

No.

IN THE
Supreme Court of the United States

SHARON BOLTON, PETITIONER,

v.

CITY OF HATTIESBURG

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Whether the Court should resolve the 5-3 circuit court split as to whether the rule in *Aikens* should apply to discrimination cases at summary judgment?
2. Whether the Court should resolve the circuit court split as to what difference in qualifications an employee must show to provide evidence of pretext?
3. Whether Mrs. Bolton has provided evidence of discrimination?

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The November 10, 2017 opinion of the Fifth Circuit is reported at *Bolton v. City of Hattiesburg*, 701 Fed. Appx. 370 (5th Cir. 2017); App. 1a. The May 30, 2017, decision of the United States District Court, S.D. Mississippi, Eastern Division dismissing the plaintiff's claims is unpublished. App. 3a.

JURISDICTION

The Fifth Circuit Court of Appeals entered its final order on February 15, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 prohibits discrimination in employment based on race, color, religion, sex or national origin.

(a) Employer practices

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; or

(2) to limit, segregate, 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.

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) prohibits discrimination in employment based on age.

(a)EMPLOYER PRACTICES

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees 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 age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter

STATEMENT

Petitioner, Sharon Bolton, asserts that (1) the *prima facie* case requirement in the *McDonnell Douglas* burden shifting analysis should not be used at the summary judgment stage, (2) she should be allowed to prove pretext by providing evidence that she was the best qualified candidate and (3) she can show pretext as Respondent lied to the Equal Employment Opportunity Commission about the selection process

and was evasive in discovery as to its legitimate non-discriminatory reason.

Mrs. Bolton began her employment with the City of Hattiesburg, Mississippi (Hattiesburg”) in 1996, as a deputy court clerk in the police department. A month after being hired Mrs. Bolton was promoted to the accounting department for Appellee. In 1998, Mrs. Bolton was promoted to the position of office assistant at the Hub City Transit department.

In 2015, Vincent Nelms, who was Mrs. Bolton’s supervisor, announced to Mrs. Bolton and other staff members that he was going to create a crew supervisor position. Hattiesburg’s employee handbook makes it clear that all open positions will be posted internally at its Human Resources department at a minimum. As such, Mrs. Bolton and others waited for Mr. Nelms to post the position, so they could apply for it when it was created. However, instead of complying with its own policy, Mr. Nelms handpicked Reggie Smith for the position without seeking any applications. At the time of the selection, Mrs. Bolton was fifty-two (52) years old, while Mr. Smith was thirty-seven (37) years old.

On October 15, 2015, Mrs. Bolton filed a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”) alleging sex and age discrimination. In response to the charge, Hattiesburg falsely claimed to the EEOC that it had received no applications or resumes for the position, and that Mr. Smith was merely a managerial transfer. This was undisputedly a lie as (1) Hattiesburg produced the resume Mr. Smith submitted for the position on May 26, 2015, and (2) this was not a managerial transfer because Mr. Smith received a

promotion and was not in a managerial position prior to the promotion.

Then in discovery and in its motion for summary judgment, Hattiesburg claimed that Mrs. Bolton was considered for the position, but that Mr. Smith was selected for the promotion because it believed he was the most qualified. The minimum qualifications for the position required (1) four years of experience in a mass transit and/or para-transit operations, (2) two years of supervisory experience and (3) either hold or be willing to attain a Class B driver license within 30 days of being selected. While there was not a minimum education requirement, the job description mentioned that it would be considered in conjunction with relevant experience. Mrs. Bolton had (1) approximately thirty-seven years of experience in mass transit operations, (2) twenty years of supervisory experience, (3) would have obtained a Class “B” CDL license within 30 days had she received the position, and (4) a bachelor’s degree in business administration. In contrast, Mr. Smith only had (1) six years and ten months experience in mass transit, (2) a two-year certification from a community college in automotive machinist, (3) fourteen years of supervisory experience of janitors, and (4) a class B driver’s license.

On April 24, 2017, Hattiesburg filed a motion for summary judgment on all claims. On May 30, 2017, the district court granted the motion for summary judgment. The district court found that Mrs. Bolton could not provide evidence of a *prima facie* case, and also concluded she could not show evidence of pretext. On June 29, 2017, Mrs. Bolton timely filed a notice of appeal to the Fifth Circuit Court of Appeals. On

November 10, 2017, the Fifth Circuit Court of Appeals issued its Opinion affirming the district court's decision.

This petition followed.

REASON FOR GRANTING THE PETITION

I. Introduction

This case presents the Court with the opportunity to resolve two issues that has plagued the courts for decades. The first is whether the *McDonnell Douglas* burden shifting analysis is relevant anymore. The second is how much of a difference in qualifications is enough to provide evidence of pretext in discrimination.

II. There are two significant circuit court splits this Court should resolve.

A. There is a 5-3 circuit split as to whether the ruling in *Aikens* should apply in discrimination cases at the summary judgment stage.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), established one method of evaluating evidence of discrimination in employment. If the plaintiff establishes a *prima facie* case of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the disputed employment action. The function of the *prima facie* case is to compel the employer to articulate such a reason. Once the employer does so, the burden returns to the plaintiff to establish that the proffered reason is a pretext for

discrimination. Although the *McDonnell Douglas* approach originated in a Title VII case, it has been widely used in other types of cases involving claims of an unlawful motive.

Because of the large volume of litigation involving allegations of invidious discrimination or other unlawful motives, this Court has repeatedly granted *certiorari* to clarify the application of the *McDonnell Douglas* methodology.¹In subsequent decisions, the Court made clear that the burden of establishing a *prima facie* case should not be onerous, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), and that “[t]he method suggested in *McDonnell Douglas* ... was never intended to be rigid, mechanized, or ritualistic.” *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983), explained that, if at trial an employer offers a non-discriminatory explanation for the action at issue, the court should *not* consider whether the plaintiff had established a *prima facie* case. Instead, *Aikens* held, the court should proceed directly to the final step of the *McDonnell Douglas* approach and decide whether the proffered reason was a pretext for unlawful discrimination. 460 U.S. at 715-16.

¹ *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978).

McDonnell Douglas and *Aikens* were decided when Title VII claims were to be adjudicated at bench trials. Since the adoption of the 1991 Civil Rights Act, however, Title VII cases (and almost all other types of discrimination claims) are tried to juries. Today most discrimination claims, prior to any trial, are subject to motions for summary judgment. In the wake of these developments, the lower courts have faced and become divided about whether *Aikens* applies to summary judgement.

At present the Sixth, Seventh, Eighth, Eleventh and D.C. circuit courts have found that the *Aikens* rule should be followed at summary judgment. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 662-3 (6th Cir. 2000); *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 296 (7th Cir. 1998); *Riser v. Target Corp.*, 458 F.3d 817, 820-21 (8th Cir. 2006); *Morrison v. City of Bainbridge*, 432 Fed. App'x 877, 881 n.2 (11th Cir. 2011); *Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 493-4 (D.C. Cir. 2008). In contrast, when faced with the *Aikens* rule the Fourth, Fifth and Tenth circuit courts have found that it does not apply at summary judgment. *Pepper v. Precision Valve Corp.*, 526 F. App'x 335, 336 n. * (4th Cir. 2013); *Hague v. Univ. of Tex. Health Sci. Ctr.*, 560 Fed. App'x 328, 335 n. 8 (5th Cir. 2014); *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1202 n.12 (10th Cir. 2008). Additionally, while other circuit courts have not directly addressed the *Aikens* rule at summary judgment, all of the other circuit courts that review Title VII employment cases require the plaintiff to provide evidence of a *prima facie* case even when the defendant has offered its legitimate non-discriminatory reason. *Cruz v. Mattis*, 861 F.3d 22, 25 (1st Cir. 2017); *Walsh v. N.Y. City Hous. Auth.*, 828 F.3d 70, 74-5 (2nd 2016); *Collins v. Kimberly-Clark Pennsylvania, LLC*,

2017 U.S. App. LEXIS 17784 *9 (3rd Cir. 2017); *Blair v. Shulkin*, 685 Fed. Appx. 587 (9th Cir. 2017). So, they continue to analyze employment discrimination cases at the summary judgment stage the same way the Fourth, Fifth and Tenth circuit courts do today even though they have not directly addressed whether the *Aikens* rule applies at summary judgment.

This issue is important as courts in five circuits use the same burden of proof at summary judgment and trial, while eight circuits apply a stricter mechanized standard at the summary judgment stage compared to simply determining whether discrimination actually occurred like they do at trial. So, in many parts of the country an employment discrimination plaintiff has a higher burden to get to trial compared to a lesser burden at trial.

In the current case, the district court found that Mrs. Bolton could not show a *prima facie* case of discrimination as she had not applied for the position or expressed interest in the position. Normally, this would be fatal to a discrimination claim because an employee could not be discriminated against as the employee would not have been considered for a position without at least expressing interest in the position. However, this is not your normal failure to promote case as (1) the employer had a policy that required posting the position, (2) the reason Mrs. Bolton did not express an interest or apply was because she was waiting on Hattiesburg to follow its own posting policy and most importantly (3) Hattiesburg admitted and the district court found that Mrs. Bolton was considered for the position even though she did not apply or express an interest in the position.

This Court has warned that the *McDonnell Douglas* burden shifting analysis was not intended to

become “rigid, mechanized or ritualistic.” *Furnoc Const. Corp. v. Waters*, 438 U.S. 567, 577(1978). However, that is exactly what many of the district courts across the country have been doing. District court and circuit court judges deal with a high volume of cases and are always looking for a clear test to make it easier to make these difficult determinations. The *McDonnell Douglas* burden shifting analysis certainly makes it easier, but it is flawed. Justice Gorsuch, while serving as a circuit court judge, has consistently found that it complicates the issue and improperly shifts attention away from the real question, and that is whether discrimination actually occurred. *Paup v. Gear Prods., Inc.*, 327 Fed. Appx. 100, 113 (10th Cir. 2009); *Barrett v. Salt Lake County*, 754 F.3d 864, 867 (10th Cir. 2014); *Walton v. Powell*, 821 F.3d 1204, 1210-11 (10th Cir. 2016). By eliminating the *McDonnell Douglas* burden shifting analysis, courts can get back to determining whether discrimination actually occurred rather than determining whether an employee can meet a flawed test.

B. There is a 4-1-6 circuit split as to what difference in qualifications a plaintiff must prove to show evidence of pretext.

In many failure to promote or hire cases, plaintiffs seek to prove discrimination by offering evidence that they were better qualified than the individual selected for the position in question. This Court has repeatedly held that a plaintiff may rely on comparative qualifications evidence to establish that an employer’s proffered explanation for its hiring or promotion decision was a pretext for discrimination. “Under this Court’s decisions, qualifications evidence may suffice, at least in

some circumstances, to show pretext.” *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006) (*per curiam*). “[A plaintiff] might seek to demonstrate that [an employer’s] claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989), superseded on other grounds by 42 U.S.C. § 1981(b). “The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer’s reasons are pretexts for discrimination.” *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

The lower courts have long disagreed about the appropriate standard “for inferring pretext from superior qualifications.” *Ash*, 546 U.S. at 457. In *Ash* this Court rejected one such standard, but recognized that “[f]ederal courts ... have articulated various other standards,” citing divergent legal rules in at least three circuits. *Id.* at 457-58. *Ash* did not attempt to resolve the differences that remained among the courts of appeals, explaining that “[t]his is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications.” *Id.* The instant case provides the ideal and essential occasion for defining that standard and resolving that circuit conflict. In the years since *Ash*, a multi-faceted circuit conflict, rooted in differences that pre-dated *Ash* itself, has become deeply entrenched. Four courts of appeals hold that a plaintiff can meet his or her burden of proof with evidence from which the trier of fact could infer that he or she was the better qualified candidate. At the other end of the spectrum, the six courts of

appeals apply a standard so exceptionally demanding very few appellate decisions in these circuits have found it satisfied. The governing standard effectively defines, and potentially limits, the scope of federal laws forbidding discrimination in promotion and hiring. As such, by having significantly different standards, employees may be successful in some circuit courts but denied justice in other circuits.

The First, Fourth, Eighth and Ninth circuit courts apply a “better qualified” standard. Essentially, employees in these circuits can show evidence of pretext by merely showing they are better qualified than the person selected. *Ahmed v. Johnson*, 752 F.3d 490, 500-02 (1st Cir. 2014); *Adams v. Trustees of the University of North Carolina*, 640 F.3d 550, 559 (4th Cir. 2011); *Cox v. First Nat. Bank*, 792 F.3d 936, 939 (8th Cir. 2014); *Shelley v. Geren*, 666 F.3d 599, 611 (9th Cir. 2010).

The D.C. circuit court applies a higher standard by contending that being better qualified is not enough to show pretext. Instead, employees must show that they were “significantly better qualified” than the person selected for the position. *Hamilton v. Geithner*, 666 F.3d 1344, 1352 (D.C.Cir. 2012).

Finally, the Second, Fifth, Sixth, Seventh, Tenth, and Eleventh circuit courts require the most stringent standard. In these courts, significantly better qualified is not even enough. Instead, employees must show that they are so overwhelming more qualified that no reasonable employer would have made the same decision. *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001); *Moss v. BMC Software, Inc.*, 610 F.3d 917, 923 (5th Cir. 2010); *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 815 (6th Cir. 2011); *Hobbs v. City of Chicago*, 573 F.3d 454, 462 (7th Cir. 2009);

Johnson v. Weld County, Colorado, 594 F.3d 1202, 1211 (10th Cir. 2010); *Springer v. Convergys Customer Mgmt. Grp., Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007). In *Ash*, this Court found that the “leap off the page and slap you in the face” standard was too vague. *Ash*, 546 U.S. at 457. Following this decision, six circuits have merely refashioned that prior standard to appear more legally clear.

III. Whether Ms. Bolton has provided additional evidence of sex and/or age discrimination?

On top of disparities in qualifications, Mrs. Bolton also provided the district court and the Fifth Circuit additional evidence that could provide evidence of pretext. Petitioner does not contend this question alone is sufficient to grant this petition. However, if this Court were to grant the petition on the other questions presented, Mrs. Bolton requests that the Court also consider her additional evidence.

Specifically, the fact that Hattiesburg lied to the EEOC about why the position was not posted, which violated its own policies. Mrs. Bolton contends this evidence shows that Hattiesburg had a discriminatory motive as it lied to a federal agency about a material fact so it could contend that Mrs. Bolton could not show a *prima facie* case of discrimination. Additionally, the fact Hattiesburg also lied to the EEOC about receiving the resume of the person selected for the position contradicted its argument to the EEOC that it was merely a “managerial transfer.”

The district court found that Mrs. Bolton could not show pretext as Hattiesburg claimed that part of the reason Mrs. Bolton was not selected was because she had received disciplinary actions in the past. In

discovery, Mrs. Bolton requested Hattiesburg's legitimate non-discriminatory reason, and at no point in Hattiesburg's response or throughout discovery did it identify Mrs. Bolton's disciplinary actions as part of the reason. Only after discovery closed did Hattiesburg produce an affidavit from Mr. Nelms claiming disciplinary actions were part of the reason for the non-selection. A reasonable jury could have determined that the reason Hattiesburg was evasive in discovery and only later provided additional detail after discovery closed was because it had an intent to hide its discriminatory motive. *Emmel v Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 634-35 (7th Cir. 1996).

CONCLUSION

For the foregoing reasons, this Court should issue a *writ of certiorari* to review the judgement of the United States Court of Appeals for the Fifth Circuit for the current case.

Respectfully submitted,

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