IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WALIED SHATER	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 4:20-CV-01465**
	§	
SHELL OIL COMPANY,	§	
	§	
Defendant.	§	

DEFENDANT SHELL OIL COMPANY'S
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant Shell Oil Company ("Shell") files this Reply in support of its Motion for Summary Judgment.

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I.
INTRODUCTION

Shell articulates through its motion a legitimate, nondiscriminatory reason for not selecting Plaintiff Walied Shater ("Shater") for the Regional Security Manager ("RSM") Americas role. Another candidate, Wayne Hunt ("Hunt"), also qualified, was a better fit.

Through his response, Shater fails to establish pretext by demonstrating that: (1) he was clearly better qualified than Hunt and no reasonable person could have selected Hunt for the RSM – Americas role, or (2) Shell's articulated reason for selecting Hunt is false or unworthy of credence. *See Burrell v. Dr. Pepper/Seven Up Bottling Grp.*, 482 F.3d 408, 412 (5th Cir. 2007) (identifying the two ways to establish pretext in failure-to-promote cases). Shater's inability to establish pretext is unsurprising since: (1) as a candidate for the RSM – Americas role, Hunt had substantial security management experience in a range of government and corporate roles across the Americas, specifically including Central and South America, and (2) Shell selected Hunt over Shater through a three-person interview panel that asked each candidate the same questions, carefully considered each candidate's prior experiences and interview answers, and, after discussing each candidate's strengths and weaknesses, unanimously decided that Hunt was a better fit for the RSM – Americas role.

Now, as a last-ditch, kitchen-sink effort to show discrimination, Shater makes numerous pleas for the Court to shift its focus from the specific promotion in question to a "big picture" involving different lawsuits and "statistical evidence" merely reflecting the demographics of Shell's Corporate Security group. Shater's effort to distract the Court from the actual evidence concerning the promotion in question underscores the fact that Shater's lawsuit is based on speculation, unreasonable inferences, and personal

frustration about not being selected for the RSM – Americas role—not on legally cognizable disparate treatment.

There is no material fact issue for the jury to decide regarding Shell's selection of Hunt over Shater for the RSM – Americas role. Summary judgment is thus appropriate.

II.
ARGUMENT AND AUTHORITY

A. Shater Fails to Establish that He Was Clearly Better Qualified than Hunt for the RSM – Americas Position.

Shell highlights through its motion an overwhelming amount of evidence that supports its business judgment that Hunt was the best fit for the RSM – Americas position. Shater contends in response that he had "clearly better qualifications as compared to Hunt" because (1) James W.D. Hall ("Hall") stated in one email that one of his several preferences was that the individual selected for the role be a U.S. national; and (2) one of the three interview panelists stated – at one point in the selection process – that he did not believe Hunt's Spanish fluency made him a better candidate.[1] Shater's contention, however, ignores key evidence supporting Shell's selection of Hunt, including:

- Hall's other preferences for the RSM – Americas position, which included a track record of leadership, experience with security issues in Central and South America and, relatedly, the ability to speak Spanish "because of [Shell's] more recent growth and the risk associated from a security perspective in the Central and South Americas regions."[2]

- Hall's testimony that, during his interview, Hunt demonstrated "that he had a better grasp of the challenges of security leadership at this level than Mr. Shater."[3]

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[1]ECF No. 22 ["Plf.'s Resp.] at 26.
[2]ECF No. 21-1 ["Hall Dec."] ¶¶ 12, 17.
[3]*Id.* ¶ 16.

- Barbara Blakely's ("Blakely") testimony that she was "impressed by Hunt's answers to [the interview panel's] questions about leadership" and "was strongly in favor of selecting Mr. Hunt for the position."[4]

- Hall's testimony that, during Hunt's interview, Hunt demonstrated he had a better understanding of security issues in Latin America and is competent in Spanish.[5]

- Andrew Maynor's ("Maynor") testimony that, even though he was initially in favor of selecting Shater for the role, he "felt as though we had two qualified people and that a fair process was followed."[6]

Shater's contention further ignores his own letter to the Texas Workforce Commission, in which he did <u>not</u> contend he was clearly better qualified than Hunt, but merely that he "was at least equally qualified for the position[.]"[7] Shater's purportedly equal qualifications neither demonstrates pretext nor required Shell to promote him to the position. *See Price v. Fed. Exp. Corp.*, 283 F.3d 715, 723 (5th Cir. 2002) ("Showing that two candidates are similarly qualified does not establish pretext under this standard.").

In further support of his contention that he was clearly better qualified than Hunt, Shater relies on four out-of-court statements that Shater improperly summarizes as stating: "Shater was clearly better qualified than Hunt for the role."[8] As an initial matter, these out-of-court statements are rank hearsay and fail to demonstrate pretext because they are not competent summary judgment evidence. *See, e.g., Goodwin v. Johnson,* 132 F.3d 162, 186 (5th Cir. 1997) (finding that hearsay statements submitted to defeat a motion for summary judgment were incompetent summary judgment evidence).

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[4]ECF No. 21-6 ["Blakely Dec."] ¶¶ 6, 8.
[5]Hall Dec. ¶ 17.
[6]ECF No. 21-9 ["Maynor Depo."] 11:17–19.
[7]ECF. No. 21-10.
[8]Plf.'s Resp. at 27.

Even if these out-of-court statements were competent evidence, which they are not, they fail to show that no reasonable person, in the exercise of impartial judgment, could have chosen Hunt over Shater for the RSM – Americas role. *See Moss v. BMC Software, Inc.*, 610 F.3d 917, 923 (5th Cir. 2010) (setting a "high bar" for "the kind of evidence" used to establish discrimination in a failure-to-promote case). Rather, these out-of-court statements demonstrate only that four individuals—none of whom were involved or in any way familiar with the interview and selection process for the RSM – Americas role—perhaps generally thought Shater was qualified for the role, that the role should have been reserved for a Cluster Security Manager ("CSM"), and that Shater should have been selected for the role. However glowing these opinions allegedly are about Shater's qualifications, and however critical these opinions allegedly are about the decision to make the role available to non-CSM candidates, they fail to establish pretext. *See, e.g., Autry v. Fort Bend Indep. Sch. Dist.*, 704 F.3d 344, 347 (5th Cir. 2013) (affirming summary judgment on a failure-to-promote claim where the plaintiff was unable to demonstrate that he was "clearly better qualified" than the successful candidate even though the plaintiff's "qualifications are sterling").

B. Shater Fails to Establish that Shell's Articulated Reason for Selecting Shater over Hunt Is False or Unworthy of Credence.

Shell details in its motion that it selected Hunt over Shater for the RSM – Americas role through a legitimate and nondiscriminatory interview process. Indeed, when Shater inexplicably withdrew his application mid-process, *Hall* encouraged Shater to resubmit his application for the role. Moreover, *Hall* later selected Shater as a finalist for the role.[9] From there, Shater was treated well and respectfully during his interview, was not asked

[9] Hall Dec. ⁋ 15.

offensive questions, and was not asked questions with any discriminatory undertones—as Shater testified during his deposition.[10]

Nonetheless, Shater now attacks the veracity of the interview process and Shell as an organization with unfounded contentions that: (1) Shell preselected Hunt for the RSM – Americas role and manipulated the interview process to cover this preselection; (2) Shell changed its explanation about why it selected Hunt over Shater for the RSM – Americas role; and (3) the "big picture" and "statistical evidence" somehow demonstrate that Shater experienced disparate treatment in connection with the RSM – Americas selection process. Setting speculation and conjecture aside, the evidence before the Court fails to demonstrate that Shell's articulated reason for selecting Hunt over Shater is false or unworthy of credence.

i. Shell selected Hunt over Shater for the RSM – Americas position through a legitimate and non-discriminatory interview process.

Shater contends that Shell preselected Hunt for the RSM – Americas position and, to conceal its alleged preselection and manipulation of the interview process, Shell: (1) included Spanish as a preferred qualifications for the RSM – Americas role, which region included Central/South/Latin America; (2) added direct reports to Hunt to make him appear more qualified for the role; and (3) attempted to convince Shater to accept another role within Shell to avoid a discrimination claim.[11] Shater's contentions are based only on speculation and conjecture.

As an initial matter, Shater does not identify any direct evidence that Shell pre-selected Hunt for the RSM – Americas position. That is because he can't. The evidence

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[10]ECF No. 21-2 ["Shater Depo."] 90:19–91:7.
[11]Plf.'s Resp. 24.

before the Court establishes that Shell selected Hunt over Shater through a three-person interview panel in February 2017, where the panel asked each candidate the same questions, carefully considered each candidate's prior experiences and interview answers and, after discussing each candidate's strengths and weaknesses, unanimously decided that Hunt was a better fit for the role.[12] Shater has not and cannot demonstrate that Shell's description of its legitimate and nondiscriminatory interview process is false or unworthy of credence.

Shater's contention that Shell purportedly manipulated the interview process is also unsupported by evidence. As it relates to Shell including Spanish as a preferred qualification for the RSM – Americas role, the uncontroverted evidence before the Court establishes that Hall encouraged the predecessor in the RSM – Americas role to learn Spanish "because of [Shell's] more recent growth and the risk associated from a security perspective in the Central and South Americas region. For these reasons, the language was also listed as a preferred skill on the RSM – Americas job description."[13] Setting speculation and conjecture aside, Shater cannot demonstrate that Hall's explanation for including Spanish as a preferred qualification is false or unworthy of credence.

As it relates to Shell assigning direct reports to Hunt, in 2016, Shell's Physical Access Control System ("PACS") program was closing, which required Shell to deliberate about key positions that were then included in the PACS program and positions that needed to be transferred to Corporate Security (given the closure of PACS) and maintained thereafter.[14] Because Hunt worked closely with the PACS program and

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[12] Hall Decl. ⁋⁋ 15–21; Blakely Decl. ⁋⁋ 5–9.
[13] Hall Decl. ⁋ 17.
[14] Def.'s Objections and Answers to Plf.'s First Set of Interrogatories, Ex. A hereto, Answer 6.

understood the needed positions, Hunt received three direct reports from that program in January 2017.[15] Again, Shater cannot demonstrate that Shell's explanation for assigning direct reports to Hunt is false or unworthy of credence.

As it relates to Shell allegedly attempting to convince Shater to accept another role, there is no evidence that Hall or any other member of the interview panel attempted to persuade Shater to take another position within Shell at any point, let alone after Shater interviewed for the RSM – Americas role. To the contrary, based on the evidence before the Court, it was *Shater* who first expressed an interest in roles other than the RSM – Americas position, and it was Shater's manager, Bob Buss, who followed up with Shater in March 2017 when those roles were posted as vacant within Shell.[16] Shater's attempt at vilifying Buss's interest in Shater's career progression is unsupported by the record and fails to demonstrate pretext or establish discrimination by any member of the interview panel.

Because Shater's groundless contentions concerning Shell's alleged preselection of Hunt and manipulation of the interview process are based only on his own self-serving speculation, they fail to establish a material fact issue for the jury. *See, e.g.*, *Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003) ("Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment.").

[15] *Id.*
[16] ECF No. 21-6 ["Shater Depo"] 150:7–153:3.

ii. Shell's "story" concerning its selection of Hunt over Shater for the RSM – Americas role has remained consistent.

Shater attempts to establish pretext by contending that Shell "changed its story" about why it selected Hunt over Shater for the RSM – Americas role, citing a conversation Shater had with Hall in May 2017.[17] According to Shater's sworn recollection of that conversation, when "[Shater] asked why [he] was not selected[,] Mr. Hall said that the other candidate answered a question about leadership better than [he] did (which [he] dispute[s])."[18] Hall's response, as recited by Shater's sworn recollection of the conversation, is consistent with Hall's testimony about the interview and selection process.[19] The same is true for Blakely's testimony about the interview and selection process[20] and Maynor's testimony about the interview and selection process.[21] It is also consistent with the "story" Shell articulated both in its position statement to the EEOC and in its pleadings before this Court.[22] Stated another way, Shell's "story" and the evidence before the Court concerning Shell's selection of Hunt over Shater consistently demonstrate that the interview panel believed Hunt was generally a better candidate for the RSM – Americas role. Shater's contention thus fails to establish pretext. *See, e.g.*, *Riney v. Lockheed Martin Corp.*, 831 Fed. App'x. 698, 702 (5th Cir. 2020) (affirming summary judgment and rejecting the plaintiff's contentions that the employer's explanations for not selecting the plaintiff to a vacant position were inconsistent where, like here, "[the employer]'s witnesses' testimony regarding [the employer]'s hiring

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[17]Plf.'s Resp. 25.
[18]ECF No. 22-1 ["Shater's Sworn Charge of Discrimination"] at 5.
[19]Hall Decl. ¶¶ 15 – 21.
[20]Blakely Decl. ¶¶ 5–9.
[21]Maynor Depo. 11:17–19
[22]ECF No. 22-8 ["Shell's Position Statement to the EEOC"]; ECF No. 21.

decision consistently shows that the hiring committee believed [the successful candidate] was generally a better candidate for the job").

iii. The "big picture" and "statistics" on which Shater rely provide the Court with no basis for determining that Shell's articulated reason for not selecting Shater is pretext for discrimination.

Apparently recognizing the lack of credible evidence supporting his failure-to-promote claim, Shater invites the Court to shift its focus from the promotion in question to the "big picture" (*i.e.*, two unrelated lawsuits filed against Shell) and to statistics (*i.e.*, the demographics of Shell's Corporate Security group). Neither the "big picture" nor the "statistics" advanced by Shater create a genuine issue of material fact for the jury to decide concerning Shell's selection of Hunt over Shater for the RSM – Americas position.

a. The "big picture" fails to establish pretext.

Shater highlights two unrelated lawsuits filed against Shell, contending that they somehow underscore his allegations of discrimination.[23] Although these lawsuits involved Shell's Corporate Security group, importantly, they were filed by two different individuals, they concerned claims that are different than the claims asserted here, and they concerned circumstances that are different than the circumstances before this Court. These lawsuits therefore have no legal bearing on whether the Shell interview panel consisting of Hall, Blakely, and Maynor failed to promote Shater to the RSM – Americas position because of his race or national origin.

Notwithstanding, Shater contends that "the Fifth Circuit encourage[s] courts to focus on the 'big picture' in determining whether there is sufficient evidence of pretext to send a case to a jury,"[24] citing *Donaldson v. CDB Inc.*, 335 Fed. App'x. 494, 504 (5th Cir.

[23] Plf.'s Resp. at 28.
[24] Plf.'s Resp. 28.

2009) and *Starnes v. Wallace,* 849 F.3d 627, 635 (5th Cir. 2017). Both *Donaldson* and *Starnes* are favorable to Shell, not Shater, since neither case encourages courts to consider unrelated lawsuits involving different plaintiffs and different claims in determining whether discrimination occurred in the case before the court. Also, in stark contrast to Shater's contention, both cases encourage courts to focus on the "big picture" constructed by evidence that is actually before the courts. *See, e.g.*, *Donaldson*, 335 Fed. App'x. at 504–05; *Starnes*, 849 F.3d at 635. Here, the evidence that is actually before this Court constructs an all-too-common "big picture" by an individual who filed suit because he is frustrated by his failure to secure a promotion through a fair and legitimate interview process, not because of his race or national origin.

b. The "statistical evidence" similarly fails to establish pretext.

Shater contends that the "statistics" he advances—*i.e.*, his allegations concerning the demographics of Shell's Corporate Security group—allegedly show an "overwhelming preference for white British persons in the Corporate Security Department."[25] As an initial matter, in disparate treatment cases like the instant case, "statistical evidence usually cannot rebut the employer's articulated nondiscriminatory reasons." *See E.E.O.C. v. Tex. Instruments Inc.*, 100 F.3d 1173, 1180–81 (5th Cir. 1996); *see also Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 356 (5th Cir. 2001) ("[W]hile the Fifth Circuit has not definitively ruled out the use of the Teamsters method of proof in a private, individual racial discrimination suit, this Court's precedents seem to support such an exclusion."). And while some district courts within the Fifth Circuit have considered statistical evidence in disparate treatment cases predominantly concerning reductions-

[25]*Id.* 29.

in-force (often only to find that such evidence fails to establish pretext), Shater fails to identify a single failure-to-promote case in which a court considered the demographics of a department to determine whether the company discriminated against a single applicant in filling a single role within that department. Simply, Shater has not demonstrated that considering statistical evidence is appropriate in this/his failure-to-promote case that concerns one open position, two final candidates, and a single decision to select one of those candidates into the sole open position. *See, e.g.*, *Ford v. Marion Cty. Sheriff's Office*, 942 F.3d 839, 858 (7th Cir. 2019) (alleging "an 'ongoing history of discrimination'" is "not enough to impugn a particular employment decision").

But even if considering statistical evidence were somehow generally appropriate in some failure-to-promote cases, considering statistical evidence here would still be inappropriate because the group of seventeen individuals that were promoted to Job-Group 1 and Job Group 2 positions from 2012 to 2017 identified by Shater is too limited of a sample size for this Court to infer discrimination. *See, e.g.*, *Harrison v. Chipolbrok Am., Inc.*, 4:17-CV-1951, 2019 WL 1755530, at *10 (S.D. Tex. Apr. 19, 2019) (Hanen, J.) (rejecting statistical evidence in an age discrimination case stemming from a reduction-in-force where a pool of seventeen employees did "not provide a large enough sample size for the Court to infer discrimination on the basis of raw numbers or statistics alone"). The statistical evidence advanced by Shater therefore fails to establish pretext.

III.
CONCLUSION

Because there are no genuine issues of material fact for the jury to consider, Shell respectfully requests that the Court grant its Motion for Summary Judgment on all of Shater's claims and further requests all other relief to which it is entitled.

Dated: December 30, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on the following parties via e-filing in compliance with the requirements of the Federal Rules of Civil Procedure on December 30, 2021:

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