No. _____

In The
Supreme Court of the United States

JANET A. RILEY,

Petitioner,

v.

ELKHART COMMUNITY SCHOOLS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) To establish a prima facie case of discrimination in promotion or hiring, is a plaintiff required to show that the position in question was filled by someone outside his or her protected group?*

(2) In *Patterson v. McLean Credit Union*, this Court held that in a case of alleged discrimination in hiring or promotion, a plaintiff "might seek to demonstrate that [the employer's] claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position." *Ash v. Tyson Foods, Inc.* recognized that the courts of appeals apply "various ... standards" regarding when proof of superior qualifications is probative of pretext.

The question presented is:

> Is proof that a plaintiff was better qualified than the person hired or promoted evidence of pretext only if the differences are so conclusive "that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue," the avowedly "high evidentiary bar" applied in the Seventh Circuit?

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* The petition in *Lavigne v. Cajun Deep Foundations, L.L.C.*, No. 16-464, presents the related question of whether to establish a prima facie case of discriminatory termination, a plaintiff is required to show that he or she was replaced by someone outside his or her protected group.

PARTIES

The parties to this proceeding are set forth in the caption.

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Petitioner Janet A. Riley, respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on July 22, 2016.

OPINIONS BELOW

The July 22, 2016 opinion of the court of appeals, which is reported at 829 F.3d 886 (7th Cir. 2016), is set out at pp. 1a-15a of the Appendix. The September 3, 2015 opinion of the district court, which is not reported, is set out at pp. 16a-45a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on July 22, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set out at pp. 46a-47a of the Appendix.

STATEMENT

Factual Background

This case concerns the repeated but unsuccessful efforts of an experienced and award-winning Indiana high school teacher to obtain a promotion to an administrative position at her school district.[1]

Plaintiff Janet Riley, an African-American, has taught in the Elkhart Community Schools since 1992. During the time period when she sought promotions at issue, she was between 55 and 60. Riley "had performed well in the past, as evidenced by her Teacher of the Year award [in 2010]...." App. 13a. She had made particular and successful efforts to "work[] with minority students, especially young black males, in several projects and activities." App. 21a. She organized a school Diversity Week and sponsored the Students for Diversity and Unity Club.[2] In addition to excelling as a teacher, Riley also had significant administrative expertise, having served as the school district's evening program coordinator. App. 21a.

Between 2007 and 2009 Riley unsuccessfully applied for four positions as an assistant principal. All of those selected were younger than Riley, including an individual selected as an assistant principal when only 25 and another who was 34. Two of those selected had

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[1] The court below concluded that certain claims were time-barred. The petition concerns only the remaining claims.

[2] Doc. 62-3, p. 15.

not previously worked for the Elkhart schools.[3] Three of the four were white.

In 2010 school officials posted vacancies that were labeled "academic dean," and that were expressly categorized as teaching positions. Each position had a particular education requirement – expertise in math and expertise in special education – that excluded Riley,[4] who in any event was interested in an administrative, not a teaching, position. The special requirements appeared tailored to two particular young white men, who were in fact selected for the jobs. Riley suspected "something discriminatory when the new academic deans ... were treated as assistant principals even though their positions were never posted as assistant principal positions that she could have applied for." App. 40a. In 2011 Riley filed a discrimination charge with the EEOC, alleging that this was a subterfuge to assure that a younger white man got a position that was in effect that of an assistant principal.[5] Riley also complained to Elkhart school officials about what had occurred.

In response, Elkhart reposted the two positions, now expressly labeling them as assistant principals, and removed the specialization requirements. App. 23a. Riley applied for both positions, but was again rejected. One of those promoted instead, in her early

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[3] Doc. 61-2, pp. 11-12.

[4] App. 40a.

[5] Doc. 54-13, p. 2.

thirties, had never taught at all.[6] The other successful applicant, also in his early thirties, had teaching experience, but far less than Riley, and no comparable award.[7] School officials asserted that they based their decision largely on interviews with the candidates. App. 12a-13a.

Proceedings Below

Riley commenced this action in federal court, alleging that the promotion denials in 2007, 2008, 2009 and 2012 were all discriminatory. Her complaint alleged discrimination on the basis of race, gender, and age. Relying on timeliness objections not here at issue, the court of appeals limited the challenges to the 2007-09 promotions to claims of racial discrimination under section 1981. 42 U.S.C. § 1981. App. 5a-6a. The 2012 promotions were challenged as discrimination on the basis of gender (under Title VII of the 1964 Civil Rights Act), race (under Title VII and section 1981), and age (under the Age Discrimination in Employment Act).

The district court rejected Riley's gender and race claim regarding the 2012 promotions on the ground that one of the individuals who was selected was, like Riley, an African-American woman. Under Seventh Circuit precedents, "[t]o establish a *prima facie* case for a failure-to-promote claim, 'the plaintiff must show that ... the employer granted the promotion to someone

[6] Doc. 62-4, pp. 15-16 (JeNeva Adams).

[7] Doc. 62-4, pp. 12-13 (Jason Grasty). Grasty was one of the individuals who had earlier been selected as an "academic dean."

outside of the protected class who was not better qualified than the plaintiff.'" App. 32a (quoting *Fisher v. Avande, Inc.*, 519 F.3d 393, 402 (7th Cir. 2008)).

> Riley cannot succeed on her race-based and gender-based claims of discrimination related to the two 2012 assistant principal positions for which Mr. Gratsy and Ms. Adams were hired. As an African-American female, Ms. Adams was ... a member of a protected class. As such, Riley cannot establish that [the school district] promoted someone outside the protected classes instead of her, which is required to satisfy the ... *prima facie* case based on race or gender.

App. 34a.

The district court assumed that Riley had established a prima facie case of age-based discrimination regarding the 2012 promotions. The school district asserted that it had selected the two other applicants instead of Riley because they were better qualified. App. 35a. Riley claimed that this reason was pretextual, and sought to support that contention with evidence that she was better qualified than the two much younger individuals who were promoted. Under controlling Seventh Circuit precedent, the trial judge noted, proof that Riley was better qualified was ordinarily legally insufficient.

> [W]here an employer's proffered non-discriminatory reason for its employment decisions is that it selected the most qualified

> candidate, evidence of the applicants' competing qualifications does not constitute evidence of pretext unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.

App. 36a (quoting *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180-81 (7th Cir. 2002)). Riley contended that the school district "did not follow its own hiring policies when it chose [the other candidates] as assistant principals." App. 37a. Specifically, Riley asserted that under the district's written standards substantial weight should have been given to her success and experience as a teacher. One of the primary responsibilities of an assistant principal is to supervise and evaluate teachers.[8] The school district contended, on the other hand, that experience and success as a teacher were not relevant qualifications; at most, it urged, a candidate's experience working for the school district mattered only as a measure of seniority, and seniority, the district insisted, was "of least significance." App. 38a. The district court assumed that only seniority mattered, and that it mattered very little, and thus ruled insufficient Riley's evidence regarding comparative qualifications. App. 38a-40a.

The district court did not address the merits of Riley's claims regarding the 2007-09 promotions, mistakenly assuming that they were time barred. The court of appeals concluded that Riley could challenge those

[8] Doc. 62-2.

promotion decisions under section 1981, a provision that is limited to discrimination on the basis of race. App. 6a. The court of appeals nonetheless rejected all of Riley's claims, applying the same two Seventh Circuit precedents relied on by the district court.

The Seventh Circuit held that several of Riley's claims were barred because the promotions in question were given to applicants who belonged to the same protected group as Riley herself. "To demonstrate a *prima facie* case for failure to promote, a plaintiff must produce evidence showing that ... the employer promoted someone outside of the protected class who was not better qualified for the position." App. 8a (citing *Jaburek v. Foxx*, 813 F.3d 626, 631 (7th Cir. 2016)). The court of appeals held that this requirement barred at least two of Riley's claims. With regard to the 2009 promotion, it concluded,

> Riley cannot prove a *prima facie* case for the § 1981 [race discrimination] claim regarding the assistant principal position for which she applied in 2009.... [The school district] hired ... an African-American [] for the assistant principal position ... available in 2009. Therefore, Riley cannot show that [the school district] promoted someone outside of her protected class for the position she sought.... She cannot establish a *prima facie* case for this § 1981 claim as a matter of law.

App. 9a. The court of appeals concluded that this requirement also barred Riley's race and gender discrimination claim regarding at least one of the 2012

positions, because that position was filled by an African-American woman. App. 11a n.3.[9]

The court of appeals rejected Riley's remaining claims on the ground that Seventh Circuit precedent precludes a plaintiff from relying on her superior qualifications to prove pretext except in the most extreme cases.

> [W]e have set a high evidentiary bar for pretext. Evidence of Riley's qualifications "only would serve as evidence of pretext if the differences between her and [the candidates who were promoted] were 'so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was *clearly better qualified* for the position at issue.'"

App. 13a (quoting *Hobbs v. City of Chicago*, 573 F.3d 454, 462 (7th Cir. 2009) (quoting *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (7th Cir. 2002))) (emphasis added in opinion below). The court of appeals assumed that neither experience nor excellence as a teacher were relevant to a candidate's qualifications. At most what mattered was a candidate's total years of employment (in any position) by the school district, and such "seniority was the least important factor." App. 13a. Having limited in this manner the measures of comparative qualifications, the court concluded that "Riley's only evidence of better qualifications is that she has more

[9] "Riley cannot establish a *prima facie* case for race or sex discrimination because Adams, like Riley, is an African-American female."

seniority than the people hired." App. 15a. Such a difference in seniority was insufficient to surmount the Seventh Circuit's avowedly "high evidentiary bar" for proof of pretext. Even if Riley was better qualified, the court of appeals held, she was not so "clearly" better qualified that no "reasonable person[] of impartial judgment" could have concluded otherwise. App. 13a, 15a.

REASONS FOR GRANTING THE WRIT

A number of important federal civil rights and employment statutes forbid discrimination in hiring and promotion. As this Court has repeatedly recognized, judicial decisions specifying a type of evidence that is required to support, or that would preclude, a claim of discrimination effectively define and limit the protections of those laws. An employee whose claim is barred by such a standard loses the protection of the law, and an employer familiar with those decisions could adapt its behavior to immunize itself from liability. For that reason, the Court has repeatedly granted review to resolve conflicts about such standards, and should do so here. *E.g.*, *O'Connor v. Consolidated Caterers Corp.*, 517 U.S. 308 (1996) (what evidence is required to establish prima facie case under the Age Discrimination in Employment Act); *Connecticut v. Teal*, 457 U.S. 440 (1982) (whether favorable treatment of others in a protected class bars a disparate impact claim under Title VII); *Patterson v. McLean Credit Union*, 491 U.S.

164, 187-88 (1989) (whether a plaintiff must demonstrate she was better qualified for a promotion in order to prove discrimination forbidden by 42 U.S.C. § 1981).

I. There Is An Important Circuit Conflict Regarding Whether A Plaintiff Claiming Discrimination In Hiring Or Promotion Must Prove That The Position In Question Was Filled by A Person Outside His Or Her Protected Group

This case presents a recurring and important issue regarding discrimination in hiring and promotion: whether a plaintiff asserting that he or she was denied a position on the basis of race, gender, age, or some other protected characteristic is required, in order to establish a prima facie case, to show that the position was filled by someone who is not a member of the protected group. In the instant case, the court of appeals, applying a long line of Seventh Circuit precedents, held that several of Riley's claims were barred because a position which she had sought was awarded to an applicant who, like Riley herself, was a black woman. In 1995 the United States advised this Court that the majority rule was to the contrary.

> In the context of Title VII litigation, the prevailing view in the courts of appeals is that a plaintiff is not prevented from establishing a prima facie case by the fact that the person hired instead of the plaintiff ... is a member of the same minority group as the plaintiff, or has the same gender as the plaintiff. This view

> permits a plaintiff who is a member of a minority group or a woman to establish a prima facie case, ... even though another person of the same minority group or gender might have escaped such treatment by the same employer.

Brief for the United States and the Equal Employment Opportunity Commission As Amici Curiae Supporting Petitioner, *O'Connor v. Consolidated Coin Caterers Corp*., No. 95-354, available at 1995 WL 793447, at 16-17 (footnote omitted).[10] While on the courts of appeals, the Chief Justice and Justice Alito joined opinions in the District of Columbia and Third Circuits, respectively, rejecting the requirement applied in the Seventh Circuit. See *infra*, pp. 17-19.

A. There Is A Deeply Entrenched and Well Recognized Circuit Conflict About This Issue

(1) Six circuits hold that a plaintiff alleging discrimination in promotion or hiring cannot establish a prima facie case if the position in question was filled by a person who is a member of the protected group in question.

The Seventh Circuit has applied this requirement for more than two decades. *Hughes v. Derwinski*, 967

[10] The petition in *Lavigne v. Cajun Deep Foundations, L.L.C.*, No. 16-464, presents the related question of whether, in order to establish a prima facie case of discriminatory termination, a plaintiff is required to show that he or she was replaced by someone outside his or her protected group.

F.2d 1168, 1171 (7th Cir. 1992) ("[t]he plaintiff ... [to] establish a prima facie case ... must show that ... the employer hired someone outside of the protected group."); *Harrison v. Larue D. Carter Memorial Hospital*, 1995 WL 445691 at *2 (7th Cir. July 25, 1995) ("to establish a prima facie case ... [plaintiff] has to show that ... the employer hired or promoted someone outside the protected group."). Under the current version of the Seventh Circuit rule, a plaintiff, in addition to proving that the position in question was awarded to someone outside the protected group, must also offer evidence about the qualifications of that individual. *Jaburek v. Foxx*, 813 F.3d 636, 831 (7th Cir. 2016) ("[t]o demonstrate a *prima facie* case for failure to promote under Title VII, [plaintiff] must produce evidence showing that: ... the employer promoted someone outside of the protected group who was not better qualified for the position that she sought."). Under either iteration of the requirement, selection of an individual who *is* a member of the protected group precludes a plaintiff from establishing a prima facie case.[11] Thus, in *Jordan v. City of Gary, Ind.*, 396 F.3d 825, 833 (7th Cir. 2005), the Seventh Circuit rejected the race and gender

[11] The Seventh Circuit has repeatedly reiterated that requirement. *Carter v. Chicago State University*, 778 F.3d 651, 660 (7th Cir. 2015) (Family and Medical Leave Act); *Garofalo v. Village of Hazel Crest*, 745 F.3d 428, 439 (7th Cir. 2014) (Title VII and Fourteenth Amendment); *Johnson v. General Board of Pension & Health Benefits of the United Methodist Church*, 733 F.3d 722, 729 (7th Cir. 2013) (Title VII); *Grayson v. City of Chicago*, 317 F.3d 745, 748 (7th Cir. 2003) (Title VII and Age Discrimination in Employment Act); *Johnson v. Nordstrom, Inc.*, 260 F.3d 727, 732 (7th Cir. 2001) (Title VII).

discrimination of the African-American female plaintiff because

> it is undisputed that [the person who was awarded the promotion] is an African-American female.... Therefore, because [the successful applicant] is a member of the same protected class as [plaintiff], [she] is precluded from successfully arguing that she was unfairly discriminated against when [the employer] chose to assign [the successful applicant to the position in question] instead of [the plaintiff].

396 F.3d at 833.

The Fifth Circuit also requires proof that "a person outside the protected class was treated more favorably; in other words, [when a male plaintiff complains of gender-based hiring discrimination, that] a female was hired instead." *Barrientos v. City of Eagle Pass, Texas*, 444 Fed.Appx. 756, 759 (5th Cir. 2011); see *Thomas v. Trico Products Corp.*, 256 Fed.Appx. 658, 662 (5th Cir. 2007) ("someone outside of the protected class was hired instead"). Thus, in *Lopez v. Martinez*, 240 Fed.Appx. 648, 649 (5th Cir. 2007), the Fifth Circuit rejected the national origin discrimination claim of the Hispanic plaintiff because "he has failed to prove that the positions were provided to members outside of his protected class. There was evidence that two qualified Hispanics, while not initially selected in a preliminary round were eventually offered the positions." Selection of a candidate in the same protected group

as the plaintiff is not merely a bar to establishing a prima facie case; the Fifth Circuit regards it as conclusive evidence of non-discrimination. "[W]here both the person seeking to be promoted and the person achieving that promotion were women, because the person selected was a woman, we cannot accept sex discrimination as a plausible explanation for (the promotion) decision." *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1030 (5th Cir. 1980) (quoting *Adams v. Reed*, 567 F.2d 1283, 1287 (5th Cir. 1978)).

In the Eighth Circuit, "[t]o establish a prima facie case [of discrimination in promotion], [the plaintiff] must show that ... the [employer] filled the position with a person not in the same protected class." *Dixon v. Pulaski County Special Sch. Dist.*, 578 F.3d 862, 867-68 (8th Cir. 2009); see *Alper v. Gallup, Inc.*, 499 Fed.Appx. 625, 625 (8th Cir. 2013) ("to show prima facie case in failure-to-hire action, plaintiff must show ... [the] employer hired someone outside [the] protected class"); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1046 (8th Cir. 2011) (en banc) ("[i]n a hiring context, an applicant must show ... the [employer] filled the position with a person not in the same protected class") (quoting *Dixon v. Pulaski County Special Sch. Dist.*, 578 F.3d 862, 867-68 (8th Cir. 2009)); *Arraleh v. County of Ramsey*, 461 F.3d 967, 975 (8th Cir. 2006) (same); *Turner v. Honeywell Federal Mfg. and Tech., LLC*, 336

F.3d 716, 720 (8th Cir. 2003) (in promotion case, plaintiff to establish a prima facie case must prove that a "similarly situated employee[ ] outside the protected group [was] promoted instead").

The Eleventh Circuit as well holds that "[t]o state a prima facie case, the plaintiff must show that ... the position was filled with an individual outside the protected class." *Holmes v. Alabama Bd. of Pardons & Paroles*, 591 Fed.Appx. 737, 742 (11th Cir. 2014); see *Daniel v. Dekalb County School Dist.*, 600 Fed.Appx. 632, 635-36 (11th Cir. 2014) ("[t]o establish a prima facie case of discrimination the plaintiff must show ... that an individual outside the protected class was hired"); *Martin v. City of Atlanta, Georgia*, 579 Fed.Appx. 819, 824 (11th Cir. 2014) (same); *Vessels v. Atlanta Ind. School System*, 408 F.3d 763, 768 (11th Cir. 2005) (same). In *Suarez v. School Bd. of Hillsborough County, Fla.*, 638 Fed.Appx. 897, 900-01 (11th Cir. 2016), the court rejected the discrimination claim of the Hispanic plaintiff because the "[plaintiff] has not established that the job was offered to individuals outside of his protected class to establish a *prima facie* Title VII case ([the person who obtained the promotion] is also Hispanic)...." In *Revere v. McHugh*, 362 Fed.Appx. 993, 997 (11th Cir. 2010), the plaintiff "failed to establish a *prima facie* case of discrimination [because] ... [a]nother African-American woman was promoted to the ... position that [plaintiff] sought.... Thus, she has failed to demonstrate that ... someone outside

her protected class was promoted to the position she sought."

In the Fourth Circuit, a plaintiff must demonstrate that he or she "was rejected for the position in question in favor of someone not a member of the protected group under circumstances giving rise to an inference of unlawful discrimination." *Alvarado v. Board of Trustees of Montgomery Community College*, 928 F.2d 118, 121 (4th Cir. 1991); see *Weathers v. University of North Carolina at Chapel Hill*, 477 Fed.Appx. 508, 510 (4th Cir. 2011) (promotion); *Williams v. Henderson*, 129 Fed.Appx. 806, 813 (4th Cir. 2005) (promotion); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760 (4th Cir. 1998) (promotion); *Andrews v. Bell*, 1999 WL 1037602 at *1 (4th Cir. Nov. 16, 1999) (hiring). Thus, the hiring or promotion of an individual in the protected class at issue would preclude the establishment of a prima facie case. In *Kebede v. Radisson Mark Plaza Hotel*, 1995 WL 134435 at *1 (4th Cir. March 29, 1995), the Fourth Circuit held that "Kebede's claim that the [employer] discriminated against him by failing to promote him to another position is ... without merit because Kebede admitted that the man who received the promotion was also a member of a protected class." In *King v. Virginia Employment Comm'n*, 1994 WL 416439 at *5-*6 (4th Cir. August 10, 1994), the court of appeals held that the plaintiff could not establish a prima facie case of gender discrimination with regard to three disputed promotions, because the successful candidates, like the plaintiff, were women, or a prima facie case of racial

discrimination regarding two promotions. because the successful candidates, like the plaintiff, were black.

The Sixth Circuit applies this requirement as well.

> In order to establish a *prima facie* case of ... discrimination based upon a failure to promote, the plaintiff must demonstrate that ... other members of similar qualifications who are not members of the protected class received promotions at the time the plaintiff's request for promotion was denied.

Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000); see *Culver v. CCL Label, Inc.*, 455 Fed.Appx. 625, 627-28 (6th Cir. 2012) (prima facie case of discrimination in promotion requires proof that "an individual of similar qualifications who was not a member of the protected class received the job at the time plaintiff's request for the promotion was denied.") (quoting *White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 240 (6th Cir. 2005)). In *Jones v. Butler Metropolitan Housing Authority*, 40 Fed.Appx. 131, 135-36 (6th Cir. 2002), the Sixth Circuit held that the black plaintiff had failed to establish a prima facie case of racial discrimination in hiring because the individual selected for the position was black.

(2) Five circuits have expressly rejected the requirement imposed in the Seventh Circuit and several other circuits.

In *Carter v. George Washington University*, 387 F.3d 872, 882-83 (D.C.Cir. 2004) (opinion joined by Roberts, J.), the District of Columbia Circuit held in a

promotion case that "a plaintiff need not show that the position was filled by someone outside her protected class in order to make a prima facie case...." See *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 n.2 (D.C.Cir. 2008) ("to make out a prima facie case, a plaintiff need not demonstrate that ... the position was filled by a person outside the plaintiff's group"); *Teneyck v. Omni Shoreham Hotel*, 365 F.3d 1139, 1150 (D.C.Cir. 2004) ("In order to make out a prima facie case, it is not necessary for an African-American to show that she was disadvantaged by the employer's hiring of a Caucasian applicant...."); *Chappell-Johnson v. Powell*, 440 F.3d 484, 488 (D.C.Cir. 2006) ("in failure-to-hire cases we impose no requirement that the employer filled the sought-after position with a person outside the plaintiff's protected class."). *Stella v. Mineta*, 284 F.3d 135, 146 (D.C.Cir. 2002), "reverse[d] the District Court's holding that because women were promoted to [the disputed] positions, [the female plaintiff] could not carry her burden of establishing a prima facie case of [gender] discrimination." "The District Court's holding that [the plaintiff] was required to show that the [disputed] positions were not filled by women finds no support in *McDonnell Douglas* [*v. Green*, 411 U.S. 792 (1973)]." 284 F.3d at 145.

The Third Circuit also rejects the requirement applied by the Seventh Circuit. In *Goosby v. Johnson & Johnson*, 228 F.3d 313, 321 (3d Cir. 2000) (opinion joined by Alito, J.), "[the employer] ... argue[d] that [the plaintiff's] claim of gender discrimination should be

dismissed because the only other women in her division was assigned to [the desirable] position...." The Third Circuit held that the favorable treatment of other women

> does not necessarily defeat [plaintiff's] claim of gender bias. Clearly, an employer does not have to discriminate against all members of a class to illegally discriminate against a given member of that class.... [I]t is certainly possible that some females may have been preferred because they were more "like one of the boys" than [the plaintiff].... In addition, it is conceivable that an employer who harbors a discriminatory animus may nevertheless allow one or two females to advance for the sake of appearances.

Id.

The Ninth Circuit has repeatedly held that "[a] plaintiff can establish [a] prima facie case even though [the] individual promoted instead of [the] plaintiff is [a] member of [the] same protected class." *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 n.3 (9th Cir. 1997); see *Hicks v. County of Los Angeles*, 1994 WL 408245 at n.2 (9th Cir. Aug. 4, 1994) (same); *Caldwell v. State of Washington*, 278 Fed.Appx. 773, 776 (9th Cir. 2008) ("[Plaintiff] presented a *prima facie* case ... despite the fact that the chosen candidate was a member of the same relevant protected class as [the plaintiff herself]."); *Lyons v. England*, 307 F.3d 1092, 1116 (9th Cir. 2002) ("[P]roof that the employer filled the position sought with a person not of the plaintiff's

protected class is neither a sufficient nor a necessary condition" of proving a Title VII case.) (internal quotations omitted). *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356 (9th Cir. 1985), reversed a district court decision which (like the Seventh Circuit in the instant case) held that "whenever the person who is selected for the position is a member of the same protected class, the plaintiff is precluded from establishing a *prima facie* case." 752 F.2d at 1359-60. "[A] plaintiff is not precluded from bringing suit merely because a person of the same protected class is selected for the challenged position." *Id.* at 1360. "The district court erred in holding that because the person promoted was a member of the same protected class as Diaz, Diaz was barred from establishing a *prima facie* case." *Id*. at 1362.

In the Tenth Circuit, "that a member of a protected class was hired or promoted in place of a Title VII plaintiff has repeatedly been held insufficient to insulate the employer from liability." *Pitre v. Western Elec. Co.*, 843 F.2d 1262, 1272 (10th Cir. 1988); see *Amro v. Boeing Co.*, 232 F.3d 790, 796 (10th Cir. 2000) ("[T]he plaintiff may establish [a] prima facie case by demonstrating that the position ... into which he or she was not hired was filled or remained available following the plaintiff's ... failure to [be] hire[d]. The plaintiff is not required to show that it was filled by someone outside the plaintiff's protected class.").

> The employer is not excused from discriminating simply because he hired a member of one or more minorities. Not does the employer

> escape because one minority was hired or preferred over another.... [T]he race or national origin of the person hired does not end the inquiry, as a matter of law, as to whether a claimant was the victim of employment discrimination.

United States v. Lee Way Motor Freight, 625 F.2d 918, 950 (10th Cir. 1979). In *Taylor v. Alexander*, 1994 WL 684571 at *1 (10th Cir. Oct. 25, 1994), the Tenth Circuit noted that the courts were divided about this issue, contrasting the Fifth Circuit decision in *Jefferies* with the Ninth Circuit decision in *Diaz*.

And in the First Circuit, where a plaintiff claims that an employer discriminated on the basis of race in deciding which laid-off workers to recall, "[c]ontrary to [the defendant's] contention, a plaintiff need not show as part of his prima facie case that the employer either recalled similarly situated non-minority employees or otherwise treated employees of different ethnic backgrounds more favorably." *Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 572, 584 (1st Cir. 1999).

B. The Seventh Circuit Requirement Is Inconsistent With The Decisions of This Court and The Purposes of Federal Anti-Discrimination Laws

The prima facie case requirement applied in the Seventh Circuit effectively defines what discrimination is, and is not, unlawful under Title VII, the Age Discrimination in Employment Act, and section 1981.

Under prevailing practice in the lower courts, a discrimination claim will almost invariably be dismissed if the plaintiff cannot establish a prima facie case. Any legal standard establishing a requirement for a prima facie case thus effectively excludes from the protections of anti-discrimination statutes cases in which that requirement would not be met. In the Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits, an employer which rejects an application for promotion or hiring on the basis of his or her race, national origin, gender, religion, age, or disability, may avoid liability by selecting another person from the same protected group.

The United States correctly advised this Court in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), that intentional discrimination could indeed occur even though the individual selected to fill a position was a member of the same group as the claimant alleging invidious discrimination.

> [The view] that a plaintiff should not be precluded from establishing a prima facie case even when the hired employee is a member of the same minority group reflects a realistic view of the nature of discrimination in the workplace. There are some situations in which an employer might discriminate on the basis of (for example) race by refusing to hire a black person, even if another black person is ultimately hired for the same or similar position. An employer engaging in racial discrimination might hire a few members of racial minority groups to ward off discrimination

> suits, or might reassign a few minority employees to conceal discrimination.... Such actions would constitute prohibited discrimination, even if the persons eventually chosen to fill the positions were black.

Brief for the United States and the Equal Employment Opportunity Commission As Amici Curiae Supporting Petitioner, *O'Connor v. Consolidated Coin Caterers Corp*., No. 95-354, available at 1995 WL 793447, at 17.

"Title VII does not permit the victim of a ... discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were [treated more favorably]." *Connecticut v. Teal*, 457 U.S. 440, 455 (1982). "Irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiffs' group can be 'of little comfort to the victims of ... discrimination.'" *Id*. at 455 (quoting *Teamsters v. United States*, 431 U.S. 324, 432 (1977)). "Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he treats favorably other members of the employees' group." *Id.* at 455. "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 579 (1978) (emphasis in original).

II. There Is An Important Circuit Conflict Regarding The Standard Governing When Evidence of Comparative Qualifications Will Support A Finding of Discrimination In Hiring Or Promotion

The second question presented is central to the resolution of claims of promotion or hiring discrimination. In most such cases, plaintiffs seek to prove discrimination by offering evidence that they were better qualified than the individual selected for the position in question. This Court has repeatedly held that a plaintiff may rely on comparative qualifications evidence to establish that an employer's proffered explanation for its hiring or promotion decision was a pretext for discrimination. "Under this Court's decisions, qualifications evidence may suffice, at least in some circumstances, to show pretext." *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006) (per curiam). "[A plaintiff] might seek to demonstrate that [an employer's] claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position." *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989), superseded on other grounds by 42 U.S.C. § 1981(b). "The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

The lower courts have long disagreed about the appropriate standard "for inferring pretext from superior qualifications." *Ash*, 546 U.S. at 457. In *Ash* this Court rejected one such standard, but recognized that "[f]ederal courts ... have articulated various other standards," citing divergent legal rules in at least three circuits. *Id*. at 457-58. *Ash* did not attempt to resolve the differences that remained among the courts of appeals, explaining that "[t]his is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications." *Id.*

The instant case provides the ideal and essential occasion for defining that standard and resolving that circuit conflict. In the years since *Ash*, a multi-faceted circuit conflict, rooted in differences that pre-dated *Ash* itself, has become deeply entrenched. Four courts of appeals hold that a plaintiff can meet his or her burden of proof with evidence from which the trier of fact could infer that he or she was the better qualified candidate. At the other end of the spectrum, the Seventh Circuit applies a standard so exceptionally demanding no appellate decision in that circuit has found it satisfied. While on the courts of appeals, the Chief Justice and Justice Sotomayor joined decisions in the District of Columbia and Second Circuits, respectively, applying yet other standards. See *infra*, pp. 29, 33. The governing standard effectively defines, and potentially limits, the scope of federal laws forbidding discrimination in promotion and hiring.

A. There Is A Deeply Entrenched Circuit Conflict About This Issue

(1) At one end of the spectrum of standards, four circuits hold that a plaintiff may establish pretext by proving that he or she was the best qualified candidate; the trier of fact assesses whether the employer's decision to select the less qualified applicant was based on some factor other than merit – such as discrimination – or was merely a mistake.

The Eighth Circuit recognizes that "[i]t is 'common business practice to pick the best qualified candidate for promotion. When that is not done, a reasonable inference arises that the employment decision was based on something other than the relative qualifications of applicants.'" *Cox v. First Nat. Bank*, 792 F.3d 936, 939 (8th Cir. 2014) (quoting *McCullough v. Real Foods, Inc.*, 140 F.3d 1123, 1129 (8th Cir. 1998)); see *Hill v. City of Pine Bluff, Ark.*, 696 F.3d 709, 714 (8th Cir. 2012) (same). "[A]n employer's selection of a less qualified candidate can support a finding that the employer's nondiscriminatory reason ... was pretextual." *Gilbert v. Des Moines Area Community College*, 495 F.3d 906, 916 (8th Cir. 1995). Thus, "to support a finding of pretext, [the plaintiff] must show that [the employer] hired a *less* qualified applicant." *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 793 (8th Cir. 2011) (quoting *Kinkaid v. City of Omaha*, 378 F.3d 799, 805 (8th Cir. 2004)) (emphasis in *Kinkaid*); see *Othman v. City of Country Club Hills*, 671 F.3d 672, 677 (8th Cir. 2012) ("To support a finding of pretext, [the

plaintiff] was required to show that the [defendant] hired a less qualified candidate.").

In the Ninth Circuit, "[e]vidence of a plaintiff's superior qualifications, standing alone, may be sufficient to prove pretext." *Shelley v. Geren*, 666 F.3d 599, 611 (9th Cir. 2010); see *id.* ("A comparison of [the plaintiff's and promoted individual's] resumes gives rise to a factual dispute as to whether [the plaintiff] was better qualified for the position...."; "[plaintiff's] resume demonstrated sufficient qualifications that a reasonable jury could find that he was substantially better qualified than [the person promoted]."). *Russell v. City of Reno*, 289 Fed.Appx. 996, 998 (9th Cir. 2008) ("[Plaintiff's] resume is sufficient, relative to the other candidates' resumes, to create a question of fact as to whether [the plaintiff] was objectively more qualified."). Even prior to this Court's decision in *Ash*, the Ninth Circuit had repeatedly held that a plaintiff could defeat summary judgment in a promotion or hiring case by adducing evidence that he or she was better qualified than the individual chosen for the position in question.[12]

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[12] *Margolis v. Tektronix, Inc.*, 44 Fed.Appx. 138, 141-42 (9th Cir. 2002) ("Margolis' principal argument is that ... she is more qualified than one or more male managers.... Margolis' evidence on this point, if believed, is adequate ... to survive summary judgment. A jury could find that Tektronix' [explanation] is a pretext for discrimination if it believes that Margolis was, in fact, more ... qualified."); *Haas v. Betz Laboratories, Inc.*, 185 F.3d 866, 1999 WL 451206 *2 (9th Cir. June 23, 1999) ("Haas also has established pretext indirectly by offering evidence that the chosen applicant ... was not the most qualified applicant for the job."); *Godwin v.*

The Fourth Circuit holds that "[a] plaintiff alleging a failure to promote can prove pretext by showing that he was better qualified...." *Adams v. Trustees of the University of North Carolina*, 640 F.3d 550, 559 (4th Cir. 2011) (quoting *Heiko v. Colombo Sav. Bank, F.S.B.*, 434 F.3d 249, 259 (4th Cir. 2006)); see *Christian v. South Carolina Dept. of Labor Licensing*, 2016 WL 3074312 (4th Cir. June 1, 2016) (same). In *Hicks v. Johnson*, 755 F.3d 738, 746 (1st Cir. 2014), the First Circuit quoted this Court's holdings in *Burdine* and *Ash* that pretext can be proven by evidence that a rejected plaintiff was better qualified than the individual selected, without imposing any heightened evidentiary standard. See *Ahmed v. Johnson*, 752 F.3d 490, 500-02 (1st Cir. 2014) (summary judgment improper where there was a "factual dispute" about the correctness of the employer's claim that the individuals selected "were the best applicants").

Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998) ("Facts tending to show that the chosen applicant may not have been the best person for the job are probative as they 'suggest that [the defendant's explanation] may not have been the real reason for choosing [the selected applicant] over the [plaintiff]' ") (quoting *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991)); *Thomas v. California State Department of Corrections*, 972 F.2d 1343, 1992 WL 197414 *3 (9th Cir. Aug. 18, 1992) ("we find that ... a rational trier of fact could conclude that Thomas was more qualified [than the person hired] and that the Department's articulated reasons for rejecting him were pretextual."); *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991) ("All of these facts tend to show that [the person promoted] may not have been the best person to lead the group, and they therefore suggest that leadership ability may not have been the real reason for choosing [him] over Lindahl.").

(2) The District of Columbia Circuit requires more than proof that the plaintiff was the better qualified applicant; he or she must have been "significantly" better qualified.

> [I]f a factfinder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate – something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.

Hamilton v. Geithner, 666 F.3d 1344, 1352 (D.C.Cir. 2012); see *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C.Cir. 2006) ("significantly better qualified"). The District of Columbia Circuit applied that standard in *Carter v. George Washington University*, 387 F.3d 872, 881 (D.C.Cir. 2004) (opinion joined by Roberts, J.); "[c]omparing [the plaintiff's] background to [that of the successful candidate], ... a jury could not reasonably conclude that Carter was significantly better qualified." That was the pre-*Ash* standard in the District of Columbia Circuit.[13]

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[13] *Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) ("[i]f a factfinder can conclude that a reasonable employer could have found the plaintiff to be significantly better qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate – something employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.").

(3) In the Tenth Circuit, even a "significant" disparity in qualification is insufficient; the difference between the plaintiff and the individual who was awarded the position in question must be "overwhelming." "[T]o suggest that an employer's claim that it hired someone else because of superior qualifications is pretext for discrimination rather than an honestly (even if mistakenly) held belief, a plaintiff must come forward with facts showing an 'overwhelming' 'disparity in qualifications.'" *Johnson v. Weld County, Colorado*, 594 F.3d 1202, 1211 (10th Cir. 2010) (quoting *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1309 (10th Cir. 2005)). "We have cautioned that pretext cannot be shown simply by identifying minor differences between plaintiff's qualifications and those of successful applicants, but only by demonstrating an overwhelming merit disparity." *Santana v. City and County of Denver*, 488 F.3d 860, 865 (10th Cir. 2007); see *Bandi v. Colvin*, 618 Fed.Appx. 426, 430 (10th Cir. 2015); *Hamilton v. Oklahoma City University*, 563 Fed.Appx. 597, 602 (10th Cir. 2014).

(4) Several circuits require proof that the plaintiff was so much better qualified than the individual chosen that the employer's decision was essentially irrational. In these circuits proof that the plaintiff was better qualified is insufficient as a matter of law to defeat summary judgment.

In the Fifth Circuit, "even if the plaintiff 'was the best qualified candidate,' that plaintiff 'still would not have proved his case'...." *Manora v. Donahoe*, 439

Fed.Appx. 352, 358 (5th Cir. 2011). "'[U]nless the qualifications are so widely disparate that no reasonable employer would have made the same decision,' ... any 'differences in qualifications are generally not probative evidence of discrimination....'" *Moss v. BMC Software, Inc.*, 610 F.3d 917, 923 (5th Cir. 2010) (quoting *Deines v. Texas Dep't of Protective & Regulatory Services*, 164 F.3d 277, 280-81 (5th Cir. 1999) and *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 357 (5th Cir. 2001)); see *Murchison v. Cleco Corp.*, 544 Fed.Appx. 556, 560 (5th Cir. 2013) (same, quoting *Moss*). The Fifth Circuit's avowedly high standard is based on its doubts about the competence of juries to assess the qualifications of applicants. *Manora v. Donahoe*, 439 Fed.Appx. 352, 357 (5th Cir. 2011).

In the Eleventh Circuit as well, "a plaintiff cannot prove pretext ... by showing that he was better qualified than the [person] who received the position he coveted." *Springer v. Convergys Customer Mgmt. Grp., Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007) (internal quotation marks omitted); see *Dishman v. State of Florida, Dept. of Juvenile Justice*, 2016 WL 4575558 at *3 (11th Cir. Sept. 2, 2016) (same, quoting *Springer*); *Loberger v. Del-Jen, Inc.*, 616 Fed.Appx. 922, 928-29 (11th Cir. 2015) (same, quoting *Springer*). "A plaintiff must show that the disparities between the successful applicant's and his own qualifications were of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff." *Springer*, 509 F.3d at 1349 (internal quotation marks omitted); see *Dishman*, 2016

WL 4575558 at *3 (same, quoting *Springer*); *Loberger*, 616 Fed.Appx. at 928 (same, quoting *Springer*). The Eleventh Circuit has repeatedly emphasized that judges, not juries, are responsible for deciding if the difference in comparative qualifications meets this demanding standard.

> *Our* task is simply to review the qualifications of the selected candidate and the plaintiff, and determine whether the difference between the two [meets the *Springer* standard].... [*W*]*e* do not find that [plaintiff's] educational experience, job history, or supervisory experience made her exceptionally more qualified than [the person selected].

Kidd v. Mando American Corp., 731 F.3d 1196, 1206-07 (11th Cir. 2013) (emphasis added); see *Dishman*, 2016 WL 4575558 at *3 ("*we* cannot say that the disparity in qualifications was so great that no reasonable person could have selected [the other applicant] over [the plaintiff]."); (emphasis added); *Bailey v. City of Huntsville*, 517 Fed.Appx. 857, 865 (11th Cir. 2013) ("*we* conclude that Bailey has failed to show that the disparities [in qualifications satisfied the Eleventh Circuit standard]") (emphasis added).

In the Second Circuit, evidence of a plaintiff's superior qualifications is insufficient to defeat summary judgment unless "[t]he plaintiff's credentials [are] so superior to the credentials of the person selected for the job that 'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate

selected over the plaintiff for the job in question.'" *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001) (quoting *Deines*, 164 F.3d at 280-81); see *Lukasiewicz-Kruk v. Greenpoint YMCA*, 404 Fed.Appx. 519, 520 (2d Cir. 2010) (same); *Kearney v. County of Rockland ex rel. Vanderhof*, 185 Fed.Appx. 68, 68 (2d Cir. 2006) (same; opinion joined by Sotomayor, J.). The Second Circuit intends this standard to impose a "weighty burden" on plaintiffs, *id*., and courts decide if the evidence meets the standard. See *Byrnie*, 243 F.3d at 103 ("*we* cannot say . . . that [the employer] was unreasonable to [select the candidate other than the plaintiff]") (emphasis added); *Lukasiewicz-Kruk*, 404 Fed.Appx. at 520 ("the district court properly concluded" that plaintiff's credentials did not meet the standard).

The Sixth Circuit applies the same demanding standard. *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 815 (6th Cir. 2011) ("the plaintiff [must show that he or she] was a plainly superior candidate, such that no reasonable employer would have chosen the [successful candidate] over the [plaintiff]...."); see *Philbrook v. Holder*, 583 Fed.Appx. 478, 485 (6th Cir. 2014) (same, quoting *Provenzano*); *Bartlett v. Gates*, 421 Fed.Appx. 485, 490-91 (6th Cir. 2010) (same).

(5) The Seventh Circuit standard is uniquely, and fatally, stringent. A plaintiff must prove that the differences in qualifications were "so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was *clearly better qualified* for the position at issue."

App. 13a (emphasis added; quoting *Hobbs v. City of Chicago*, 573 F.3d 454, 462 (7th Cir. 2009), quoting *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (7th Cir. 2002)). In more familiar legal terms, a plaintiff must show beyond a reasonable doubt that he was better qualified beyond a reasonable doubt, a standard that exceeds that applied in criminal cases.

The court below emphasized that this Seventh Circuit standard establishes "a high evidentiary bar for pretext." App. 13a. Since the Seventh Circuit established this standard in 2002, no appellant has ever been able to satisfy it. App. 48a-49a. The Seventh Circuit has imposed this extraordinary limitation on the ability of plaintiffs to prove unlawful discrimination because it doubts the competence of juries to evaluate the qualifications of job applicants.

> If we were to allow a jury to evaluate competing credentials to determine whether the employer's assertion that it selected the best candidate was pretextual, the jury would in most cases be replacing the employer's personnel department. Yet neither the judge nor the jury is "as well suited by training and experience to evaluate qualifications for high level promotion in other disciplines as are those persons who have trained and worked for years in that field of endeavor for which the applications under consideration are being evaluated."

Millbrook, 280 F.3d at 1181 (quoting *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993)).

B. The Seventh Circuit Standard Impermissibly Limits The Protections of Federal Anti-Discrimination Laws

This conflict regarding the standard governing use of comparative qualifications evidence warrants review by this Court today for the same reason that it warranted review fourteen years ago in *Ash*: the standard effectively limits, in some circuits severely, the protections of federal anti-discrimination laws. In hiring and promotion cases, evidence of an applicant's greater qualifications is the most important proof that a discrimination plaintiff is usually able to offer. Employers engaging in unlawful discrimination rarely announce their illegal purpose, and an employer of even modest cunning can avoid the tell-tale remarks that might reveal a covert motive. Where the differences in qualifications between two applicants are not great enough to meet one of the more demanding standards that exist in many circuits, an employer usually will be able to discriminate with impunity. In the Seventh Circuit, for example, federal anti-discrimination laws usually do not protect workers from discrimination in hiring or promotion except when their qualifications are so vastly superior "that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." App. 13a. As experience demonstrates, perhaps unsurprisingly, it is virtually impossible for a worker to meet that standard and enjoy the protection of federal law. App. 48a-49a.

The Seventh Circuit standard is assuredly inconsistent with the decisions of this Court in *Ash, Burdine*, and *Patterson* that a claimant may indeed demonstrate pretext by adducing evidence of superior qualifications; under the Seventh Circuit, what this Court's decisions permit in theory is essentially impossible in practice. The "no reasonable person" and "overwhelming disparity" standards also have the effect of restricting, to an impermissible degree, the protections of federal anti-discrimination statutes.

In *Patterson*, the United States advised this Court that the appropriate standard requires only that a plaintiff demonstrate that he or she was better qualified than the individual whom the employer hired or promoted.

> The fact-finder need only find that the preponderance of the evidence establishes that but for the consideration of her race plaintiff would not have been denied the promotion she sought. The plaintiff may demonstrate this fact by producing evidence that she was more qualified than the candidate who was actually selected.

Brief of the United States As Amicus Curiae Supporting Petitioner, *Patterson v. McLean Credit Union*, No. 87-107, available at 1987 WL 881062 at *25; see *id*. at *7 ("A plaintiff may show ... discriminatory purpose in many ways. She may rely on evidence that she was more qualified than the candidate who was actually selected for the position.").

III. This Case Is An Excellent Vehicle for Resolving Both Questions Presented

Because this case involves multiple distinct claims, which were rejected on separate and independent grounds, it provides an excellent vehicle for resolving both questions presented.

Riley's claim of racial discrimination in the filling of an assistant principal position in 2009 was rejected by the court of appeals solely on the ground that the position had been awarded to another African-American. App. 8a.[14] Because the court of appeals concluded that Riley could not establish a prima facie case with regard to this promotion, it did not consider whether Riley had sufficient evidence of pretext. In rejecting seven other claims,[15] the court of appeals below relied exclusively on the Seventh Circuit's exceptionally demanding standard of proof regarding comparative qualifications.

[14] This was the position of assistant principal at Memorial High School. See App. 6a, 9a.

[15] The court of appeals rejected on this basis alone Riley's racial discrimination claims regarding the 2007 promotion, the 2008 promotion, and the 2009 promotion at Central High School, her claims of racial and gender discrimination with regard to the 2012 position filled by Gratsy, and her claims of age discrimination with regard to both 2012 promotions.

The court of appeals rejected on both grounds Riley's claim of gender and race discrimination with regard to the position awarded in 2012 to Adams. See App. 11a n.3, 12a-15a.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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2016 WL 3947810
United States Court of Appeals,
Seventh Circuit.

Janet A. Riley, Plaintiff-Appellant,
v.
Elkhart Community Schools, Defendant-Appellee.

No. 15-3166
|
Argued April 11, 2016
|
Decided July 22, 2016

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 3:12-cv-00564-CAN – **Christopher A. Nuechterlein**, *Magistrate Judge.*

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Before Bauer and Williams, Circuit Judges, and Adelman,* District Judge.

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* Of the United States District Court for the Eastern District of Wisconsin, sitting by designation.

Opinion

Bauer, Circuit Judge.

Plaintiff-appellant, Janet Riley, sued defendant-appellee, Elkhart Community Schools ("ECS"), for discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII"), discrimination under the Age Discrimination in Employment Act 29 U.S.C. § 621 ("ADEA"), and violation of her equal rights under 42 U.S.C. § 1981. Riley roots her causes of action in ECS's failure to promote her to various positions during her career as a teacher with the school district. The district court granted summary judgment for ECS on all claims, based on procedural bars and insufficient evidence. We affirm.

I. BACKGROUND

ECS has employed Riley, an African-American female, as a teacher since 1980. She has served in multiple capacities during her tenure. Currently, she teaches business education at Elkhart Central High School and leads evening and summer adult education classes. She has an administrator's license and is pursuing her doctorate in education. In 2010, she was named the ECS Teacher of the Year.

From 2005 through 2013, Riley unsuccessfully applied for twelve different positions with ECS. Seven positions are relevant to this appeal. In 2007, Riley applied for an assistant principal position at Elkhart Memorial High School. ECS hired Carey Anderson, who is

white. In 2008, Riley again applied for an assistant principal position, this time at Central High School. ECS hired Andrew Bridell, who is white. In 2009, Riley applied for two more assistant principal positions, one at Northside Middle School, the other at Memorial High School. ECS hired Mary Wisniewski, who is white, for the position at Northside Middle School; it hired Krista Hennings, who is African-American, for the position at Memorial High School.

In 2010, ECS posted two academic dean positions, but did not advertise them as administrative positions. Riley did not apply for these positions; ECS hired two white males under the age of 40 for the openings. In both 2010 and 2013, Riley applied for the coordinator position of the Blazer Connection program, an after-school tutoring program. In both instances, ECS hired white males. Finally, in the spring of 2012, Riley again applied for two open assistant principal positions, one at Central High School and the other at Memorial High School. ECS appointed a committee to screen potential candidates. The screening committee reviewed the candidates and made recommendations to the superintendent. The committee chose Riley for an interview, but recommended Jason Gratsy, a white male under 40, and JaNeva Adams, an African-American female under 40, for the openings. The committee noted that Gratsy and Adams performed better in their interviews than Riley; ECS ultimately hired Gratsy and Adams.

On May 12, 2011, Riley filed an Equal Employment Opportunity Commission charge against ECS,

claiming that race, sex, and age discrimination were the reasons that ECS had not promoted her to any of the positions for which she had applied. The EEOC sent Riley a right to sue letter on April 26, 2012.

On July 24, 2012, Riley filed a *pro se* complaint in federal court alleging discrimination, harassment, libel, defamation, and retaliation by ECS. On August 8, 2012, Riley filed an amended complaint, alleging violations of Title VII race and sex discrimination, ADEA age discrimination, and violation of equal rights under § 1981. She filed both incarnations of the complaint in the Southern District of Indiana, which transferred the case to the Northern District of Indiana, where both parties reside.

Riley retained counsel on November 26, 2012, and the parties agreed on January 16, 2013, to have a magistrate judge adjudicate the dispute. On May 13, 2015, ECS moved for summary judgment. The district court granted summary judgment for ECS on all counts, dismissing some claims on procedural grounds, and dismissing the remaining claims because Riley had failed to produce sufficient evidence.

Riley appealed.

II. DISCUSSION

First, like the district court, we winnow down Riley's bevy of claims to those which we will assess on their merits. The other claims fail for procedural reasons. Some claims appear in her original complaint but

not in the amended complaint; an amended complaint supersedes any prior complaint, and becomes the operative complaint. *See Anderson v. Donahoe*, 699 F.3d 989, 997 (7th Cir. 2012) (citations omitted). So any claim in Riley's original complaint not included in her amended complaint is extinguished. *Id.* These include her claims of hostile work environment and disparate treatment.

Riley argues that we should be lenient towards her because she drafted the original and amended complaints without assistance of an attorney. *See, e.g.*, *Ambrose v. Roeckeman*, 749 F.3d 615, 618 (7th Cir. 2014) (citations omitted) ("[w]e have repeatedly emphasized that *pro se* petitions . . . should be held to standards less stringent than formal pleadings drafted by attorneys"). However, while Riley did draft her complaints *pro se*, she has had counsel since November 2012. Since retaining counsel, she has never moved to amend her complaint. Having had counsel for over three years, and ample opportunity to amend her complaint, she is not entitled to the usual *pro se* leniency.

Additionally, some of Riley's claims are time-barred. Both Title VII claims and ADEA claims must be filed within 300 days of the alleged discriminatory act or unlawful practice. 42 U.S.C. § 2000e-5(e)(1) (Title VII statute of limitations); 29 U.S.C. § 626(d)(1)(B) (ADEA statute of limitations). Section 1981 claims must be filed within four years of the alleged discriminatory act. 28 U.S.C. § 1658; *Campbell v. Forest Pres. Dist. of Cook Cty., Ill.*, 752 F.3d 665, 667-68 (7th Cir. 2014) (citing *Jones v. R.R. Donnelley & Sons Co.*, 541

U.S. 369, 382-83, 124 S.Ct. 1836, 158 L.Ed.2d 645 (2004)). Here, Riley filed her first charge of discrimination – her EEOC complaint – on May 12, 2011. Any Title VII or ADEA violation related to an incident occurring before July 16, 2010 (300 days before the filing), and any alleged § 1981 violation related to an incident occurring before May 12, 2007 (four years before the filing), are therefore time-barred. This eliminates Riley's Title VII claims relating to the positions for which she applied in 2005, 2006, 2007, 2008, and 2009. It also eliminates her § 1981 claims related to the position for which she applied in 2005 and 2006. The district court ruled that Riley's § 1981 failure to promote claims relating to four assistant principal positions for which she applied in 2007, 2008, and 2009 were also time-barred. This was incorrect: the claims were brought within the four-year statute of limitations period.

When the dust settles, these four § 1981 claims as well as three Title VII claims remain. All of these causes of action are for failure to promote. The § 1981 claims relate to the following positions: (1) assistant principal available in 2007; (2) assistant principal available in 2008; (3) assistant principal at Central High School available in 2009; and (4) assistant principal at Memorial High School available in 2009. The Title VII claims relate to the following positions: (1) the academic dean positions available in 2010; (2) the Blazer Connection coordinator position available in

2010;[1] and (3) the assistant principal positions available in 2012.

The district court correctly held that Riley failed to produce sufficient evidence for any of these claims to survive summary judgment. We review the grant of summary judgment *de novo*, construing the facts in the light most favorable to the non-moving party, Riley. *E.g.*, *Chaib v. Geo Group, Inc.*, 819 F.3d 337, 340 (7th Cir. 2016). Summary judgment is appropriate and the moving party is entitled to judgment as a matter of law where "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a); *accord. Boss v. Castro*, 816 F.3d 910, 916 (7th Cir. 2016). Here, summary judgment for ECS on these claims is appropriate because Riley either failed to produce evidence entirely or produced evidence that did not create a triable issue of fact under the relevant legal framework.

To proceed to trial on a failure to promote claim, a plaintiff either must produce "sufficient direct or circumstantial evidence that [the employer's] promotion decisions were intentionally discriminatory or make an indirect case of discrimination" under the burden-shifting method of *McDonnell Douglas Corp. v. Green*,

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[1] We do not consider her 2013 application for this position. On August 14, 2014, Riley filed an EEOC complaint regarding her failure to receive the position in 2013. She received a right to sue letter from the EEOC on December 11, 2014, but never incorporated the allegations from this second right to sue letter into her complaint. Any allegation not found in the amended complaint is forfeited. *See Anderson*, 699 F.3d at 997. This includes her 2013 application for the Blazer Connection coordinator position.

411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Adams v. City of Indianapolis*, 742 F.3d 720, 735 (7th Cir. 2014). Here, Riley has chosen the indirect path. Under this rubric, Riley must first produce evidence of a *prima facie* case for failure to promote; if she does so, ECS must then produce evidence of "a legitimate nondiscriminatory reason for the employment action"; if the employer produces evidence of a legitimate reason, the plaintiff must then produce evidence that the employer's "stated reason is a pretext." *Simpson v. Beaver Dam Cmty. Hosps., Inc.*, 780 F.3d 784, 790 (7th Cir. 2015) (citing *McDonnell Douglas*, 411 U.S. at 802-04, 93 S.Ct. 1817).

To demonstrate a *prima facie* case for failure to promote, a plaintiff must produce evidence showing that: (1) she was a member of a protected class; (2) she was qualified for the position sought; (3) she was rejected for the position; and (4) the employer promoted someone outside of the protected class who was not better qualified for the position. *Jaburek v. Foxx*, 813 F.3d 626, 631 (7th Cir. 2016) (citation omitted). Summary judgment for the employer is appropriate if the employee fails to establish any of the elements of a *prima facie* case for failure to promote. *See Atanus v. Perry*, 520 F.3d 662, 673 (7th Cir. 2008) (citation omitted).

First, Riley cannot prove a *prima facie* case for the § 1981 claim regarding the assistant principal position for which she applied in 2009. Section 1981 causes of action are limited to discrimination claims based on race. *See McDonald v. Santa Fe Trail Transp. Co.*, 427

U.S. 273, 285-86, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976); *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 402-03 (7th Cir. 2007) (section 1981 establishes causes of action for racial discrimination as well as retaliation for opposing racial discrimination). ECS hired Krista Hennings, an African-American, for the assistant principal position at Memorial available in 2009. Therefore, Riley cannot show that ECS promoted someone outside of her protected class for the position she sought. *See Jaburek*, 813 F.3d at 631. She cannot establish a *prima facie* case for this § 1981 claim as a matter of law.

Second, Riley cannot prove a *prima facie* case regarding the 2010 academic dean positions because she never applied for the positions. So ECS could not have rejected her.[2] *See Jaburek*, 813 F.3d at 631 (citing *Johnson v. Gen. Bd. of Pension & Health Benefits of United Methodist Church*, 733 F.3d 722, 728 (7th Cir. 2013)) (summary judgment for defendant on Title VII failure to promote claim appropriate where plaintiff never applied for promotion). Because Riley failed to produce

[2] Riley argues that she did not apply for the positions because she did not know that they were administrative positions. Citing Eighth Circuit dicta, Riley argues that the application requirement can be excused where the employer has no formal application process or where the employee is unaware of the opportunity. *See Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1105 n. 13 (8th Cir. 1996). Even if this were established Eighth Circuit law and we adopted it, Riley's own deposition undermines her argument. There, she stated that she knew of the position and did not apply because the position required certain teaching certifications that she lacked. There is no evidence that surreptitious ECS action precluded her from applying.

evidence that she was rejected for the positions, she cannot establish a *prima facie* case; the claims fail as a matter of law.

Third, Riley did not prove a *prima facie* case regarding the Blazer Connection coordinator position, because being rejected for this position does not constitute a sufficiently adverse employment action. Failure to promote claims are only actionable if not receiving the position is a "materially adverse" employment action. *Carter v. Chi. State Univ.*, 778 F.3d 651, 660 (7th Cir. 2015); *see also Atanus*, 520 F.3d at 677. Generally, this means that the position for which the plaintiff was rejected offered markedly greater compensation, responsibilities, or title. *See Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 465-66 (7th Cir. 2002). Here, Riley presented no evidence of how the Blazer Connection position offered a significant pay raise, increase in responsibilities, or boost in title. The district court appropriately called it a lateral move. Riley's failure to produce evidence that being rejected for the position was an adverse employment action dooms her claim as a matter of law.

Riley's remaining claims fail because she has not produced sufficient evidence of pretext. Regarding the 2012 assistant principal positions, Riley has produced evidence of a *prima facie* case for age discrimination: (1) she is over 40 years old; (2) she has extensive teaching experience and an administrator's license, so she is qualified; (3) ECS rejected her for the positions; and (4) ECS instead hired two people outside of the

protected age group – both Gratsy and Adams were under 40 – who did not have her teaching experience.[3]

But ECS has produced evidence of a nondiscriminatory reason for not hiring Riley: both Adams and Gratsy were more qualified for the position than Riley. *See Scruggs v. Garst Seed Co.*, 587 F.3d 832, 838 (7th Cir. 2009) (hiring someone whom employer believes is better qualified for position is legitimate, nondiscrim-

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[3] Riley cannot establish a *prima facie* case for race or sex discrimination because Adams, like Riley, is an African-American female. But the effect of hiring Adams on Riley's race and sex discrimination claim relating to Gratsy is hazier. The district court essentially viewed the position as one position with two openings. This means that because ECS hired an African-American female for the position, *both* of Riley's race and sex discrimination claims fail, regardless of whether ECS also hired a person who is outside Riley's protected race and sex classes. Riley argues that we should view the position as two distinct positions giving rise to two distinct failure to promote claims. This means that even if ECS hired Adams, Riley can still bring a separate claim relating to ECS hiring Gratsy.

It is hard to divine from the record whether Riley raised this argument in the district court, so she has likely waived the argument. *E.g.*, *Homoky v. Ogden*, 816 F.3d 448, 455 (7th Cir. 2016). Further, she cites no precedent for her position. But the district court's ruling also cites no precedent, and it would be improper to hold that the opinion reflects our jurisprudence on the issue. The few analogous cases could be used to justify either position. *See, e.g.*, *Jordan v. City of Gary, Ind.*, 396 F.3d 825 (7th Cir. 2005); *Rooks v. Girl Scouts of Chicago*, 95 F.3d 1154 (7th Cir. 1996) (unpublished opinion). Ultimately, we find no reason to decide the topic here: even if we were to agree with Riley and find that she has produced evidence of a *prima facie* case for race and sex discrimination related to hiring Gratsy, she has not produced sufficient evidence of pretext, and her claim would still fail as a matter of law.

inatory reason for action). ECS produced the list of factors that the screening committee considered in recommending candidates. These factors were:

> a. [Administrative] [c]ertification;
>
> b. Skills, abilities, attributes, training, and education which the applicant possesses which would be necessary or desirable for an [ECS] administrator, and any other employment requirements imposed by law;
>
> c. Contribution the applicant is likely to make to students and/or the school system due to special training and/or competence;
>
> d. Ability to communicate and relate effectively to others;
>
> e. Good past performance in position(s) with [ECS] [s]chools or other school corporations;
>
> f. Opportunity for professional growth of the applicant; and
>
> g. Length of service of the applicant in the [ECS].

ECS listed the factors in order of priority. Thus, length of service in ECS – which Riley argues differentiates her from Gratsy and Adams – was the *least* important factor for the committee's consideration.

ECS also produced the affidavit of Krista Hennings, who was a member of the screening committee. Hennings averred that the committee believed that Adams and Gratsy were the best at answering interview questions, specifically the questions relating to

particular ways to improve the respective school to which the applicant would be assigned. Hennings noted how Gratsy's and Adams's answers to these specific questions related directly to factors c, d, and f of the committee's assessment rubric. Hennings also stated that Riley did not communicate as effectively in her interview; she tended to criticize without providing potential solutions. Hennings also noted that the committee did not view Riley's teaching experience with ECS as dispositive, given that seniority was the least important factor in the screening committee's rubric.

In response to ECS's evidence, Riley needed to produce evidence of pretext. She has not done so. Simply put, pretext is a lie – "a phony reason for some action." *Smith v. Chi. Transit Auth.*, 806 F.3d 900, 905 (7th Cir. 2015) (quotation marks and citation omitted). Riley produced evidence that she has many years of teaching experience, has an administrator's license, and performed well in the past, as evidenced by her Teacher of the Year award; nevertheless, ECS hired two people with less teaching experience. But we have set a high evidentiary bar for pretext. Evidence of Riley's qualifications "only would serve as evidence of pretext if the differences between her and [Adams and Gratsy] were 'so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was *clearly better qualified* for the position at issue.'" *Hobbs v. City of Chicago*, 573 F.3d 454, 462 (7th Cir. 2009) (emphasis added) (quoting *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (7th Cir. 2002)) (other citation omitted).

Riley has not produced evidence that she was *clearly* better qualified for the position than Gratsy and Adams. The evidence presented shows that while Riley had more *teaching* experience, all three had comparable *administrative* experience and training. Thus, all three were on the same plane for the assistant principal position, an administrative position. Further, Riley has produced no evidence that contradicts Hennings's statements regarding the answers of the candidates to the interview questions. Finally, the evidence produced shows that ECS valued length of service to ECS as the least important consideration for recommending a candidate for the position. Therefore, since there is no evidence that she was clearly better qualified than either Gratsy or Adams, Riley's age discrimination claim fails as a matter of law.

Nor is there sufficient evidence of pretext for the § 1981 claims relating to her 2007, 2008, and 2009 applications to assistant principal positions. In each instance, ECS hired a white woman or man instead of Riley. She argues that she was better qualified than these three because she had more teaching experience and had worked at ECS longer. But this is not sufficient evidence that she was *clearly* better qualified for the positions. As with the Title VII age discrimination claim related to the 2012 assistant principal positions, that Riley had more teaching experience does not carry particular weight. The position was administrative, and each of the three people that ECS chose obtained his or her administrator's license at the same time as

Riley. Thus, Riley had comparable administrative experience and training as the three candidates whom ECS eventually hired. Riley's only evidence of better qualifications is that she has more seniority than the people hired. But seniority is "not enough to meet her burden" for pretext. *Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 738 (7th Cir. 2006) (citations omitted).

A court is not a "super personnel department that second-guesses employers' business judgments." *Millbrook*, 280 F.3d at 1181 (quotation marks and citation omitted). Judicial intervention is permissible if there is sufficient evidence of "unlawful hiring practices," particularly where an employer fails to hire or promote someone clearly better qualified than the person chosen. *Id.* at 1180-81; *see Deines v. Texas Dept. of Prot. and Regulatory Services*, 164 F.3d 277, 279 (5th Cir. 1999), *quoted in Millbrook*, 280 F.3d at 1179-80 ("The single issue for the trier of fact is whether the employer's selection of a particular applicant over the plaintiff was motivated by discrimination."). But that is not the case here, because there is not sufficient evidence that Riley was clearly better qualified than any of the three people chosen. Riley's § 1981 claims fail as a matter of law.

III. CONCLUSION

We AFFIRM the grant of summary judgment in favor of ECS.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

JANET A. RILEY, Plaintiff, v. ELKHART COMMUNITY SCHOOLS, Defendant.	)	CAUSE NO. 3:12-cv-564-CAN

ORDER

(Filed Sep. 3, 2015)

On July 24, 2012, Plaintiff, Janet A. Riley ("Riley"), proceeding *pro se*, filed her original complaint against her employer, Defendant Elkhart Community Schools ("ECS" or "the School"), in the United States District Court for the Southern District of Indiana alleging discrimination, harassment, libel, defamation of character, mental anguish, alienation, and retaliation citing Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. §2000e *et seq*. On August 8, 2012, Riley, still proceeding *pro se*, filed her "Employment Discrimination Complaint" alleging discrimination based on race, sex, and age citing Title VII, the Age Discrimination in Employment Act, 29 U.S.C. § 621, and equal rights under 42 U.S.C. § 1981. On October 1, 2012, the Southern District of Indiana transferred Riley's case to this Court. Riley's counsel entered her appearance on November 26, 2012, and the parties

consented to having this case adjudicated by the undersigned on January 16, 2013.

Now pending and ripe before this Court is ECS's motion for summary judgment filed on May 13, 2015. On August 18, 2015, the Court held oral argument on ECS's motion. The Court issues the following opinion pursuant to the consent of the parties and 28 U.S.C. § 636(c). Before proceeding to address ECS's motion for summary judgment, however, the Court must resolve the procedural question of which claims remain active in this case.

I. Clarification of Operative Claims

In compliance with this Court's order dated August 12, 2015, the parties appeared at oral argument on August 18, 2015, and discussed their opposing views on whether Riley's original complaint [Doc. No. 1], filed on July 24, 2012, or her document styled "Employment Discrimination Complaint [Doc. No. 3]," docketed as "Amended Complaint" and filed on August 8, 2012, constitutes the operative complaint, and consequently, the operative claims in this case. At the Court's invitation, Riley also submitted a supplemental brief on August 25, 2015, discussing this issue. ECS followed with a timely response brief on August 31, 2015.

ECS contends that the "Employment Discrimination Complaint" should be construed as an amended complaint that supersedes her original complaint. Construed liberally, Riley's claims in her "Employment Discrimination Complaint" would be discrimination

based on race, sex, and age under Title VII, the AREA, and Section 1981 for failure to promote to administrative positions, disparate treatment, and hostile work environment.

Riley disagrees with ECS's perspective and urges the Court to construe liberally the original complaint and the "Employment Discrimination Complaint" together. Riley argues that she should be afforded some leniency related to her complaints because she was a *pro se* litigant at the time she filed both documents. In addition, Riley suggests that ECS treated the claims in both documents as operative by making discovery requests seeking information related to claims raised only in the original complaint. If the Court were to accept Riley's invitation to construe the documents together, her claims would also include retaliation, harassment, libel, defamation of character, mental anguish, and alienation claims.

Riley's arguments, however, are unpersuasive. A plaintiff may not amend her complaint through summary judgment arguments. *Anderson v. Donahoe*, 699 F.3d 989, 997 (7th Cir. 2012). Moreover, amended pleadings supersede original pleadings. *Id.* Any question raised as to whether the "Employment Discrimination Complaint" constituted an amended complaint is resolved by Riley's short-lived status as a *pro se* litigant in this case.

There is no doubt that "a trial court is obligated to give a liberal construction to a pro se plaintiff's filings." *Nichols v. Mich. City Plant Planning Dep't*, 755

F.3d 594, 600 (7th Cir. 2014) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)). However, when a *pro se* party retains counsel, who knows that the complaint was drafted by the party, the "[p]laintiff does not get the advantage of the Court applying the more generous standard for pro se litigants." *Stoller v. Dart*, No. 12 C 4928, 2013 WL 2156049, at *2 (N.D. Ill. May 17, 2013).

Here, Riley has had the benefit of representation by the same attorney since November 26, 2012. As a result, Riley was only a *pro se* litigant for about four months in a case that is now more than three years old. Moreover, Riley's counsel was undoubtedly aware of the state of Riley's *pro se* pleadings when she agreed to represent her. If nothing else, Riley's counsel was reminded of the *pro se* pleadings when the Court afforded Riley time as late as December 2014 for the specific purpose of submitting an amended complaint. Given the legal expertise of Riley's counsel and her definite knowledge of Riley's *pro se* pleadings over the 2-1/2 years she has been involved in this case, there is no reason to apply the liberal pleading standard that *pro se* parties receive.

Riley's second argument also fails. Riley cites no authority for the proposition that the operative claims in a case should be defined based on the content of the defendant's discovery requests. Without more, the Court is left to apply the straightforward rule in *Anderson* that amended complaints supersede any previous complaints. To do otherwise would result in an unwieldy method for defining Plaintiff's complaints, a

process that flies in the face of the principles underlying the Federal Rules of Civil Procedure. For instance, relying on a defendant's discovery requests to define claims would usurp the plaintiff's control over her own complaint. In addition, the broad scope of discoverable information allowed under Rule 26 would likely broaden rather than narrow a plaintiff's claim. This approach offers nothing constructive to the litigation process.

Therefore, the Court finds Riley's "Employment Discrimination Complaint" filed on August 8, 2012, to be an amended complaint that supersedes Riley's original complaint. As a result, Riley's only operative claims are her failure-to-promote, disparate treatment, and hostile work environment claims as stated in "Employment Discrimination Complaint."

II. ECS'S MOTION FOR SUMMARY JUDGMENT

A. Facts

The following facts are primarily not in dispute. Where the facts are in dispute, this Court has determined that the disputes are either not material or has chosen to address such disputes in the Court's substantive analysis of the issues.

ECS is a school corporation as defined by the Indiana Code. Doug Thorne is its Executive Director of Personnel and Legal Services. Frank Serge is the principal at Elkhart Central High School and has served in that capacity since approximately 2000. Thorne and Serge

were the only two individuals deposed in this case other than Riley herself.

ECS has enacted policies prohibiting discrimination and harassment based upon "race, color, religion, sex, national origin, age, disability, or any other characteristic protected by law." Doc. No. 54-6 at 2. In support of its discrimination and harassment policies, ECS has established a complaint procedure for individuals, including teachers, who endure discrimination or harassment in any activity connected to the School. *Id.* at 3-5. ECS also has a "Diversity in Employment Practices" policy through which it states its "commitment to attracting and retaining a teaching, administrative, and support staff representative of the diversity existing in the communities [it] serves." *Id.* at 9. ECS communicates these policies to its employees upon hire and also through its website.

Riley is an African-American female who has worked for ECS as a teacher since 1980. In addition to her teaching license, Riley maintains an administrator's license and is pursuing her doctorate degree. During her tenure at ECS, Riley has taught business courses, served as the evening adult education program coordinator, and worked with minority students, especially young black males, in several projects and activities. Riley was also chosen as ECS's Teacher of the Year in 2010. Currently, Riley teaches business courses at Elkhart Central as well as adult education courses in the evening and during summer school.

In her complaint, Riley alleges discrimination and harassment creating a hostile work environment growing out of her experiences at ECS from 2005 until 2013. During that time, Riley applied for about twelve positions, mostly administrative in nature, that would have facilitated Riley's professional advancement or increased her salary. She was not hired for any of the positions. Also during that time, Riley was rendered ineligible for the ECS Teacher of the Year award twice after ECS investigations led the School to conclude that she had violated board policy. Specifically, the administration concluded that she misappropriated a colleague's identity by using the colleague's email to nominate herself for the 2006-2007 Award. The administration's subsequent investigation related to the 2010-2011 Award revealed that she had used class time to require nominations from students in violation of Board policy.

In her attempt to secure an administrative position, Riley persistently applied for administrative positions from 2005 on, as they became available. Riley did not, however, apply for two academic dean positions posted in 2010 because they were not advertised as administrative positions. Riley came to believe later that they were "stepping stone" positions that could provide experience in an administrative setting in preparation for future administrative positions. ECS hired two Caucasian males, one of whom was Mr. Jason Gratsy, to fill the academic dean positions.

On May 12, 2011, Riley filed her first Charge of Discrimination against ECS with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination based on race, sex, and age by failing to promote her to various administrator positions between 2005 and 2009. Riley also alleged that ECS had created the 2010 academic dean positions and tailored the job descriptions specifically to the second younger, Caucasian male applicants' credentials to prevent Riley from applying despite her extensive teaching and administrative experience. Doc. No. 1-1 at 1. On April 26, 2012, the EEOC mailed a right to sue letter to Riley.

In 2012, after Riley complained about the academic deans being treated like assistant principals without their positions having been posted as administrative positions, the academic dean positions were eliminated and two assistant principal positions were posted. Riley applied for these positions and was interviewed, but was not chosen. Gratsy was chosen for one of the positions and an African-American female named JaNeva Adams was chosen for the other. In that same year, Riley was rejected for a principal's position. In 2013, Riley applied for a position held by Gratsy before he became academic dean. She was not chosen.

On August 14, 2014, Riley filed her second Charge of Discrimination with the EEOC alleging discrimination based on race, sex, and age after she filed this lawsuit in July of 2012. In short, Riley's second Charge suggested that ECS retaliated against her with a wide range of conduct that in its totality created a hostile

work environment. *See* Doc. No. 54-14 at 2-4. On December 11, 2014, the EEOC mailed Riley a right to sue letter. Despite being afforded time by this Court in December 2014, Riley has not amended her complaint to incorporate her second Charge.

In the instant motion for summary judgment, ECS contends that Riley's failure-to-promote claims fail as a matter of law. First, ECS argues that many of the claims are time-barred or barred because Riley did not raise them in her EEOC Charge. Second, ECS concludes that Riley cannot succeed on the merits of her Title VII and Section 1981 claims because she cannot establish a *prima facie* case of discrimination and has not designated any evidence to establish pretext. Third, ECS similarly asks this Court to dispense with any disparate treatment or hostile work environment claim based on Riley's alleged failure to produce evidence to establish all the necessary elements of each claim. Unsurprisingly, Riley rejects ECS's arguments.

B. Analysis

1. Applicable Legal Standards

Summary judgment is proper where 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 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 922 (7th Cir. 2001). In determining whether a genuine issue of material fact

exists, this Court must construe all facts in the light most favorable to the nonmoving party as well to draw all reasonable and justifiable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Healy v. City of Chicago*, 450 F3d 732, 738 (7th Cir. 2006).

To overcome a motion for summary judgment, the nonmoving party cannot rest on the mere allegations or denials contained in its pleadings. Rather, the nonmoving party must present sufficient evidence to show the existence of each element of its case on which it will bear the burden at trial. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986); *Jones v. City of Elkhart, Ind.*, 737 F.3d 1107, 1112-13 (7th Cir. 2013). Where a factual record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In other words, "[s]ummary judgment is not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005) (quotations omitted); *see also Olendzki v. Rossi*, 765 F.3d 742, 749 (7th Cir. 2014).

2. Admissibility of ECS's Exhibits

In response to ECS's Statement of Material Facts, Riley challenges the admissibility of some of ECS's allegations in its Statement of Material Facts and its

attached exhibits. Doc. No. 61-2 at 2-3. Riley objects to the use of (1) ECS's discrimination, harassment, and diversity policies [Doc. No. 54-6] as hearsay and improperly authenticated documents; (2) ECS's allegations and documentation regarding her conduct and the investigation leading to her ineligibility for the 2006-2007 Teacher of the Year award [Doc. No. 54-6; 55 at 3-4, ¶ 7] as irrelevant hearsay; and (3) ECS's documentation of her conduct and the investigation leading to her ineligibility for the 2010-2011 Teacher of the Year award [Doc. No. 54-8] as irrelevant hearsay. Yet, Riley has not developed any argument to exclude these allegations, policies, statements, and documents besides an unexplained reference to the hearsay rules found at Fed. R. Evid. 801-803. "An undeveloped argument is a waived argument." *Kochert v. Adagen Med. Int'l, Inc.*, 491 F.3d 674,679 (7th Cir. 2007). Therefore, Riley has waived any such argument. The Court refuses to exclude any of ECS's evidence.

3. ECS is entitled to judgment as a matter of law on Riley's failure-to-promote claims.

Through the operative "Employment Discrimination Complaint," Riley raises claims of discrimination based on race, sex, and age under Title VII, the ADEA, and 42 U.S.C. § 1981. Title VII makes it unlawful for an employer "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." 42 U.S.C.

§ 2000e-2(a)(1). The standards for liability under the ADEA and Section 1981 mirror those governing Title VII.[1] *Richter v. Hook-SupeRx, Inc.*, 142 F.3d 1024,1028 (7th Cir. 1998) (ADEA); *Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F.3d 1025,1035 (7th Cir. 1998) (Section 1981). ECS successfully attacks Riley's failure-to-promote claims both procedurally and substantively.

a. Procedural Defects

i. Time-Barred Claims

A Title VII claim is time-barred if it is not filed within 300 days after the alleged discriminatory act. 42 U.S.C. § 2000e-5(e)(1). Similarly, ADEA claims are time-barred if not filed within 300 days of the alleged unlawful practice. 29 U.S.C. § 626(d)(1)(B). Section 1981 claims are time-barred if not filed within four years after the alleged discriminatory act. *Jones v. R.R. Donnelly & Sons, Co.*, 541 U.S. 359, 382-83 (2004) (applying four-year statute of limitations from 28 U.S.C. § 1658(a) because claim was based on amendments to Section 1981 enacted in 1991). A discrete discriminatory act includes failure to promote. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002).

Riley filed her first Charge of Discrimination on May 12, 2011, making any Title VII or ADEA failure-to-promote claims based on positions hired before July

[1] Because the ADEA and Section 1981 standards for liability mirror those governing Title VII, the Court will only reference Title VII in its substantive analysis of Riley's failure-to-promote claims.

16, 2010 (*i.e.*, 300 days before the Charge was filed) time-barred as ECS contends. Likewise, any Section 1981 failure-to-promote claims based on positions hired before May 12, 2007, (*i.e.*, four years before Riley's first Charge was filed) are time-barred. Riley does not object to these conclusions.

Instead, Riley argues that the pre-2010 time-barred claims should be considered evidence in support of her timely claims. ECS does not disagree, in principle. Neither does this Court. When a plaintiff timely alleges a discrete discriminatory act, "acts outside of the statutory time frame may be used to support that claim." *W. v. Ortho-McNeil Pharm. Corp.*, 405 F.3d 578, 581 (7th Cir. 2005) (quoting *Davis v. Con-Way Transp. Cent. Express*, Inc., 368 F.3d 776, 786 n.4 (7th Cir. 2004) and interpreting *Morgan*, 536 U.S. at 113) (internal quotations omitted).

ECS does, however, urge this Court to disregard the time-barred claims as evidence because Riley did not cite any designated evidence to support the assertions in her original response brief filed on June 25, 2015. The Court expressed its concern about Riley's citations in its order setting the instant motion for oral argument and afforded Riley the chance to amend her response brief with citations. Doc. No. 72. Riley timely filed her amended response brief on July 15, 2015. The Court will address any shortcomings in Riley's citations to designated evidence in the analysis of the merits of her claims below.

ii. Exhaustion of Administrative Remedies

"Generally, a plaintiff may not bring claims under Title VII that were not originally included in the charges made to the EEOC." *Sitar v. Ind. Dep't of Transp.*, 344 F.3d 720, 726 (7th Cir. 2003). An exception to this rule exists in cases where the uncharged claim is "so related and intertwined" with the charged claim "in time, people, and substance that to ignore that relationship for a strict and technical application of the rule would subvert the liberal remedial purposes of the Act." *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364, 368 (7th Cir. 1993). Among such exceptions are retaliation claims. "[A] separate administrative charge is not prerequisite to a suit complaining about retaliation for filing the first charge." *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) (allowing retaliation claim based on termination after plaintiff filed original EEOC charge alleging various failures to promote).

ECS correctly notes that Riley did not allege discrimination in her first Charge of Discrimination based on the School's decisions not to hire her into the positions of (1) Blazer Connection Coordinator in 2010 and 2013, (2) assistant principal at Central or Memorial High School in 2012, (3) principal at Tipton Street Center in 2012, and (4) academic dean at Central High School in 2013. ECS contends that any allegations related to these positions are insufficient to invoke the exhaustion exception because they are not sufficiently related or intertwined with the discrimination claims in Riley's first Charge. Specifically, ECS explains that

the positions were filled over several years and at different locations. In addition, ECS contends that Riley cannot designate any evidence to show that the same decisionmakers were involved in these hiring decisions.

The Court is inclined to agree with ECS. Riley only makes it easier by failing to adequately address ECS's exhaustion argument in her response brief.

In her response, Riley does not address ECS's exhaustion argument directly. She does reference the 2012 assistant principal positions in her Statement of Genuine Disputes stating that "her complaints indicate that she intended to include acts leading up to the date of filings of the complaint, including the AP positions applied for and denied in 2012." Doc. No. 61-2 at 9. In addition, she notes that she checked the "continuing action" box in her first Charge to indicate that ECS engaged in a pattern of discrimination, harassment, and a hostile work environment that continued until she filed her complaint and should be addressed through this action. *Id.* Her response brief, however, only develops her opposition to ECS's exhaustion argument related to her alleged retaliation claim, which is not an operative claim in this action. *See* Part I, Clarification of Operative Claims *supra.*

With Riley's extremely limited discussion of the exhaustion issue, the Court cannot divine any relevant or convincing evidence to show that ECS's five hiring decisions between 2010 and 2013 cited above are related and intertwined enough with the discrimination

claims in her first Charge to overcome the exhaustion requirement. Therefore, Riley has likely forfeited any claims related to the 2010-2013 hiring decisions listed above by failing to include them in her first Charge of Discrimination. Even if she has not forfeited those claims, they would fail on the merits as discussed below. Therefore, the Court now turns to a substantive analysis of Riley's 2010-2013 failure-to-promote claims.

b. ECS is entitled to summary judgment on Riley's Title VII, Section 1981, and ADEA 2010-2013 failure-to-promote claims because she fails to establish a *prima facie* case of discrimination and has not produced evidence to support a finding of pretext.

To establish a violation of Title VII, the ADEA, or Section 1981 for failure-to-promote, a plaintiff may use the direct method of proof or the indirect, burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 477 U.S. 792 (1973). Because Riley has not designated any direct evidence of race, age, or sex discrimination or presented any argument related to the direct method of proof, the Court proceeds immediately to analysis of the failure-to-promote claims using the indirect method of proof. Under *McDonnell Douglas*, a plaintiff must first establish a *prima facie* case of discrimination after which the burden shifts to the employer to articulate a legitimate, non-discriminatory

reason for its decision. *O'Neal v. City of New Albany*, 293 F.3d 998, 1005 (7th Cir. 2002). If the employer carries this burden, the plaintiff must provide evidence showing that the employer's alleged non-discriminatory reason is pretextual in order to survive a motion for summary judgment. *Id.* "'The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 538 (7th Cir. 2007) (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

To establish a *prima facie* case for a failure-to-promote claim, "the plaintiff must show that (1) she belongs to a protected class; (2) she applied for and was qualified for the position she sought; (3) she was rejected for that position; and (4) the employer granted the promotion to someone outside of the protected class who was not better qualified than the plaintiff." *Fischer v. Avanade, Inc.*, 519 F.3d 393, 402 (7th Cir. 2008) (quoting *Grayson v. City of Chicago*, 317 F.3d 745, 748 (7th Cir. 2003) (internal quotations omitted). Implicit in the third element is the requirement that the rejection constitute a "materially adverse employment action," which typically means the position sought involves substantially greater compensation, responsibilities, or title. *See Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 465-66 (7th Cir. 2002).

Riley obvious [sic] belongs to three protected classes as an African-American female over the age of forty. In addition, there is no dispute that she applied

for multiple administrative positions between 2005 and 2013. As discussed above, however, the claims based on Riley's applications for administrative positions from 2005 to 2009 are time-barred leaving only the five 2010-2013 positions as potential failure-to-promote claims. Yet Riley cannot establish a *prima facie* case of discrimination for most of the five remaining claims.

First, Riley cannot establish the second element of a *prima facie* case for the two academic dean positions posted in 2010 because she did not apply for those positions. Second, the Blazer Connection Coordinator positions in 2010 and 2013 did not entail a substantial increase in compensation, responsibilities, or title. As such, Riley's rejection for those positions does not constitute a materially adverse employment action as required to establish the third element of a *prima facie* case.

Third, Riley has not produced sufficient evidence to show that she was more qualified than the younger, Caucasian male chosen instead of her for the principal position at Tipton Street Center in 2012. Riley has only produced her resume and application along with her deposition testimony, in which she indicates that she has more experience than the man chosen. She has not even produced a job description to which the Court might be able to compare her qualifications.

Nevertheless, it is not the Court's role to determine on its own whether Riley is qualified for any job

or how her qualifications compare to those who ultimately were hired. "[A] court's role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second-guesses employers' business judgments." *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181 (7th Cir. 2002) (internal citations and quotations omitted). Therefore, Riley has failed to meet her burden to establish the fourth prong of a *prima facie* case related to the Tipton position.

Fourth, Riley cannot succeed on her race-based and gender-based claims of discrimination related to the two 2012 assistant principal positions for which Mr. Gratsy and Ms. Adams were hired. As an African-American female, Ms. Adams was not a member of a protected class. As such, Riley cannot establish that ECS promoted someone outside the protected classes instead of her, which is required to satisfy the fourth prong of a *prima facie* case based on race or gender. Arguably, Riley cannot likely meet the fourth prong's requirement that she show she was more qualified than Gratsy and Adams either, for the same reasons discussed above. Despite this potential shortcoming, the parties agreed at oral argument that Riley's two age-based claims related to the 2012 assistant principal positions are the only claims that survive the *prima facie* analysis.

Assuming that Riley has established a *prima face* [sic] case of age-based discrimination based on the 2012 assistant principal positions, the burden shifts to ECS to state a legitimate, non-discriminatory reason for rejecting her application for the two positions. *See*

O'Neal, 293 F.3d at 1005. ECS asserts that it followed its hiring policies and chose the younger Gratsy and Adams because they were the most qualified applicants. Riley argues that ECS's reason is merely a pretext for age-based discrimination because she was more qualified, or at least equally qualified, for the positions.

To establish pretext, a plaintiff must show that the employer's alleged reason for the adverse employment action is a lie, or in other words, a phony reason for the action. *Id.* "[E]vidence that the defendants were more likely than not motivated by a discriminatory reason or that their explanations are not worthy of credence, *i.e.*, they are factually baseless, did not actually motivate the defendants, or were insufficient to motivate the adverse employment action" establishes pretext. *Id.* As a result, the Court here is unconcerned with whether ECS misinterpreted the facts surrounding Riley's applications or if ECS's stated reason for her rejection was unfair. *See O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 635 (7th Cir. 2011). The question is whether ECS believed the reason it offered for rejecting Riley's application or whether that stated reason was a lie. *See id.* It is not the Court's role "to question the wisdom of [an employer's] decisions on how to run its [operations], only to assure that such decisions are not intended to provide cover for illegal discrimination." *Johal v. Little Lady Foods, Inc.*, 434 F.3d 943, 946-47 (7th Cir. 2006).

Riley's evidence of pretext, however, is just as thin and incomplete as her evidence to show her own qualifications. Moreover, she once again asks the Court to reach conclusions beyond its authority.

The Seventh Circuit has held that

> where an employer's proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants' competing qualifications does not constitute evidence of pretext unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue. In other words, in effect, the plaintiff's credentials would have to be so superior to the credentials of the person selected for the job that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.

Millbrook v. IBP, Inc., 280 F.3d 1169, 1180-81 (7th Cir. 2002) (internal citations and quotations omitted). Again, the fact-finder cannot replace an employer's personnel department. *Id.* at 1181. And here, Riley has given the Court nothing to overcome this high burden of establishing pretext.

Riley alleges that ECS is lying when it states that Gratsy and Adams were more qualified than her based on their demonstrably less teaching experience as an educator generally, and at ECS in particular. Riley

acknowledged that Gratsy and Adams received their principal's licenses about the same time she did, but then criticized ECS for never explaining how Gratsy and Adams were more qualified. Riley also alleges that ECS did not follow its own hiring policies when it chose Gratsy and Adams as assistant principals. Riley cites ECS's use of a rubric to evaluate applicants that did not correspond with ECS's stated selection criteria.

More emphatically, Riley contends that ECS's handling of the 2010 academic dean positions is clear, but admittedly circumstantial, evidence of discrimination against Riley when she applied for the 2012 assistant principal positions that were posted after she complained about the process used and the results of the 2010 academic dean search. Specifically, Riley alleges that the 2010 academic dean job descriptions were narrowly tailored to prevent her from applying for the positions and ultimately qualifying for the assistant principal positions. Presumably, Riley is suggesting that she may have been hired as one of the assistant principals in 2012 had she had not been prevented from applying for the academic dean positions, which would have given her administrative experience had she been hired, in 2010.

Yet Riley presents no evidence, beyond her own allegations, of a lie. Her allegations that ECS failed to abide by the School's hiring policy and intentionally prevented her from qualifying for the 2010 academic dean positions are completely unsupported and do not demonstrate any age-based motivation in the 2012

hiring decisions. Moreover, ECS has presented uncontroverted evidence to show that Riley was not the most qualified person for the assistant principal positions in 2012, that seniority was the criterion of least significance in ECS's hiring policy, and that the 2010 academic dean positions required subject matter specialties outside the scope of Riley's licensure.

First, ECS cites to the affidavit of Krista Hennings, who served on the ECS screening committee responsible for recommending applicants for the two 2012 assistant principal positions. Ms. Hennings averred that the screening committee weighed significantly each applicant's ability to answer the committee's questions during the interview and "to articulate specific ways to improve the building to which the administrator would be assigned." Doc. No. 54-11 at 2, ¶ 7. Recalling Riley's interview, Hennings stated that Riley "was unable to articulate ways to improve the building; instead, she tended to criticize without proposing solutions to those criticisms." *Id.* at 3, ¶ 7. In addition, Herrings opined that years of service as a teacher was not a significant factor in determining whether an applicant was highly qualified for an administrator position. *Id.* at ¶ 8.

Second, ECS cited to its policy for appointments to administrative position, notably filed by Riley in support of her summary judgment brief. Specifically, the policy outlines the criteria that a selection committee shall consider in formulating recommendations to the Superintendent for administrative positions. Doc. No. 64 at 2. The policy states:

> The committee in formulating its recommendations shall consider the following in order of priority:
>
> a. Certification;
>
> b. Skills, abilities, attributes, training, and education which the applicant possesses which would be necessary or desirable for an Elkhart Community Schools' administrator, and any other employment requirements imposed by law;
>
> c. Contribution the applicant is likely to make to students and/or the school system due to special training and/or competence;
>
> d. Ability to communicate and relate effectively to others;
>
> e. Good past performance in positions(s) with the Elkhart Community Schools or other school corporations;
>
> f. Opportunity for professional growth of the applicant; and
>
> g. Length of service of the applicant in the Elkhart Community Schools.

Id. While Riley argues that ECS did not properly apply these criteria in the hiring process, she only argues that her teaching experience and tenure at ECS were enough to make her more qualified than Gratsy and Adams. Yet years of service as an educator or an ECS employee is the least significant criterion to be considered. An applicant's potential contribution to the

students or school clearly is a more significant criterion. And as Ms. Hennings confirmed, the selection committee prioritized Riley's potential contribution to the school over her tenure just as the policy states.

Lastly, ECS cites to Riley's own deposition testimony to show that she was not qualified for the 2010 academic dean positions that allegedly demonstrate ECS's discriminatory intent. Indeed, as Doug Thorne, ECS's Executive Director of Personnel and Legal Services, testified, ECS posted the academic dean positions as teaching rather than administrative positions because the dean positions are governed by the teacher's association contract and are not administrative. Doc. No. 54-2 at 17-18. In addition, Thorne testified that both assistant principals and academic deans are often hired with specific academic area expertise because of a principal's particular for someone with a knowledge of the specific area of instruction even if they have no classroom teaching responsibilities. *Id.* at 16. At her own deposition, Riley did not seem to challenge this reality. In fact, Riley recognized that the 2010 academic dean positions required qualifications she did not have in math, history, English, or special education. Doc. No. 54-4 at 19. Accordingly, Riley did not apply.

Riley only seemed to suspect something discriminatory when the new academic deans began their work and were treated as assistant principals even though their positions were never posted as assistant principal positions that she could have applied for. *Id.* Riley's

suspicions alone, however, do not support any conspiracy against her because of her age resulting in her failure to win an assistant principal position in 2012.

Instead, the evidence in the record before the Court shows that ECS followed its hiring policies in its handling of the 2012 assistant principal applications. More importantly, the evidence shows that Riley was likely not the most qualified person for the job because she did not provide adequate answers to the screening committee's questions and her seniority would not have been significant enough to overcome that shortcoming. In other words, Riley's credentials were not so superior that no reasonable and impartial person could have chosen Gratsy or Adams over her for one of the 2012 assistant principal positions. Moreover, the record includes no evidence that ECS used the 2010 academic dean positions to circumvent its own policies or to prevent Riley from becoming an assistant principal. As such, Riley has not met her burden to establish pretext and cannot survive summary judgment.

c. Disparate Treatment

Although not clear from the briefs or oral argument, Riley's potential disparate treatment claims appears to be based on ECS's finding that she was ineligible for the 2010-2011 Teacher of the Year Award due to her solicitation of nominations from students during class time. Using the indirect method of proof, a plaintiff must also establish a *prima facie* case of disparate treatment. To do so in this case, Riley would

need to show that (1) she is a member of a protected class; (2) her performance met ECS's legitimate expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than similarly-situated employees who are in a different class. *See Bio v. Fed. Express Corp.*, 424 F.3d 593, 596 (7th Cir. 2005).

Of course, Riley likely waived any disparate treatment argument because she did not address it in her summary judgment brief or at oral argument. Regardless, Riley cannot establish the second, third, or fourth prongs of a *prima facie* case of discrimination. Riley's failure to establish that she suffered an adverse employment action dooms any disparate treatment claim.

An adverse employment action materially alters the terms and conditions of employment. *Stutler v. Ill. Dep't of Corr.*, 263 F.3d 698, 703 (7th Cir. 2001). It is "something more disruptive than a mere inconvenience or an alternation of job responsibilities." *Nichols v. SIUE*, 510 F.3d at 780 (quotations omitted). "[N]ot everything that makes an employee unhappy is an actionable adverse action." *O'Neal v. City of Chicago*, 392 F.3d 909, 911 (7th Cir. 2004). Categories of actionable, materially adverse employment actions include:

> (1) cases in which the employee's compensation, fringe benefits, or other financial terms of employment are diminished, including termination;
>
> (2) cases in which a nominally lateral transfer with no change in financial terms significantly reduces the employee's career

> prospects by preventing her from using her skills and experience, so that the skills are likely to atrophy and her career is likely to be stunted; and
>
> (3) cases in which the employee is not moved to a different job or the skill requirements of her present job altered, but the conditions in which she works are changed in a way that subjects her to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in her workplace environment.

Nichols v. SIUE, 510 F.3d at 780 (7th Cir. 2007) (quoting *O'Neal*, 392 F.3d at 911). Ineligibility for an award does not qualify as an adverse employment action under any of the above categories. Therefore, Riley cannot establish a *prima facie* case based on the decision to deny her eligibility for the Teacher of the Year Award in 2010-2011.

d. Hostile Work Environment

Riley has also likely waived any hostile work environment claim because she did not address it in her summary judgment brief or at oral argument. Should the claim remain, however, she cannot succeed. To succeed on a hostile work environment claim, a "plaintiff must show that the work environment was so pervaded by discrimination that the terms and conditions of employment were altered." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 (2013) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). To avoid summary

judgment on such a claim, a "plaintiff must provide sufficient evidence to create a genuine issue of material fact as to at least one of following four elements: (1) the work environment must have been both subjectively and objectively offensive; (2) her gender or national origin must have been the cause of the harassment; (3) the conduct must have been severe or pervasive; and (4) there must be a basis for employer liability." *Chaib v. Indiana*, 744 F.3d 974, 985 (7th Cir. 2014) *cert. denied*, 135 S. Ct. 159 (2014).

In its summary judgment brief, ECS addressed only Riley's ineligibility for the 2010-2011 Teacher of the Year award as the source of her hostile work environment claim. Riley, however, wants the Court to consider a much broader range of incidents in support of her claim. Riley suggests that she is entitled to a certain level of treatment, respect, and opportunities based solely on her years of service to ECS and the greater community. The problem remains that Riley has not produced evidence to show that her national origin or gender motivated any of ECS's decisions related to her position or responsibilities. In fact, the only evidence in the record shows that Riley was disciplined on a couple occasions because of her conduct and that her conduct raised other legitimate school concerns. In addition, Riley has not produced any evidence to show that she utilized the ECS complaint procedures designed to address discriminatory or harassing conduct against members of the ECS community.

With nothing more, Riley has failed to support her bald allegations of hostile work environment and has

not established any question of material fact as to any of the four elements of a hostile work environment above. Therefore, any hostile work environment claim must fail.

III. CONCLUSION

Because Riley has not established any genuine dispute of material fact as to any operative claim in this action and because no rational jury could find discriminatory conduct based on the evidence in the record, the Court **GRANTS** ECS's motion for summary judgment on all claims. [Doc. No. 53]. The Court **DIRECTS** the Clerk to enter judgment in favor of Elkhart Community Schools on all claims.

SO ORDERED.

Dated this 3rd Day of September, 2015.

S/Christopher A Nuechterlein
Christopher A. Nuechterlein
United States Magistrate Judge

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise 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. . . .

Section 703(m) of the Act, 42 U.S.C. § 2000e-(m), provides:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Section 4(a) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a), provides in pertinent part:

> (a) *Employment Practices*. It shall be unlawful for an employer –
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with

> respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . .

Section 1981 of 42 U.S.C. provides in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts. . . .
>
> (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Seventh Circuit Decisions

Applying The "No Reasonable Person/ Clearly Better Qualified" Standard

Hatcher v. Board of Trustees of Southern Illinois University, 829 F.3d 531, 541-42 (7th Cir. 2016) (standard not satisfied)

Stone v. Ballard, 526 Fed.Appx. 688, 691-92 (7th Cir. 2013) (standard not satisfied)

DuPree v. Lahood, 493 Fed.Appx. 757, 762 (7th Cir. 2012) (standard not satisfied)

Hobbs v. City of Chicago, 573 F.3d 454, 462 (7th Cir. 2009) (standard not satisfied)

Tai v. Shinseki, 325 Fed.Appx. 444, 447 (7th Cir. 2009) (standard not satisfied)

York v. Peake, 286 Fed.Appx. 318, 321 (7th Cir. 2008) (standard not satisfied)

Fisher v. Avanade, Inc., 519 F.3d 393, 404 (7th Cir. 2008) (standard not satisfied)

Foster v. Principal Life Ins. Co., 247 Fed.Appx. 836, 839 (7th Cir. 2007) (standard not satisfied)

Currie v. Paper Converting Machine Co., Inc., 202 Fed.Appx. 120, 122 (7th Cir. 2006) (standard not satisfied)

Sublett v. John Wiley & sons, Inc., 463 F.3d 731, 738 (7th Cir. 2006) (standard not satisfied)

Mlynczak v. Bodman, 442 F.3d 1050, 1059-60 (7th Cir. 2006) (standard not satisfied)

Gullett v. Town of Normal, Ill., 156 Fed.Appx. 837, 840 (7th Cir. 2005) (standard not satisfied)

Farrell v. Butler University, 421 F.3d 609, 615-16 (7th Cir. 2005) (standard not satisfied)

Cichon v. Exelon Generation Co., L.L.C., 401 F.3d 803, 813 (7th Cir. 2005) (standard not satisfied)

Reed v. Manteno School Dist., 59 Fed.Appx. 868, 871-72 (7th Cir. 2003) (standard not satisfied)

Karim v. Board of Trustees of Western Illinois University, 52 Fed.Appx. 855, 858 (7th Cir. 2002) (standard not satisfied)

Millbrook v. IBP, Inc., 280 F.3d 1169, 1180 (7th Cir. 2002) (standard not satisfied)