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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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June 04 , 2025

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 24 - 50770 Delton York v. Ezell
USDC No. 5 :22 -CV-451

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 39, 40, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 40 require you to attach to your petition for panel rehearing or rehearing en bane an unmarked copy of the court' s opinion or order.** Please read carefully the Internal Operating

Procedures (IOP 's) following Fed. R. App. P. 40 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set fort h good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for *certiorari* in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U. S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm you that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that appellant pay to appellee the costs on appeal. A bill of cost form is available on the court 's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/
Lisa E. Ferrara, Deputy Clerk

Enclosure(s)

Mr. Robert D. Green
Mr. Delton York

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[DATE STAMP]
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
FILED
June 4, 2025
Lyle W. Cayce
Clerk

No. 24-50770

Delton York,
Plaintiff-Appellant,

versus

CHARLES EZELL, *Director of the United States Office of Personnel Management,*
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:22-CV-451

Before WIENER, DOUGLAS, and RAMIREZ, *Circuit Judges.*

PER CURIAM:*

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* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Plaintiff-Appellant Delton York, a former employee with the United States Office of Personnel Management ("OPM"), brought this employment discrimination suit against the Director of OPM, in his official capacity, under Title VII of the Civil Rights Act of1964 ("Title VII") and the Age Discrimination in Employment Act of 1967 ("ADEA"). York alleged that his employer unlawfully refused to recommend him for a promotion because of his race and age. The district court granted Appellee's motion for summary judgment. We AFFIRM.

I

York, an African-American man in his forties, was employed as a career ladder Human Resources Specialist in OPM's Organization Design & Position Classification(" ODPC ") unit. York was hired by Jason Parman, the Human Resources Strategy Group Manager and second-line supervisor for ODPC. At all times relevant to this suit, York's General Schedule ("GS") grade level at OPM was GS-12. Given that York held a "career ladder" position, he could have been promoted to a successive grade level, at management's discretion and without further competition, provided that certain criteria were met. The criteria for such promotions are set by 5 C.F.R. § 335.104 and the OPM Human Resources Handbook ("Handbook"). According to the regulation:

> No employee shall receive a career ladder promotion unless his or her current rating of record. . . is "Fully Successful" (level 3) or higher. In addition, no employee may receive

> a career ladder promotion who has a rating below "Fully Successful" on a critical element that is also critical to performance at the next higher grade of the career ladder.

5 C.F.R. § 335.104.2.[1] Per the Handbook, in addition to having a fully successful summary rating at their current grade, employees "must also demonstrate the ability to perform acceptably at the next higher grade" to be eligible for a career ladder promotion.

From 2010 to the fall of 2013, York was directly supervised by Michelle Arcara, the first-line supervisor in ODPC. During that time, Arcara rated York as "fully successful" in his annual performance appraisals for Fiscal Years ("FY") 2011, 2012, and 2013. After Acara left OPM in December 2013, a series of acting supervisors – Yvonne Ryan, Firooz Basri, Morris Blakely, and Rachelle Booth – were appointed to serve on a rotating basis for the remainder of the first half of FY 2014. Parman testified that these appointments were not competed for, but rather were «informal assignments" meant to be "a stopgap measure" while the unit evaluated whether Arcara would return. Once it became clear that Acara's departure was indefinite, the unit held a competitive process, in which employee Laura Knowles applied for, and was selected to serve as, the first-line supervisor in ODPC for the remainder of FY 2014. Compared to the informal appointees,

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[1] The "current rating of record" refers to the summary rating from an employee's most recent annual performance appraisal. *See* 5 C.F.R. § 430.203.

Knowles spent the longest amount of time supervising York.

Parman was the final decision-maker concerning York's eligibility for a promotion to the GS-13 level at the end of FY 2014, and he was not required to consider any feedback from Knowles or the previously acting supervisors. Nonetheless, in April 2014, Parman solicited and received input regarding York's performance from the various individuals who held supervisory roles in ODPC during FY 2014. Knowles recommended against promoting York to GS-13 based on her assessment of his ability to work autonomously, meet deadlines, and engage directly with ODPC's customer agencies without a supervisor present. Ultimately, Parman decided not to recommend York for a GS-13 promotion on or about September 16, 2014. He reasoned that York demonstrated "an inability to perform the more complex aspects of consulting work in organization design and position classification," and «to correctly perform certain basic functions of his job (i.e. submitting timely and correct billing statements, work reports, travel authorizations, and vouchers)."

York administratively challenged Parman' s refusal to promote him.[2] After exhausting that process, he filed this suit against Defendant-Appellee Charles

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[2] In an affidavit submitted in relation to York's administrative case with the Equal Employment Opportunity Commission ("EEOC"), Parman stated that each of the persons who rotated as acting ODPC supervisors for FY 2014 "stated that [York] was not ready to be promoted, as he had not demonstrated the competencies necessary to succeed at the G S-13 level."

Ezell, in his official capacity as OPM Director, in the United States District Court for the Western District of Texas. York alleged that Appellee's refusal to recommend him for a promotion constituted discrimination based on race and age. In support, York claimed that his colleague Jason Hohman, a white male under 40 years of age, was a similarly situated employee who received a promotion from GS-12 to GS-13 in June 2013. Appellee moved for summary judgment, arguing that he was entitled to judgment as a matter of law because Hohman was not a similarly situated employee, and thus York could not show that any comparator was elevated to GS-13 within ODPC under similar circumstances. Appellee also contended that there was a legitimate, non-discriminatory reason for the decision not to elevate York to GS-13, and that York failed to demonstrate that the tendered reason was pretextual for discrimination.

The district court granted summary judgment in favor of Appellee. First, the court found that York failed to establish a prima facie case of race or age discrimination because, in light of substantial evidence indicating disparate job performances between Hohman and York for purposes of their consideration for a GS-13 promotion, the two employees were not similarly situated. Second, even if York had established a prima facie case, the court concluded that he failed to show that Appellee 's neutral reason for declining to promote him – concern for York's ability to perform his job adequately – was a pretext for discrimination. Proceeding pro se, York now appeals from the district court's entry of final judgment on July 30, 2024, in which the court

dismissed his claims with prejudice.

II

We review a district court's grant of summary judgment de novo. *Bargher v. White,* 928 F.3d 439,444 (5th Cir. 2019), *as revised* Guly 2, 2019). Summary judgment may be granted only if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. C1v. P. 56(a). "When considering a motion for summary judgment, a court must make all reasonable factual inferences from the evidence in the light most favorable to the nonmovant." *Bargher,* 928 F.3d at 444. But "conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden." *Id.* (quoting *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1429 (5th Cir. 1996)). Rather, the nonmovant "must set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case." *Morris v. Govan World Wide Moving, Inc.,* 144 F.3d 377, 380 (5th Cir. 1998).

III

Title VII discrimination cases "based on circumstantial evidence," such as York's race-based claim for a failure to promote, "are subject to the *McDonnell Douglas* burden-shifting analysis." *Davis v. Dallas Area Rapid Transit,* 383 F.3d 309, 316 (5th Cir. 2004) (citing *Meinecke v. H & R Block of Hous.,* 66 F.3d 77, 83 (5th Cir.1995) (per curiam)). The same analysis applies to York's age discrimination claim under the

ADEA. *See Ross v. Univ. of Texas at SanAntonio,* 139 F.3d 521,525 (5th Cir.1998).

Under that framework, the employee-plaintiff must first make a prima facie case of discrimination, after which the burden shifts to the employer-defendant to provide a legitimate, non-discriminatory reason for the adverse employment decision. *Davis,* 383 F.3d at 317 (citing *Patel v. Midland Mem)l Hosp. & Med. Ctr.,* 298 F.3d 333, 342 (5th Cir. 2002)). "If the employer is able to state a legitimate rationale for its employment action," the employee has the burden of showing that the proffered reason for the employer's decision was pretextual for discrimination. *Id.* To show pretext on summary judgment, "the plaintiff must substantiate his claim of pretext through evidence demonstrating that discrimination lay at the heart of the employer's decision." *Price v. Fed. Express Corp.,* 283 F.3d 715, 720 (5th Cir.2002).

Here, "[w]e need not reach the question [of] whether [York] made out a prima facie case" because, for the reasons below, we agree with the district court that York did not satisfy his ultimate burden of showing that Appellee's neutral reason for not promoting him was a mask for discrimination. *Tortorici v. Harris,* 610 F.2d 278, 279 (5th Cir. 1980) (per curiam); *see also Ebbs v. Folger Coffee Co.,* No. 97-30945, 1998 WL 156335, 140 F.3d 1037, *2 (5th Cir. 1998) (unpublished) (pretermitting the issue of whether employee established a prima facie case of racial discrimination because he failed to show that employer's legitimate reason for discharging him was pretextual).

IV

Assuming arguendo that York has shown a prima facie case of discrimination under Title VII and the ADEA, Appellee has the burden of articulating a non-discriminatory reason for the decision not to recommend York for a GS-13 promotion. An employee's "poor job performance" is a legitimate, non-discriminatory reason for an adverse employment action. *Little v. Republic Ref Co.,* 924 F.2d 93, 96 (5th Cir. 1991) (finding that employer's termination of employee for "poor job performance" was a legitimate reason). That principle applies to the adverse employment action alleged in this case: failure to promote. *See Haire v. Bd. of Sup'rs of La. State Univ. Agric. & Mech. Coll.,* 719 F.3d 356, 364 (5th Cir. 2013) (" Failure to promote is clearly an adverse employment action." (citing *Breaux v. City of Garland,* 205 F.3d 150, 157 (5th Cir. 2000) ("Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands."))). Parman declined to promote York based on his concerns for the sufficiency of York's job performance-a neutral basis for his decision that is thoroughly substantiated by the record. *See Little,* 924 F.2d at 96. As summarized by the district court:

> Knowles testified about Plaintiff's difficulty managing administrative tasks and her need to "follow up quite a bit with [Plaintifi] to seek clarification on items." Knowles also testified about Plaintiff's struggles to work autonomously without supervision, communicate effectively with ODPC team members and customers, and meet

> timelines. In addition, Knowles emailed Parman in September 2014 regarding concerns about Plaintiff seeking reimbursement for a car rental in an amount that exceeded the prior approved amount. Parman echoed Knowles' concerns, identifying Plaintiff's "inability to perform the more complex aspects of consulting work in organization design and position classification" as well as "demonstrat[ing] an inability to correctly perform certain basic functions of his job (i.e. submitting timely and correct billing statements, work reports, travel authorizations, and vouchers)."

Instead of rebutting these concerns with evidence that Parman' s true motive was discriminatory, York contends that a genuine dispute of material fact exists because two of the ODPC acting supervisors, Morris Blakely and Rachelle Booth, testified that they believed York was promotion-ready in FY 2014. But notably, York does not dispute that second-line supervisor Parman was the sole person responsible for the decision to refrain from granting him a career ladder promotion in FY 2014 – not the acting, first-line supervisors who were informally appointed and served only on a rotational basis. As it is uncontested that the acting supervisors were not the final decision-makers regarding York's promotion-readiness, the opinions of Blakely and Booth on that subject are inconsequential. *See Lavigne v. Cajun Deep Founds., L.L.C.*, 654 F. App'x 640, 647 (5th Cir. 2016) (per curiam) ("'[S]tatements by non[-] decision makers, or statements by decision makers unrelated to the

decisional process itself [do not] suffice to satisfy the Plaintiff's burden' of showing discriminatory intent." (alterations in original) (quoting *Rios v. Rossotti,* 252 F.3d 375, 382 (5th Cir. 2001))).

York's appellate brief makes two additional arguments for his claim that Parman's refusal to promote him was pretextual–both are unavailing.

First, York insists that Booth "heard Parman make a statement to York (and others) at the worksite that caused Booth to understand that Parman was only interested in hiring and promoting Caucasian employees."[3] York's formulation of the meaning behind this purported statement by Parman belies the record.[4]

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[3] Though York does not specify the contents of this alleged statement, in his opposition to Appellee's motion for summary judgment, he asserted that the statement showcases York's preference for hiring employees "from his majority-white alma mater because 'they have the same values.'"

[4] In his deposition, Parman testified that, during a substantial growth period from 2006 through 2010, OPM concentrated on hiring from the industrial and organizational psychology graduate programs of four universities: the University of Maryland, Missouri State University (Parman's alma mater), the University of Wisconsin-Whitewater, and the University of Northern Iowa. Contrary to York's bald claim that this targeted recruiting initiative suggested Parman's preference for hiring and promoting Caucasian employees, Parman's testimony explained that the initiative was based on the skills taught in those graduate programs: "data evaluation analysis and analytics skill and capability... human factors assessment and the principles of assessment and measurement [and] the ability to write both technically and persuasively in deep technical subjects related to

And, in any event, Booth and York's subjective belief about what the alleged statement denotes is irrelevant for the requisite showing of pretext. *See Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 654 (5th Cir. 2004) (finding that employee's "subjective belief" about supervisor's race-or-age-based animus was "insufficient to create an inference of... discriminatory intent.") (quotations and citation omitted).

Second, York claims to have "produced evidence of improper witness tampering" by Parman "upon which a trier of fact could conclude an improper motive." Given that York makes this argument without specifying what the alleged evidence entails, it is a baseless assertion that fails to move the needle on his burden of showing pretext. *See Bargher,* 928 F.3d at 444. Moreover, York did not present this argument to the district court in his opposition to Appellee's motion for summary judgment, and thus he cannot assert it for the first time on appeal. *See Greenberg v. Crossroads Sys., Inc.,* 364 F.3d 657, 669 (5th Cir. 2004).

V

In sum, even if York could make a prima facie case for his claims alleging race and age discrimination under Title VII and the AD EA, his claims fail because he cannot show that Appellee' s neutral reason for refusing to promote him was pretextual for discrimination. We AFFIRM.

HR[,] related to assessment, [and] related to measurement."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DELTON YORK,
Plaintiff

-vs- SA-22-CV-00451-XR

KIRAN AHUJA, DIRECTOR OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT;
Defendant

FINAL JUDGMENT

This action was considered by the Honorable Xavier Rodriguez, and the following Judgment is rendered. It is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that: Plaintiff Delton York shall take nothing by his claims against Defendant Kiran Ahuja, and Plaintiff's claims are **DISMISSED WITH PREJUDICE**.

It is so **ORDERED**.

SIGNED this 30th day of July, 2024.

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DELTON YORK,
Plaintiff

-vs- SA-22-CV-00451-XR

KIRAN AHUJA, DIRECTOR OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT;
Defendant

ORDER

@@ START HERE

On this day, the Court considered Defendant's motion for summary judgment (ECF No. 41), Plaintiff's response (ECF No. 43), and Defendant's reply (ECF No. 44). After careful consideration, the Court **GRANTS** Defendant's motion for summary judgment.

BACKGROUND

Plaintiff Delton York brings this employment discrimination suit under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq.* ECF No. 22. Plaintiff

alleges that Defendant[1] unlawfully refused to recommend him for promotion because of both his race and age. *Id.* ¶ 138. Plaintiff is African American and was born in 1965, making him over 40 years old at all times relevant to this suit. *Id.* ¶¶ 31, 32.[2]

Plaintiff began his employment as a Human Resources Specialist with the Office of Personnel Management ("OPM") in July 2010. *Id.* ¶ 30. Plaintiff was employed by Defendant as a "career-ladder Human Resources Specialist under its Organization Design & Position Classification ('ODPC') unit." *Id.* ¶ 5. Plaintiff's position was a "career ladder" position, permitting Defendant to promote Plaintiff to a successive grade level, without further competition, based on time and performance. *Id.* ¶¶ 35–42. Plaintiff alleges that Defendant refused to promote him from a GS-12 role to a GS-13 role, despite meeting the requirements for the superior role and not receiving negative feedback for his performance. *Id.* ¶ 48.

Human Resources Strategy Group Manager Jason Parman—the man who Plaintiff now contends discriminated against him by refusing to recommend him for promotion—personally hired Plaintiff into OPM. ECF No. 43-8, Ex. H at 2. From 2010 to the Fall

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[1] Defendant Kiran Ahuja is the Director of the U.S. Office of Personnel Management and is named in her official capacity pursuant to 42 U.S.C. § 2000e-16.

[2] The Court dismissed Plaintiff's Title VII and ADEA retaliation claims in its ruling granting Defendant's partial motion to dismiss. *See* ECF No. 29.

of 2013, Plaintiff's direct supervisor was Michelle Arcara. ECF No. 43 at 5. During her time as York's direct supervisor, Arcara rated York as "fully successful" in his FY11, FY12, and FY13 annual performance appraisals. *Id.* Plaintiff asserts that at no time did Arcara tell him his performance was deficient or that he did not exhibit the necessary competencies to earn a promotion from a GS- 12 to GS-13 position. ECF No. 22 ¶¶ 43–45. When Arcara left OPM, Plaintiff began to be supervised by several acting managers—Yvonne Ryan, Firooz Basri, Morris Blakely, Rachelle Booth, and Laura Knowles. ECF No. 43 at 10. Plaintiff's second-line supervisor remained Jason Parman. *Id.*

In April 2014, Parman received input from the various acting managers regarding Plaintiff's performance, including Laura Knowles, who supervised Plaintiff during the second half of FY14. ECF No. 41 at 8. Knowles recommended that Plaintiff not receive a promotion to GS-13 based on her assessment of Plaintiff's ability to work autonomously, meet deadlines, and engage directly with ODPC's customer agencies without a supervisor present. ECF No. 41-10, Ex. G at 317:20–319:3. Parman testified that he was the final decisionmaker with respect to Plaintiff's promotion and was not required to consider any of Plaintiff's interim and acting supervisors' input. ECF No. 41-4, Ex. C at 283:5–284:3. Parman decided against recommending Plaintiff for a promotion to GS-13 at the end of FY14, on or about September 16, 2014. ECF No. 22 ¶ 17; ECF No. 41 at 1. Parman concluded that Plaintiff demonstrated "an inability to perform the more complex aspects of consulting work in

organization design and position classification. In addition, Plaintiff continue[d] to demonstrate an inability to correctly perform certain basic functions of his job (i.e. submitting timely and correct billing statements, work reports, travel authorizations, and vouchers.)." ECF No. 41-13, Ex. J at 5.

Plaintiff's internal complaints and administrative process and appeals ran from October 27, 2014 through March 2, 2022. ECF No. 22 at 2–3. Plaintiff's complaint was filed in this Court on May 9, 2022. ECF No. 1.

Defendant's Motion for Summary Judgment

Defendant argues that she is entitled to summary judgment as a matter of law because Plaintiff cannot demonstrate any comparator who was elevated to the GS-13 level within ODPC in the Fall of 2014.[3] ECF No. 41 at 2. Secondly, Defendant argues that she has articulated legitimate, non-discriminatory reasons for the decision not to elevate Plaintiff to GS-13, and Plaintiff has failed to offer "substantial evidence" that those reasons are pretextual. *Id.* The Court agrees

[3] The Court previously dismissed any claims brought by Plaintiff that predate September 2, 2014 because they are administratively barred. ECF No. 29 at 11 (A federal employee is required to "initiate contact with [an EEO] counselor within 45 days of the date of the matter alleged to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1)).

with Defendant.[4]

DISCUSSION

I. Standard of Review

The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED R. CIV. P. 56. To establish that there is no genuine issue as to any material fact, the movant must either submit evidence that negates the existence of some material element of the non-moving party's claim or defense, or, if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidence in the record is insufficient to support an essential element of the nonmovant's claim or defense. *Little v. Liquid Air Corp.*, 952 F.2d 841, 847 (5th Cir. 1992), *on reh'g en banc*, 37 F.3d 1069 (5th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323

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[4] In addition, Defendant argues that an element of Plaintiff's damages claims should be dismissed. Plaintiff claims that at the insistence of his supervisor, he enrolled in a Master of Business Administration program at the University of Phoenix. ECF No. 43 at 28. Plaintiff appears to seek between $52,000 and $120,000 in education expenses. ECF No. 41 at 2. Defendant argues that the federal government already paid for the tuition in the form of Plaintiff's GI bill benefits, and, consequently, Plaintiff has not incurred any out-of-pocket damages. *Id.* Following oral argument on Defendant's motion for summary judgment at a July 1, 2024 hearing, the Court entered summary judgment on behalf of Defendant on this claim, finding that Plaintiff was not entitled to recover such educational expenses as damages in this action.

(1986)).

Once the movant carries its initial burden, the burden shifts to the nonmovant to show that summary judgment is inappropriate. *See Fields v. City of S. Hous.*, 922 F.2d 1183, 1187 (5th Cir. 1991). Any "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment," *Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003), and neither will "only a scintilla of evidence" meet the nonmovant's burden. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Rather, the nonmovant must "set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case." *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). The Court will not assume "in the absence of any proof... that the nonmoving party could or would prove the necessary facts" and will grant summary judgment "in any case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant." *Little*, 37 F.3d at 1075.

For a court to conclude that there are no genuine issues of material fact, the court must be satisfied that no reasonable trier of fact could have found for the nonmovant, or, in other words, that the evidence favoring the nonmovant is insufficient to enable a reasonable jury to return a verdict for the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In making this determination, the court should review all the evidence in the record, giving credence

to the evidence favoring the nonmovant as well as the "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000). The Court "may not make credibility determinations or weigh the evidence" in ruling on a motion for summary judgment, *id.* at 150, and must review all facts in the light most favorable to the nonmoving party. *First Colony Life Ins. Co. v. Sanford*, 555 F.3d 177, 181 (5th Cir. 2009).

II. Title VII and ADEA failure to promote claims

Title VII failure-to-promote claims are evaluated under the *McDonnell Douglas* burden-shifting framework. *Davis v. Dall. Area Rapid Transit*, 383 F.3d 309, 316–17 (5th Cir. 2004). A plaintiff

> first must demonstrate a prima facie case by offering evidence that she (1) is the member of a protected class; (2) sought and was qualified for the position; (3) was rejected; and (4) was passed over by the employer so it could promote, hire, or continue to seek a person in a non-protected class. If the plaintiff makes a prima facie case, the defendant must offer a legitimate nondiscriminatory reason for promoting the non-protected employee. If the defendant does so, the plaintiff must then produce substantial evidence indicating that the proffered legitimate nondiscriminatory

reason is a pretext for discrimination.

Hart v. Mississippi Dep't of Rehab. Servs., No. 22-60408, 2023 WL 3888175, at *1 (5th Cir. June 8, 2023) (citation and internal quotations omitted). The same analysis is applied for an age discrimination claim under the ADEA. *See Smith v. AT&T Mobility Servs., L.L.C.*, No. 21-20366, 2022 WL 1551838, at *4 (5th Cir. May 17, 2022).

A. Plaintiff has not established a prima facie case of race or age discrimination

Under the *McDonnell Douglas* framework, Plaintiff must first make a prima facie case of discrimination, at which point the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for the employment decision. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To establish a prima facie case of race and age discrimination and survive summary judgment, Plaintiff must show that he was treated less favorably than similarly situated employees who were not members of his protected class, under nearly identical circumstances. *Daywalker v. UTMB at Galveston*, No. 22-40813, 2024 WL 94297, at *7 (5th Cir. Jan. 19, 2024) (explaining that the Fifth Circuit "consistently rejected arguments that proffered comparators need not be nearly identical, that is, need not share similar attributes or responsibilities to sustain a claim").

The Court finds that there is insufficient evidence from which a reasonable trier of fact could conclude that similarly situated individuals outside of Plaintiff's

protected classes were treated more favorably. Plaintiff argues that Jason Hohman is a similarly situated employee who is a white male under 40 years of age and received a promotion in June of 2013 from GS-12 to GS-13. ECF No. 22 ¶ 112. Defendant responds that notwithstanding Hohman received a promotion prior to the timeframe involved here, Hohman was not similarly situated to Plaintiff because Plaintiff's "conduct that drew the adverse employment decision" was not "'nearly identical' to that of the proffered comparator [Hohman] who allegedly drew dissimilar employment decisions." *Lee v. Kan. City S. Ry. Co*, 574 F.3d 253, 260 (5th Cir. 2009). "If the difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer, the employees are not similarly situated for the purposes of an employment discrimination analysis." *Id.* (citation and internal quotations omitted).

Defendant points to substantial summary judgment evidence indicating the disparate job performances of Plaintiff and Hohman. Specifically, Knowles testified about Plaintiff's difficulty managing administrative tasks and her need to "follow up quite a bit with [Plaintiff] to seek clarification on items." ECF No. 41-10, Ex. G at 91:6–11. Knowles also testified about Plaintiff's struggles to work autonomously without supervision, communicate effectively with ODPC team members and customers, and meet timelines. *Id.* at 91:18–92:6. In addition, Knowles emailed Parman in September 2014 regarding concerns about Plaintiff seeking

reimbursement for a car rental in an amount that exceeded the prior approved amount. ECF No. 41-19, Ex. O at 1. Parman echoed Knowles' concerns, identifying Plaintiff's "inability to perform the more complex aspects of consulting work in organization design and position classification" as well as "demonstrat[ing] an inability to correctly perform certain basic functions of his job (i.e. submitting timely and correct billing statements, work reports, travel authorizations, and vouchers.)" ECF No. 41-13, Ex. J at 5.

In contrast, Parman testified that Hohman arrived to the ODPC "with significant technical experience in org design, classification position management from his former agency at the GS-12 level." ECF No. 41-4, Ex. C. at 227:11-18. Defendant also points to a "promotion package" assembled by Hohman and his direct supervisor articulating Hohman's technical competencies and reasons justifying his promotion to GS-13. *See* ECF No. 41-11, Ex. K. The promotion package emphasized Hohman's competency in areas identified as Plaintiff's deficiencies, including Hohman's strength in communicating and managing relationships within ODPC and with ODPC's customer agencies. *Id.* Plaintiff, on the other hand, testified that he did not assemble a similar promotion package. ECF No. 41, Ex. A at 60:12–20.

Rather than explaining why Hohman serves as an appropriate comparator, Plaintiff sidesteps this inquiry and instead disputes the legitimacy of Parman and Knowles's concerns with his performance.

Specifically, Plaintiff cites other managers who felt that the standards for career promotions were inconsistently applied, contests the accuracy of Parman's spreadsheets capturing other managers' opinions of Plaintiff's performance, and disputes the weight that Parman afforded Knowles' evaluation of Plaintiff. ECF No. 43 at 16–22. Plaintiff also insists that Parman and Knowles exhibited discriminatory animus because Parman favored hiring from his majority-white university alma mater and Knowles assigned a "Minimally Successful" rating to another Black employee. *Id.* at 20–21. But such arguments fail to address Plaintiff and Hohman's comparative job performance for purposes of identifying an appropriate comparator.

Accordingly, because Plaintiff has failed to point the Court to any summary judgment evidence indicating that Hohman shared the same aspects of Plaintiff's job performance that drew the adverse employment decision, Plaintiff has not identified a proper comparator for his race or age discrimination claims. *See Daniels v. BASF Corp.*, 270 F. Supp. 2d 847, 853–54 (S.D. Tex. 2003) (finding plaintiff could not establish discrimination under Title VII where there was no evidence that comparator employee experienced the same performance problems as plaintiff); *Gonzales v. Wells Fargo Bank, NA*, No. 5:16-CV-39-DAE, 2017 WL 10754454, at *6 (W.D. Tex. Oct. 19, 2017) (granting summary judgment on ADEA claim where plaintiff "failed to identify any comparator who made, or continued to make, the same

performance deficiency").[5]

Despite making no reference to Angelina Lowe—a Black woman below 40 years old at the time of her promotion—in his Complaint as a potential comparator for ADEA purposes, Plaintiff appears to invoke Lowe for this purpose in his response to Defendant's motion for summary judgment. ECF No. 43 at 23. Yet Plaintiff fails to proffer evidence demonstrating that Lowe had nearly identical job responsibilities and performance histories to Plaintiff. Indeed, Plaintiff concedes that one of his previous supervisors, Knowles, did not supervise Lowe at the time of her promotion. ECF No. 20. Accordingly, the Court finds that Plaintiff has not established Lowe as a proper comparator for his ADEA claim. *See Marable v. DOC*, No. 3:18-cv-3291-N-BN, 2021 WL 536510, at *10 (N.D. Tex. Jan. 28, 2021) (finding plaintiff's "ability to establish a prima facie case of discrimination under Title VII and the ADEA turns on his identifying a proper comparator").

In an effort to salvage his ADEA claim without identifying a proper comparator, Plaintiff alleges "age

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[5] Plaintiff also identifies Laura Knowles—a white woman under age 40—as "one of the similarly situated employees who were treated better and not part of either of Plaintiff's classes." ECF No. 22 ¶ 112. However, Plaintiff points the Court to no summary judgment evidence rebutting Defendant's argument that Knowles was assigned different job responsibilities, reported to a different direct supervisor, and obtained her promotion through a competitive selection process to which Plaintiff did not apply. ECF No. 41 at 16-17.

discrimination may be inferred as the likelihood that only 14 promotions happened to people all under the age of 40 is extremely suspicious and indicative of a bias against age." ECF No. 43 at 23. This argument is unavailing. The "Career-Ladder Promotions" chart from October 1, 2012 to September 30, 2014 tracks 14 employees' promotions, but only two of these individuals (Angelina Lowe and Jason Hohman) were in Plaintiff's same "Organization Design and Position Class" unit. ECF No. 41-17, Ex. M-2. Plaintiff points the Court to no case law indicating that two promotions of individuals outside of Plaintiff's protected age group—but who are not direct comparators—constitutes a sufficient statistical basis for the Court to infer age discrimination. As explained below, even if the Court found that Plaintiff satisfied his prima facie case under the ADEA, Plaintiff's claim would still not succeed because he has failed to establish that his age was the but-for cause of not receiving the promotion to GS-13.

B. Assuming arguendo that Plaintiff established a prima facie case of race and age discrimination, Plaintiff has failed to demonstrate that the employer's reasons are merely pretextual

"If the employer articulates a legitimate, non-discriminatory reason for the employment decision, the plaintiff must then be afforded an opportunity to rebut the employer's purported explanation, to show that the reason given is merely pretextual. A plaintiff may show pretext either through evidence of disparate

treatment or by showing that the employer's proffered explanation is false or 'unworthy of credence.'" *East v. Walgreen Co.*, 860 F. App'x 367, 368–69 (5th Cir. 2021). The concerns with Plaintiff's performance identified above constitute a non-discriminatory reason for declining to promote Plaintiff. *See Franklin v. Boeing Co.*, 232 Fed App'x. 409, 411 (5th Cir. 2007) (citing "job performance" as a "legitimate, non-discriminatory" reason in the Title VII context).

Turning to the question of pretext, Plaintiff first insists that Parman "has been inconsistent in providing his reasons for why he ultimately determined not to promote York at the end of FY14." ECF No. 43 at 25. The Court disagrees. Before the administrative grievance process, Parman stated:

Delton continues to meet two of the criteria for career ladder promotion - time in grade and at least fully successful performance in his current position. However, he does not meet the third critical requirement - demonstration of the knowledge, skills, and abilities (referred hereafter as competencies) necessary to succeed at the next higher grade level; in this case, the full performance level of GS-201-13, HR Consultant. Career ladder promotion is not automatic, and this requirement to demonstrate the competencies necessary to succeed at the next higher grade level is well-established legally and in precedent government-wide.

ECF No. 43-8, Ex. H at 3. Plaintiff fails to point to evidence in the summary judgment record demonstrating that Parman departed from this

reasoning.

Plaintiff's remaining arguments regarding pretext simply insists that Plaintiff was, in fact, ready for a promotion. Plaintiff concedes that the GS-13 position required a higher level of technical competence and less supervision than the GS-12 position. ECF No. 41-1, Ex. A at 78:24–79:5. The decision-maker in this case, Parman, assessed that the Plaintiff did not demonstrate this higher competency level. Plaintiff merely disagrees with that assessment. Indeed, Plaintiff seems to acknowledge specific incidents of mishandling administrative tasks and poor communication skills with co-workers—such as improperly submitting a travel reimbursement request in September 2014 or sharing personal grievances with Knowles in a manner she found unprofessional in August 2014—but then simply disputes their significance. ECF No. 43 at 25– 27.

Further, Plaintiff's own subjective belief that he was qualified to receive a promotion is not competent summary judgment evidence to raise a genuine issue of material fact. *See Jones v. Gulf Coast Rest. Grp., Inc.*, 8 F.4th 363, 369 (5th Cir. 2021) ("we are 'not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial relief'") (quoting *Little v. Republic Refining Co.*, 924 F.3d 93, 96 (5th Cir. 1991)). Indeed, disagreement with the employer's decision is insufficient to show pretext. *See Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 325 (5th Cir. 2002). To

the extent that other co-workers[6] (non-decisionmakers) thought that Plaintiff should have been promoted does not raise a genuine issue of material fact as to pretext. *Whitfield v. Wood Grp. PSN, Inc.*, No. CV 17-17450, 2019 WL 4213412, at *15 (E.D. La. Sept. 5, 2019). Quite simply, Plaintiff has not produced evidence addressing his purported difficulty managing administrative tasks, inability to communicate effectively with colleagues, concerns about his ability to work autonomously, and inability to perform more complex aspects of his work in organization design. *See Ajao v. Bed Bath & Beyond Inc.*, 265 Fed. App'x. 258, 263 (finding pre-text not rebutted where plaintiff provided "no evidence of his own attendance, follow-through on projects, communication, or initiative, thereby failing to rebut any of [defendant's] reasons for not promoting him").

Otherwise, Plaintiff suggests that the proffered reasons for the denial of his promotion is pretextual and unworthy of credence because temporary supervisors, Booth and Blakely, testified that standards applied for career promotions have been

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[6] *See* Sworn Declaration of Rachelle Booth, ECF No. 43-18, Ex. R at 8. *But see* Affidavit of Yvonne Ryan, ECF No. 43-21, Ex. U at 13 ("I do not know, but I doubt sex or race were factors used to determine the complainant's eligibility for promotion. While serving as the complainant's first-line supervisor during the 90-day period in 2014, and as his co-worker, I was aware that the complainant's performance lacked quality in several performance elements that were used to rate ODPC employees (e.g., project management; written communication skills; customer service; and team work.").

inconsistently applied and are not transparent.[7] Plaintiff also asserts that Parman gave undue weight to Knowles's review of his performance, as well as created spreadsheets that inaccurately captured his other supervisors' opinions of his readiness for promotion. Even interpreting this evidence in the light most favorable to Plaintiff, it does nothing to suggest that racial or ageist animus played any role in Parman's decision making. When evaluating whether a nondiscriminatory reason for an adverse action is credible, the "question is not whether an employer made an erroneous decision; it is whether decision was made with discriminatory motive." *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995). Plaintiff has not offered sufficient evidence to establish a material fact issue regarding any discriminatory motive, thereby dooming his Title VII claim.

Plaintiff also has not demonstrated pretext with respect to his age discrimination claim. To establish a disparate-treatment claim under the plain language of the ADEA, a "plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176 (2009). In

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[7] *See* Sworn Declaration of Morris Blakely, ECF No. 43-19, Ex. S at 9 ("It is my belief that within OPM, not all employees were evaluated on their competency when approaching a promotion."). Ms. Blakely also explained that she found it "unfair" that Parman "preferred" to hire from his college alma mater. *Id.* at 9–10. Ms. Blakely's suspicion or "belief" is not competent summary judgment evidence. Further, whether Parman preferred hiring new employees from his alma mater is not relevant to this promotion case.

the instant case, Plaintiff simply contends that because no one "above the age of 40 has been promoted during the 2 years prior to [Plaintiff] not being promoted," it can be "strongly infer[red]" that Plaintiff was not promoted because of his age. ECF No. 43 at 24. But, as noted above, Plaintiff has only identified two other individuals receiving promotions from GS-12 to GS-13 in ODPC.

To the extent that Plaintiff is alleging that statistical disparities indicate that ADEA-protected employees were passed over for promotion at a significantly higher rate than employees who were under the age of forty, Plaintiff has not provided testimony substantiating such empirical claims or any other evidence explaining how the Court could use this limited data point to find age discrimination. *See Siler v. Hajoca Corp.*, No. H–11–1201, 2013 WL 5410071, at *11 (S.D. Tex. Sept. 25, 2013) (finding that plaintiff's statistical evidence had "very little probative value" for rebutting employer's nondiscriminatory reasons where plaintiff only provided "the raw numbers" indicating "more employees over the age of forty were terminated than employees under the age of forty from 2008-2010. The information lacks context, such as details on the age composition of Defendants' employees overall."). The Fifth Circuit has also previously held that "generalized statistical evidence will rarely rebut a particularized nondiscriminatory rationale," and that the value of any such statistical evidence is ultimately dependent on "all the surrounding facts, circumstances, and other evidence of discrimination." *E.E.O.C. v. Tex. Instruments Inc.*, 100 F.3d 1173, 1185 (5th Cir. 1996). Here, without additional evidence of

age-based discrimination, Plaintiff has not rebutted Defendant's nondiscriminatory explanation for declining to recommend he be promoted to GS-13.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's motion for summary judgment (ECF No. 41).

IT IS THEREFORE ORDERED that Plaintiff Delton York's claims against Defendant Kiran Ahuja are **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that Plaintiff shall take nothing in this case Defendant. A final judgment pursuant to Rule 58 will follow.

It is so **ORDERED.**

SIGNED this 30th day of July, 2024.

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE