United States Court of Appeals
For the First Circuit

No. 16-2487

JAMES GREENE,

Plaintiff, Appellant,

v.

WALGREEN EASTERN CO., INC.,

Defendant, Appellee.

Before

Torruella, Kayatta and Barron,
Circuit Judges.

JUDGMENT

Entered: November 15, 2018

James S. Greene brought this employment discrimination action against Walgreen Eastern Co., Inc. ("Walgreens"), claiming that Walgreens failed to promote him to the position of Assistant Store Manager Trainee ("ASMT") on account of his race and age, in violation of Title VII, 42 U.S.C. § 2000e, et seq., and the Age Discrimination in Employment Act, 29 U.S.C. § 623 ("ADEA"). The district court granted Walgreens' motion for summary judgment, finding that Greene failed to present evidence sufficient to support an inference that Walgreens' non-discriminatory reason for failing to select him was a pretext for discrimination, and that Greene had failed to establish a prima facie case of discrimination under a disparate impact theory. Prior to granting summary judgment, the court also denied several motions seeking to compel and reopen discovery. We affirm the district's grant of summary judgment to Walgreens on the disparate impact claim and find no abuse of discretion in the discovery rulings. However, we conclude that the evidence as a whole is sufficient to make out a jury question as to pretext and discriminatory animus. Because the parties are familiar with the underlying facts that gave rise to this dispute, we do not recount them here and proceed directly to the analysis.

DISCUSSION

A. Scope and Timeliness

As an initial matter, Greene challenges the district court's determination that any claims based on promotions denied between 2006 and 2012 were time-barred. Under both Title VII and the ADEA, Greene was obligated to file a charge with the EEOC within 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e–5(e)(1); 29 U.S.C. § 626(d)(1). The promotion denied in March 2014 is the only event that falls within that time period. To the extent that Greene argues that the "continuing violation doctrine" allows him to reach back to promotions denied in years prior because those events were related to the event that occurred within the limitations period, his argument fails because the Supreme Court has held that the failure to promote is a discrete act of discrimination which is "not actionable if time barred, even when . . . related to acts alleged in timely filed charges," National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002); see Campbell v. BankBoston, N.A., 327 F.3d 1, 11 (2003) (applying Morgan to ADEA claims).

B. Summary Judgment

1. Legal Standards

"We review a grant of summary judgment de novo, reversing the district court 'only if, after reviewing the facts and making all inferences in favor of the non-moving party . . . , the evidence on record is sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'" Adamson v. Walgreens Co., 750 F.3d 73, 78 (1st Cir. 2014) (quoting Prescott v. Higgins, 538 F.3d 32, 39–40 (1st Cir. 2008) (internal quotation marks omitted)). "The nonmovant bears the burden of pointing to admissible evidence showing the existence of a triable fact and 'may not rely on conclusory allegations, improbable inferences, and unsupported speculation.'" Adamson, 750 F.3d at 78 (quoting Shervin v. Partners Healthcare Sys., Inc., 804 F.3d 23, 32 (1st Cir. 2015) (internal quotation marks omitted)).

2. Disparate Impact Claim

Greene first alleged discrimination based on a disparate impact theory of liability. See 42 U.S.C. § 2000e-2(k); Smith v. City of Jackson, 544 U.S. 228, 236 (2005) (disparate impact claims cognizable under ADEA). To establish a prima facie disparate impact case, a plaintiff must identify a specific employment practice and show that the identified practice had a disparate impact on a protected group. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988); Jones v. City of Boston, 752 F.3d 38, 46 (1st Cir. 2014). With respect to the first requirement, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact." Smith, 544 U.S. at 241. "Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is . . . responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." Watson, 487 U.S. at 994.

The district court here found that Greene failed to establish his prima facie case because he did not identify a specific employment practice and instead seemed to challenge the "three wave promotion process" generally. On appeal, Greene explains that he is challenging the weight given the subjective components of the selection process, i.e., the "Internal Reference Review" ("IRR") and interview, which together made up 85% of the final composite score. Even assuming that

Greene adequately articulated that argument in the district court, and even assuming that the weighting of the subjective factors is a sufficiently specific employment practice, Greene has not produced evidence sufficient to support an inference that the weighting of the final composite score caused a disparate impact.

In advancing his numerical claims, Greene relied upon two distinct groupings: those he classified as "non-whites" versus whites, and candidates over age 40 versus younger candidates. He argued that the selection rates for non-white and older candidates, as compared to the selection rates for other candidates, demonstrated a disparate impact. Because the relative selection rates for those whom Greene classified as non-white and older candidates fell below the EEOC's 80% standard (i.e., the "four-fifths rule"), Greene argued that the statistical disparity showed adverse impact. See 29 C.F.R. § 1607.4(D) (stating that a selection rate that is less than 80% "of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact"); Watson, 487 U.S. at 995-96, n.3 (EEOC's 80% standard is "a rule of thumb for the courts"). But this rule of thumb application examines the outcomes of the entire selection process rather than the outcomes of the challenged component. Moreover, while a rule of thumb analysis may be quite helpful for some purposes, see Lopez at 52, we have never suggested that it could serve in lieu of a valid statistical analysis to provide sufficient support for a finding of disparate impact. See Fudge, 766 F.2d at 658 n. 10. Without a proper statistical analysis, the numbers here are not such as to allow a reasonable jury on this record to find a disparate impact caused by the practice he challenges.

3. Disparate Treatment

Greene also asserted a claim of disparate treatment. Where there is no direct evidence of discrimination, claims are evaluated under the three-step burden-shifting framework outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Quinones v. Buick, 436 F.3d 284, 289 (1st Cir. 2006). Greene seems to challenge the application of the McDonnell Douglas standard, but the January 15, 2014 memorandum he characterizes as a "smoking gun" is not discriminatory on its face. Application of the McDonnell Douglas framework was therefore appropriate.

Under that framework, a plaintiff has the initial burden to set forth a prima facie case of employment discrimination. Kosereis v. Rhode Island, 331 F.3d 207, 212 (1st Cir. 2003). "If a plaintiff establishes a prima facie case of discrimination . . . , the burden of production shifts to the employer to come forward with a legitimate, nondiscriminatory reason for its action." Gomez-Gonzalez v. Rural Opportunities, Inc., 626 F.3d 654, 662 (1st Cir. 2010). If the employer provides such a reason, the burden "'shifts back to the plaintiff, who must then show, by a preponderance of the evidence that the employer's articulated reason for the adverse employment action is pretextual and that the true reason for the adverse action is discriminatory.'" Id. (quoting Lockridge v. Univ. of Me. Sys., 597 F.3d 464, 470 (1st Cir. 2010)).

Although the parties disputed whether Greene could establish a prima facie case of race- or age-based discrimination, their primary focus was on Greene's qualifications in relation to the candidates selected for promotion, and whether Walgreens' proffered reasons for denying Greene the promotion were pretextual. Greene seems to argue that the district court held him to a higher prima facie standard than was necessary, but the court's decision makes clear that it assumed

Greene succeeded in carrying his initial burden and proceeded directly to the evaluation of Walgreens' non-discriminatory explanation and the question of pretext. We can follow suit. See Adamson, 750 F.3d at 79; Gomez-Gonzalez, 626 F.3d at 662 (where focus of dispute was whether stated grounds for termination were pretextual, it was "expeditious and appropriate" to assume plaintiff "'made out a prima facie case in order to move on to the real issues in the case'" (quoting Garcia v. Bristol-Myers Squibb Co., 535 F.3d 23, 31 (1st Cir. 2008)). See also Fennell v. First Step Designs, Ltd., 83 F.3d 526, 535 (1st Cir. 1996) ("On summary judgment, the need to order the presentation of proof is largely obviated, and a court may often dispense with strict attention to the burden-shifting framework, focusing instead on whether the evidence as a whole is sufficient to make out a jury question as to pretext and discriminatory animus").

To the extent Greene asserts that Walgreens failed to articulate a legitimate, nondiscriminatory reason for its decision, his argument is meritless. The employer's burden at this stage is not onerous, Mesnick v. Gen. Elec. Co., 950 F.2d 816, 824 (1st Cir. 1991), and Walgreens produced evidence to support its assertion that Greene was not selected for promotion because his composite score on the three-part evaluation and overall ranking were lower than those of the candidates who were selected. While part of the evaluation was subjective, Walgreens submitted affidavits and documentary evidence explaining that the scores were based on specific criteria applied using a standardized method. This was sufficient to discharge its burden. See Ruiz v. Posadas de San Juan Assocs., 124 F.3d 243, 248 (1st Cir. 1997) (to rebut the plaintiff's prima facie case, an employer "need only produce enough competent evidence, taken as true, to enable a rational factfinder to conclude that there existed a nondiscriminatory reason for the challenged employment action" (emphasis omitted)).

Thus, to defeat Walgreens' summary judgment motion, Greene had to produce evidence sufficient to support an inference that Walgreens' proffered reason was pretextual and that Greene was in fact denied the promotion because of his race or age. See Ahmed v. Johnson, 752 F.3d 490, 497 (1st Cir. 2014). Pretext can be shown "'in any number of ways,' including by producing evidence that plaintiff was treated differently from similarly situated employees" who were not members of plaintiff's protected group(s), Garcia, 535 F.3d at 31 (quoting Kosereis, 331 F.3d at 214), by showing that the employer deviated from its established rules or procedures in dealing with the plaintiff, Molloy v. Blanchard, 115 F.3d 86, 92-93 (1st Cir. 1997) (failing to provide statutorily mandated hearing to female officer), or "by showing that the employer's proffered explanation is unworthy of credence." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (citation and quotation marks omitted). In evaluating whether the stated reason for not selecting Greene for a promotion was pretextual, the focus is on whether Walgreens believed that its stated reason was true. See Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 7 (1st Cir. 2000); Mesnick, 950 F.2d at 824.

Greene first argues that statistical evidence shows disparate treatment in that all 11 successful candidates were white and 9 were under 40; more specifically, Greene notes that none of the seven non-white applicants were selected and only two of the eight applicants over age 40 were selected. While statistical evidence is admissible in a disparate treatment case, it is rarely, "'in and of itself, suffic[ient] to rebut an employer's legitimate, nondiscriminatory rationale for its decision,'" Ray v. Ropes & Gray LLP, 799 F.3d 99, 116 (1st Cir. 2015) (quoting LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 848 (1st Cir. 1993)), and statistical evidence that is derived from a small

sample size carries little weight because slight changes in the data can drastically alter the result. Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 663 (9th Cir. 2002); see LeBlanc, 6 F.3d at 848-49. Moreover, to prove disparate treatment based on statistical evidence, Greene was required to show that the individuals with whom he seeks to be compared were similarly situated in all material respects. See Timmerman v. U.S. Bank, N.A., 483 F.3d 1106, 1115 (10th Cir. 2007); Aragon, 292 F.3d at 663-64; Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 21 (1st Cir. 1999). Because the candidates received different scores on the three components of the application, and all performed better on the interview, Greene cannot make this showing.

Greene also maintains that the data produced by Walgreens showing that five of the 20 candidates who took the math test received higher scores than he did is implausible because, in Greene's view, the test was difficult and some of the candidates had only a high school education while he had multiple graduate degrees. However, Greene's belief that the scores on the math test were inaccurate or manipulated is purely speculative, and the math assessment accounted for only a small fraction of the final composite score in any event. See Mesnick, 950 F.2d at 824 (To demonstrate pretext, "[i]t is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive: age discrimination" (quotation marks and citation omitted)); Dunn v. Trustees of Boston Univ., 761 F.3d 63, 73 (1st Cir. 2014)("[A] plaintiff cannot make pretext a trial-worthy issue by 'essentially relying on his personal belief that he was more qualified' for a job that his employer gave to someone outside of the protected class" (quoting Vega–Colon v. Wyeth Pharms., 625 F.3d 22, 28 (1st Cir. 2010)). Similarly, Greene argues that, given his educational achievements and prior work experience both outside Walgreens and in his Management Trainee ("MGT") position, it is implausible to believe that he was less qualified for the ASMT position than candidates with only a high school education and less work experience. But Greene acknowledges that the eligibility criteria for the ASMT position were quite minimal, requiring only a high school diploma or GED, a recent satisfactory performance review, and no written disciplinary actions in the prior year; in his deposition, Greene stated that "any high school graduate with two to three years of experience at Walgreens" who had opened and closed the store a few times, managed shifts, handled cash, and could get along "pretty well" with co-workers, was qualified for the ASMT position. While Greene believed he met those criteria, he also admitted that he did not consistently get along with managers and co-workers and had received negative performance reviews, and he did not show that any of the applicants who received the promotion lacked the necessary qualifications. Greene's subjective belief that he was more qualified for the promotion than other candidates is not sufficient to support an inference of pretext. Shorette v. Rite Aid of Maine, Inc., 155 F.3d 8, 15 (1st Cir. 1998) (employee's personal opinion regarding job qualifications is not sufficiently probative on the issue of pretext); Ruiz, 124 F.3d at 248-49 (plaintiff's subjective belief that stated reasons for termination were pretextual is insufficient to state a claim for employment discrimination).

Next, Greene asserts that Store Manager Diane Peavey and Community Leader Bob Nash discouraged him from applying for the ASMT position and pressured him to accept a demotion or resign before the application process opened; the record reflects that Peavey prematurely presented Greene with a "Confirmation of Election to Step Down or Separate Memorandum" in January 2014, before the ASMT application process opened. In doing so, Peavey deviated from the

announced procedure by treating Greene as a member of the first wave of the MGT phase-out who was not eligible to apply for the ASMT position, when in fact he was not part of that group. Peavey also deviated from procedure in requiring Greene to sign the memo on the spot, rather than giving him time to consider his options. But minutes after Greene signed the form indicating that he would resign, Nash called and told him that the memo had been given to him prematurely and that he should disregard it. Greene saw this as a "bluff" designed to get him to voluntarily step down or resign before he had an opportunity to apply for a promotion. However, despite the alleged pressure to accept a demotion or resign, Greene did eventually apply for the ASMT position. Because Peavey and Nash rescinded the memo and it did not impede Greene from applying for the ASMT position, the premature presentation of the memo does not in itself support an inference that the reasons given for denying Greene the promotion were pretextual.

However, Peavey, as Greene's store manager, also provided subjective feedback that formed the basis for the "Internal Reference Review" ("IRR") component of the hiring procedure. The IRR comprised 35% of each candidate's overall composite score, and was based on information obtained from the candidate's current store manager -- in Greene's case, Peavey -- concerning the candidate's job performance and skills. Although measures were taken to standardize the IRR evaluation by using an anchored rating scale to score specific categories of competencies, and Greene does not allege or provide evidence showing that the ultimate decisionmakers acted with discriminatory animus, based on the record before us, it appears that Greene's IRR score, which was relatively low compared to other candidates, was derived solely from Peavey's input. While the use of subjective employment criteria does not in itself indicate discriminatory animus, Hicks v. Johnson, 755 F.3d 738, 746 (1st Cir. 2014), subjective evaluations may be susceptible to manipulation and can mask discrimination. The apparently negative subjective assessment provided by Peavey coupled with her earlier deviation from standard procedure in prematurely presenting Greene with a separation memo could together be sufficient to support an inference that the subjective criteria of the IRR was exploited in a discriminatory manner. And, because the IRR score comprised a significant, potentially outcome-determinative portion of the overall score, the supportability of that inference is sufficient to generate a triable issue of fact as to pretext.

C. Discovery Rulings

Finally, Greene challenges several discovery rulings, which we review for abuse of discretion. See Braga v. Hodgson, 605 F.3d 58, 59 (1st Cir. 2010). In essence, Greene argues that the rulings prevented him from presenting evidence sufficient to oppose the summary judgment motion.

To the extent that Greene challenges the denial of his first motion to compel the production of employee data he needed to compile statistics necessary to support his disparate impact claim, we find no abuse of discretion as Greene failed to link the information requested to the challenged employment practice or to the specific position Greene sought. Greene's second motion to compel was properly denied because it sought information relating to promotions denied prior to 2014. Finally, the district court did not abuse its discretion in denying three motions seeking to reopen discovery to obtain information that could have been sought before the deadline closed and before Walgreens filed its motion for summary judgment.

CONCLUSION

In sum, Greene has failed to present any substantial issue for review with respect to the district court's discovery rulings or its determination that Greene failed to establish a prima facie case of disparate impact discrimination. However, the evidence is sufficient to support an inference that the subjective criteria was exploited in a discriminatory manner, and that the stated reasons for denying Greene the promotion were pretextual. Accordingly, we vacate the grant of summary judgment with respect to the disparate treatment claim and remand for further proceedings consistent with this opinion.

By the Court:

Maria R. Hamilton, Clerk

cc:
Hon. Richard G. Stearns
Robert Farrell, Clerk, United States District Court for the District of Massachusetts
James Greene
Lisa Stephanian Burton
Peter David Larson

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 15-12949-RGS

JAMES S. GREENE

v.

WALGREEN EASTERN CO., INC.

MEMORANDUM AND ORDER ON DEFENDANT WALGREEN'S MOTION FOR SUMMARY JUDGMENT

November 18, 2016

STEARNS, D.J.

James S. Greene, a *pro se* plaintiff, brought this action against his former employer, Walgreen Eastern Co., Inc. (Walgreens), alleging that it discriminated against him on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Counts I, II, and III), and his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (Counts IV, V, and VI). Limited by the timing of his November 20, 2014 filing with the Massachusetts Commission Against Discrimination (MCAD),[1] Greene raises actionable claims of race and age

[1] In his Complaint, Greene contends that Walgreens unlawfully denied him promotions in 2006-2007, 2011-2012, and 2014. Greene filed a charge of discrimination with the MCAD on November 20, 2014. In an Order dated April 14, 2016, the court found that "only the 2014 denial was filed within the

discrimination with respect to Walgreens' failure to promote him in 2014. Greene alleges discrimination theories based on both disparate treatment and disparate impact.[2] Walgreens now moves for summary judgment on all counts.

BACKGROUND

The facts, taken in the light most favorable to Greene as the nonmoving party, are as follows.[3] Greene is an African-American man who worked for Walgreens from 2005 until 2014 as a Management Trainee (MGT). During

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applicable 300 days." Dkt #40. Consequently, the court does not address the portions of Greene's Opposition dedicated to the alleged earlier rejections.

[2] In his Opposition to summary judgment, Greene pleads, for the first time, that this is a reduction in force case. "Plaintiffs may not raise new and unadvertised theories of liability for the first time in opposition to a motion for summary judgment. Allowing a plaintiff to proceed on new, unpled theories after the close of discovery would prejudice defendants, who would have focused their discovery efforts on the theories actually pled." *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 76 (1st Cir. 2016) (internal citations omitted). Notwithstanding, Walgreens notes in its Reply that there is no evidence that it failed to act neutrally in eliminating the management trainee position nationwide. Def.'s Reply at 3. In fact at his deposition Greene was asked, "Is it your belief that this was done specifically because of you, the restructuring of the company and the jobs? Answer: No." Greene Dep. at 51-52.

[3] Greene objects to four of Walgreens' stated facts. See Dkt #69 at 49-51 ("Defendants undisputed facts disputed by plaintiff"). None of these disputed facts have a bearing on Walgreens' dispositive motion.

his tenure at the company, Greene worked at several Walgreens stores in southeastern Massachusetts, in a territory designated as "District 106." When Greene left Walgreens, he was working at the District 106 Bridgewater store.

In 2012, Walgreens decided to revamp its store management structure. The company eliminated the MGT position in all of its stores nationwide, and replaced it with a new position titled Assistant Store Manager-Trainee (ASM-T).[4] All existing MGTs were either to be transferred to the new ASM-T position, demoted to a non-management "Shift Lead" position, or terminated.[5] Walgreens' minimum qualifications for promotion to the ASM-T position were: (1) a rating of "Achieving Expectations" on a 2013

[4] While Walgreens' Statement of Facts (SOF) suggests that the ASM-T position simply redefined the MGT position in the corporate structure, both parties characterize an employee's move from being an MGT to an ASM-T as a promotion.

[5] Elimination of the MGT position was scheduled in three waves. Wave One took place in early 2014, directed at the MGTs who were not eligible to apply for the ASM-T position. Wave Two occurred in the Spring of 2014, affecting MGTs who were eligible to apply but who either chose not to, or applied and were not selected for an interview. Greene figured in Wave Three in the Summer of 2014 targeted for MGTs who applied and were interviewed but who were not ultimately promoted. These employees could either take a lesser position or separate from the company with severance pay. Def.'s SOF ¶¶ 26-30.

performance review, (2) a high school diploma or GED, and (3) no written disciplinary actions during the prior 12 months.

It is undisputed that Greene met the three entry-level qualifications. Greene alleges that notwithstanding his advanced degrees and exemplary work history, his supervisors repeatedly discouraged him from applying for an ASM-T position, and instead urged him to step down to the Shift Lead level.[6] On January 15, 2014, Greene's immediate supervisor, Diane Peavey, presented him with a memorandum giving him the option of accepting a Shift Lead job or separating from the company, and demanded that he "sign it today." Greene Dep. at 102. Greene elected to resign and signed the document. However, shortly afterwards, Bob Nash, a Walgreens' "community leader"[7] notified him that he had been given the memorandum by mistake and that he was in fact eligible to apply for a promotion to an ASM-T position. Greene decided to remain at Walgreens.[8]

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[6] Greene holds a bachelor's degree and a master's degree in mathematics, a master's degree in business administration, and a master's degree in telecommunications.

[7] "A community leader is a store manager who oversees 5 or more stores on behalf of a district manager." Pl.'s Opp'n at 31.

[8] Greene alleges that the mistake was in fact a "bluff" to discourage him from applying for a promotion. Peavey's testimony is that Greene had only transferred into her store two weeks before, and that she was unaware at the

Walgreens' ASM-T selection process had three components; for each component, the applicant received a numerical score from 1 to 5, with 5 being the highest possible score.[9] First, eligible applicants were to complete a mathematics examination administered through a computer. The math test was composed of thirty math questions "measuring low-level job-related retail math skills." Gerjerts Decl. ¶ 7 (Dkt #73-2). It included questions about "measuring calculations of gross profits, costs, retail profits, and pro-rated ad prices." *Id.* Second, district managers asked patterned questions of the applicants' supervisors regarding his or her job skills, utilizing "an anchor rating scale to rate job-related competencies" relevant to the ASM-T position. *Id.* at 7, 11 (Overview of ASM-T Selection Process). The skills included "Knowledge of Company Policies and Procedures; Ability to Learn and Work Under Pressure; Valuing the Customer; [and] Being Motivated and Ethical & Honest." *Id.* ¶ 8. This process, termed the Internal Reference

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time that Greene was eligible to apply for the promotion. *See* Peavey Decl. ¶¶ 8-14 (Dkt #47-4).

[9] The candidates' numerical scores were then grouped into five distinct rating "bands." Def.'s SOF ¶ 36. Walgreens considered candidates within the same "band" to be equally qualified even though the candidates' numerical scores differed slightly. The bands were as follows: "Very Highly Recommended," "Highly Recommended," "Recommended With Some Caution," "Recommended with Serious Caution," and "Not Recommended." *Id.*

Review (IRR), took "about 45 minutes to complete." *Id.* at 7. Finally, applicants who achieved a minimal level of competency on the first two measures were invited to an interview. Interviewers asked nine specific questions, common to all applicants, "relating to ASM-T job competencies . . . assessing how applicants handle certain job-related situations and . . . the applicant's ability to manage the store and others." *Id.* ¶ 9. The interviewers were provided a rubric with which to evaluate the applicants' responses. The interviews were conducted by a panel consisting of at least two Walgreens managers – individuals to whom the candidate did not report – and "took about 30-45 minutes to complete." *Id.* The candidate's performance on the three components was then weighted and aggregated to determine his or her overall score. The mathematics exam comprised 15% of the rating, the IRR performance review 35%, and the interview evaluation the remaining 50%.

On the mathematics exam, Greene received a score of 4.06 out of 5, placing him in the band of "Highly Recommended." Greene received a 3.11 on the IRR component which correlated to the band of "Recommended with Serious Caution." His combined IRR/math score, after weighting, was 3.4, also corresponding to the band of "Recommended with Serious Caution." All applicants with a combined IRR/MA rating within the "Recommended with

Serious Caution" band or above were invited to interview for the ASM-T position; fifteen employees in Greene's cohort chose to do so.[10]

"The panel that interviewed Greene consisted of three individuals to whom Greene did not report – Community Leaders Geoff Robinson, Kelly Zbyszewski and Todd Halliwell." Def.'s SOF ¶ 40. At his interview, Greene received a score of 2.08 – "Not Recommended" – the third-lowest score of the fifteen candidates.[11] *See* Dkt #47-3 at 42. After the interview score was combined with the math and IRR components, Greene had a final composite score of 2.74, again the third-lowest among the candidates. Walgreens promoted the top eleven candidates based on the final composite scores. Of the candidates who reached the interview stage, Walgreens advanced two who were over the age of 40 (42 and 59) and nine who were under the age of 40; all eleven successful candidates are white. Conversely, all four of the rejected candidates were over 40, and none of them is white.[12]

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[10] This included Greene, as well as four applicants with lower combined IRR/math scores than Greene's, one of whom was ultimately promoted because of a higher interview score. Two candidates who were invited to interview withdrew their applications; both were nonwhite.

[11] Walgreens states that the interviewers noted that Greene's answers were "vague and/or contradictory . . . [and] conveyed more of an hourly team member mindset than a manager's mindset." Def.'s SOF ¶ 42.

[12] Another rejected candidate is African-American; a third is Hispanic, and the fourth is Asian-American.

On June 12, 2014, after Greene's application for an ASM-T promotion had been denied, Peavey again offered Greene the choice of stepping down to a "Shift Lead" position or separating from Walgreens. Greene elected to leave the company, but declined to take a severance package. Greene was 67 years old when he resigned from Walgreens.

In November of 2014, Greene filed a complaint against Walgreens with the Equal Employment Opportunity Commission (EEOC) alleging that Walgreens had discriminated against him by failing to promote him to the ASM-T position.[13] The EEOC dismissed the complaint in April of 2015. Greene filed this action on July 10, 2015. Following discovery, Walgreens moved for summary judgment. Greene filed an Opposition on September 12, 2016.

DISCUSSION

Summary judgment is appropriate when, based upon the pleadings, affidavits, and depositions, "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment will not be granted if the evidence is "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*

[13] Greene did not timely file administrative charges for the two prior promotion denials that he alleges occurred between 2006 and 2011. Greene Dep. at 72-74.

v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the initial burden of establishing that no genuine issue of material fact exists. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant carries its burden, the nonmovant must show more than a "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

"In a wrongful termination case under the ADEA, the plaintiff must establish 'that his years were the determinative factor in his discharge, that is, that he would not have been fired but for his age.'" *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 842 (1st Cir. 1993), quoting *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1335 (1st Cir. 1988); *see also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009). Similarly, Title VII provides:

> [that it] shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e–2(a)(1). It is undisputed that Greene is an employee covered by Title VII and the ADEA. *See Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 206 (1997) ("[T]he employment relationship is most readily demonstrated by [an] individual's appearance on the employer's

payroll."). In reviewing Greene's claims, "the ADEA and Title VII stand[ ] in pari passu" and "judicial precedents interpreting one such statute [are] instructive in decisions involving [the other]." *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997).

Greene offers no direct evidence of discrimination. The court will therefore analyze his claims under the burden-shifting formula set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this formula, Greene must first demonstrate a prima facie case of discrimination. If Greene succeeds in establishing a prima facie case, the burden of production shifts to Walgreens to offer a legitimate, nondiscriminatory reason for denying Greene a promotion. The burden then shifts back to Greene to show that Walgreens' proffered reasons are pretextual and mask unlawful discrimination.

The parties initially dispute whether Greene has successfully made out a prima facie case of discrimination. In the context of a failure to promote, Greene must show that (1) he was a member of a protected class; (2) he was qualified for an open position; (3) he was denied the position; and (4) that the position was given to someone with similar or inferior qualifications. *Ahmed v. Johnson*, 752 F.3d 490, 496 (1st Cir. 2014). The parties' disagreement is focused on Greene's qualifications in relation to those

candidates selected for promotion. The court will assume a prima facie case as the issue of Greene's qualifications for promotion is the same whether analyzed as an element of his prima facie case or at the second and third stages of the burden-shifting inquiry. *Cf. Coward v. Cambridge Sch. Comm.*, 171 F.3d 12, 19 (1st Cir. 1999).

Disparate Treatment

Greene alleges that he was qualified for the ASM-T position, but was subjected to "disparate treatment" during the hiring process because of his race and age. Greene maintains that with 30 years of experience as a manager in major corporations and after having served as a management trainee at Walgreens for nearly nine years, he was more qualified than the other candidates, and that he was denied the promotion because of animus on the part of his store manager Diane Peavey and community leader Bob Nash.[14] As evidence, Greene claims that Peavey, together with Nash, repeatedly discouraged him from applying for a promotion, pressured him to accept a non-management position, and failed to follow protocol in asking

[14] Greene expresses his personal doubt that "[a] white SFL [shift leader] as young as age 24 with a high school diploma will score higher on business math tests that a black candidate with BS and MS degree in mathematics; has successfully completed business math courses as part of an MBA degree; and, who in 2005 . . . passed the certification tests required to teach math in Massachusetts public schools." Pl.'s Opp'n at 30.

him to accept a demotion or separation – "a deviation from Walgreens' 'standard business practice.'"[15] Pl.'s Opp'n at 24, quoting *Kouvchinov v. Parametric Tech. Corp.*, 537 F.3d 62, 68-69 (1st Cir. 2008).

As part of his disparate treatment claim, Greene also complains that if "[e]mployees were evaluated for the position based on their competencies . . . Walgreens never states the nature of those skills, knowledge and abilities." Pl.'s Opp'n at 31. Greene adds "that the IRR and interview portions of the selection process were highly subjective, . . . [and] that District 106 personnel could have assigned any scores desired at any time to the [shift leader] candidates" as its personnel "were authorized to edit and change selection process scores." *Id.* at 32.

Kyle Gerjerts, the senior manager of Walgreens Talent Management department, testified to the specific skills, work behavior, and future performance prediction that the interview, performance reviews, and mathematics exam intended to measure. It is true that Walgreens' evaluation formula gave greater weight to the less-objective interview component of the process. *See Keyes v. Sec'y of the Navy*, 853 F.2d 1016,

[15] Greene claims a "sense that [Peavey] did not feel comfortable to work with him on a daily basis . . . that [she] had a racial animus towards [him]." Pl.'s Opp'n at 23. In his deposition, Greene testified that he believed that he was not on Walgreens "list to be promoted" because Peavey had "an attitude" about him. Greene Dep. at 106.

1026 n. 12 (1st Cir. 1988) ("Evaluating an applicant at an interview is a highly subjective exercise."). Walgreens contends that the format for the interview, from which the interviewers were not permitted to deviate, effectively eliminated subjective influences on the outcomes. More to the point, neither Peavey nor Nash (the only managers to whom Greene attributes a subjective animus) were involved in the interview process. Rather, Greene was interviewed by a panel of managers to whom he did not report. He was asked the same nine questions as were all other applicants. His interviewers used the same format in comparing his answers with those of the other candidates. *See* Def.'s Ex. B, Dkt # 47-3 at 14-38. In a similar case, where the employer "took pains to standardize the interview process, as well as record and quantify the candidates' performance on a uniform scale," asked precisely the same questions of each candidate, and made "the subjective part of the promotion process as objective as possible," the First Circuit held that, without more, no reasonable inference of pretext could be drawn. *Hicks v. Johnson*, 755 F.3d 738, 747 (1st Cir. 2014), quoting *Freeman*, 865 F.2d at 1341 ("If the interviewers erred in judging the candidates' relative qualifications, . . . there is nothing to suggest that the error was anything but a permissible 'garden-variety mistake in corporate judgment.'"). The same applies here as well.

Apart from alleged animus on the part of Peavey and Nash, Greene relies on statistical evidence of disparate treatment – namely that the eleven candidates chosen from among the 15 who vied for the AST-M position were all white and nearly all under forty.[16] However, in disparate treatment cases, statistical evidence carries little probative weight. *See LeBlanc*, 6 F.3d at 848 ("[A] company's overall employment statistics will, in at least many cases, have little direct bearing on the specific intentions of the employer when dismissing a particular individual."). This is in part because "[i]n a disparate treatment case . . . the issue is less whether a pattern of discrimination existed and more how a particular individual was treated, and why." *Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 156 (1st Cir. 1990). Statistical evidence is relevant where a large sample size yields statistics showing, for example, that the upper ranks of management are closed to a protected class, thus giving rise to an inference of discrimination. *Cf.*

[16] Greene argues that the selection rate for whites exceeded 80%, which "using the EEOC Rule of four-fifths, plaintiff has proven statistical significance of both race and age in this case." Pl. Opp'n at 18 (Dkt #68). However, the four-fifths rule has long been discredited in cases like this where there is such a small pool of candidates. *Jones v. City of Boston*, 752 F.3d 38, 51 (1st Cir. 2014), quoting *Fudge v. City of Providence Fire Dep't*, 766 F.2d 650, 658 n.10 (1st Cir. 1985) ("We previously rejected reliance on the four-fifths rule by a plaintiff in a case in which the sample size was small, describing the rule as 'not an accurate test of discriminatory impact.'").

Lipchitz v. Raytheon Co., 434 Mass. 493, 509 (2001). The inference, however, ordinarily requires the support of expert testimony. *See* Fed. R. Civ. P. 403. While Greene offers the hearsay statement of Dr. Elizabeth Newton, a statistician, Dr. Newton was never named as an expert, qualified as one, nor does her statement shed much light on why she thought statistical significance could be drawn from such small numbers.[17]

Even if Greene could show convincing weaknesses in Walgreens' interview process, he is still required to demonstrate that Walgreens' proffered reasons for failing to promote him were not only pretextual, but motivated by unlawful discrimination. While Greene may be correct that Peavey and/or Nash did not like him personally, there is no evidence that his age and race influenced their negative feelings. "It is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real [and discriminatory] motive." *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 824

[17] Greene states that "[a]fter Dr. Newton had completed a cursory evaluation of the data, she stated that her first impression, without having completed a detailed analysis, was that the computed disparities are statistically significant." Pl.'s Opp'n at 18. Because the sample size is statistically insignificant, the court sees no purpose to be served in permitting Greene additional time to attempt to further qualify Dr. Newton's opinion.

(1st Cir. 1991). Despite the alleged lack of support for his candidacy by Peavey and Nash, Greene did apply for the ASM-T position and neither Nash nor Peavey was involved in the testing or interviews that led to the denial of the promotion. *See* Peavey Aff. ¶ 17. To succeed on a failure-to-promote claim, plaintiff must be able to plausibly trace a discriminatory intent to the person or persons who denied him the promotion. *Bennett v. Saint-Gobain Corp.*, 507 F.3d 23, 31 (1st Cir. 2007), quoting *Velázquez-Fernández v. NCE Foods, Inc.*, 476 F.3d 6, 11-12 (1st Cir. 2007) ("Statements made by those who are not involved in the decisional process 'normally are insufficient, standing alone, to establish either pretext or the requisite discriminatory animus.'"). This Greene has failed to do.

Disparate Impact

"'[D]isparate impact' [claims] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993), quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977). Unlike disparate treatment claims, disparate impact claims do not require proof of a discriminatory motive. *See Prescott v. Higgins*, 538 F.3d 32, 41 (1st Cir. 2008).

As evidence of disparate impact, Greene again relies on the comparison of the ages and race of the chosen and the rejected candidates. But he has not pointed to any specific aspect of the mathematics exam, the IRR, the interview process, or the weighting of the three components that led to a disparity because of race or age, an essential requirement in a disparate impact case. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmt'ies Project, Inc.*, 135 S. Ct. 2507, 2523 (2015) ("[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement . . . protects defendants from being held liable for racial disparities they did not create."). Greene simply alleges that Walgreens' "published procedure" and its "three wave promotion process" excluded older and minority candidates, and that "either the math test, or the job interview, or both taken together unfairly impacted members of protected classes." Dkt # 1 at 27; Pl.'s Opp'n at 31. However, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact." *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 357 (2011) ("[M]erely proving that [a] discretionary system has produced a racial or sexual disparity *is not enough*.").

Even if Greene were able to establish a prima facie case of disparate impact, Walgreens submits convincing evidence that Greene was not promoted because he was among the lowest-performing applicants for the open positions in District 106 (despite his acknowledged mathematical abilities), and because he had one of the weakest interviews.[18] It also contends (with support in the record), that even if its promotion decisions had a disparate impact on older, non-white candidates, those decisions are "job-related for the position in question," "borne out of business necessity," and based on reasonable factors other than age and race. *Lopez v. City of Lawrence,* 823 F.3d 102, 110-111 (1st Cir. 2016).

To establish a "business necessity" defense under Title VII's disparate impact provisions, Walgreens must demonstrate that its program "aims to measure a characteristic that constitutes an 'important element[] of work behavior,'" and that the outcomes of the evaluation process are "'predictive of or significantly correlated with' that characteristic." *Jones v. City of Boston,* 752 F.3d 38, 54 (1st Cir. 2014), quoting *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 431 (1975). Walgreens evaluated its candidates on three job-related factors: the candidate's mathematical skills, past job

[18] *See* Def.'s Ex. B, Dkt # 47-3 at 8 (declaration of Christopher Cogdill, the Walgreens district manager who served on Greene's interview panel).

performance, and responses to a series of interview questions specifically targeted to address ASM-T competencies. According to Walgreens, the competencies measured by the math test were the ability to "calculate[e] gross profits, costs, retail prices, gross-profit percentages or pro-rated ad prices." Gerjerts Decl. ¶ 7. The IRR asked a series of questions designed to rate the candidate's job performance related to "Knowledge of Company Policies & Procedures; Ability to Read and Write; Ability to Learn and Work Under Pressure; Valuing the Customer; [and] Being Motivated and Ethical & Honest." *Id.* ¶ 8. The interview consisted of questions assessing "how applicants handle certain job-related situations and [their] ability to manage the store and others." *Id.* ¶ 9. All three measures had a comprehensive, detailed rating scale; Walgreens selected the best-performing candidates or those best fitted to its business model.

Greene attempts to counter Walgreens' business necessity defense by contending that an alternative test or set of selection criteria might exist that served Walgreens' business interest without the "undesirable racial effect." Pl.'s Opp'n at 35, quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). But fatal to his claim, he fails to identify the better alternative that

he has in mind.[19] *See Ricci v. DeStefano*, 557 U.S. 557, 578 (2009); *see also Lopez*, 823 F.3d at 120.

The business judgment rule allows a company to make bad, unwise, or even unfair decisions without judicial interference so long as these decisions are not discriminatory. "Courts may not sit as super personnel departments, assessing the merits — or even the rationality — of employers' nondiscriminatory business decisions." *Mesnick*, 950 F.2d at 825; *see also Kelley v. Airborne Freight Corp.*, 140 F.3d 335, 352 (1st Cir. 1997) (same). As a consequence, proof of competing qualifications will seldom create a triable issue of pretext. *See Rathbun v. Autozone, Inc.*, 361 F.3d 62, 74-75 (1st Cir. 2004) ("Qualifications are notoriously hard to judge and, in a disparate treatment case, more must be shown than that the employer made an unwise personnel decision by promoting 'X' ahead of 'Y.'"); *cf. Melendez v. Autogermana, Inc.*, 622 F.3d 46, 53 (1st Cir. 2010) ("[D]ecision to adopt a new sales quota is a business decision that we may not question in an employment discrimination case.").

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[19] Greene argues that "Walgreens must also prove the lack of an acceptable alternative process." Pl.'s Opp'n at 39. This is a misstatement of the law; the burden of showing an alternative rests with a plaintiff. *See Jones*, 752 F.3d at 53, quoting *Albemarle*, 422 U.S. at 425 ("[A] plaintiff can prevail in the face of demonstrated business necessity only by proving a failure to adopt an alternative practice that would satisfy the department's legitimate business needs 'without a similarly undesirable racial effect.'").

ORDER

For the foregoing reasons, Walgreens' motion for summary judgment on all counts is ALLOWED. The clerk shall enter judgment for Walgreens and close the case.

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE