



Dukes v. Shelby County Board of Education et al

2018 | Cited 0 times | N.D. Alabama | February 16, 2018

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

KENNETH E. DUKES,

Plaintiff, v. SHELBY COUNTY BOARD OF EDUCATION, et al.

Defendants.

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Case No.: 2:16-cv-00340-RDP

MEMORANDUM OPINION This case is before the court on 18). The parties have fully briefed the Motion for Summary Judgment (Docs. # 19, 21, 23), and

the Motion is under submission. After careful review, and for the reasons explained below, the court concludes that the Motion for Summary Judgment is due to be granted. I. Factual Background 1 This employment discrimination action concerns two promotions granted by Defendant Shelby County Board of Education (th applied for the positions, was qualified for them, and interviewed for the positions, but was not

selected for either position. He claims the failure to promote him was discriminatory. The court

Then, the court will discuss each promotion, in turn.

1 examination of the evidentiary record. All reasonable doubts about the facts have been resolved in favor of the nonmoving party. See Info. Sys. & Networks Corp. v. City of Atlanta, 281 F.3d 1220, 1224 (11th Cir. 2002). These through live testimony at trial. See Cox v. Adm U.S. Steel & Carnegie Pension Fund, 17 F.3d 1386, 1400 (11th Cir. 1994).

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A. Plaintiff began working for Shelby County driver. (Dukes Deposition at 13-14). 2

SCS hired him as a permanent bus driver in 1988. (Id. at 15, 20). Plaintiff also served as a volunteer football and basketball coach for several years, before transitioning to an assistant coach in the early 1990s. (Id. at 28). From 1989 to 1994, Plaintiff worked as a bus driver for Shelby County Area Transportation during summers and weekends. (Doc. # 20-1 at 61). In that position, he drove Shelby County residents to various appointments and transported soccer camp attendees from an airport to the University of Montevallo. (Dukes Deposition at 28-29). Since the beginning of his career with SCS, Plaintiff has consistently driven a bus route transporting students to Montevallo High School. (Id. at 23). Plaintiff also has driven a morning bus route transporting students from Montevallo High School and Calera High School to the College and Career Center in Columbiana, Alabama. (Id. at 23-24, 35). He has transported students from the Career Center to Montevallo High School each morning as well. (Id. at 35). Finally, he has driven afternoon routes that transport elementary, middle, and high school students in Montevallo to the Wilton community. (Id. at 37-38). Plaintiff has been a bus driver in the same community for more than twenty years, although he drives different routes from year to year. (Id. at 38). Plaintiff has served on a committee of bus drivers who make bus routes, bus equipment and apparatus -2 at 3). In 2008, s degree from the Birmingham Easonian Baptist Bible College. (Dukes Deposition at 16-18). He has served as a pastor at two churches. (Id. at

2 -1. deposition, this Memorandum Opinion cites the electronically-generated CM/ECF page numbers.

31-32). Easonian Baptist Bible College located in Shelby County. (Id. at 33-34). As dean, Plaintiff registers students for classes, manages the facility and secretary, and helps fundraising for the bible college. (Id.). In addition to his employment positions, Plaintiff has served as the president of the Shelby County Education Support Professionals, a division of the Alabama Education Association for SCS support personnel. (Id. at 49; Doc. # 22-2 at 1-2). As a union representative, Plaintiff has helped SCS bus drivers handle problems related to bus transportation outes, equipment, purchasing, and -2 at 3). As of the date of his deposition, Plaintiff served as president of the Shelby County chapter of the NAACP. (Dukes Deposition at 37). B. The 2012 Transportation Route Supervisor Promotion On February 22, 2012, the Board posted a notice of vacancy with two proposed transportation route supervisor positions. (Doc. # 20-1 at 57). At the time they were posted, neither position had been budgeted for. (See id.) (mentioning that an assistant band director position was budgeted for, but not indicating whether the route supervisor positions were budgeted for). Thirty-nine candidates, including Plaintiff, applied for the job. (Doc. # 20-2 at 33-35). 3

In March 2012, SCS interviewed eleven applications, including Plaintiff, for the job. (Doc. # 22-11 at 1). The SCS interview panel considered all eleven candidates to be qualified for the job. (Doc. # 20-13 at 2). Four SCS employees interviewed the route supervisor finalists: 3

This citation refers to an exhibit to a deposition and, thus, cites the electronically-generated



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superintendent; (3) Rick Vines, a transportation supervisor; and (4) Mary Howard, a human resources coordinator. (Doc. # 20-4 at 16). tion route supervisor contains five qualifications: nse with certain bus driver endorsements, which could be obtained within six months

of hiring; and (5) computer literacy. (Doc. # 22-16 at 1). A route supervisor performs several functions related to bus transportation, including: 1. Assist[ing the] Transportation Coordinator and Transportation Supervisor

in the routing of buses and other operations of the [SCS] Transportation Department. 2. Mak[ing] recommendations for establishing or changing bus stops. 3. Keep[ing] records and mak[ing] reports as required. . . . 5. Assist[ing] in investigating reports of road hazards. 6. Monitor[ing] and operat[ing] two-way radio equipment in a professional

manner. 7. Assist[ing] in responding to requests on route problems from bus drivers,

parents, and principals. 8. Assist[ing] in training bus drivers. (Doc. # 22-16 at 1-2). During the interviews, the panelists asked Plaintiff and the other finalists about their training backgrounds and experiences, their perceptions about the most important function of the route supervisor position, and their experiences with software. (E.g., Doc. # 20-13 at 6-7) (listing questions asked during the route supervisor interviews). They asked the applicants to describe what factors should be considered when reviewing a bus route. (E.g., id. at 6). They

also asked the applicants to explain how they would handle certain problems, such as angry or feuding parents and overcrowded buses. (Id. at 6-7). to the questions on a one to five numerical scale. (See id.). Howard

Dukes Deposition at 94- 95). Nevertheless, Plaintiff does not recall any inappropriate questions asked during the interview. (Id. at 93). Of the eleven interviewed applicants, Brian Miller 4

received the fifth highest interview score at -9 at 11). Plaintiff had the most driving experience among the interviewed applicants. (See id.) (recording that Plaintiff had twenty-four ing experience as of March 2012 and that Miller had six w performance, the panelists also route supervisor. (Docs. # 20-11 at 3; 20-13 at 3; 20-15 at 3). The panelists ultimately agreed

that Miller was the best candidate because he had worked as a full-time substitute bus driver for several years and had driven bus routes in several areas of Shelby County. (Docs. # 20-11 at 3; 20-12 at 3; 20-13 at 3; 20-15 at 3). Vines, the SCS employee who was responsible for route [Miller] broader experience than the other candidates and that his knowledge of more routes in



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the County would give him a head start in the Route Supervisor job (15 at 3). Significantly, all four panelists mentioned in their interview notes that Miller had worked as a permanent substitute bus driver, and three of those panelists recounted that he had worked in the

4 For clarity, this Memorandum Opinion refers to Brian name.

permanent substitute position for five years. (Docs. # 20-11 at 8; 20-12 at 6; 20-13 at 8; 20-15 at 8). Under SCS policy, the interview panel submits a recommended applicant for hire to applicants. (Doc. # 20-9 at 3). Thereafter, the superintendent makes a formal recommendation

to the Board. (Id.). The parties dispute whether the Board receives information about the unsuccessful applicants. Plaintiff asserts that the Board must receive such information because Jimmy Bice, a Board member, once told him that the Board would consider a black applicant for See Docs. # 22-1 at 2; 22-2 at 1; 20-7 at 13). superintendent for human resources, has averred that the Board receives no information about

unsuccessful applicants. (Doc. # 20-9 at 3). Moreover, Bice has testified that he was unaware of

-7 at 12). In April 2012, the Board voted to approve -9 at 13-14). The parties have also addressed the question of why SCS chose to hire one route supervisor, instead of two route supervisors. According to Defendants, chose to only fill one route supervisor position because SCS needed to reduce expenses when - 10 at 2-3). Ferguson has recalled that the panel knew there would only be one route supervisor hired by the date the interviews occurred. (Doc. # 20-11 at 2-3). In contrast, Plaintiff has averred that members of the interview panel told him that they were interviewing for two route

supervisors. 5

(Doc. # 22-2 at 1). And, Miller has recalled a high volume of hiring in 2012. (Doc. # 20-2 at 66). C.

After Plaintiff failed to obtain the route supervisor position, he complained to a Board member about the racial makeup of the Transportation Department. (Doc. # 22-2 at 5). As Plaintiff explains in his affidavit,

32. While attending a Shelby County event in 2013, I had a discussion with Aubrey Miller regarding the fact that I was denied a Route Transportation Supervisor position in 2012, and regarding the lack of minorities employed in the Transportation Department. I advised him that there were two vacancy postings, that the second vacancy was pulled and I was not hired. Aubrey Miller advised me to let him know when I applied for a Transportation Supervisor position in the future and he would keep an eye on it. 33. I advised Mr. Aubrey Miller when I was in the process of applying for the Transportation Supervisor position in June of 2014. (Id.). Bobby Pierson, another SCS bus driver, has affirmed that the conversation between Plaintiff and Aubrey Miller occurred. (Doc. # 22-1 at 2).



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Pierson also recounts that he discussed SCS assistant superintendent. (Id. at 1).

5 In his opposition brief, Plaintiff insists that it would have been illogical for SCS to post two route caused a need to cut personnel expenses, since Alaba - Plaintiff mentions that the Alabaster City Council approved a sales tax and a process for creating a school board and a new school district in October 2011. (Doc. # 22-11 at 4). But, the Alabaster school board did not approve the separation agreement until May 2013. (Id.). Defendant Fuller explains that SCS attempted to negotiate with Alabaster to keep the municipality in the school district in early 2011, but he began trimming expenses in late 2011 in anticipation that Alabaster would leave the school district. (Doc. # 20-10 at 2-3). Among other financial decisions, Fuller chose to not hire a second route supervisor, even though the position had been posted. (Id. at 3). This factual dispute is immaterial, however, because Fuller has testified that he did not know who had applied for the route supervisor vacancies when he decided to only hire one route supervisor. (Id.). The Rule 56 record contains no evidence contradicting that testimony by Fuller.

D. The 2014 Transportation Supervisor Promotion In June 2014, the Board posted a vacancy notice for a transportation supervisor position. (Doc. # 20-8 at 103). Twenty-two candidates, including Plaintiff, applied for the position. (Doc. # 20-5 at 17-18). SCS officials chose to interview four applicants, including Plaintiff, for the position. (Doc. # 20-14 at 2). Two applicants -- Plaintiff and Debra Cummings -- were interviewed by a panel on June 18, 2014. (Doc. # 22-14). For the other two applicants, the interview panel decided to rely upon the interviews those applicants had completed in connection with a different position, transportation coordinator. (Docs. # 20-9 at 5; 20-10 at 4; 20-14 at 3). Jim Miller has explained consistent with how we had handled similar situation in which a candidate would be interviewed -9 at 5). The transportation supervisor serves as the second-in-command within transportation department. (Doc. # 20-

supervisor requires school transportation, 22-17 at 1). Moreover, a

d school Id.). The Board may accept alternative qualifications to those listed in the description. (Id.). A transportation supervisor performs several transportation and leadership functions, including:

1. Assist[ing the] Transportation Coordinator in administering transportation

program to meet all requirements of the daily instructional program and extracurricular activities. 2. Assist[ing] the Transportation Coordinator in the management and

purchasing of equipment as well as in the budget planning process.

3. Assist[ing the] Transportation Coordinator in the routing of buses and

other operations of the Transportation Department. 4. Receiv[ing] and investigat[ing] complaints



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against drivers and [working]

with the Transportation Coordinator to enforce disciplinary measures when necessary. 5. Mak[ing] recommendations for establishing or changing bus stops. . . . 9. Monitor[ing] internal and external communication systems including the

transportation web page in a professional manner. 10. Responsible for video surveillance on each school bus equipped with such

equipment. 11. Assist[ing] in responding to requests on route problems from bus drivers,

parents, and principals. 12. Encourag[ing] and assist[ing] principals to have 2 bus evacuation drills a

year. 13. Assist[ing] in training bus drivers. 14. Check[ing] road and weather conditions to assist in determining school

openings and closing. 15. Maintain[ing] maps used to determine School Boundaries and/or zoning.

16. Assist[ing] with local and state School Bus Road-e-o. . . . 22. Perform[ing] other job-related assignments determined by Transportation

Coordinator, Deputy Superintendent, or Superintendent. (Id. at 1-2). The interview panel believed that all four interviewees were qualified for the transportation supervisor position. (Doc. # 20-9 at 4-5). As discussed more fully below (in the analysis section), Plaintiff disputes that Brent Copes was qualified to become transportation he was hired. (Doc. # 21 at 10).

Four SCS employees interviewed Plaintiff and Cummings for the transportation supervisor position: superintendent; (3) Jim Miller, an assistant superintendent; and (4) Vines, who had been promoted to transportation coordinator. 6

(Doc. # 20-9 at 5). During the interviews of Plaintiff and Cummings, the panelists asked them about their leadership experience and abilities, their plan for handling exceptions to established bus routes, their process for setting up bus stops, their plan for the first thirty to sixty days in the position, and their process for handling difficult people. (See, e.g., Doc. # 20-15 at 14). Copes received very similar questions during his June 4, 2014 interview, except that the panelists questioned Copes on establishing bus routes, rather than bus stops. (See, e.g., Doc. # 20-9 at 18). The first question included on the transportation supervisor score sheet included the statement See, e.g., Doc. # 20-15 at 14). on a one to five numerical scale. (See id.). Of the four candidates, Copes received the highest interview score, with an average score of 3.475 per question. (Doc. # 20-9 at 26). Dukes obtained the third- highest interview score of 3.05 per question. (Id.). Miller, Brooks, and Fuller have testified that Copes was the best-qualified candidate due to his leadership experience as principal and assistant principal. (Docs. # 20-9 at 7; 20-10 at 4; 20-14 at 3-4). Vines has recounted that the other three



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panelists identified Copes as the best candidate. (Doc. # 20-15 at 5). Vines knew at the time that Copes had leadership experience as

provide him valuable experience as transportation supervisor because SCS assistant principals

6 Fuller, Brooks, and Miller also participated in the transportation coordinator interviews for Copes and Northcutt on June 4, 2014. (Doc. # 20-9 at 5). Miller included the interview scores given by a fourth panelist -- Tom Ferguson -- transportation supervisor role. (Id. at 6).

managed the transportation at their schools. (Id.). Therefore, Vines agreed with recommending Copes as transportation supervisor. (Id.). During his deposition, Vines explained that he trusted the judgment of the three panelists who had also interviewed Copes because he had less experience than them. (Doc. # 20-4 at 29-30). On June 24, 2014, Tom Ferguson, a deputy superintendent, submitted a written recommendation to hire Copes as transportation supervisor. (See Doc. # 20-8 at 108). The -6 at 19). The Board considered

during a June 24, 2014 meeting that occurred at noon. (Doc. # 20-8 at 108). Three of the five Board members attended the meeting. (Id.). Two Board members -- Aubrey Miller and Steve Martin -- were absent. (Id.). This Board meeting lasted for seven minutes, and the Board merely a transportation supervisor and an elementary school principal. (Id.). Ferguson has testified that the June 24th Board meeting was a special Board meeting, rather than a regular Board meeting that would have occurred on a Thursday evening. 7

(Ferguson Transcript at 44-45). The three attending Board -8 at 108). The minutes of that meeting reflect that Plaintiff gave the invocation (id.), but Plaintiff denies attending that meeting. (Doc. # 22-2 at 5). Following failed promotion application in 2014, Plaintiff and Pierson confronted Bice about the lack of black employees in the transportation department. (Doc. # 22- 1 at 2). Bice responded that SCS might not have received a good resume from a black applicant.

7 20-8. This Memorandum Opinion cites the manuscript pages of that deposition. When citing exhibits to Fergu deposition, this Memorandum Opinion cites the electronically-generated CM/ECF page numbers.

(Docs. # 22-1 at 2; 22-2 at 1). As already referenced, Bice indicated a black applicant could be considered for a position in that department if they received a decent resume. (Id.). II. Standard of Review

Under Federal Rule of Civil Procedure 56 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, show that there is no genuine issue as to any material fact and that the moving party is Celotex



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Corp. v. Catrett, 477 U.S. 317, 322 (1986). The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings or filings which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323. Once the moving party has met its burden, Rule 56 requires the non-moving party to go beyond the pleadings and -- by pointing to affidavits, or depositions, answers to interrogatories, and/or admissions on file -- designate specific facts showing that there is a genuine issue for trial. *Id.* at 324.

The substantive law will identify which facts are material and which are irrelevant. See *Anderson v. Liberty Lobby, Inc.* *Anderson* about the facts and all justifiable inferences are resolved in favor of the non-movant. See *Allen v.*

Bd. of Pub. Educ. for Bibb Cty., 495 F.3d 1306, 1314 (11th Cir. 2007); *Fitzpatrick v. City of Atlanta* evidence is such that a *Anderson*, 477 U.S. at 248. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. See *id.* at 249.

When faced with for summary judgment, [the nonmoving party] must come forward with specific factual evidence, presenting more than mere *Gargiulo v. G.M. Sales, Inc.*, 131 F.3d 995, 999 (11th Cir. 1997). As *Anderson* teaches, under Rule 56(c) a plaintiff may not simply rest on her allegations made in the complaint; instead, as the party bearing the burden of proof at trial, she must come forward with at least some evidence to support each element essential to her case at trial. See *Anderson*, 477 rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts

Id. at 248 (citations omitted).

bear the burden of proof at trial. *Celotex Corp.* granted if the non- *Sawyer v. Sw. Airlines Co.*, 243 F. Supp. 2d 1257, 1262 (D. Kan. 2003) (citing *Anderson*, 477

U.S. at 250-51).

evidence and determine the truth of the matter but to determine whether there is a genuine issue

Anderson a sufficient disagreement to require submission to the jury or whether it is so one-sided that one *Sawyer*, 243 F. Supp. 2d at 1262 (quoting *Anderson*, 477 U.S. at 251-52); see , 62 F. Supp. 2d 1366, 1371 (S.D. Fla. 1999)

III. Analysis Plaintiff raises race discrimination claims under Title VII of the Civil Rights Act and 42 U.S.C. § 1981. Title VII racial disparate treatment claims and § 1981 race discrimination claims are evaluated using the same analytical framework. See *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 13 proof and use the same analytical framework, therefore we shall explicitly address the Title VII



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claim with the understanding that the analysis applies to the § 1981 claim together for purposes of summary judgment.

Typically, Title VII and § 1981 discrimination claims that rely on circumstantial evidence are evaluated under the McDonnell Douglas burden-shifting framework. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See also Chapter 7 *Trustee v. Gate Gourmet, Inc.* discrimination through indirect evidence using the burden-shifting framework set out in *McDonnell Douglas . . . prima facie failure to promote case by showing: (1) he or she is a member of a protected class; (2) he or she was qualified and applied for the promotion; (3) he or* *Wilson v. B/E Aerospace, Inc.*, 376

F.3d 1079, 1089 (11th Cir. 2004), abrogated on other grounds by *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006). Here, Defendants have not disputed that Plaintiff makes out prima facie failure to promote claims under Title VII and § 1981. 8

(See Doc. # 19 at 15-16).

8 To be sure, Defendants strongly argue that the promoted individuals were more qualified than Plaintiff for the route supervisor and transportation supervisor openings. But, because the interview panels relied on subjective qualifications to deem Miller and Copes more qualified, the court determines that the qualification issue

Once the plaintiff successfully demonstrates a prima facie case, the defendant is required to articulate a legitimate, non-discriminatory reason for its conduct. *Wilson*, 376 F.3d at 1087. *Turnes v. AmSouth Bank, N.A.*, 36 F.3d if the employer satisfies its burden by articulating one or more reasons, then the presumption of discrimination is rebutted, and the burden of production shifts to the plaintiff to offer evidence that the alleged reason of the employer is a pretext for illegal *Wilson*, 376 F.3d at 1087. Here, the Board explains that it promoted Miller and Copes to route supervisor and transportation supervisor, respectively, because they were more qualified for those promotions than Plaintiff. (Doc. # 19 at 16). That qualifies as a legitimate, non-discriminatory reason for the promotions. *Wilson*, 376 F.3d at 1090. When deciding a pretext issue at summary judgment he plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 892

(11th Cir. 2011) (internal quotation marks and citation omitted). A legitimate reason for a and that discrimination was the *rea Springer v. Convergys Customer Mgmt. Grp, Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007) (emphasis in original) (quoting *Jefferson Cty.*, 446 F.3d 1160, 1163 (11th Cir. 2006)). When a pretext issue hinges on the

relative qualifications of a plaintiff and another successful applicant (in other words, when a plaintiff claims pretext is demonstrated because of the relative qualifications of himself and the incumbent) should be one to be considered at the pretext stage. *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763,



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768-69 (11th Cir.

2005).

Kidd v. Mando Am. Corp., 731 F.3d 1196, 1206 (11th Cir. 2013) (emphasis in original). Rather, whether the difference between the two is of able

person, in the exercise of impartial judgment, could have chosen the candidate selected over the 9

Id. (quoting Springer, 509 F.3d at 1349). Among other Rule 56 evidence, Plaintiff presents statistical evidence that no African- transportation department -- a department within office -- as proof of pretext. (See Doc. # 21 at 28). Statistical evidence can be relevant to

determining whether an emplo -discriminatory reason for an action is pretext for discrimination. Miles v. M.N.C. Corp., 750 F.2d 867, 870 (11th Cir. 1985). Yet, statistical evidence is not meaningful to analyzing a pretext issue if there is no way to discern whether the -discriminatory Ogletree v. City of Auburn, 619 F. Supp. 2d 1152, 1170 (M.D. Ala. 2009) (quoting , 2007 WL 3124452, at *20 Wilson, 376 F.3d at 1089 (internal quotation marks omitted) (quoting Evans v.

McClain of Ga., Inc., 131 F.3d 957, 963 (11th Cir. 1997)). For example, in Wilson, the court - presidents for forty-four vice-president openings in a seven-year period was not probative evidence of pretext bec Id. at 1088-89. Similarly,

9 ns alone. See Ash v. Tyson Foods, Inc., 546 U.S. 454, 456-58 (2006). To be clear, the court has not applied this abrogated standard and has applied the post-Ash standard announced in Springer.

the Eleventh Circuit has also rejected statistical evidence about the number of black gas dealers in predominantly white areas of the Atlanta metropolitan area

applied and were rejected and evidence of the success rate o Howard v. BP Oil Co., 32 F.3d 520, 524 (11th Cir. 1994). A. Plaintiff Has Not Presented Reason for Promoting Miller was a Pretext for Race Discrimination

In their summary judgment motion, Defendants explain that Miller was a more qualified Certainly,

knowledge of routes across Shelby County could be valuable for a position that primarily concerns creating and changing bus routes. (See Doc. # 22-16 at 1). Plaintiff responds that his leadership experience, driving experience, and training experience made him more qualified for the position. (Doc. # 21 at 21) (referring to Doc. # 21 at 17-19). But, while Plaintiff certainly possessed more driving experience than Miller, Miller was a bus driver for more than five years before his promotion the minimum transportation experience required for a route supervisor. (Docs. # 20-9 at 11; 22-16 at 1).



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And, the panelists who interviewed the route supervisor applicants have uniformly explained that they believed Miller possessed more knowledge about bus routes because of his substitute driving experience. (Docs. # 20-11 at 3; 20-12 at 3; 20-13 at 3; 20-15 at 3). Finally, it must be reiterated that out of eleven interviewees the panelists gave Plaintiff the sixth-highest interview score (102) and Miller the fifth (103.5). (Doc. # 20-9 at 11). The panelists thought the two were closely situated. more qualified than Miller relies on second-guessing the business judgment that substitute

driving experience in se

experience, which was concentrated in one area of the county. The court cannot critique such business judgments when deciding whether one applicant or another was more qualified. Cf. Kidd, 731 F.3d at 1207 (explaining that courts cannot second-guess honest business judgments for promoting one individual over another under Title VII). Simply put, the difference in qualifications between Miller and Plaintiff is not so vast that no reasonable person could have selected Miller for the promotion to route supervisor. See *id.* at 1206. Plaintiff contends # 21 at 21). But, collectively, the four panelists gave Miller an overall higher score than Plaintiff

for the experience question used during the interviews. 10

(See Docs. # 20-11 at 6, 8; 20-12 at 6, 8; 20-13 at 6, 8; 20-15 at 8, 10) (scoring Miller at 15.5 on the training background and experience question and Dukes at 14 on that question). Plaintiff also contends that Defendants

Intermediate School for two school years, and his 2009 contract designated him as a regular bus driver. (Doc. # 21 at 6). This discrepancy in the Rule 56 record is not substantial evidence of pretext, though, because three of the four panelists recounted in their interview notes that Miller had been a permanent substitute driver for five years. (Docs. # 20-11 at 8; 20-12 at 6; 20-13 at at the time of the interviews belies any inference that Defendants have exaggerated substitute driving experience to justify his promotion. (Cf. Doc. # 21 at 7 n. 4.). Neither of these factual

10 Likewise, Plaintiff insists experience as a basis for selecting him because Ferguson gave Miller and Plaintiff the same score on the technology experience question. (Doc. # 21 at 21). While it is true that Ferguson gave Miller and Plaintiff the same score on that particular question (see Doc. # 20-11 at 6, 8), Miller received an overall higher score on that question from the four panelists than Plaintiff. (See Docs. # 20-11 at 6, 8; 20-12 at 6, 8; 20-13 at 6, 8; 20-15 at 8, 10) (scoring Miller at 12.5 on the technology experience question and Plaintiff at 10 on that question).

e for the substitute driving experience.

evidence of pretext. (Doc. # 21 at 22). The court is not convinced. First, none of the Rule 56



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evidence before the court indicates that Plaintiff would have been the applicant hired for the second route supervisor position. None of the panelists have testified that Plaintiff was their second choice, and he only received the sixth-highest interview score. Nothing in the record -- -- indicates that he would have been selected for the second route supervisor opening in the event Fuller had decided to fill it. Second, c argument, the Rule 56 evidence indicates that Alabaster merely began

separation process from SCS in 2011 and did not finalize the separation until 2013. (Doc. # 22- 11 at 4). Although Fuller has testified that he began considering budget cuts before February 2012 (see Doc. # 20-10 at 2-3), the court is not persuaded that the posting of two route supervisor openings shows that Fuller had budgeted for both positions. Indeed, neither of the route supervisor positions was budgeted for when SCS began accepting applications for them in February 2012. (Doc. # 20-1 at 57). For these reasons, the withdrawal of the second route supervisor opening offers no Rule 56 evidence in support of Plain Because Plaintiff presents insufficient Rule 56 evidence for a reasonable factfinder to unlawful discrimination, Defendants are due to be granted summary judgment on all Title VII

and § 1981 claims pertaining to the 2012 route supervisor promotion decision.

B. Reason for Promoting Copes was a Pretext for Race Discrimination

In their summary judgment brief, Defendants state that the Board promoted Copes to transportation supervisor because his leadership experience as principal and vice principal made him a superior candidate. (Doc. # 19 at 18). The Rule 56 evidence indicates that SCS wanted a transportation supervisor with prior leadership experience, as the interview score sheet described E.g., Doc. # 20-10 at 11). Copes had school-level administrative experience as principal and vice principal that Plaintiff lacked. Additionally, Copes received a higher average score on the leadership question than Plaintiff did. (See Docs. # 20-9 at 18-22, 28; 20-10 at 7, 11; 20-14 at 6, 9; 20-15 at 14) (giving Copes an average score of 3.625 on question one of the interview and Plaintiff an average score of 3 on that question).

qualification for a transportation supervisor. (See Doc. # 20-5 at 26). During his deposition, transportation issues as a principal and vice principal constituted sufficient transportation

experience. (Id. at 30-31). And, Brooks explained that transportation experience could be gained at the school level because principals supervised transportation of students at their respective schools. (Id. candidate.

In his opposition brief, Plaintiff claims that Copes was not qualified to be a transportation at the time he was hired. (Doc. # 21 at 10-11). This argument misconstrues the transportation supervisor

qualifications. SCS required the transportation sup 22-17 at 1). The phrasing of this requirement plainly contemplates that a transportation



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supervisor could obtain his or her CDL after hiring. transportation supervisor prior t after he became a transportation supervisor. (Doc. # 20-4 at 8).

Plaintiff also claims that he was more qualified than Copes because he had more transportation experience and more recent transportation experience. (Doc. # 21 at 24). But, Plaintiff fails to address the distinction between non-supervisory transportation experience and supervisory transportation experience. included administrative and management duties. (See Doc. # 22-17 at 1) (indicating that the ment as well

Copes directly supervised the bus drivers at his school when he served as an assistant principal. (See Docs. # 20-2 at 33; 20-3 at 20; 22-2 at 4). In contrast, Plaintiff worked in a non-supervisory role as a bus driver, although at least one of the panelists -2 at 33). The court finds that the interview panelists reasonably could have determined that supervisory and administrative experience would be superior for the transportation supervisor position. Plaintiff argues that his transportation experience should be considered superior because Copes obtained any relevant transportation experience several years before his hiring as transportation coordinator. (Doc. # 21 at 24). That argument fails to show that no reasonable person could have selected Copes, as less recent transportation experience -- which included supervisory and management duties -- over

-supervisory transportation experience. Cf. Kidd, 731 F.3d at 1206. Accordingly, Plaintiff has not established a triable issue of pretext regarding the 2014 promotion based on his qualifications to his own qualifications. Plaintiff argues that additional evidence -- in addition to the disparity in qualifications -- rationale. First, Plaintiff claims that Defendants covered up a written reprimand Copes received a month before being hired as transportation supervisor. 11

(Doc. # 21 at 25-26). that he received a written reprimand in May of an unspecified year from the elementary school coordinator, and he only worked in an elementary school (Calera Intermediate School) from July 2013 to June 2014. According to Plaintiff, while logic dictates that Copes received the reprimand in May 2014, one month before the Board selected him to be a transportation supervisor (id. at 25), the written Id. at 26). Upon careful analysis, the court concludes that the cited Rule 56 evidence provides no support for the supposition that SCS employees covered up the reprimand. Plaintiff cites an exhibit with personnel records that does not include the written reprimand (see Doc. # 21 at 26) (citing Doc. # 22-4), but that omission is not probative evidence of a cover up because the personnel records lacked knowledge of the written reprimand, but any such ignorance simply is not evidence of a

cover up because Copes identified Ricky Darby and Fuller as the supervisors involved in that discipline. (Doc. # 20-6 at 17- Copes received

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Copes received the reprimand at issue for taking one of his children with him on a field trip. (Doc. # 20- 6 at 17).

After careful review, the court finds no probative evidence that Defendants (or any SCS

Second, his pretext argument. (Doc. # 21 at 27-28). , own standard decision to not interview Copes again for the supervisor position qualifies as a failure to follow

hiring policy. Plaintiff identifies no established policy requiring SCS to interview applicants after the job is posted, and Jim Miller merely testified that it would be normal to interview people during that period. (See Doc. # 20-2 at 20-21). While Fuller testified during his deposition that SCS h process see Doc. # 20-3 at 33), that testimony does not provide probative

evidence of a policy to interview all applicants with the same interview panel or to interview all applicants after posting an opening. The Rule 56 record shows that an SCS interview panel -- with three of the same supervisors that interviewed Plaintiff -- asked Copes essentially identical questions to those Plaintiff received. Plaintiff also contends in his opposition brief that the -29). But, Plaintiff presents no Rule 56 evidence that the Board violated any standard procedure by approving employment recommendations in a specially called meeting, rather than a regular meeting. (See id.). Therefore, the process by which Copes was promoted to transportation supervisor offers no significant Rule 56 evidence from which a reasonable jury could find pretext. Thus, although Plaintiff has attacked several aspects of the decisions to deny his requests for promotion and argued that Defendants should have followed different procedures in the employment process,

those arguments miss the mark. H wisd - Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991). See also Combs v.

Plantation Patterns to second- abrogated in part on other grounds by

Ash, 546 U.S. 454 (2006). Third, Plaintiff argues that the complete lack of African-American employees in the

the Rule 56 record presented to the court, the court disagrees. Plaintiff does not present any evidence regarding the number of African-Americans who expressed interest in transportation department positions; he merely presents evidence that Pierson and he applied for transportation department positions. Cf. Wilson, 376 F.3d at 1089. Nor does Plaintiff offer evidence about the success rate of equally qualified white and African-American applicants. Cf. Howard, 32 F.3d at 524. Without such contextual evidence to assist a factfinder in analyzing why the transportation department lacks African-Am pretextual. Wilson, 376 F.3d at 1089.

Fourth, Plaintiff claims that the Board provided incorrect information to the Equal when it



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responded to his EEOC charge that constitutes circumstantial evidence of discrimination. (Doc. # 21 at 26-27). The court agrees with Plaintiff that the EEOC response contains some inaccurate information. The Board informed the EEOC that Fuller, Vines, Brooks, and Miller interviewed the four applicants for the

supervisor position (Doc. # 22-7 at 1), but it is apparent that Vines did not participate in the interview panel that examined Copes and Northcutt. The Board also told the EEOC that Copes statement was not true, as Copes actually told the interview panel that he used mapping software

to create bus routes. 12

(Compare Doc. # 22- with Docs. # 20-10 at 7, 20-14 at 6 (notes by Fuller and Brooks reflecting statement that Copes developed routes on mapping software)). Having said that, Plaintiff incorrectly claims that the Board misrepresented routes to the EEOC had that period. (Doc. # 22-7 at 2). It does not claim that he supervised the summer school program

while he was a principal at Calera Elementary School (see id.), nor does it specify precisely when Copes created bus routes. Although misstatements in an EEOC position statement may be circumstantial evidence that could support a finding of discrimination, the court concludes that this evidence is insufficient to support a triable issue of pretext here because neither misstatement involves a material issue. One of the misstatements in the position statement concerns a procedural aspect of the promotion, and the other misstatement concerns a transportation-related qualification. The position statement -- briefing -- describes the transportation supervisor role as an administrative and leadership position and states that Copes had significant leadership experience. (Doc. # 22-7 at 2). 13

12 Copes has testified that he used mapping software to create the bus routes and did not develop his own software program. (Doc. # 20-6 at 23-24).

13 :

Plaintiff primarily relies on *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222 (5th Cir. 2015), where the Fifth at the EEOC charge level on performance problems discovered after its decision to terminate the plaintiff a month earlier constituted evidence of pretext where the employer de-emphasized those post-decision deficiencies before the district court and the reasons offered to the EEOC were illegitimate. *Id.* at 238-39. But this case is distinguishable because the Board presented legitimate reasons to the EEOC which support more qualified most importantly, that Copes held prior SCS administrative and leadership positions. Likewise, the *McInnis v. Alamo Community College District*, 207 F.3d 276 (5th Cir. 2000), is distinguishable from this case because the Fifth Circuit observed in *McInnis* that the decisionmaker knew of the EEOC position statement when it was submitted. *Id.* at 283. No similar Rule 56 evidence has been presented here. For these



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reasons, the court concludes that the non-material position statement do not establish a triable issue of pretext. 14

See Lane v. Riverview Hosp., 835 F.3d response is factually wrong in a self-serving way on a material fact, the choice between treating it as an honest mistake or a deliberate falsehood is

The position for Transportation Supervisor is an administrative and leadership position. Mr. Copes was Principal at Calera Elementary School when he applied for the position at issue. . . . Mr. Copes had numerous years of experience in leadership roles. The interview committee felt Mr. Copes was the best qualified for the position. (Doc. # 22-7 at 2).

14 Plaintiff also cites Chapman v. AI Transport, 180 F.3d 1244, 1252 (11th Cir. 1999), banc, 229 F.3d 1012 (11th Cir. 2000), and Karas v. New NGC, Inc., 2013 WL 12109490, at *2 (N.D. Ga. Jan. 17, 2013), but those authorities are distinguishable because they address whether evidence of an inaccuracy in an EEOC position statement is admissible evidence at trial. The court does not dispute that the inaccuracies position statement might be admissible at trial if there was sufficient evidence for a reasonable factfinder to find the rationale for promoting Copes, instead of Plaintiff, incredible. That is not the case here.

Because Plaintiff presents insufficient Rule 56 evidence for a reasonable jury to find that unlawful discrimination, Defendants are due to be granted summary judgment on all Title VII

and § 1981 claims pertaining to the 2014 transportation supervisor decision. C. Evidence to Support His Race Discrimination Claims Concerning the 2014

Transportation Supervisor Promotion Plaintiff argues, circumstantial evidence to create an inference of race discrimination for the 2014 promotion

decision. (Doc. # 21 at 29). The court disagrees.

In Smith v. Lockheed-Martin, the Eleventh Circuit held that a plaintiff does not always have to establish a prima facie case under the McDonnell Douglas framework to present a triable Title VII claim of unlawful discrimination through circumstantial evidence. 644 F.3d 1321, 1328 (11th Cir. 2011). A plaintiff can present a triable issue of discriminatory intent through a convincing mosaic of circumstantial evidence from which a reasonable jury could find intentional discrimination by the decisionmaker. Id. Or, stated ng milarly situated

Lewis v. City of Union City, 877 F.3d 1000, 1018 (11th Cir. 2017) (quoting Silverman v. Bd. of Educ. of City of Chi., 637 F.3d 729, 733-34 (7th Cir. 2011)). In Lockheed-Martin, the circumstantial evidence presented by the plaintiffs was overwhelming and included: (a) a documented history of disparate treatment of Caucasian and African-American employees; (b) a spreadsheet listing employees under



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investigation by name and race t

the workplace, which focused on violence by a white supremacist. See *id.* at 1329-40. The Eleventh Circuit concluded, among other reasons, that the plaintiffs presented a triable race

discipline decision making without an adequate explanation for doing so. *Id.* at 1341.

The evidence of race discrimination in this case falls far short of that presented in *Lockheed-Martin*. Plaintiff has only presented a single ambiguous (at best) statement from a Board member to support his argument that the relevant decisionmakers considered race in employment decisions. Cf. *id.* at 1329-40 (explaining in detail the less favorable treatment

no African-Americans have been empl offered evidence from which the court could find that Defendants systematically treated white employees more favorably than similarly situated black employees in promotion decisions. Cf. *Lewis*, 877 F.3d at 1018. And, for the reasons explained above, a reasonable factfinder could not reason for promoting Copes was a pretext for race discrimination. Cf. *id.* VII and § 1981 claims regarding the 2014 transportation supervisor promotion cannot survive summary judgment on a mosaic theory. IV. Conclusion is due to be granted. 15

An Order consistent with this Memorandum Opinion will be entered.

15 Because Plaintiff has failed to present a triable § 1981 violation by any of the individual Defendants, the court need not decide whether the individual Defendants are entitled to qualified immunity.

DONE and ORDERED this February 16, 2018.

_____ R. DAVID PROCTOR UNITED STATES DISTRICT JUDGE

