Mot. Dismiss Ex. 9), and that such a position requires good writing skills, Ms. Kormelink's decision to select two candidates with superior writing and proofreading skills for the position is not unreasonable.

Nor has Ms. Senior succeeded in demonstrating that the Agency's proffered reason is mere pretext for discrimination. To prove pretext, a plaintiff must show that the reason provided "was false, *and* that discrimination was the real reason." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993). Ms. Senior offers two arguments in support of her claim of pretext: first, that despite Ms. Kormelink's designation as the selecting official, Mr. Masko ultimately made the decision not to hire Ms. Senior because of her disability; and second, that she was more qualified than the selectees. Both arguments fail.

Ms. Senior has not offered any evidence pointing to Mr. Masko's influence over the selection process beyond his involvement in the interviews, which she says made her uncomfortable. (Pl's Opp'n Ex. 6 at 86-87.)⁶ In her affidavit, Ms. Kormelink states that she was "solely responsible for the selection," that Mr. Masko "sat in the interviews" but was "not involved in the selection," and that her decision was subject only "to concurrence by a higher level manager." (Def's Mot. Dismiss Ex. 7 at 3.) It was Ms. Kormelink who sought permission from Human Resources to fill two vacancies in the office through the same candidate selection process. (Def's Mot. Dismiss Ex. 7 at 4.) Indeed, it is only Ms. Kormelink's signature that

⁶Ms. Senior suggests, in her opposition to summary judgment, that discovery might reveal more evidence. Ms. Senior has not, however, filed a Rule 56(f) affidavit identifying currently unavailable facts that are essential to her opposition, and the administrative record is substantial. Given these facts, summary judgment is appropriate.

appears as the “selecting official” on the Review Committee Consensus form. (Def’s Mot. Dismiss Ex. 10.)

Ms. Senior also claims that she was more qualified than the two selectees, Ms. Reilly and Ms. Pate - though she admits that she had not reviewed Ms. Reilly’s written application and had only “scanned” Ms. Pate’s. (Def’s Mot. Dismiss Ex. 6 at 102, 105.) Ms. Senior claims that she had “attained more experience in case management as far as training and all” than Ms. Reilly, but admits that she was not aware of the extent of Ms. Reilly’s experience in Injury Compensation outside of the Baltimore office. (*Id.* at 102.) Ms. Senior also argued that she was more qualified than Ms. Reilly in processing certain claims. (*Id.* at 104.) She makes similar claims regarding Ms. Pate, and notes that she had more work experience than Ms. Pate in the Injury Compensation Office. (*Id.* at 106.)

Ms. Senior’s perception of her abilities, without evidence to support it, is not dispositive. *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980). It is the perception of the decision maker that is relevant to the determination of whether discrimination existed in the selection process. *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996). Here, there is ample evidence that Ms. Kormelink reasonably perceived Ms. Senior as being less qualified for the Specialist position than the two ultimately selected candidates. Ms. Kormelink’s affidavit cites Ms. Senior’s sloppily edited written application as making her a poor match for a position which “involves a great deal of communication with other agencies,” and “is responsible for articulating the Postal Service’s challenges to and controversions of claims submitted by employees.” (Def’s Mot. Dismiss Ex. 7 at 3-4.) Ms. Senior herself admits that she failed to notice the errors in her application, despite knowing that the Form 991 application was

“a little more than half the weight in determining whether [she] got the job.” (Def’s Mot. Dismiss Ex. 6 at 96-98.)

Ms. Kormelink has consistently cited the misspellings and grammatical errors on Ms. Senior’s application as one of the reasons for her nonselection; indeed, this was her response the very first time Ms. Senior asked why she had not been hired. A reading of Ms. Pate’s and Ms. Reilly’s applications reveals that they suffer from no similar defects. (See Def’s Mot. Dismiss Ex. 16, 17.) Moreover, Mr. Masko testified that Ms. Senior also did not perform well in her oral interview; when she was asked to list three instances in which continuation of pay could be denied - a “very basic question” - she was only able to list one. (Pl’s Opp’n Ex. 5 at 82.) Having failed to offer any evidence that her qualifications were superior to the selected candidates, Ms. Senior has not demonstrated that the Postal Service’s offered reason was pretextual, and her claim of discrimination must be denied. A separate Order follows.

March 25, 2008
Date

/s/
Catherine C. Blake
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

GWENDOLYN SENIOR,

v.

JOHN E. POTTER,
Postmaster General,
United States Postal Service, *et al.*

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Civil No. CCB-06-2894

ORDER

In accordance with the foregoing Memorandum, it is hereby ORDERED that:

1. John E. Potter's Motion to Dismiss or, in the alternative, for Summary Judgment, (docket entry no. 8) is GRANTED;
2. Gwendolyn Senior's Motion for Discovery (docket entry no. 13) is DENIED;
3. Judgment is entered in favor of the defendant; and
4. The Clerk shall **CLOSE** this case.

March 25, 2008
Date

/s/
Catherine C. Blake
United States District Judge