

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

United States Court of Appeals  
Fifth Circuit

**FILED**

January 4, 2011

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No. 10-50635  
Summary Calendar

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Lyle W. Cayce  
Clerk

JOE A. CISNEROS,

Plaintiff-Appellant

v.

JANET NAPOLITANO, SECRETARY, DEPARTMENT OF HOMELAND  
SECURITY,

Defendant-Appellee

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 5:08-CV-856

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Before WIENER, PRADO, and OWEN, Circuit Judges.

PER CURIAM:\*

Plaintiff-Appellant Joe A. Cisneros brought the instant appeal under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621 *et seq.* following his failure to be promoted to a position as an Assistant Special Agent in Charge (ASAC) in the Immigration and Customs Enforcement (ICE) Division of the Department of Homeland Security. Cisneros filed this suit against two

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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officials involved in the selection process and against former Secretary of the Department of Homeland Security, Michael Chertoff, for whom current Secretary Janet Napolitano was duly substituted, both in their official capacities. The individual officials were dismissed previously because they are not “employers” under the ADEA.

Following receipt of the Report and Recommendation of a magistrate judge, the district court granted the Secretary’s motion for summary judgment, dismissing Cisneros’s action and overruling as moot all pending motions. We affirm.

Fifty-five year old Cisneros applied for an ASAC position noticed for San Antonio, but a thirty-eight year old applicant was selected for the position. After an unsuccessful complaint to the EEOC, Cisneros brought the instant action, asserting age discrimination in the ASAC selection process. In the customary minuet for such cases, Cisneros made a prima facie case under the ADEA, Napolitano advanced numerous non-discriminatory reasons for the selection of the applicant who prevailed over Cisneros, and Cisneros proffered putative reasons that Napolitano’s non-discriminatory explanations were pretextual. Following review of the extensive analysis set forth in the Report and Recommendation of the magistrate judge, the district court granted Napolitano’s motion for summary judgment, concluding that Cisneros had failed to bear his burden of demonstrating pretext in Napolitano’s facially non-discriminatory reasons for selecting the younger applicant.

We have reviewed the Report and Recommendation of the magistrate judge, the district court’s Order accepting that recommendation, and the entire remainder of the record on appeal, including the briefs of the parties and the applicable law as presented therein and as independently determined. As a result, we are satisfied that the judgment of the district court dismissing the instant action with prejudice should be, and therefore is, in all respects,

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AFFIRMED.