No. 22-20289

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WALIED SHATER,

Plaintiff – Appellant

v.

SHELL OIL COMPANY,

Defendant – Appellee

On Appeal from the United States District Court for the Southern District of Texas, Houston Division, No. 4:20-CV-1465

REPLY BRIEF OF APPELLANT WALIED SHATER

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SHATER'S REPLY ARGUMENTS

A. Shell Wrongly Asserts That "Shater's Case Theory Centers Around His Allegation That He Is "Clearly Better Qualified" For The RSM – Americas Role Than Hunt" – In Fact, It Is Based On Substantial Evidence Of Preselection, Pretext, And James Hall's Repeated Lies In March 2017

Experienced employment lawyers know that the "clearly better qualified" standard for promotion claims is so demanding that it is usually a losing theory. Thus, it would serve Shell if this Court believed that Shater centered his claim on that theory. That is what Shell represented (Shell's Brief at 17). But Shell is wrong.

Shater's case is centered primarily on his assertion that there is substantial evidence that James Hall ("Hall") preselected Wayne Hunt ("Hunt") for the RSM – Americas job and, therefore, Shell's articulated reason for rejecting Shater for the position – that it in good faith followed its standard policies and practices, which led Hall to ultimately conclude that Hunt was better qualified – is false and unworthy of credence (Shater's Brief at 28-30). *See Gosby v. Apache Indus. Servs., Inc*., 30 F.4th 523, 528 (5th Cir. 2022) (reversing summary judgment because the plaintiff presented evidence that the employer's given reason was false or unworthy of credence). This is not new: Shater premised his case primarily on this theory from the start (Docket Entry No. 1; ROA.13-23, 40-42).

Still arguing the "clearly better qualified" argument that Shater did not primarily premise his case on, Shell noted that after Shater's rejection for the RSM

– Americas position, he wrote a *pro se* letter complaining to the Texas Workforce Commission and stated that he was "at least equally qualified for the position . . . ." (Shell's Brief at 18) (citing ROA.472). Shell suggests that this shows that Shater himself did not believe he was "clearly better qualified" than Hunt (*Id*.). This is triply unpersuasive. First, Shell neglected to mention that the reason Shater used this specific language is because he was under the mistaken belief at the time that U.S. law required Shell to give a U.S. citizen (like himself) the job over a non-U.S. citizen (like Hunt) if the two were at least equally qualified – therefore, there was no reason to address who was better qualified in the letter (Shater Dep. at 168-69; ROA.934-35). Second, Shater saying that he was "at least" equally qualified is not linguistically or logically inconsistent with saying he is clearly better qualified. Third, while Shater was, in fact, clearly better qualified than Hunt – who had never lived or been employed in America before and could not even get a U.S. security clearance – Shater's main argument in this case is, as noted above, that Shell's given reason for rejecting him for the job is false and unworthy of credence. Shater's letter has no bearing on that argument.

Shell also repeatedly asserts that Shater's claim is based only on "speculation and conjecture." Shell is wrong again. Shater's case is based on specific evidence of preselection and pretext that he cited to in his Brief, and reasonable inferences from that evidence. As explained below, Shell failed to rebut Shater's compelling

evidence-based arguments of preselection and pretext that amply support a finding that Shell's given reason for rejecting him for the RSM – Americas position is false and unworthy of credence and mandate the reversal of summary judgment in this case.

Finally, Shater's appeal is also predicated on critical evidence that the District Court completely overlooked: Hall's admitted repeated lies in March 2017 about not having decided about who to hire for the RSM – Americas position, when in truth he had already decided by then to give the job to Hunt (Shater's Brief at 13-14). As explained below in Section B.4, based on Fifth Circuit case law, Hall's repeated lies in this regard also compel reversal of summary judgment in this case.

B. Shell Failed To Rebut Shater's Most Compelling Arguments And Evidence Of Preselection And Pretext

1. Hall's Secret Insertion Of The Unprecedented Spanish/Portuguese Language Preference Remains Strong Evidence Of Preselection And Pretext

Shater's Brief established with citations to specific evidence:

- The highly suspicious timing of Hall's secret change to the RSM – Americas job description to add for the first time ever a "Spanish and/or Portuguese" language preference – after he had fired Oaks, and before he'd hired Hunt, who he knew spoke Spanish.

- That no such language preference was ever in any other RSM job description around the world.

- That other RSMs (including Shater's boss, Robert Buss ("Buss")) cover localities around the world for which they do not speak the local language.

- That the most senior executive vice president for all Shell Americas did not speak Spanish, and he regularly met with South American government officials.

- That Shell's own HR Manager, Andrew Maynor ("Maynor"), testified that Shater's Spanish fluency did not make him a better candidate for the job.

- That the predecessor in the role that Shell treats like the *Invisible Man* in its briefing, Crockett Oaks ("Oaks"), and the person who held the RSM – Americas position before Oaks, did not speak Spanish.

- That English is Shell's official business language.

- That according to its own annual reports, Shell has nearly twenty times more employees in North America than South America. Specifically, Shell has approximately 18,000 employees in North America and only approximately 1,000 in South America.

- That Hall concealed his tellingly timed alteration to the job description from both Maynor and Barbara Blakely ("Blakely").

(Shater's Brief at 6-9 and n.1, 33-34, 42-43 and record citations therein).

Shell does not dispute any of this evidence. Nor does Shell dispute its legal relevance to the pretext analysis. Shell's only response to this evidence is to assert that "[t]he uncontroverted evidence 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 America region.'" (Shell's Brief at 21-22) (bold added). This vague, unproven, and conclusory assertion is contradicted by the record evidence and is otherwise

unconvincing. Shell claimed to have based this response on paragraph 17 of Hall's Declaration (*Id*. at 22). But paragraph 17 of Hall's Declaration claims in conclusory fashion that "**Shell**" – not Hall himself – encouraged Oaks to learn Spanish (Hall Decl. at ¶ 17; ROA.387). Accordingly, Shell's assertion in its Brief is not supported by the record evidence it cited to. Moreover, it is additionally unconvincing because:

- In his Declaration, Hall never says who specifically from "Shell" supposedly encouraged Oaks to learn Spanish, or when that supposedly happened. Such a conclusory declaration is entitled to no weight. *See Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992) (citing *Broadway v. City of Montgomery*, 560 F.2d 657, 660 (5th Cir. 1976)) ("conclusory assertions cannot be used in an affidavit on summary judgment").

- In his Declaration, Hall never says how he supposedly knows, *i.e*, has the requisite personal knowledge, that the unidentified person(s) from "Shell" encouraged Oaks to learn Spanish. A declaration not shown to be on personal knowledge also carries no weight. *See Williamson v. U.S. Dep't of Agric.*, 815 F.2d 368, 383 (5th Cir. 1987).

- Hall never explains what is so unique about Central and South America, as opposed to other parts of the world, that motivated him to include a language preference for the RSM – Americas job when he did, but not for RSM roles covering any other parts of the world, including high-risk countries in the Middle East and Africa such as the RSM – MENA role that Shater's boss, Buss held.

- Hall and Shell presented no independent evidence – an email, text message, memo, etc. – showing that "Shell" ever encouraged Oaks to learn Spanish. As such, this reeks of fabrication by Hall to try to wiggle out of yet another bad spot that he put himself in because of his illegal employment decisions – much like the false story he admittedly manufactured and then tried to get Oaks to jointly pitch with him to potential employers about Oaks's father having a stroke being the real reason he left Shell, after Hall had fired Oaks and was trying to

convince him to sign a release and waiver agreement that would have barred him from suing Shell. *See* Shater's Brief at 14-15.

The bottom line remains the same: Hall knew Hunt spoke Spanish and Shater did not, and after firing Oaks, Hall secretly changed the existing job description to insert an entirely unprecedented and pretextual preference for "[c]onversational Spanish and/or Portuguese speaking candidates." From this, and the remaining relevant record evidence, a reasonable jury could conclude that after firing Oaks, Hall preselected Hunt to replace Oaks, altered the job description to favor Hunt's selection, and then lied about it. That is sufficient to reverse the District Court's grant of summary judgment and send this case to a jury. *See, e.g., Rollerson v. Brazos River Harbor Navigation Dist*., 6 F.4th 633, 640 (5th Cir. 2021) (discrimination may be found where the evidence "suggests the decision-makers were willing to deviate from established procedures in order to accomplish a discriminatory goal."); *Gosby*, 30 F.4th at 528 (reversing summary judgment in a discrimination case where plaintiff presented evidence that the employer's given reason for termination was false or unworthy of credence).[1]

[1] That Hunt was preselected was recognized in real time by other employees in the Corporate Security Department. Indeed, Hall himself admitted that his department was rife with what he called "rumors" that he had preselected Hunt (Hall Decl. at ¶ 24; ROA.389). To quash those "rumors," Hall sent a note to his entire department on March 23, 2017, assuring them that he had not decided who to select for the position (Shell's Original Answer, Doc. No. 7 at ¶ 35; ROA.307; Shell's Statement of Position at pp. 11, 16-17; ROA.831, 836-37; Email from Shater to Lattin of 05/04/2017; ROA.964-65; RE Tab 8). But that was a lie: Hall had already made the decision to select Hunt before he sent that note (Maynor Dep. No. 2 at 15-16; ROA.945). *See also* Section B.4.

2. Shell Offers No Rebuttal To The Evidence Shater Presented That Shortly After The RSM – Americas Job Was Posted, Hall Sent Hunt To The United States To Meet The Corporate Security Team There That He Would Be Leading In The RSM – Americas Role, Which Is Further Evidence Of Preselection And Pretext

Shater's Brief established with citations to specific evidence that on January 30, 2017, and only after Oaks had been fired, Hunt's name was added to the invitation list to the Shell North Americas Corporate Security Workshop meeting to occur in February 2017 (Shater Sworn COD at 3; ROA.522; Email from Shater to Lattin of 05/04/17; ROA.964-65; RE Tab 8). Hunt accepted the invitation and attended the meeting in Houston in February 2017 (Shater Sworn COD at 3; ROA.522; Shell's Original Answer, Doc. No. 7 at ¶ 28; ROA.306; Hunt Dep. at 30-32; ROA.975). A reasonable jury could find that this evidence suggests that Hall had preselected Hunt to replace Oaks and wanted him to meet the Americas Security team that he would be supervising (Shater Sworn COD at 3-4; ROA.522-23; Email from Shater to Lattin of 05/04/17; ROA.964-65; RE Tab 8). A reasonable jury could also conclude that Hall had hoped the Oaks matter would be settled by the time of this meeting in Houston, and that Hunt could be announced as his replacement at the meeting (Email from Shater to Lattin of 05/04/17; ROA.964-65; RE Tab 8). This makes a lot of sense because, at the time, Hall expected Oaks's replacement to be in the role by March 1, 2017 (ROA.406, 568; RE Tab 5).

Shell did not dispute this evidence (Shell's Brief at 22-23). Instead, Shell claimed it is irrelevant because it is not "direct evidence that Shell preselected Hunt for the RSM – Americas role." (*Id*. at 22). But Shater need not present "direct evidence" – circumstantial will do. *See, e.g. Watkins v. Tregre*, 997 F.3d 275, 285 (5th Cir. 2021) (relying in part on "suspicious sequence of events" in finding sufficient circumstantial evidence of pretext to defeat summary judgment).

This evidence is one piece of a circumstantial puzzle that, when all (or even just some) of the biggest pieces are put together, presents a clear and compelling case that would permit a reasonable jury to conclude that Hall preselected Hunt for the RSM – Americas position from the start because there was no way he wanted another American minority in the role after what had just taken place with Oaks. *See* Shater's Brief at 1-26. *See, e.g., Lindsey v. Bio-Medical Applications of La.*, 9 F.4th 317, 326-27 (5th Cir. 2021) (reversing summary judgment in an employment case based on evidence of pretext); *Watkins*, 997 F.3d at 285 (same).

3. Shell's Unverified Interrogatory Answer Is Not Admissible Evidence That Rebuts Shater's Allegations About Hunt Suspiciously Being Giving Three New Direct Reports In January 2017, And Thus That Evidence Remains Strong Additional Proof Of Preselection And Pretext

Shater's Brief established with citations to specific evidence that to make Hunt appear more qualified for the RSM – Americas job than he really was, Hall was suspiciously involved in giving Hunt three new direct reports on January 1, 2017

– shortly after Hall had fired Oaks (Shater's Brief at 10). Shell does not dispute that happened. Rather, Shell argues that there was a legitimate basis for it (Shell's Brief at 23). But, to try to prove this, Shell relies solely on an unverified interrogatory response it provided to Shater's counsel in discovery (Shell's Brief at 23 (citing Shell Unverified Interrog. Answers, ROA.1032). Interrogatory responses may constitute competent summary judgment evidence if they satisfy the other requirements of Rule 56. *See* 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2722 at 51–52 (1983). Verified or sworn pleadings are competent summary judgment evidence, but unverified answers to interrogatories are not. *See Fowler v. S. Bell Tel. & Tel. Co*., 343 F.2d 150, 154 (5th Cir. 1965); *Tesco Corp. v. Weatherford Int'l, Inc.*, 904 F. Supp. 2d 622, 636 (S.D. Tex. 2012) ("Verified or sworn pleadings are competent summary judgment evidence; unverified answers to interrogatories and interrogatories not based on personal knowledge are not."); *Brady v. Blue Cross and Blue Shield of Tex., Inc.*, 767 F. Supp. 131, 135 (N.D. Tex. 1991) (unsworn, unverified interrogatory answers are not competent summary judgment evidence). Because Shell relies only on its own inadmissible unverified interrogatory response, it failed to refute Shater's evidence-based argument that Hall was suspiciously involved in giving Hunt three new direct reports on January 1, 2017 – shortly after Hall had fired Oaks (Shater's Brief at 10).

4. Hall's Repeated Lies In March 2017 About Not Having Made A Decision About Who To Promote Into The RSM – Americas Position Are Strong Evidence Of Preselection And Pretext That Mandate Reversal Of The Summary Judgment Based On Fifth Circuit Case Law

Shater's Brief established with citations to specific evidence that Hall lied in writing to Shater, Blakely, and the entire Corporate Security Department in March 2017 about not yet having decided who to select for the RSM – Americas job, when in truth he had already selected Hunt in February 2017 (Shater's Brief at 13-14 and RE Tabs 7, 8, and 11; Maynor Dep. No. 2 at 15-16; ROA.945). Shell's Brief does not dispute that Hall repeatedly lied about that material – indeed central – issue. Rather, Shell points out that in Hall's Declaration – some four years and nine months after the fact – Hall finally ultimately effectively conceded that he lied repeatedly in March 2017 about not having decided yet and vaguely explained in conclusory fashion that he did so "because of ongoing issues with the predecessor in the position" *i.e.*, Oaks, over which he allegedly had no control (Hall Decl. at ¶ 23; ROA.389). Shell argues that Shater cannot rebut Hall's vague and conclusory explanation for having repeatedly lied (Shell's Brief at 25). There are three fundamental problems with Shell's confused and confusing argument – all of which further vividly demonstrate why this is not a summary judgment case.

First, the reason why Hall repeatedly lied about not having decided who to select for the RSM – Americas position yet – even though he had already decided

on Hunt – is not the point. The point is that, in a case that turns on whether Hall was truthful about when he decided to select Hunt for that job, the fact that he repeatedly lied – in writing – about that very issue to Shater, Blakely, and his entire department, is compelling evidence of pretext that is sufficient by itself to defeat summary judgment (RE Tabs 7, 8, and 11; Maynor Dep. No. 2 at 15-16; ROA.945). *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (discussing in a discrimination case the "general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'") (quoting *Wright v. West*, 505 U.S. 277, 296 (1992)). The District Court's failure to acknowledge, address, or analyze the evidence of Hall's undisputed material lies is thus reversible error.

Second, in any event, the ill-articulated reason Hall ultimately offered nearly five years after the fact for why he lied validates and vindicates Shater's argument that the facts concerning Oaks are relevant to his case. This is so because – although he was purposefully vague about it – Hall effectively admitted that he and Shell strategically delayed telling Shater he did not get the RSM – Americas job to replace Oaks for months – and repeatedly lied about it in the meantime in March 2017 – so that Shell could first settle Oaks's pending EEOC Charge and lawsuit in April 2017 (Hall Decl. at ¶ 23; ROA.389; Joint Motion and Order in Oaks's Case; ROA.650). As such, Shell's own actions in this regard show that – contrary to what Shell has

relentlessly argued, and the District Court erroneously held – Oaks's lawsuit was not "unrelated" to Shater's case (Shater's Brief at 4-5, 16, 46-47). *Cf. Edwards v. Oklahoma ex rel. Bureau of Narcotics and Dangerous Drugs Control*, 233 F. Supp.3d 1228, 1233-34 (W.D. Okla. 2017) (denying employer's motion for summary judgment in a Title VII failure to promote discrimination case in part because of evidence of preselection, suspicious procedural practices, and the fact that another discrimination case was pending against the employer at the time the plaintiff was rejected for the at-issue position).

Third, that Hall's credibility was seriously damaged, and frankly far more than called into legitimate question, is yet another key reason why summary judgment was not proper. As the Fifth Circuit has observed, summary judgment is inappropriate when a nonmovant adequately calls a key witness' credibility into question. *See Thomas v. Great Atl. & Pac. Tea Co*., 233 F.3d 326, 331 (5th Cir. 2000); *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 81 (5th Cir. 1987). This is especially true when, as is the case here, the witness' testimony constitutes the bulk of the moving party's evidence on an issue. *See Lodge Hall Music, Inc*., 831 F.2d at 81. Based on this Fifth Circuit authority, Hall's material admitted lies in this case as reflected in Record Excerpt Tabs 7, 8, and 11 mandate the reversal of summary judgment.

5. Shell Fails To Rebut Shater's Argument And Evidence That During March 2017 Shater's Boss Relentlessly Pestered Shater To Take A Different Job In The Company – Which Is Yet More Evidence That Supports A Finding Of Preselection And Pretext

Shater's Brief established with citations to specific evidence that in March 2017, while Shater was awaiting a decision on whether he would be awarded the RSM – Americas position – unaware Hall had already made the decision because Hall had lied about that to him (RE Tab 7) – his supervisor, Buss, contacted him about a possible position within the Business Integrity Division ("BID") (Shater Sworn COD at 8; ROA.527; Shell's Responses to Shater's First RFAs at No. 37; ROA.880). Shater told him he was not interested (Shater Sworn COD at 8; ROA.527). Despite this, Buss approached him four or five more times and told him that he and Hall had a conference call with the head of BID to discuss Shater's qualifications, and that she was interested in him (Shater Sworn COD at 8; ROA.527; Shater Dep. at 167-68; ROA.934). It was highly unusual for Buss to have hounded Shater so relentlessly for a job that Shater said from the start he was not interested in (Shater Dep. at 148-49, 167-68; ROA.929-30, 934). *See Watkins v. Tregre*, 997 F.3d at 285 relying in part on "suspicious sequence of events" in finding sufficient circumstantial evidence of pretext to defeat summary judgment).

A jury could easily reasonably conclude that Hall asked Buss to do this because he wanted Shater to accept another job so that Shater would not be in a position to complain when he announced Hunt's selection to replace Oaks. This

conclusion is especially logical because, although Hall lied about it, it is now a known and undisputed fact that by March 2017 – the same time Shater was being hounded to take the BID job – Hall had already decided to select Hunt. *See* Shater's Brief at § III.E.6. Not surprisingly, no one encouraged Hunt to apply for another job during this same time (Hunt Dep. at 49; ROA.979). Why would they? Despite Hall's lies to the contrary, Hunt already had the RSM – Americas job in the bag by this time. *See* Shater's Brief at § III.E.6.

Shell's only response to this evidence is to dispute that it exists (Shell's Brief at 25). The Court can read Shater's record citations and decide that for itself. But here is an excerpt from Shater's deposition that shows that Shater is on the right side of that issue:

> Q: Okay. Now, this situation that you and Ms. Johnson talked about where between the time you interviewed for the RSM Americas job and then the time that you were told that you had been rejected, I think it's fair to summarize without being accused of leading that you testified that Bob Buss came to you multiple times and tried to convince you to apply for this business integrity department position, correct?
>
> Ms. Johnson: Objection to the characterization.
>
> A: That's correct.
>
> Q; Okay. Now, prior to your applying for the RSM Americas role, was that something that had happened, you know, lots of times before so this wouldn't have been really unusual or not?
>
> Ms. Johnson: Objection, leading.
>
> A: Never happened.

Q: Okay. So I mean, is that one of the reasons also you found it odd?

Ms. Johnson: Objection, leading.

A: Extremely. I felt like he was trying to ram the position down my throat, although I've never indicated that I was interested in it.

(Shater Dep. at 167-68; ROA.934). *See also* Shater Sworn COD at 8; ROA.527 (setting out same evidence in greater detail); Shell's Responses to Shater's First RFAs at No. 37; ROA.880) (admitting that Buss contacted Shater about a possible position within BID in March 2017).

6. Despite Shell's Attempts To Deflect Attention From Hall, The Fact Remains That Hall Alone Manipulated The Job Description And Vetting Process, And Made The Decision To Select Hunt Over Shater For The RSM – Americas Job

In its Brief, as when it responded to Shater's EEOC Charge, Shell tries to portray the decision to vet the candidates and select Hunt as one in which Maynor and Blakely were as involved as Hall from start to finish. The record evidence shows that is simply not true:

- Maynor did not agree that Hall was the better fit for the role (Maynor Dep. No. 2 at 11-12; ROA.944). He just deferred to Hall, like everyone else at Shell. *See infra*.

- Hall secretly played Maynor: Maynor was not even aware that Hall had just altered the job description to add the unprecedented and unheard of "Spanish and/or Portuguese" language preference (Maynor Dep. No. 2 at 33-34; ROA.949-50). Maynor did not learn about that until Shater's counsel deposed him in November 2021 and showed Maynor that evidence.

- Hall also secretly deceived Blakely, who he personally selected for the interview team (Blakely Decl. at ¶ 3; ROA.445) and used as yet another of his pawns: when Hall sent her the RSM – Americas job description just two to three days before the interviews of Shater and Hunt, he sent her the old job description without the preference for a Spanish and/or Portuguese speaking candidate, not his secretly altered version (Email from Hall to Blakely and Smits of 02/06/2017 with attached prior RSM – Americas job description; ROA.691-694; RE Tab 10; Maynor Dep. No. 2 at 30-32; ROA.949).

- Blakely was out of the loop on Hall's vetting process and ultimate decision, as reflected by her email exchanges with Hall on February 6, 2017 (ROA.691-694; RE Tab 10) and March 2017 ROA.725; RE Tab 11).

- Hall had no qualms about lying to Blakely. In the email exchange on March 20, 2017, Blakely asked Hall if he had made a decision yet about who to select for the RSM – Americas role and Hall replied on March 23, 2017, that he had not (ROA.725; RE Tab 11). In fact, he had (Maynor Dep. No. 2 at 15-16; ROA.945).

- In short, her own emails reflect that Blakely was effectively a bystander to the vetting and selection decision (RE Tabs 10 and 11). It was Hall alone who controlled and manipulated the process and decision, from start to finish.

During discovery, Shell tried a similar strategy to deflect and protect Hall and failed again. Specifically, Shell asserted in an unverified interrogatory response that Maynor was also involved in setting the job requirements for the altered RSM – Americas position (Shell Rog. Answer No. 1; ROA.1031). If that had been true, that could have thrown a kink in Shater's case theory. But that was false. As Maynor testified under oath at his deposition, it was Hall alone who altered the job description to add the language preference (Maynor Dep. at 32; ROA.949).

Shell's repeated factually inaccurate representations designed to deceptively make Maynor and Blakely appear equally involved as Hall – and therefore deflect attention from Hall – are more evidence of preselection, pretext, and discrimination. *See Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 239-40 (5th Cir. 2015) (reversing summary judgment that had been granted for the employer and holding that a jury may view "erroneous statements in [an] EEOC position statement" as "circumstantial evidence of discrimination.").

C. Shell Did Not Meaningfully Even Try To Rebut Substantial Other Evidence Shater Presented Of Preselection, Pretext, And Race And National Origin Discrimination

Shater presented substantial evidence of preselection, pretext, and discrimination that Shell never meaningfully addressed in its Brief. First, Shell never addressed the evidence that after Hunt interviewed for the RSM – Americas job, but before Hall announced he was selected for it in May 2017, in his Individual Development Plan ("IDP"), Hunt himself identified his next job at Shell as the RSM – Americas job (Hunt Dep. at 19-20; ROA.972). Hunt claimed in his deposition that he was merely expressing that he aspired to the RSM – Americas job, but on this record a reasonable jury could view this evidence as proof that Hunt knew he already had the job in the bag because he had been preselected by Hall. Shell did not argue otherwise in its Brief.

Second, Shater presented evidence that Buss told him that he was the most qualified for the RSM – Americas position and that numerous other employees who worked in the Corporate Security Department told him that Hunt was favored for the job over him specifically because of his British national origin (Shater's Brief at 20-21, 39). Shell's Brief never mentions this evidence. But it is probative of discrimination. *See, e.g.*, *Haun v. Ideal Industries Inc.*, 81 F.3d 541, 548 (5th Cir. 1996) (affirming the district court's decision to allow lay testimony in a discrimination case that the employer was "phasing out older workers."); *see also Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 224 (5th Cir. 2000) (affirming verdict for plaintiff in a discrimination case and relying on testimony from the plaintiff's former subordinates that, "Russell did an "excellent" job of keeping the facility in federal compliance.").

Third, Shater presented evidence that: (1) under Hall's leadership, the senior level positions within the Corporate Security Department were overwhelmingly awarded to white Brits; and (2) that Shater had been passed over for promotions numerous times in favor of clearly less qualified white Brits (Shater's Brief at 3-4, 21-24). Shell's Brief never mentions this evidence. But it provides important context. As the Fifth Circuit has stated: "[j]ust as '[a] play cannot be understood on the basis of some of its scenes but only on its entire performance, . . . similarly, a discrimination analysis must concentrate not on individual incidents, but on the

overall scenario.'" *Donaldson v. CDB Inc.*, 335 Fed. Appx. 494, 503 (5th Cir. 2009) (citations omitted).

Based on the full record evidence in this case, *i.e.*, the overall scenario, a reasonable jury could conclude that: (1) Hall generally favors white Brits and is more comfortable with them in leadership positions; and (2) after Oaks, an American minority, had just embarrassed and admittedly "upset" him, he purposefully manipulated the process so he could replace Oaks with a fellow white Brit, Hunt, who he felt comfortable with, rather than another American minority like Shater. In other words, this evidence makes it even more reasonable for a jury to conclude that in this specific case Hall's actions were motivated by race and national origin. That this conclusion is a reasonable one explains why Shell has taken an ostrich-like approach to this evidence and anything to do with Oaks. But, contrary to Shell's legally unsupported position, evidence concerning Oaks may be considered as part of the analysis of Shater's case. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 380 (2008) (refusing to issue a *per se* rule on the admissibility of evidence of discrimination against other employees in employment cases because "[r]elevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case."); *Parker v. Tyson Foods, Inc*., 499 F. Supp. 3d 297, 301-02 (S.D. Miss. 2020) (denying employer's motion to exclude "me too" evidence and noting that under U.S. Supreme Court authority there is no

per se prohibition against admitting such evidence); *Edwards*, 233 F. Supp.3d at 1233-34 (denying employer's motion for summary judgment in a Title VII failure to promote discrimination case in part because another discrimination claim was pending against the employer at the time the plaintiff was rejected for the at-issue position); *cf. Starnes v. Wallace*, 849 F.3d 627, 634 (5th Cir. 2017) (encouraging courts to focus on the evidentiary "big picture" in performing pretext analysis).

Fourth, Shater presented evidence that on May 1, 2017, when Hall called Shater and told him that he was second for the RSM – Americas role, and that another candidate was selected, Shater told Hall that if he went through all the listed competencies for the job from the job description, he is objectively qualified for them, and Hunt – who Shater suspected he had selected for the job – is not (Shater Sworn COD at 5; ROA.524). Shater presented evidence that at that point Hall replied that "sometimes we can't go by competencies." (Shater Sworn COD at 5; ROA.524; Shater Dep. at 155; ROA.931). Shater's Brief sets out why, on this record, a reasonable jury could find that Hall's reply is consistent with a finding that Hall had preselected Hunt and that he had done so not based on a good faith analysis of who had superior competencies for the role – as Shell now claims – but rather on the fact that Hall and Hunt shared the same race and national origin (Shater's Brief at 38-41). In other words, this is yet another piece of evidence that demonstrates that there is a material issue of fact for the jury to decide in this case.

Fifth, Shater presented evidence that his complaint to Shell's HR Department in May 2017 over his rejection for the RSM – Americas position was purposefully swept under the rug by Sonja Gonzales in order to protect Hall (Shater's Brief at 25). In his Brief, Shater cited to specific evidence that Gonzales has a proven history of working to cover up Hall's discrimination – even going so far as to submit a facially dishonest sworn interrogatory answer in another federal court case to try to protect Hall (Shater's Brief at 25-26). Shell's Brief says nothing about this evidence. A reasonable jury could conclude that Gonzalez buried Shater's HR complaint to protect Hall yet again from the consequences of his unlawful discrimination. *Cf. Ion v. Chevron*, 731 F.3d 379, 395 (5th Cir. 2013) (reversing summary judgment for employer in a retaliation case where the employer's investigation was so one-sided that a reasonable jury could conclude that it was not done in good faith, but rather was designed to conceal the employer's retaliation).

CONCLUSION

At the summary judgment stage, Shater does not have to prove that a jury would have absolutely no choice but to rule for him. Rather, he only needs to show that, based on the record evidence, and reasonable inferences from that evidence, a reasonable jury could find that the real reason Hall and Shell rejected him for the RSM – Americas position was race and national origin discrimination. *See Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470, 478 (5th Cir. 2015). Shater has made

that showing. Accordingly, Shater respectfully requests that this Court reverse the District Court's grant of summary judgment and remand the case for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document has been electronically filed with the United States Court of Appeals for the Fifth Circuit and served through the electronic filing system to the persons listed below on this the 23rd day of September 2022.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 5598 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B) (iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word word-processing program in 14 font size, Times New Roman.

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