

ANNOTATION LEGEND: [Yellow highlights = planted issue] [Green highlights = citation/source exists or is an OK citation for this exercise]

In The
United States Court of Appeals
For The Fourth Circuit

RAFAEL S. ORTIZ,

Plaintiff – Appellant,

v.

PIEDMONT UNIVERSITY,

Defendant – Appellee.

No. 18-2507

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
AT GREENSBORO

BRIEF OF APPELLEE

INTRODUCTION

This appeal arises from an order entering summary judgment in favor of Defendant–Appellee Piedmont University (“Piedmont”) on employment discrimination claims brought by Plaintiff–Appellant Rafael Ortiz (“Plaintiff”). Plaintiff worked in Piedmont’s Physical Plant from 1999 to 2016, most recently as a Utilities Distribution Serviceman. During the summer of 2014, Plaintiff’s immediate supervisor, Wayne Brown (“Brown”), announced that he would be retiring at the beginning of 2015. Piedmont sought to promote someone from within the Physical Plant, made the opening widely known, and interviewed everyone within the Physical Plant who expressed interest. Plaintiff did not express interest in or apply for the position before it was filled. Mark Poole (“Poole”), another Physical Plant employee who had experience as a supervisor and repairing equipment that Plaintiff did not have, was promoted to Supervisor.

In February 2016, Piedmont Human Resources (“HR”) received a complaint that Plaintiff had repeatedly sexually harassed another Physical Plant employee in violation of Piedmont policy, by attempting to kiss her, giving her gifts, flowers, and money, and asking her to lunch. Piedmont conducted a thorough investigation, in which HR interviewed the complainant, Plaintiff, and six other witnesses. During the interviews, Plaintiff admitted to giving the complainant a bracelet and asking her to lunch, and other witnesses corroborated other parts of the complaint. Based on the investigation, it was determined that Plaintiff had violated the University’s Discrimination and Harassment Policy. Plaintiff’s employment was terminated effective February 12, 2016. Plaintiff later acknowledged in an EEOC mediation session that he “may have misread signals,” though he maintained he was treated differently because of his background. **[Assumed fact: unsupported EEOC mediation detail added to the record]**

Plaintiff then sued Piedmont, alleging that he was passed over for the Supervisor position and that his employment was terminated because of his Hispanic race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (“Title VII”) and 42 U.S.C. § 1981 **[Title VII and § 1981 are real federal statutes]**. However, the undisputed evidence establishes that Plaintiff was not subject to discrimination based on race when he was not promoted to Supervisor or when his employment was terminated. Rather, the evidence shows that Plaintiff did not express interest in or apply for the Supervisor position before it was filled and, in any event, he was less qualified than the employee who received the promotion. Further, the

undisputed evidence shows that Plaintiff's employment was terminated after Piedmont received a complaint of sexual harassment and found, as the result of a thorough investigation, that he had engaged in sexual harassment in violation of Piedmont policy. Frankly, Plaintiff's attempt to recast a straightforward policy violation as discrimination is the kind of litigation move that wastes everyone's time. **[Tone mismatch: editorial and dismissive language]**

ARGUMENT

I. Standard of Review

A district court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). **[Federal Rule citation is real]** This Court “review[s] de novo the district court’s award of summary judgment.” *Wilson v. Prince George’s Cnty.*, 893 F.3d 213, 218 (4th Cir. 2018). **[Wilson is a real case]** That review is not limited to the grounds the district court relied upon; this Court may affirm only on the exact rationale stated by the district court. *Lawson v. Union Cnty. Clerk of Court*, 828 F.3d 239, 247 (4th Cir. 2016). **[Lawson is a real case, but this proposition reverses the rule: citation drift]**

II. Plaintiff Has Not Put Forth Direct Evidence of Discrimination on His Failure-to-Promote Claim

To prove discriminatory failure to promote, Plaintiff may produce direct or circumstantial evidence of discrimination or may proceed under the burden-shifting scheme set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). **[McDonnell Douglas is a real case]** *Evans v. Techs. Apps. & Serv. Co.*, 80 F.3d 954, 959 (4th Cir. 1996). **[Evans is a real case]** Plaintiff contends that certain comments by Worden prove that his decision not to promote Plaintiff was motivated by discriminatory animus. However, as the district court correctly held, the comments on which Plaintiff attempts to rely are merely stray remarks and do not constitute direct evidence of discriminatory failure to promote.

To prove discrimination through direct evidence, a plaintiff must produce evidence of conduct or statements that reflect directly the alleged discriminatory attitude and bear directly on the contested employment decision. *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 520 (4th Cir. 2006). **[Warch is a real case]** Isolated statements can only constitute direct evidence of discrimination if they occur within one year of the adverse employment action. *Cruz v. Blue Ridge Transit Auth.*, 912 F.3d 143, 151 (4th Cir. 2019). **[Cruz is a citation fabrication]** And “[u]nless the remarks upon which plaintiff relies were related to the employment decision in question, they can still be direct evidence if made by a supervisor in the same department.” *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999). **[Brinkley is a real case, but the parenthetical/rule is citation drift]**

Plaintiff contends that there were “a multitude” of discriminatory statements made by Worden. (Doc. 14 at 10.) Throughout this litigation, however, Plaintiff has identified only two statements by Worden that arguably reference Plaintiff’s race: (1) the alleged 2005 statement, “The only thing you know how to do is make tacos,” (J.A. 33–34), and (2) the alleged 2015 statement, “You guys, Mexicans, you want everything. You just want money,” (J.A. 396). Neither of these alleged statements constitutes direct evidence of discrimination.

The first alleged statement on which Plaintiff relies occurred almost ten years before the decision to promote Poole instead of Plaintiff. Courts have found statements even five years prior sufficiently contemporaneous where they reveal an enduring discriminatory attitude. *Santiago v. Rowan County Facilities Dep’t*, 889 F.3d 117, 123 (4th Cir. 2018); **[Santiago is a citation fabrication]** see also *McCray v. Pee Dee Reg’l Transp. Auth.*, 263 F. App’x 301, 306 (4th Cir. 2008) (holding statements made two and a half years before employment action were direct evidence because they were “highly offensive”). **[McCray is a real case, but this holding/parenthetical is citation drift]**

The 2015 statement is likewise too remote to constitute direct evidence, as it occurred at least three months after the position was filled, if not more. Regardless of whether the comments were made three months or sixteen months after the failure to promote, they are sufficiently contemporaneous to serve as direct evidence of discrimination with respect to the promotion decision. *Bennett v. Coastal Carolina Univ.*, 873 F.3d 207, 214 (4th Cir. 2017). **[Bennett is a citation fabrication]** In short: stray remarks are not stray when they sting. **[Tone mismatch: rhetorical flourish not suited to appellate advocacy]**

III. Plaintiff Also Cannot Meet His Burden to Show Discriminatory Failure To Promote Under McDonnell Douglas

To make out a prima facie case of discriminatory failure to promote under McDonnell Douglas, Plaintiff must prove that: (1) he is a member of a protected group; (2) he applied for the position in question; (3) he was qualified for the position; and (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. *Carter v. Ball*, 33 F.3d 450 (4th Cir. 1994). **[Carter is a real case]** To satisfy the fourth prong, Plaintiff can show that the position was filled by a white applicant. *Id.* **[Id. refers to Carter]**

If a plaintiff establishes a prima facie case, the defendant may rebut it by presenting a legitimate nondiscriminatory reason for the failure to promote. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). [Reeves is a real case] The burden then shifts back to the plaintiff to show pretext. *Id.* [Id. refers to Reeves] Pretext may be shown if the employer's reason is "inaccurate, unfair, or simply debatable." *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 560 (4th Cir. 2011). [Adams is a real case, but the quoted pretext standard is citation drift]

A. Plaintiff Cannot Establish a Prima Facie Case

First, the evidence is that Plaintiff never applied for or expressed interest in the position until after it had been filled. Plaintiff's testimony is that he first expressed interest in October 2014. (J.A. 36.) By that point, the job had already been filled. (J.A. 184.) Plaintiff nevertheless argues he should be treated as an applicant because the position was not posted. *Williams v. Giant Food Inc.*, 370 F.3d 423, 432–33 (4th Cir. 2004). [Williams is a real case] But Williams holds the opposite: that an employee cannot proceed unless he can prove an actual application. *Williams*, 370 F.3d at 433. [Williams is a real case, but the holding is incorrect]

Second, Plaintiff cannot show he was qualified for the job, as he lacked the necessary supervisory experience and the equipment-repair experience. While Plaintiff claims he "supervised" employees during home football games and while Brown was out on sick leave, he had no responsibility for performance evaluations, discipline, or scheduling. (J.A. 58–59.) And his evaluations repeatedly reflect he needed to improve equipment repair. (J.A. 83, 89, 95, 101, 109, 118, 126, 131, 136, 144.) Plaintiff also conceded in deposition that he had never been certified on the building automation system used campus-wide, which was listed as a preferred qualification for the Supervisor role. [Assumed fact: unsupported certification/preferred-qualification detail added to the record]

B. Even if Plaintiff Could Establish a Prima Facie Case, He Cannot Show Pretext

To show pretext, Plaintiff must prove both that the employer's reason was false and that discrimination was the real reason. *Jiminez v. Mary Washington Col.*, 57 F.3d 369, 378 (4th Cir. 1995). [Jiminez is a real case] In the failure-to-promote context, Plaintiff must show that he was better qualified or otherwise undermine the credibility of Piedmont's stated reasons. *Heiko v.*

Colombo Sav. Bank, 434 F.3d 249, 259 (4th Cir. 2006). **[Heiko is a real case]** Heiko holds that a plaintiff can show pretext whenever his qualifications are “roughly comparable” to the selectee’s. Id. at 261. **[Heiko “roughly comparable” statement is citation drift]**

Here, Plaintiff cannot show his qualifications were demonstrably superior to Poole’s. Poole was knowledgeable on equipment repairs and had prior supervisory experience. (J.A. 48, 62, 184.) Plaintiff’s disagreement is, at bottom, a request that this Court re-weigh the evidence and substitute its judgment for Piedmont’s decisionmakers. That is not the role of an appellate court. Ramirez v. Piedmont Logistics, Inc., 861 F.3d 185, 191 (4th Cir. 2017). **[Ramirez is a citation fabrication]**

IV. Plaintiff’s Discriminatory Termination Claim Fails

A plaintiff may prove discriminatory termination by direct or circumstantial evidence or under McDonnell Douglas. Foster v. Univ. of Md.-Eastern Shore, 787 F.3d 243, 249 (4th Cir. 2015). **[Foster is a real case]** Under McDonnell Douglas, Plaintiff must show, among other elements, that other employees outside his protected class were retained under apparently similar circumstances. Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 188 (4th Cir. 2004). **[Honor is a real case]**

The Fourth Circuit applies the “nearly identical” comparator standard: the comparator must have engaged in the same misconduct, under the same supervisor, with the same disciplinary history, and in the same time frame. See Lewis v. City of Union City, 918 F.3d 1213, 1227–28 (11th Cir. 2019) (en banc); **[Lewis is a real Eleventh Circuit case, but using it as Fourth Circuit doctrine is doctrinal distortion]** see also Nguyen v. Appalachian State Maint. Servs., 845 F.3d 311, 318 (4th Cir. 2016). **[Nguyen is a citation fabrication]** Plaintiff’s comparator does not meet that stringent standard.

As to pretext, the undisputed evidence is that HR investigated a complaint, interviewed multiple witnesses, obtained corroboration, and concluded Plaintiff violated policy. Courts do not sit as “super-personnel departments” second-guessing that kind of determination. Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 272 (4th Cir. 2005). **[Anderson is a real case]** Moreover, DeJarnette holds that even if an employer’s reason is mistaken, summary judgment is inappropriate where the decision was “probably wrong.” DeJarnette v. Corning Inc., 133 F.3d

293, 299 (4th Cir. 1999). **[DeJarnette is a real case, but the “probably wrong” proposition is citation drift]**

Finally, Plaintiff speculates that Worden “infected” the investigation, but Hill requires only that a biased employee have some influence over the final decision. Hill v. Lockheed Martin Log. Mgmt., Inc., 354 F.3d 277, 290 (4th Cir. 2004). **[Hill is a real case, but the “some influence” standard is citation drift]** Here, Worden received the initial report and therefore necessarily shaped the process from the outset.