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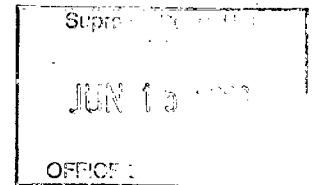
No. \_\_\_\_\_

ORIGINAL  
PETITION

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IN THE  
***Supreme Court of the United States***

HENRY OVIEDO



Petitioner

V

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Respondent

On Petition for a Writ of Certiorari  
To the Supreme Court of the United States

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

42 U.S.C. & 2000e-2(a)(1) and Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer “to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual” which respect to “compensation, terms, conditions, or privileges of employment” because of the individual’s race, religion, sex, or other protected status. The questions are:

1. IF A FACTFINDER CAN CONCLUDE THAT A REASONABLE EMPLOYER WOULD HAVE THE PROTECTED PLAINTIF TO BE SIGNIFICANTLY BETTER QUALIFY FOR THE JOB, BUT THIS EMPLOYER DID NOT. WHY DOES WMATA CONSCIOUSLY SELECTED LESS-QUALIFIED CANDIDATES? IS DISCRIMINATION PART OF THE PICTURE, AKA V WHC 156 F.3d 1284, 1290.

2. SHOULD THIS COURT GRANT DEFERENCE TO THE EEOC GUIDELINES ON ENGLISH-ONLY LANGUAGE RULES IN THE WORKPLACE, AND FIND LANGUAGE DISCRIMINATION FALL UNDER NATIONAL ORIGIN DISCRIMINATION, GARCIA V SPUN STEAK 998 F. 3d., MALDONADO V CITY OF ALTUS, 443 F. 3d. 1294.

3. WMATA IN RETALIATION VIOLATED OVIEDO'S PROTECTED STATUS BY SENDING TO WORK IN A HIDEOUS MAINTENANCE BUILDING. ARE THE TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT' COVERED BY SECTION 703 (a)(1) LIMITED ONLY TO HIRING, FIRING, PROMOTION, COMPENSATION, AND LEAVE? BREAUX V CITY OF GARLAND, 205 F. 3d 150, 157, AND PETERSON V LINEAR CONTROL, INC. No. 18-1401.

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#### **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Henry Oviedo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## **OPINION BELOW**

The opinion of the United States of Appeals for the District of Columbia is reported at No. 1:16-cv-01883. The district court's memorandum ruling granting defendant's motion for summary judgment is case 1:6-cv-01883-TSC, document 34 filed 03/16/18. Court of Appeal argued on 09/10/2019, decided on 01/28/2020 No. 18-7037.

## **JURISDICTION**

The judgment of the court of appeal was decided on January 28, 2020. This Court has jurisdiction pursuant to 28 U.S.C. && 1254(1).

## **STATUTORY PROVISION INVOLVED**

- a. Title VII of the Civil rights Act of 1964, 42 U.S.C. &200e et seq. (1994);
- b. Section 703a of Title VII of the Civil Rights Act of 1964, 42 U.S.C. & 2000e-2;
- c. Employment Ac ("ADEA"), 29 U.S.C.&& 621-3491994).

Provides:

- (1) It shall be an unlawful employment practice for an employer:
  - (a) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, term, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
  - (b) to limit, aggregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

## **INTRODUCTION**

Oviedo is defending his case by "Title VII of the civil rights Act of 1964, 42 U.S.C. && 2000e et seq., prohibits a range of employment practices. As is relevant here, Section 703(a)(1) of that Title forbids racial discrimination with respect to an

employee's "terms, conditions, or privileges of employment." 42 U.S.C. & 2000e-2(a)(1)".

Oviedo felt disappointed by the lack of promotion by racial discrimination during 16 years of uninterrupted work for WMATA, and tired of the daily long walking from the Eisenhower Metro Station to his office in Alexandria, Virginia. As a result, Oviedo "felt like" he was forced to retire by racial discrimination, at the same job classification and the same grade pay 14 as he was hired.

During his working time Oviedo charged discrimination to EEOC in 2009 for adverse actions indicated below in points for a, b, c. WMATA called these charges extinguished. Then on 2013, he charged discrimination to EEOC for adverse actions indicated below in points d, e, f, g, h. WMATA called these charges non-extinguished, with Oviedo's right to complaint. Oviedo suffered stress and emotional pain when:

- a. sent to work in hideous maintenance building from around 2008 to 2015.  
(see Ouattara Deposition, page 49-59 & Oviedo's Deposition)
- b. denied job to supervisor by being too old.  
(see Ouattara and Thomas deposition)
- c. denied about 20 jobs for promotions  
(see Computer data, JA 266).
- d. remarks for his ethnic origin.  
(see Oviedo's Deposition)
- e. removed from inspection job in Dulles extension program.  
(see Robinson's Deposition & Oviedo's Deposition)
- f. denied promotion for Project Manager  
(see Thomas' Deposition JA at 68-81))
- g. Thomas' inference of age discrimination.  
(see Thomas' Deposition)
- h. at retirement he was not compensated for sick leave not taken.  
(see Oviedo's Deposition)

## **OVIEDO' WORK HISTORY**

Oviedo was a loyal and dedicated employee working during 16 years in WMATA as Project Manager at the Engineering and Services Department. The employer, Washington Metropolitan Area Transportation Authority (WMATA), also known as Metro, is a heavy rapid transit system authority serving the Washington metropolitan area. WMATA opened the passenger service in 1976 with just a core of underground passenger station service. Now, the Authority rail network includes six train lines with more than 1,200 vehicles in service, with about 100 passenger stations, and more than 200 miles of rail routes in Washington DC, portion of south Maryland and portion of north Virginia. Also, WMATA provides metropolitan bus service with almost 2,000 vehicles. Today, WMATA is the second or third busiest Metro system in USA., with a daily ridership approximately 900,000 passengers. Also, it is the most important employer in the Washington DC area with more than 10,000 employees.

Oviedo, joined WMATA in April 1999, and was hired as Project Manager with his seat at the J. Graham WMATA headquarter building located at 600 Fifth Street NW., Washington DC 20001. Oviedo substantial experience in railroads operation started as Electrical Engineer and Project Manager in Chile from 1960-1970, where he worked at the national cargo and passenger railroad. Oviedo main job in Valparaiso, Chile, was Superintendent of Service and Maintenance shops taking care of the rolling stock equipment and about 70 specialized mechanic workers. This position apart from his technical capabilities, allowed him to be familiar with finance and administration, as applied to labor force, parts, material, and implementing procedures, rules and policy of the company.

Oviedo immigrated to USA in 1972, due civil unrest in Chile during the presidency of Salvador Allende. Then, living, studying and working in USA, Oviedo continued his transportation career in Philadelphia, PA, during the years 1977-1995 working at the South Eastern Pennsylvania Transportation Authority (SEPTA). This railroad company hired him as Transportation Engineer, after he passed a series of tests and received his license as Professional Engineer in

Pennsylvania (PA). In SEPTA, Oviedo had a great professional career, was promoted several times, and became a Sr. Project Manager in the Engineering and Construction Department. In recognition of his ample knowledge in transportation work, practices, procedures, SEPTA put him in charge as PM rebuilding a fleet of 50 stainless steel cars, with a multimillion dollars budget and later PM on a line renewal of 4.5 miles superstructure elevated traction power, signal and communication system for the Frankford Elevated Reconstruction Program (FERP) . For the first time in USA, this program did not impact the main service, because it was done totally during the weekend day and nights.

Later in SEPTA, Oviedo was in charge of reconstruction of in-service railroads facilities and new construction of traction power substations which Oviedo built, installed equipment, tested and commissioned it. In this position, he was in charge of consulting engineers, preparing design for new maintenance facilities, power equipment design, specification development. In his 15 years in charge of main transportation construction projects for SEPTA, Oviedo was in charge of the finance control of all his projects, including scheduling, budget and contractor payments for labor and equipment. In 1977, Oviedo was the first engineer in SEPTA working in the Construction and Engineering Department to have the professional license (PE), and in 1986 was the second engineer in SEPTA working in the Construction and Engineering to have a master in electrical engineering (MSEE) taken from the University of Pennsylvania.

In 1995 Oviedo accepted a new work as consulting engineer with Day and Zimmerman Engineering Services, and he was in charge of the System Integration Testing Program to put in service the new light rail fleet and service facilities for the new Dallas Area Regional Transportation (DART). He developed the integration and commissioning program and was in charge of an engineer group that tested all major mechanical and electrical equipment for the new DART light rail transportation system. His work as manager of integration and testing was completed in 1998.

In June 1998, Siemens Transportation Partnership lured Oviedo to work with them as Manager of Commissioning for the new Tren Urbano in Puerto Rico, in the city of San Juan. As Manager of Commissioning, Oviedo provided expert knowledge to develop the requirements and standards to test and commissioning the new installed railroad equipment. Tren Urbano was a new heavy rail system in San Juan, PR to serve the transportation needs of the people of San Juan. It was a railroad project of 23 kilometer of new rail, 17 new passenger stations, and two maintenance facilities built with a cost around 1.7 billion USAD. Oviedo managing in part this important transportation project became familiar with Tren Urbano's policy, rules and procedures and with the Federal Transportation Authority (FTA) who financed the railroad project. As his Project Manager of Commissioning work in Tren Urbano dwindled down, Oviedo accepted an offer to work in the Washington Metropolitan Area Transportation Authority (WMATA), and was hired in Spring 1999 as a Project Manager, grade 14 pay. Oviedo worked all his career at WMATA Engineering Service Department during 16 years, and retire on 2015 at the age of 80 years old with the same grade and position. At the time of his hiring by WMATA as project manager Oviedo had worked already more than 25 years in three important rail authorities in USA, and 10 years work at the Chilean Railroad. WMATA in 2001 put Oviedo as Project Manager with the solely responsibility of developing a major traction power modernization program called Power Master Plan (PMP) to provide guide lines and engineering evaluation for the modernization of all traction power equipment in service from 1976. This task was very critical because all WMATA traction power equipment was getting close to the end of theirs 40 years life expectancy. In summary in this study, Oviedo planned and recommended the upgrading all traction power system, including all power cables and the electrical equipment, in the traction power substations to meet new requirements of more passenger service and more electrical load that almost double the electrical capacity of the WMATA railroad system by adding new and more capacity in the traction power equipment. After the completion of this assignment two years later, Oviedo was

the Project Manager in charge of the engineering work with the major construction and modernization projects for the Branch Avenue Rail Yard, Largo Extension Railroad, construction of New York Passenger Station, construction New Carrollton Storage Yard, in charge of the design and installation of an Auxiliary Power For the Columbia Metro Station, Electrical Testing Manager for Dulles Extension Project Phase 1. Oviedo is a member of IEEE, Traction Power Substation Section. He presented several technical papers in the American Public Transit Association in his traction power expertise in Atlanta, Georgia in 1996, Washington DC in 1997, and Vancouver, B.C. in 2001. Oviedo with regret retired from WMATA on April 2015, at 80 years old<sup>1</sup>.

<sup>1</sup>Salitre Inc. is a book written by Oviedo (author name Eduardo Bordonez-Molina). It is a biography of Oviedo and his people.

## STATEMENT OF THE CASE

A. Title VII Claims Introduction. The conflict of evidence in Oviedo's case involves, in large part, a dispute over job classifications, Oviedo and those of the successful contenders for the Project Manager jobs. WMATA claims that it hired Levy and Larkin because they were more qualified than Oviedo. Oviedo replies that WMATA is mistaken as their "comparative qualifications", and it was Oviedo who was more qualified to take one of two positions of Project Manager. (See Aka v WHC, 156 F. 3d 1284). Thomas, the WMATA interviewer, intentionally misread and misstated Oviedo resume, which show he has 16+ years of experience working in new railroad construction projects in WMATA as Project Manager and another 16+ years of experience working in another 3 Metro Rail Authorities.

(Point a). Oviedo stated that WMATA retaliated and violated section 703(a) when sent him to work in a hideous maintenance building located in Alexandria, VA.

WMATA knew the new work location of the work of Oviedo was inaccessible by Metro rail. WMATA policy is to provide transportation to his employees to get the work. When WMATA working place is far away of a Metro passenger station, WMATA provide special shuttle bus service. The legal aspects of this case is some U.S. Courts hold that this difference function is described as “working conditions, somehow do not affect petitioner’s salary conditions of employment”, others courts found this view “is narrow of” what constitutes prohibited discrimination under Section 703(a), see Breaux v City of Garland, 205 F. 3d 150, 157 (5<sup>th</sup> Cir. 2000), and Peterson v Linear Control, Inc. 18-1401. WMATA does no force his employees to take a new job located far away from a Metro location. Taken a personal car to get the work, it was not an option for Oviedo.

B. The ADEA Claim. (point b). A review of the entire case reveals that WMATA contents that summary judgment is warranted on Oviedo’s age discriminations claim because WMATA is immune from suit under ADEA. The Appeal court agreed. Oviedo challenges the district Court’s conclusion that WMATA enjoy sovereign immunity from Oviedo’s ADEA claims, following Kimel v Florida Board of Regents, 528 U.S. 62 (2000). First, Mr. M. Ouattara (Ouattara), Supervisor of Henry Oviedo (Oviedo) denied Oviedo’s promotion to supervise two maintenance engineers, because Ouattara said to Oviedo he cannot be a supervisor, because “he is too old” to claim emergency ladder from the WMATA underground tunnel to the street level. This is not true, till today Oviedo can climb that emergency ladders. Ouattara words are a direct evidence of discrimination, and should stop a summary judgment in favor of WMATA. Secondly (point g), Mr. John Thomas (Thomas) Chief of Major Capital Projects (MCAP), as the interviewer for Oviedo, used an age tabulation table to find out and select Ms. Levy (Levy) and Mr. Larkin (Larkin), the two youngest applicants from a list of 6 applicants. From the age’s point of view, Oviedo at 78 years old did not have a chance to compete for one open position for Project Manager (PM). These actions of discrimination and decisions from Ouattara and Thomas are not

quintessential “government functions”, they do not enjoy immunity, so their “propriety or personal” actions are a clear violation of ADEA.

C. Exhaustion of Administrative Remedies. (point c) WMATA has a file with about 20 denied promotion to Oviedo (see computer data JA 266). Jobs application and complains from Oviedo never made their way into WMATA. Oviedo seeks to be excused from timely exhausting these 20 claims. Two EEOC complaints took more than 4 years to get a resolution. The high rate of denied promotion by WMATA put a heavy technical burden on Oviedo to claim each adverse action on time to EEOC. WMATA many job adverse decisions were with inference of discrimination and the causal appear to be the national origin of Oviedo (Latino looking, and poor English sound). The District Court’s equitable power to toll the statute of limitation never understood Oviedo efforts to get his denied promotions into the Court. The time limitation issued by EEOC should not apply. New doctrines as the “continuing violation theory, the discovery rule, pay check accrual under Lilly Ledbetter could help to understand better why Oviedo should be excuse of the exhaustion time limit.

D. Title VII. (point f), Defendant contends that summary judgment is warranted on the discrimination and retaliation claims (1) Plaintiff failed to exhaust his administrative remedies with respect to all claims, where Oviedo is requesting equitable tolling. Also, WMATA claim it has articulated “legitimate, nondiscriminatory reason” for not interviewing Oviedo for two Project Manager positions. Oviedo concluded that it was error for the lower courts to grant summary judgment to WMATA disparate-treatment, because Oviedo was a well-qualified applicant, with better experience and education standards than the two selected candidates for Project Manager Levy and Larkin.

E. Direct Evidence of Discrimination or Retaliation (point d).

The District Court is wrong to state that Oviedo has neither identified the manager who made the alleged remarks nor produced evidence of when and in what context they were made (see Oviedo’s Deposition). Oviedo identified at least, one high ranking WMATA’s managers from the WMATA Construction

Department Mr. A. Kolodne made derogatory remarks about Oviedo ethnicity and his Hispanic accent (see *Ayissi-Etoh v Fannie Mae*, 1:10-cv-01259). In the labor world environment, speaking can be a way to accept or reject a person, "It is not what Oviedo says, but it is how Oviedo sounds". Direct evidence of discriminatory intent alone is sufficient to survive summary judgment, (see. *Robinson v Red Coats* 11-2212-RBW). Direct evidence would generally entitle a plaintiff to a jury trial, see (*Vatel v Alliance of Auto Mfrs*, 627 F3d. 1245). However, the Courts finds that Oviedo has not produced no direct evidence of discrimination to overcome summary judgment.

The 20-job promotion application rejected and one interview rejected by Thomas has one common source: the way that Oviedo speak English make the English-only language policies discriminatory, and have a disparate impact on certain national origin. Oviedo is a bilingual employee, and this English-only policy that WMATA accepts, and not condemn, create an atmosphere of inferiority, isolation and intimidation in a hostile work environment which constitutes discrimination. In WMATA Oviedo found difficult for English-only language job to get promotion and talented employees as him looked as unable to get a promotion and take a new good job like his American partners. Oviedo in spite of his excellent experience and education and good qualification, WMATA never recognized his merits, because English-only rule is a big barrier for promotion for bilingual employee, *Garcia v Spun Steak Co.* 998 F. 2d 1480. EEOC agrees with certain regulations of English speaking and bilingual employees by accepting in some way with the "Arabian American Oil" guide lines. The Spanish speaking population has already overpassed the African-American population as the biggest minority group in USA, what it means bilingual employees will rapidly increase in the job market, *Maldonado v City of Altus*, 443 F. 3d 1294. Oviedo bad work history promotion is an example of national origin discrimination. With large variance among district courts, it is time for this court (Supreme Court) to address whether language discrimination can fall under national origin discrimination.

#### **F. INDIRECT EVIDANCE OF DISCRIMINATION AND RETALIATION.**

The courts failed Oviedo direct evidence of discrimination, so Oviedo has to go to work under the McDonnel-Douglass frame work. Oviedo must establish a *prima facie* case of prohibited discrimination from WMATA. Then WMATA present his reason for not accepting Oviedo to take the mandatory interview to compete for two PM positions. if WMATA succeed in presenting such reason, the burden then shifts back to Oviedo, who has an opportunity to discredit WMATA's explanation. Nothing of the above events happened, WMATA did not present any reason or evidence for not taking Oviedo for a promotion interview, neither the district court did not make any attempt to make a comparison of skill, knowledge of Levy, Larkin v versus Oviedo or any other reason to justify the District Court no action, just WMATA stated that his action for not interviewing Oviedo was "legitimate and non-discriminatory" and just the District Court found credible the words given by WMATA. So, the McDonnell test to prove inference of discrimination from WMATA against Oviedo never got its way to get a jury. The McDonnell Douglass Corp three steps discrimination test never proved or challenged Oviedo's experience, knowledge, skill capacities. Then, the District Court rushed to accept "Thomas claims that the purpose of the two positions for which Oviedo applied "was primarily to manage projects, as performing engineering tasks and functions. A factfinder will find that Thomas is wrong, "Oviedo is better than what Thomas claims". Oviedo's resume said he was a Project Manager managing rail projects construction for 16+years in SEPTA, Philadelphia in total charge of preliminary system design, construction, equipment installation, testing and commissioning of multi-million dollars projects. As stated in Thomas oral deposition (see page 38, 49), Oviedo performed in SEPTA, "more the same work that Thomas does in WMATA", so the explanations of Thomas, as recruiter that Oviedo does have experience only in engineering design, and does not have manager experience in construction is pretextual. The only apparent reason of Thomas for not selecting Oviedo is his "Chilean-Spanish origin", and retaliation

because Oviedo did not agree with him in construction-engineering issues. Oviedo complained to WMATA, EEOC a couple of times for discrimination in WMATA during the promotion process that left Oviedo with about 20 engineering application not accepted with inference of discrimination. The District Court stated that Thomas did not know “Oviedo’s protected activity”, a requirement to take the McDonnell test, and it was too lengthy the time from the 2009-2011 EEOC charge to raise the inference of discrimination. WMATA is not truly, because WMATA EEOC Chief Mr. J. Wynne sent a memorandum to all Departments alerting them that Oviedo had complained 2 times to OEEC and WMATA about discrimination in the promotion process, and Oviedo for this fact has “protected activity”, see JA 259. WMATA intentionally discriminated against Oviedo on a prohibited basis by rejecting Oviedo from a group of 6 applicants to take an interviewee for promotion, see (Adeyemi v District of Columbia (04-cv-01684. It was a critical judiciary mistake that the District Court and Appeal Court agreed to denied Oviedo the McDonnell 3 steps discrimination test.

#### REASON FOR GRANTING THE WRIT

1. Oviedo is asking this court to determine if Thomas representing the WMATA-HRD as “his interviewer” has the right to denied a job interview to one qualified applicant. Oviedo was supposed to take a schedule interview to compete for promotion to a position of PM in the MCAP. The HRD had approved Oviedo as a well-qualified applicant. The interview was denied by Thomas, the interviewer, not because Oviedo was not meeting some job position requirements, but Thomas the person in charge of the interview arbitrarily stated Oviedo was not meeting new requirements formulated from him for the PM position. The selection of two PM positions were already completed, when Thomas fabricated new requirements, after the facts, just to justify that Oviedo did not qualify for the PM job.

2. Thomas added new requirement, after the selection of two PM, that the PM position requires good “knowledge of WMATA policy, procedures and rules”.

These new requirements applied only to Oviedo, it did not apply to Levy and Larkin, the applicants selected by Thomas to take the position of PM. In accordance with their resumes submitted Levy and Larkin have less substantial experience and education than Oviedo what it means that Thomas did not enforce his own rules to Levy and Larking of good knowledge of WMATA Policy, procedures and rules.

3. To prove Thomas' decision was intentional and personal for not interviewing Oviedo, a memorandum written by Priyanka Nanda (see JA 260), recruiter from HRD who was responsible for the selection of all candidates for the interview, Priyanka wrote in part," The hiring manager, John Thomas was advised to interview all six candidates, as they had all not only met, but exceeded the minimum job qualification for this position", she refers to job code 2854 requirements (see JA260).

Priyanka, passed to Thomas 6 candidates for the interview, including Oviedo. As an interviewer, Thomas has not authority to change, alter, denied in any way the pool of candidates selected by the HRD. The interviewer responsibility is to select the best qualified applicants from the pool that best meet the job code #2854 requirements.

The basic question is how Thomas knew that Oviedo was not "familiar with WMATA's processes and procedures" as he stated in his memo signed on 8/22/17 JA at 066, when he arbitrarily decided not to interview Oviedo, who with 16+ years of experience working as Project Manager on major WMATA transportation projects should know WMATA Policy, rules and procedures better than Levy and Larkin the applicants selected by Thomas, because Levy has only 2 years of experience working as project coordinator in WMATA not related with construction projects. Larkin with 19 year of experience working in the track department, never was a project manager. Their jobs did not provide enough administration knowledge to overcame Oviedo's superior PM experience in application of WMATA's policy, procedures, rules.

4. Oviedo working more than 16 years as PM in WMATA, for sure his daily work educated him to know and to deal with WMATA policies, rules and practices. Thomas is pretextual to assume his applicants selected for Project Managers, with less experience than Oviedo, they have more knowledge of being familiar with WMATA's policies, rules and practices than Oviedo. HRD did not approve Thomas's decision to disqualify Oviedo for the PM position without taking on him the required interview. Mr. James Wynne, WMATA Chief of the EEO, wrote that "Thomas should have interview Oviedo, because he fit better the PM work" (see James' memo in JA at 259). Also, HRD demanded that Thomas explains in a memo his reasons for not interviewing Oviedo. Thomas complied and wrote this time a different requirement for the PM job "Oviedo was not the best candidates for either job as his experience at WMATA, as demonstrated by his resume, concentrated primarily on electrical engineering design". For a person familiar with WMATA business, will find Thomas' statement is pretextual, because PM in WMATA do not work in engineering design. WMATA do not make his own project design. WMATA hires outside consultant engineering companies to make new design of project facilities, passenger station passenger, new railroad extensions, etc. WMATA hire engineers like Oviedo to work mainly in operation, maintenance, construction, safety of WMATA extensive passenger service line. What Thomas means is PM in the Engineering Department review construction design prepared by outside consultants. Also, others work in the engineering department is developing specs for rolling stock equipment, performing and testing new railroad equipment, etc. Thomas "did not read Oviedo's resume" which shows extensive Oviedo experience in railroad construction projects. Thomas by stating that Oviedo experience is only in electrical engineering design, which is not a capital offense, he demonstrates he does not want Oviedo to work in his construction department, and he is using any kind of excuses and pretexts to justify his discrimination behavior against Oviedo.

5. The District Court failed to do a comparison of experience and education taking Aka v WHC as an example. Appeal had to bring Amicus Curie

to help the court to do the comparison work between the selected applicants Levy, Larkin versus Oviedo following Aka's approach. Also, amicus had to evaluate why the District Court did not evaluated Oviedo's evidence showing that WMATA's explanation for not interviewing Oviedo was pretextual. It was critical for Oviedo that Appeal did object that the district Court did not rebuke Thomas's reasons to select Levy and Larkin. The District Court statement "was not the court job, nor her function of become a super-personnel department that reexamines an entity (WMATA) business decision". See Barbour v Browner, quotation omitted".

From the District Court point of view, it means that any applicant picked up by Thomas should be accepted, except Oviedo. This court has the obligation of clarify this procedure. There are ten thousand of WMATA's employees where hiring and promotion are the means to make progress in their careers. Thomas writing that Oviedo does not qualify for the position of PM, because his experience at WMATA is only on "electrical engineering design" is just pretextual to surprise other people who does not know how WMATA operates his business. Design work is not the main function for Oviedo in WMATA nor for a PM. See JA 064, point #4.

6. Thomas did not read Oviedo' resume. He did not know that Oviedo did in SEPTA the same kind of work that Thomas does in WMATA (see Thomas' deposition at JA page 155-158), nor Oviedo's PM construction experience in DART, and Tren Urbano, PR. It appears that Thomas discriminates, because Oviedo is a Latino Engineer.

7. Later, after the selection of Levy and Larkin, Thomas shifted for a second time, the requirements to fill the already taken PM positions. He changed the requirements from somebody with knowledge of WMATA rules and procedures (see JA at 020 dated January 31, 2014), to somebody having experience in canopy installation and finance work (see declaration of Thomas dated 08/22/17 in JA at 064-066). Thomas argument to select Levy and Larkin for the positions of Project Manager, gave only colorful reasons that "they had

the best combination of leadership ability, breath of, and technical knowledge so as to be the best candidates for the respective positions. Asked by Oviedo at his oral deposition (see page 077-080) from where he got that conditions, he cannot explain the reason. Thomas never worked with Larkin in any capacity, and only two years of work around Levy in project coordinator tasks. Thomas did not provide any documentation to prove his remarks. As conclusion, Thomas' declaration that Oviedo is not the best qualified applicant is not worthy of any credence. A factfinder will find the new requirements for canopy and finance work requested by Thomas are not mentioned or required by WMATA job specification 2854. In any case, Oviedo can do Canopy or Finance works, equal or better than Larkin or Levy. Thomas new job requirements are just pretextual, because he did not want Oviedo, a Chilean-Spanish Engineer to work in his construction department. The adverse action of Thomas is evidence of discrimination and the causal appear to be Oviedo's national origin.

8. Both courts were wrong when they accepted that WMATA had "legitimate, nondiscriminatory" reason for not selecting Oviedo for one of the two Project Manager position in November 2013. Oviedo as a matter of law, established a claim of discrimination or retaliation. This court should take the opportunity to correct possible wrong decision mistakes from the lower courts, because Oviedo in this case challenged WMATA covered illegal employment practice. Oviedo showed that despite his excellent qualifications, he was rejected when he applied for the promotion job. (see Aka v WHC, 156F. 3d 12994, 1290 (D.C. Cir. 19980). Was WMATA entitled to summary judgments if the records, viewed in the light most favorable to the nonmoving party, reveals that there are lots of genuine issues as to many material facts waiting to discuss (See Tao v Freeh, 27 F. 3d 6350)?

Summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party (See Anderson v Lobby, Inc., 477 U.S. (1986) by WMATA rejecting or declining to promote Oviedo for the PM position.

9. Should the District Court apply the McDonnel-Douglass framework to claim that WMATA has acted with discriminatory intent? Did the district court act differently from other state courts when Oviedo was asking and ready to initiate of proving a prima facie case of discrimination or retaliation? The District Court prematurely decided that WMATA has produced evidence sufficient for reasonable jury to find WMATA has asserted “legitimate non-discriminatory reason” for not accepting Oviedo to compete for a better job. Oviedo argued with valid reasons that the record evidences shows that Thomas’ explanations for not taken Oviedo for a schedule interview to compete for two open positions for Project Manager are “unworthy of credence”. Why Appeal Court did accept the action of the District Court, and did not rebuke Thomas’s decision for not interviewing Oviedo? The District Court responded, because “Title VII.... does not authorize a federal court to become a super personnel department that reexamines an entity’s business decision” (see, Barbour v Browner 181 F. 3d 1342). This decision is in conflict with Oviedo petition, and of another U.S. court of appeal decisions. As result, it was OK. that WMATA hired candidates less qualified than Oviedo for the two Fall 2013 Project Manager positions. Also, it was OK. for both Courts that Thomas, the interviewer, shifted twice his explanations for his hiring of the Project Manager positions as Amicus proved.

10. Appeal failed to make a credible comparison of education and experience as it was done in Aka. To make sure that Levy and Larkin has an engineering education as require for the job description code 2854, Oviedo looked in Levy and Larkin resumes, the only documents in files about their education and experience. Appeal to compare education requirements stated: Levy has a “bachelor’s in international economic relations degree” (as indicated in his very bad printing resume), the only document presented by Levy when she applied for the PM job. Human Resource should not take in consideration that degree, because she did not provide any original degree, courses transcripts from her university. WMATA failed to enforce his own regulations that university degrees have to meet “accreditation” when they are taken in foreign countries.

Levy's university International Economic Relations degree was taken in Uzbekistan, former Russia Republic. Then Appeal said that Levy has an MBA taken in Virginia, with not transcript about what courses she took. Also, Levy claim a Master Degree in Project Management taken at the George Washington University with not certification about the length and content of her studies. As for Larking the only superior study indicated in his resume is a program in IT, with no indication it was a bachelor degree or master degree taken at the University of Maryland, no transcripts of studies and content of the course taken are in his job application. However, WMATA during the discovery process requested to Oviedo to send all original or notarized copies of all University educational documents and degrees, including courses description, transcripts of each courses taken, program, etc. Oviedo met WMATA requests and send a package with all his educational documents. Everything Oviedo said about his education is there in WMATA's file, but WMATA failed to provide to Oviedo the educational documents of both selected Project Managers Levy and Larkin. There are not in file any documents to prove or check degrees or educational certificates. A resume is not considered by the USA Job Government site as a legitimate, credible document for degrees or studies. In any case, if Levy and Larking superior studies were true, a factfinder should find that Oviedo degrees and studies still are superior to Levy and Larkin studies. Oviedo studies is pure Engineering core, which is the number one main requirement for Construction Project Manager positions. This Court should check, if Oviedo was or not significant better qualified than Levy and Larking (see Aka, 156 F. 3d at 1294). Appeal without any evidence added for comparison stated "Levy's professional experience indicates, over 9 years of progressively responsible experience in the areas of transportation energy construction and project finance". That Appeal statement is not supported for any document in Levy's files supporting that she performed that kind of work (Appeal said he can't read all Levy's resume for the bad quality of the copy). Levy had only two years of experience as project coordinator in WMATA Construction Department when she applied for the PM

position. Before WMATA work, Levy never was involved with any major transportation project. Most of her time, she worked in bank credit institutions, and a consulting agency supporting government operations. If Aka is the heart of the comparison studies and experience, documents certification is the most credible tool to check substantial education.

11. The Human Resources selected Thomas as the interviewer to conduct the selection of the best applicants meeting the job code 2854. Thomas refused to interview Oviedo, and after the interview process, he selected Levy and Larking as his PM selection. Oviedo complained to WMATA Human Resources, and later filed a charge of national origin, retaliation and age discrimination with EEOC, charge No. 570-2014-00474

12. As part of this discrimination charge, Oviedo complained to EEOC that WMATA violated Oviedo's the terms of his condition of employment? His contract and his job position assigned him to work in the WMATA headquarter J. Graham Building located at down town Washington D.C., 600 Fifth St., NW, 4<sup>th</sup> Floor. Around 2008, his Supervisor M. Ouattara "retaliated" sending Oviedo to work at Alexandria, Virginia in a hideous maintenance building with no access to Metro transportation. The "retaliation" was, because Oviedo complained to human resources that Ouattara and others two applicants were improperly selected for high engineering jobs, without having the engineering license that WMATA and the States requires to perform engineer functions. (see JA at 257). Later, after a rail train collision, Ouattara was removed from the Chief Engineer position, because he did not have the professional license required for that position (oral deposition pages 46-49). Also, Ouattara "retaliated" because Oviedo did not follow his instructions of providing a better appraisal to Engineer S. Paimpalill who complained to Ouattara (see Ouattara's oral deposition pages 45, 48, 49, 62, 64, and district court doc. 20, dated 01/03/17, point 2, page 4, point 6-page 4. The maintenance building became a hostile place to work, because Oviedo's office was far away from the Eisenhower Metro station, and was a real physical effort to walk daily a couple of miles back and forward. It was a disparate

treatment from WMATA, because Oviedo was the only worker walking to get his job far away. From a work force approximately 200 maintainers assigned to that location no body walked from the Eisenhower (Yellow Line) closest Metro rail station to the Maintenance building. Driving to get the job, was not an option for Oviedo. Oviedo's Project Manager position requires to get his work assignments from the Chief Engineer, and other high management people located in the Metro headquarter building in down town Washington DC. "Are the term, conditions, or privileges of employment covered by Section 703(a)(1) is limited only to hiring, firing, promotions, compensation, and leave"? Oviedo's salary was not impacted, but to walk through dangerous heat in summer and extreme cold weather in winter was a real adverse employment action by the employer due retaliation. The retaliation walking occurred from about 2008 till Oviedo retire in 2015 at the age of 80 years old, (see Peterson v Linear Control, Inc., docketed May 7, 2019).

13. As indicated in Oviedo's Brief of Pro Se in Support of Appellant Delivery to the Appeal Court on March 07, 2019, page 14, Oviedo Claimed "in the rush to leave his work, because he was totally burnt out for WMATA's discriminatory practices, and working in hideous maintenance building, was hurt by WMATA non-compensation for sick leave no taken. WMATA do not pay for unused accrued sick time no taken by his employees, but normally adjust the retirement date to his workers to exhaust the sick leave no taken. Oviedo with more than 2,000 hours of sick leave, never seen in WMATA, because is a very high sick leave, accumulated during his 16 years as a healthy working employee at WMATA, was not compensated for that loss, what is a "disparate treatment". All employees who retire from WMATA they do with a sick leave of zero hours in their files. Sick leave is a contract benefit, WMATA should pay Oviedo a compensation lump sum equivalent to 2,000 hours in accordance with Oviedo's last hourly salary. Is Oviedo correct to ask this Court an opinion on this adverse case of disparate treatment?

In summary my questions to this Court are:

**1. WHY AN EMPLOYER CAPRICIOUSLY DENIED A JOB INTERVIEW TO A WELL QUALIFIED APPLICANT.**

Oviedo primary argument is the District Court erred by not conducting a qualification comparison as instructed in Aka between Levy, Larkin and Oviedo. The second argument is the interviewer Thomas denied to a qualified applicant Oviedo, the right for the interview, then without from the benefits of the interview, where Thomas had the opportunity to check the applicant specific experience for the work, related education for the position, he stated without any base or record evidence that Oviedo with 16 years of experience in WMATA as PM, he was not the best candidate for the project manager job. Is inference of discrimination on the picture against Oviedo by being a Latino Engineer?

**2. WHY EMPLOYER HIRED LESS QUALIFIED CANDIDATES FOR TWO PROJECT MANAGER OPEN POSITIONS IN WMATA?**

Oviedo argues that the record evidence shows that Thomas hired candidates less qualified than he for the two Fall 2013 Project Manager positions and that Thomas shifted his explanation for his hiring decisions to make his selected candidates appear more qualified. Appeal found the lack of evidence put in the records foredooms both of Oviedo's arguments. Oviedo presented as evidence of lower experience and education the resumes sent by the applicants Levy and Larkin to the Human Resources Department. Oviedo is substantially better than Levy and Larkin alleged better education and experience that they put in their resumes. Also, Oviedo presented to the court as a record evidence the official WMATA job specification number 2854 which details duties that Levy and Larkin are not meeting.

A factfinder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job, but WMATA did not, the factfinder can legitimately infer that WMATA, the employer consciously selected

a less qualified candidate, something that employers do not usually do, unless some other strong considerations, such a discrimination enters into the picture (see Aka v WHC). Oviedo put in the records as evidence a memo written by the Human Resources Recruiter P. Nanda. She analyzed and evaluated 23 resumes to pick up the candidates who best meet the minimum job posting code requirements. Nada selected 6 candidates, including Oviedo who has high professional functions and abilities, exceeding the requirements of the job posting code 2854. Oviedo selected by the Human Resources as a well-qualified candidate for the PM job, was not even selected to take the interview, because Thomas arbitrarily refuse to do it. As an interviewer nominated by the Human Resources Department, Thomas has not authority or rights to change the requirements of the position specification, but he did it. Later, Thomas alleged that Oviedo was not selected, because he was not meeting the new job requirements that he fabricated. Thomas choose Larkin to take the job of PM canopy installation, never done by him, then Thomas took Levy to take on the PM finance work, which is also a different assignment from the habitual work of PM. The evidences show that Thomas clearly violated WMATA Hiring and Promotion Policy, by changing the job requirements by adding new canopy and finance experience, on the fly, not mentioned nor required by the job specification 2854.

Oviedo is a professional engineer registered in Maryland, Washington DC and VA. and he has 16+ years of Project Manager experience in WMATA engineering and he supported all major construction transportation projects done by WMATA. A reasonable jury will find Oviedo is substantially better applicant compare with Levy and Larking with no experiences as Project Managers, as shown in theirs resumes attached to theirs job applications. It is unbelievable the lower courts, after Oviedo provided all kind of evidence, supported in each brief and an appendix documents with 270 pages, still the courts found that the evidence submitted by Oviedo are not enough. Amicus Curiae stated as evidence to Appeal, and in the oral presentation that "Thomas shifted his

explanation at least twice for his hiring decisions to make his selected candidates appear more qualified than Oviedo. A reasonable juror will find the evidences put in the records by Oviedo, should be more than enough to charge Thomas of inference of discrimination (Aka v WHC, 156 f. 3d 1284)”.

**3. IS PRO SE APPARENT FAILURE TO COMPLY RULE 56 AND LOCAL RULE 7(h)(1) IS ENOUGH TO ADMIT ALL THE MOVING PARTY STATEMENT OF MATERIAL FACTS?**

Oviedo opposed the motion for summary judgment, but appear he did not file a separate statement disputing any facts asserted in WMATA's Statement of Material Facts Not in Dispute. Oviedo presented arguments with record evidence to support his statement that Thomas erroneously and arbitrarily decided that Oviedo's qualifications were insufficient for the position, disputing the positions focused on finance and canopy work as not required, not listed in the job specification 2854 (see JA 102). Oviedo presented factual evidences of his work at WMATA show he is more qualified to take one of the two Fall 2013 Project Manager positions, than the selected candidates Levy and Larkin with marginal experience in WMATA major transportation projects. Levy and Larking resumes are the evidences they have only marginal work experience in comparison with the Job posting requirements code 2854 (see JA 106). To be clear, Oviedo attached as a record evidence the project Manager position description entitled "WMATA Job Code 2854 dated on 2010, but Appeal said No Declaration or Testimony showing what relevance that document had to the 2013 vacancies at issue. The relevance is clear that a factfinder will find the official WMATA documents Job code 2854 is the one to be used to fill the PM positions. HRD attached this job code in the application as the requirements to fill the PM positions. The posting is shown in JA 238-241.as record evidence. The Job Code 2854 is shown in the job data sheet at the right bottom side (see JA254 for Levy, JA 265 for Larkin, JA 266 for Oviedo) and this job code is on the computer job

data for each job application. The relevance is clear that without a job code 2854, the PM job cannot be filled. An Appeal Judge concurring in part, disagreed with the Court blaming Oviedo for alleged missing evidence:

“the majority has invoked district court Civil Local Rule 7(h) to ignore material facts and supporting evidence that Oviedo proffered in his opposition to WMATA’s motion for summary judgment. That rule permits-but does not required-district courts to assume that facts identified in the moving party’s statement of material facts are admitted unless those facts are controverted in the non-moving party’s separate statements of genuine issues. See LCvR7(h)91) ..... The majority faults Oviedo for “his failure to dispute” WMATA’s statement of Facts describing the job specifications for the positions for which Oviedo did not receive an interview for what Oviedo were discriminatory reason. Op. 17-18. Proceeding pro se, Oviedo included in his opposition to WMATA’s motion for summary judgment a concise, numbered list of facts that he sought to prove at trial..... The majority acknowledges the court’s obligation to liberally construe documents files pro se to draw all reasonable inferences”.

**4. WAS THE REFUSE FOR OVIEDO’ JOB INTERVIEW BY THOMAS AN EVIDANCE OF DISCRIMINATION?**

The case originated when Oviedo applied for one of two Project Manager position advertised by WMATA Human Resources in the Fall 2013. The job posting for the position was the requisition #131416, code 2854 (see JA at 260 and JA at 266). Also, Oviedo attached the job description as an evidence of opposition to the Summary Judgment provided in favor of WMATA. The Appeal Court did reject such document, because they said there was no declaration entitled or testimony showing what relevance that document had to the 2013 Project Manager vacancies at issue. The true is pro se and amicus heavily relied in this job description code in multiple parts of his summary judgment response as his principal tool to show WMATA’s requirements to fill the two openings for

Project Manager positions (see JA at 106, 115, 116, 125). Oviedo also attached the job description as an exhibit in JA 137-139. One Circuit Judge, concurring in part with Oviedo stated:

“the majority faults Oviedo for his failure to dispute WMATA’s Statement of Facts describing the job specifications for the positions for which Oviedo did not receive an interview for what he claims were discriminatory reason. Op.17-18. Oviedo included in his opposition to WMATA’s motion for summary judgment with a concise, numbered list of facts that he sought to prove at trial, Opp’n to Summ”.

##### 5. DO SELECTED PROJECT MANAGERS HAVE VERY MARGINAL WORK EXPERIENCE?

Some Appeal Judge wrote: 5-6, and a factual background section with ample record citations. Oviedo’s contention that the selected project managers had “very marginal” work experience compared to the “Job Posting requirements and the WMATA Job Code 2854,” To find out Thomas rejecting Oviedo for the interview was a WMATA procedural matter or a personal pretext for discrimination, we look at a memo written by Priyanka Nanda (see JA at 260), WMATA Human Resources Recruiter Agent. She was in charge of the selection of the candidates for these two openings for Project Manager position. On April 10, 2015, Priyanka wrote: “Metro received a total of 23 applicants. According to the minimum job qualification for this position a candidate should possess:

“A bachelor’s degree in Engineering, Transportation Planning or a related field. A minimum of eight (8) years of experience as a project manager in the transportation industry, including management of consultants and professional staff.....”

Appeal stated that Oviedo failed to present a material dispute of facts on the WMATA Job Code 2854. Unbelievable, that Court treated WMATA’s statement of the job description as undisputed, unsupported allegation. Appeal is making a big

mistake, because the job code 2854 is the official WMATA operating tool to hire or not hire any employee in WMATA for PM jobs. It have been in the HR job classification for more than 20 years. Appeal also stated that Oviedo never submitted a declaration stating that Job Code 2854 was the same job description to which he applied in the Fall 2013. The best way to demonstrate that the job code and the PM vacant job is the same animal, it is enough to look in the computer job data to see that Levy, Larkin and Oviedo apply the same job code 2854 when they fill up the job application (JA264 for Levy, 265 for Larkin, 266 for Oviedo). WMATA does not require an affidavit, as the Appeal suggested to get the job and the code defined. The Courts did not understand that Canopy and Finance jobs were created by Thomas, just to stop Oviedo's participation in the selection PM process, they do not have any job code. They do not exist in HRD job inventory. Finance PM and Canopy PM are not named in the job code description as job or duties required to carry over by a PM.

It is not doubting that the Districtourt and then Appeal Court failed to conduct a qualification comparison as instructed in AKA, between Levy, Larkin and Oviedo. Amicus was requested to do that comparison job. Appeal said in light of the undisputed fact that Thomas was seeking a "financial manager". Appeal is wrong, this discrimination case is just because Thomas was not authorized nor he has the responsibility to hire people to work in not specified work designed or approved by the HRD. Another contradictory argument by the Appeal Judge is to believe no reasonable jury could conclude that Oviedo was significantly better qualified for the job. The true is Oviedo is better qualified for the job. Oviedo experience in managing railroad construction project has the same level than Thomas, with the difference that Oviedo is Engineer. Levy resume indicates she has only two years of experience working as coordinator in contract office jobs. Appeal without any record evidence claimed that Levy had a bachelor in international economic relation, but that study or degree need to be accredited by a review or studies and accreditation institution, because her degree was taken in a foreign country, in this case Uzbekistan, former Soviet Republic. This is a

WMATA requirement for professional degrees taken outside U.S.A., also Levy claim a MBA in an International University in Fairfax, Virginia, a Maser in Project Management in GWU, no college transcripts indicating time, program, courses content were provide by WMATA. If all the above in Levy were true, Oviedo still have better education with a master in electrical engineering from a IVY League School. Let's experience, Appeal stated that Levy's professional summary indicates "over 9 years of progressively responsible experience in the areas of transportation energy construction and project finance". Her resume indicates nothing of experience in the above subject. She put 3 years working in similar duties providing consulting services for diverse clients. Never have ant energy construction project under her hands.

Nobody in WMATA knew that Thomas was seeking a Finance PM and Canopy PM. These requirement were known after the interview was done because HRS requested to Thomas to provide reason why he did not interview Oviedo. Thomas interview only 5 candidates, refusing to interview Oviedo. Later Oviedo complained to Human Resources Recruiter Nanda the reasons for his non selection for an interview. Thomas for the first time provided the following response

:" Oviedo experience at WMATA has been focused on the technical aspects of the electrical power systems for the operation of the rail system, but the position requires knowledge of the business aspects of WMATA's policies, procedures, and practices.... Oviedo's experience was too narrowly focused to qualify for the position of Project Manager in MCAP (see JA at 261).

At that moment, Oviedo will say that Thomas is wrong. The main work of Oviedo at WMATA was not to take care of the third rail system, which is a small part of WMATA Traction Power System, what Thomas does not understand and ignores. Oviedo as the senior PM engineered all new railroad projects taken for WMATA during his 16 years tenure of Oviedo's at WMATA. Thomas will never admit that he does not want Oviedo to work in his construction department,

because Oviedo is a Latino Engineer who oppose to him a couple time from the engineering point of view by his wrong doing in his construction projects. It is import to note in accordance with WMATA Hiring, Promotion Policy, Thomas as the job interviewer has not business, nor authority to reject or disqualify the selection provided by the Human Resources Department "before the interview". During the interview or after it, Thomas can disqualify an interviewer who demonstrated poor knowledge and short of capabilities to meet the requirement for the PM position.

#### **6. IS WMATA RIGHT TO ASK THIS COURT TO DISREGARD OVIEDO EVIDENCE OF BEING A WELL QUALIFIED CANDIDATE OVER OTHERS?**

WMATA advertised internally and externally the hiring/promotion of the two-project manager positions. As any company in need to fill jobs, it must provide some operative documents detailing the condition, responsibilities, requirements of the position. WMATA advertised the PM selection process as requisition # 131416 and job code 2854. As evidence, Oviedo show them in WMATA computerized job data sheet (see JA at 264). These two documents are crucial to understand WMATA selection process. The applicants know what requirements must meet in order to have a shot for the positions. After the selection of candidates was completed by HRD, based in the two above documents, Thomas saw on the interviewer list provided to him, the name of Oviedo and other 5 applicants. Thomas interviewed all candidates, except Oviedo, and make his selection on Levy and Larkin. At that point, the selection process was OVER, the posting was closed, and two PM were selected. Thomas did not tell anybody in the WMATA organization that he did not call Oviedo for the interview. He selected Levy and Larkin as the winner of his selection process for the PM position. Oviedo complained to HRD, and then to EEOC for inference of discrimination by Thomas in the selection process by denying him the right for the interview to compete for a better job. The problem is the District Court did not

realize that the interview process was OVER when Thomas started to find good reason for not interviewing Oviedo. From 23 candidates HRD found only six meeting the requirement of the position, including Oviedo. HRD found Oviedo was a well-qualified applicant for the job, but Thomas don't. It appears that Thomas did not want to have a Latino Engineer, as Oviedo in his construction department. Thomas has not authority to change on the fly WMATA job requirement to justify his job selection. Amicus proved to the Appeal Court that Thomas pedal back at least two or three times to convince others that Oviedo was not a well-qualified to take the PM job.

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## 7. CAN THE COURT INVOKE RULE 56 AND LOCAL RULE 7(h) TO IGNORE MATERIAL FACTS IN OVIEDO' MOTIONS OPPOSING WMATA'S SUMMARY JUDGMENT?

Pro se did not submit properly documents to comply with Rule 56 and Local Rule 7(h). The rule 56(a) requires WMATA moving for summary judgment to identify all Oviedo's defenses. The District Court assumed that facts identified in the moving party's statement of material facts are all admitted unless those claims are controverted by Oviedo in separate statement of genuine issues. Oviedo opposed with briefs his opposition to WMATA's motion for summary judgment. The Court is accepting WMATA's Seven Points Statement of Material Facts as facts not disputed by pro se. However, six obvious points of that statement were accepted by Oviedo in separate briefs (see JA briefs), because they were not in conflicts in any way with Oviedo. From the seven WMATA' s points, the only point in dispute, and immediately rejected by Oviedo was the point related with the 2014 EEOC discrimination charge, which WMATA was affirming as "non-discriminatory and legal", but WMATA at the same time recognized in his own brief as the only points of that list that Oviedo has the legal right to dispute or claim. Most of the many docket entries prepared by Oviedo, they all carried the 2014 EEOC discrimination charge as the main issue, and those arguments

provided cannot be ignored by the Courts. As for rule 7(h) not opposed at the proper time, Oviedo evidences proffered in his opposition to WMATA's motion for summary judgment were all provided with plenty of arguments. The rule 7(h) permit, but not require district court to assume that facts identified in WMATA's statements of material facts are admitted, because they were full controverted by Oviedo in statement of genuine issues in separated briefs.

8. . CAN THE COURT FIND WMATA JOB SPECIFICATION UNWORTHY OF CONSIDERATION, BECAUSE OVIEDO PUT IT IN THE SAME DOCUMENT AS THE ARGUMENTS.?

The WMATA job application carry a job code number to apply the job requirements. Some of the 10 thousand of WMATA's employees may use the hiring and promotion policy for their hiring, grow, promotion, better salaries. Job specification or job code to fill jobs are used for most companies, included the DC judicial system. They state the job requirements and duties to fill new positions. WMATA to fill two Project Manager position used job code #2854 as the job description tool. Thomas, the interviewer did not know what code WMATA was calling for these positions. How Thomas can make a good interview, if he did not know the requirements for the PM positions. The candidate's selection for the interview is solely in the hands of the Human Resources Department (HRD). The final selection of the candidates is solely a responsibility of the interview, "after all qualified candidates are interviewed.". Thomas failed Oviedo a well-qualified candidate, before taking his interview.

WMATA never will recognize that Thomas failed Oviedo, because he was a Chilean Spanish Engineer, denying his best education and experience at WMATA and at other transportation authorities in USA. The District Court did not take the McDonnel indirect discrimination test, nor the but-for causation test where Oviedo is subtracted from his ethnic origin, but keeping all other attributes and conditions of Oviedo like his experience and education. The but-for

causation test for sure, will select Oviedo for one PM position. These tests help the Courts to make a better decision, if discrimination was part of the picture. In essence, WMATA got the summary judgment, because the McDonell three steps test, and the but-for causation test were not performed as required.

**9. DOES THOMAS HAVE RIGHTS TO CHANGE THE JOB CODE 2458 REQUIREMENTS TO SELECT APPLICANTS MEETINGS HIS PERSONAL REQUIREMENTS?**

Thomas decision to not interview Oviedo is inference of discrimination by his ethnic origin (Latino) and retaliation for complaining to WMATA by discriminatory promotion practices. Thomas in order to disqualify Oviedo, fabricated new job requirements, not required or mentioned by the job description code #2854, after the PM selection was done, finance work or canopy installation were added as new requirements for the PM job. These aggregates are not the main core work of the PM responsibilities. Experience in canopy and finance are just monkey wrenches thrown by Thomas to disqualify Oviedo. Any way, if such works are needed in accordance with Thomas, but not in accordance with the job description, Oviedo can do these jobs. Oviedo did more technical, more complex construction jobs. If Levy and larking can do those jobs, Oviedo will make them better, based in his superior education and experience over Levy and Larlin. The main work of the Project Managers in the MCAP is to use experience and skill to manage large railroad construction projects. It is unbelievable that Larking and Levy, the two candidates selected by Thomas to take the PM jobs are the only ones who cannot do the job required by Thomas, because the new requirements were added after the interview, only to stop Oviedo from making the interview. Also, Levy and Larkin failed the job requirements, because they are not engineers, never work as PM in charge railroad projects, do not have the minimum 8 years of experience managing large railroad projects, as the job

posting 2854 required. Canopy and Finance experience are just pretextual requirements to hide Thomas discrimination or/and retaliation actions.

**10. CAN THE COURT NOT EVALUATE OVIEDO'S REBUTTAL EVIDANCE, AND THEN STATED HE FAILED TO SUBMIT EVIDANCE OF INTENTIONAL DISCRIMINATION?**

The District Court decided in his own accord, without warning to pro se, to strictly enforce the federal and local summary judgment rules against Oviedo. WMATA never invoke the local rule 7(h) in moving for summary judgment. Although Oviedo knew some of his briefs were not 100% correct, the District Court never alerted Oviedo that his statement of facts was deficient, because it was not written in a separate document. However federal rule 56e allows to pro se and lawyers a second chance to perfect factual statements. WMATA requested writing grant of discretion to the district court to exclude all Oviedo's evidences at the final summary judgment, because of formatting error. At this late stage the court did ignore Amicus recommendation that the Court has ignored important procedures and gave WMATA significant advantage by ignoring Oviedo's rebuttal declaration that WMATA was not telling the true. WMATA provided during the documentation procedure the resumes that WMATA Human Resource approved to declare applicants Levy and Larkins qualified for the interview. WMATA back pedal to call back and declare null Levy's resume, job specification code 2458. The District Court used these documents to give WMATA the summary judgment. At the Appeal Court, WMATA declared all null his own documents indicated above, because they are not authentic. In spite of all shortcoming from WMATA to prove that Oviedo rejection from the interview was nothing more than a right from Thomas, the Appeal Court supported all finding by the District Court and affirming the District summary judgment, and rejecting the "on banc affirmative judgment by pro se". So, the discrimination claims by Oviedo of national origin, retaliation, age died at the entrance steps of the Appeal Court building for lack of so-called affirmatives evidences.

## **11. CAN WMATA JOB REQUIREMENTS CHANGE BY PERSONAL OPINION OF INTERVIEWER?**

The hiring manager Thomas determined that Oviedo was not the best candidate for either job as his experience at WMATA as demonstrated by his resume concentrated primarily on electrical design. A Juror will find that the above statement is highly pretextual, because Oviedo resume stated he has 30+years of experience as project manager in construction of railroad facilities, power substations, maintenance and service shops, passenger cars storage yards, etc. Oviedo with professional license (PE) in five states will not be short of experience and education to manage a project manager job installing canopies over escalators, or do some finance job which is not the major responsibility of a construction project manager. Thomas affidavits are pretextual. The applicants that Thomas selected Levy and Larking theirs resumes indicated they cannot do the above jobs, because WMATA requires engineering education, they never were project manager as the position require, and they do not have the 8 years of experience as PM in charge of important railroad construction project.

## **12. OVIEDO PRESENTED EVIDENCE OVER AND OVER REBUTTING WMATA PROFFERED EXPLANATION THAT TERMINATION HAS NOT OCCURRED. WERE BOTH COURTS RIGHT TO FAIL ALL OVIEDO CLAIMS FOR LACK OF EVIDENCE?**

Amicus helped the court to analyze Aka v Washington Hospital Center (quotations omitted) to see if Aka discrimination was related in some ways with Oviedo VII discrimination charge. Amicus reviewed meticulously all Oviedo and WMATA documents presented to the Court and his recommendation to Appeal Court was clear and soundly “reverse the court summary judgment decision in favor of WMATA”, because Oviedo is more competent and better qualified than Levy and Larkin.

### 13. WMATA IS NOT WILLING TO ENFORCE A TRANSPARENT HIRING, PROMOTION PROCEDURE.

During the hiring and promotion procedure, every hiring decision is up to the Interviewer thinking. Subjective questions during the interview prevail over question related with qualification, education or experience of the applicants. In this environment English-only language have a substantial adverse impact on bilingue speakers. The WMATA cultural belief is an employee who speak a different language like Spanish, because of his national origin, he is not the best candidate. The organization do not trust bilingue speakers. If Oviedo will not have Chilean-Spanish national origin, he will greatly be accepted in the organization. As an example, Oviedo offers evidence that Kolodne's ethnic origin remarks on Oviedo and his speaking is or constitute a direct evidence of discrimination, but the district court did not agree. The court said remarks must come from Thomas, the decision maker. See district court summary judgment page 13.

### CONCLUSION.

I pray for the foregoing reason, the petition for writ of certiorari should be granted. Respectfully submitted,

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