No. 05-___

In The
Supreme Court of the United States

ANTHONY ASH and JOHN HITHON,

Petitioners,

v.

TYSON FOODS, INC.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Under what circumstances, if any, may a plaintiff establish the existence of invidious discrimination in employment by adducing evidence that he or she was better qualified than the individual selected for a disputed position?

(2) Does proof that a white decisionmaker addressed the two adult African-American plaintiffs as "boy" constitute evidence of discrimination?

LIST OF PARTIES

The parties to this action are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Anthony Ash and John Hithon[1] respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on April 19, 2005.

OPINIONS BELOW

The April 19, 2005 opinion of the court of appeals, which is reported at 129 Fed. Appx. 529, is set out at pp. 1a-13a of the Appendix. The June 23, 2005 order of the court of appeals, which is not officially reported, is set out at pp. 37a-38a. The March 26, 2004 memorandum decision of the district court, which is not officially reported, is set out at pp. 14a-34a. The May 18, 2004 order of the district

[1] Resolution of the questions presented in this case would affect petitioners in different ways.

The courts below, based on their views of the two questions presented, concluded that the jury's finding of racial discrimination against petitioner Ash should be set aside, and judgment entered in favor of Tyson. A decision by this Court in favor of Ash on either of those issues would require that that decision to award judgment as a matter of law be either reversed or vacated.

The court of appeals overturned the judgment as a matter of law against petitioner Hithon, but upheld the district court's decision to order a new trial. The district court's new trial order was based on its conclusion that the jury's finding of discrimination against Hithon was "against the great weight of the evidence." (35a). That new trial order itself contained no analysis of the evidence in this case; it necessarily was colored by the trial judge's conclusion, set forth only two months earlier, that much of the evidence offered by Hithon could not as a matter of law support a finding of discrimination. A decision by this Court in favor of Hithon regarding the issues presented in this petition would require that the trial judge reconsider his decision regarding whether the jury verdict was against the great weight of the evidence.

court, which is not officially reported, is set out at pp. 35a-36a.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on April 19, 2005. A timely petition for rehearing was denied on June 23, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 703(a)(1) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 1981 of 42 U.S.C. provides in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .
>
> (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

STATEMENT OF THE CASE

This case concerns two promotions that were made in the summer of 1995 to the position of shift manager at the Gadsden, Alabama plant of Tyson Foods. The plant processes chickens. At the time petitioners Ash and Hithon, both African-American men, were superintendents at the plant, the position immediately below shift manager. The shift manager vacancies were both filled by whites.

After a period of discovery, the case was tried before a racially mixed jury. The trial court proceedings, with the consent of the parties, were presided over by a magistrate judge. The jury found that Tyson was guilty of racial discrimination against both Ash and Hithon. The jury awarded each plaintiff $250,000 in compensatory damages and $ 1.5 million in punitive damages.

At trial the parties offered sharply conflicting evidence on a wide range of factual issues. The questions presented by this petition, and addressed by the court of appeals, concern the legal sufficiency of the type of evidence introduced by the plaintiffs. Two aspects of the trial record are material here.

First, there was repeated testimony[2] that on several occasions Thomas Hatley, the plant manager who made the promotion decisions, addressed Ash and Hithon as "boy." (26a). On one of those occasions Ash's wife was present and objected to the remark, pointing out that her husband was a man; in response, "Hatley laughed." (*Id.*). Tyson filed an in limine motion to bar admission of this

[2] Tr. 150-51, 250-52, 284-85, 338. Hatley denied making at least several of these remarks. Tr. 420-21.

evidence, objecting in part that there would be "undue prejudice" if the jury learned what Hatley had said.[3] Tyson also requested an instruction limiting jury consideration of these remarks. The district court denied the in limine motion and refused to give the requested instruction.

Hatley's action in addressing Ash and Hithon as "boy" was a major issue at trial. In their closing arguments, counsel for plaintiffs[4] and defendant[5] discussed and disagreed about the significance of Hatley's asserted actions in addressing Ash and Hithon as "boy."

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[3] Defendant's Motion in Limine Regarding "Stray Remarks" As To Plaintiffs Anthony Ash and John Hithon, p. 2.

[4] Tr. 571-72 ("[W]e all know that is a term meant to be deprecating or a put down to a black man. We all know that. We're southerners. . . . I suggest to you that that remark shows a reflection of [Hatley's] thinking and Tyson's thinking.")

[5] Tyson's attorney insisted that the word "boy" "wasn't delivered with that level of venom and hostility that [plaintiffs' witnesses] delivered it on the witness stand." (Tr. 612). If the word "boy" had been used in that tone of voice, he urged, Ash and Hithon would surely have complained to the plant personnel section. (Tr. 613). Of course, since Hatley was the plant manager, the staff in the personnel section were his subordinates.

Defense counsel also acknowledged that the term "boy" could have a racist meaning when used as a form of address to a African-American man:

> I know they were said, and I have to deal with them, because I grew up in Anniston in the 1950's, and I know what that comment means. . . . [W]hen I was in high school, that . . . was fighting words. . . . [I]f Hatley said it the way it was said on that witness stand by those witnesses, you know, back when I was growing up, there would probably be a little trouble. And that was a mean thing to say, and I would not defend that.

(Tr. 611).

Second, both parties offered substantial evidence regarding whether the whites who got the promotions were less qualified than Ash and Hithon. Plaintiffs offered evidence tending to show that under Tyson's own written standards the two whites were far less qualified than Ash and Hithon, and that one or both of the whites did not even meet the minimum requirements for the job.

Plaintiffs introduced a Tyson "job summary" which stated that three to five years of experience was among the "requirements" for the job of shift manager;[6] one of the whites promoted, Steve Dade, had worked for Tyson for less than two years.[7] A separate Tyson "Personnel Policy" indicated that when filling vacancies, priority consideration should be given to Tyson workers in the department or complex in which that vacancy existed.[8] Although Ash and Hithon were in the same plant as the two shift manager positions, the other white promoted, Randy King, was not from the Gadsden plant or the complex of which it was a part. Third, another Tyson "Personnel Policy" offered into evidence stated that promotion was among the "benefits and rights for team members who establish seniority with the company."[9] Ash and Hithon had fifteen and thirteen years, respectively, of seniority with Tyson, compared to less than two years for Dade.

Tyson offered two types of evidence to respond to the contention that Ash and Hithon were more qualified under the company's own standards. First, the defendant offered

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[6] Plaintiffs' Exhibit 2.

[7] Tr. 148, 247.

[8] Plaintiffs' Exhibit 10 p. 8.

[9] Plaintiffs' Exhibit 9.

testimony by Hatley that he simply did not know about these written Tyson personnel and promotion standards.[10] On this theory the proper method of determining the comparative qualifications of the individuals involved would have been, not Tyson's own express standards, but whatever standards Mr. Hatley himself had decided to fashion and use in filling the two vacancies. Second, Tyson disputed the meaning of the written standards in question. For example, although the job summary stated that three to five years experience was a "requiremen[t]", defense counsel argued that that amount of experience was merely being "suggested."[11]

In addition, Tyson offered evidence that a primary criterion that was used to determine the most qualified individual was whether he or she did *not* work at the Gadsden plant, and thus could bring a fresh approach and prospective.[12] Application of that criterion would have strongly favored the two whites actually selected. Hatley explained that he used that standard – rather than experience or seniority or work in the same department or complex – because the Gadsden plant was assertedly losing money, and was at risk of being closed by Tyson.[13] Plaintiffs contended that this ad hoc standard had been fashioned simply to rationalize promoting two less qualified whites; plaintiffs offered evidence that the Gadsden plant was not actually losing money, and that one of the

[10] Tr. 355-56, 536, 539.

[11] Tr. 607.

[12] Tr. 436, 445, 446.

[13] Tr. 439-440.

whites selected had come from a Tyson plant that had in fact been closed because it was not profitable.[14]

Much of the closing argument at trial was devoted to these disputes regarding whether the whites who were promoted were, under Tyson's own standards, far less qualified than Ash and Hithon.[15] The jury was properly instructed that it could not find Tyson liable merely because the promotion decisions "were stupid decisions or bad decisions," but only if those decisions had been motivated by racial discrimination.[16]

Following the jury verdict for plaintiffs, Tyson moved for judgment as a matter of law. The district court concluded that as a matter of law much of the evidence offered by plaintiffs could not be relied on to support the jury's finding of intentional discrimination. First, applying Eleventh Circuit precedent, the trial judge held that plaintiffs could not rely on evidence that they were better qualified than the promoted whites, unless that evidence was so extraordinary it "jump[s] off the page and slap[s you] in the face." (23a) (*quoting Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000)). Even if Ash and Hithon were more qualified than Dade and King, the court held, any disparity was not great enough to meet that demanding standard. (25a). Second, the judge concluded that Hatley's use of the term "boy" was not "racial in nature." (26a). The judge also ruled, in the alternative, that Tyson was entitled to a new trial, in part because "the

[14] Tr. 449.

[15] Tr. 560, 573-74, 576-85, 589, 603-04, 605-07, 617, 622.

[16] Tr. 636.

jury's verdict of discrimination is against the great weight of the evidence." (35a).

The Eleventh Circuit upheld the trial judge's conclusion that the evidence regarding comparative qualifications and regarding Hatley's actions in calling Ash and Hithon "boy" could not, as a matter of law, be relied on to support the jury's finding of discrimination. The court of appeals held that evidence that Ash and Hithon were more qualified than the whites promoted could not be relied on to show the employer's reasons were a pretext for discrimination, unless the disparities in qualifications were so great that they "virtually jump off the page and slap you in the face." (7a) (*quoting Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004)). The court of appeals held, as it had in every prior case utilizing that standard, that the evidence offered by the plaintif did not meet that stringent requirement. The panel explained, somewhat paradoxically, "[A]n employee's showing that the employer hired a less qualified candidate is probative of whether the employer's reason is pretextual, but not proof of pretext." (7a).

The court of appeals also held that as a matter of law Hatley's use of the term "boy" when addressing Ash and Hithon was not evidence of discrimination; only use of the phrase "black boy" could support a finding of discrimination.

> While use of "boy" when modified by a racial classification like "black" or "white" is evidence of discriminatory intent, . . . the use of "boy" alone is not evidence of discrimination. *See Ruby v. Springfield R-12 Public School Dist.*, 76 F.3d 909, 912 (8th Cir. 1996) (holding that referring to the appellant as "boy" and comments about clothing and blacks committing more crimes were not

> evidence of pretext); *Bonner v. Home Depot*, 323 F. Supp. 2d 1250, 1258-59 (S.D.Ala. 2004), *aff'd*, No. 04-12887 (11th Cir. 2004) (finding that a single reference to a plaintiff as "boy" was not evidence of pretext.)

(6a).

The court of appeals upheld the decision of the district court to award judgment as a matter of law dismissing Ash's claim. (7a-8a). With regard to Hithon's claim, the panel concluded that there was sufficient evidence to support the jury verdict, because Hatley had interviewed Hithon for one of the vacancies only *after* Hatley had actually offered the job to King, and King had accepted it. (8a). The appellate court upheld the trial court's actions in granting Tyson a new trial with regard to Hithon's claim. (13a).

Petitioners filed a timely petition for rehearing in the Eleventh Circuit. That petition was denied on June 23, 2005. (37a-38a).

REASONS FOR GRANTING THE WRIT

I. THERE IS A WIDESPREAD CONFLICT AMONG THE CIRCUIT COURTS REGARDING WHEN, OR INDEED WHETHER, EVIDENCE REGARDING COMPARATIVE QUALIFICATIONS CAN BE UTILIZED TO PROVE INVIDIOUS DISCRIMINATION IN EMPLOYMENT

This case presents a widespread and well recognized inter-circuit conflict regarding when, and indeed whether, a plaintiff alleging discrimination in promotion or hiring can prove invidious discrimination by showing that he or

she was more qualified than the person selected for the position in question. The Eleventh, Fifth and Tenth Circuits hold that evidence that the plaintiff was better qualified cannot support a finding of discrimination unless the disparities in qualification are so great that they "jump off the page and slap you in the face." (7a). This vivid metaphor is actually the legal standard applied in more than a hundred lower court decisions. In practice it is a standard which has proven virtually impossible to meet. Conversely, the Ninth and Sixth Circuits have expressly rejected this standard, and accept evidence of far less extreme differences in qualifications as sufficient to support a finding of discrimination. The District of Columbia Circuit applies an intermediate standard, permitting reliance on evidence of comparative qualifications in some but not all cases.

The Eleventh Circuit adopted the "slap in the face" standard in 2000, and has now applied it in a total of ten decisions involving a variety of federal employment discrimination cases, including claims under Titles VI and VII of the 1964 Civil Rights Act, 42 U.S.C. sections 1981 and 1985, the Age Discrimination in Employment Act, and the Fourteenth Amendment.[17] That circuit has correctly

[17] In addition to the instant case, the Eleventh Circuit applied this standard in *Goodman v. Georgia Southwestern*, 2005 WL 2136910 *5 (11th Cir., Sept. 6, 2005) (Title VII); *Cooper v. Southern Co.*, 390 F.3d 695, 732, 745 (11th Cir. 2004) (Title VII and section 1981); *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1090-91 (11th Cir. 2004) (Title VII); *Hall v. Alabama Association of School Boards*, 326 F.3d 1157, 1166-69 (11th Cir. 2003) (Title VI, Title VII, section 1981 and Fourteenth Amendment); *Walker v. Prudential Property and Casualty Insurance Co.*, 286 F.3d 1270, 1277-78 (11th Cir. 2002) (Title VII); *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268-69 (11th Cir. 2001) (Title VII and ADEA); *Denney v. City of Albany*, 247 F.3d 1172, 1187-88 (11th Cir.

(Continued on following page)

characterized its adoption of this standard as "one of its more important decisions on discrimination law." *Hall v. Alabama Association of School Boards*, 326 F.3d 1157, 1167 (11th Cir. 2003). In that circuit it is for judges, not juries, to decide whether evidence of qualification disparities satisfies the "slap in the face" standard. *Hall*, 326 F.3d at 1168 (affirming award of summary judgment because "[*t*]*he court* cannot say that the disparities [in] qualifications are so apparent as virtually to jump off the page and slap one in the face.") (emphasis added); *see Clark v. Alfa Insurance Co.*, 2002 WL 32366291 *2 (N.D. Ala., May 28, 2002) ("this court's face does not feel slapped.")

The "slap in the face" standard, avowedly stringent in theory, is fatal in practice. In the ten Eleventh Circuit decisions applying this standard, no plaintiff ever succeeded in making the requisite showing. The court of appeals has applied that standard both to direct summary judgment for defendants[18] and, as here, to overturn jury verdicts.[19] Equally striking is the pattern of decisions among district court decisions in the Eleventh Circuit. Since that circuit adopted the "slap in the face" standard in 2000, it has been applied in 34 district court decisions reproduced in Westlaw. In every one of them the district (or magistrate) judge held that the plaintiff had failed to show that the disparities in qualifications were so great

2001) (Title VII and section 1985); *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254-55 (11th Cir. 2000) (Title VII) (overturning jury verdict); *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1340 (11th Cir. 2000) (Title VII, section 1981, and the Fourteenth Amendment).

[18] *E.g., Cofield v. Goldkist*, 267 F.3d 1264, 1268-69 (11th Cir. 2001).

[19] *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254-55 (11th Cir. 2000).

that they jumped off the page and slapped one (i.e. the judge) in the face.[20]

The Eleventh Circuit's "slap in the face" standard is all the more significant because of a related rule in that circuit. In a promotion discrimination case in the Eleventh Circuit, the plaintiff is required in order to establish a prima facie case to show that the position he sought was filled by "equally or less qualified employees who were not members of the protected class." *Hithon v. Tyson Foods*, 2005 WL 1820041 *2 (11th Cir., Aug. 3, 2005).[21] A defendant can therefore defeat a promotion discrimination claim by showing that the plaintiff was less qualified than the individual who obtained the promotion. Thus in any promotion discrimination case in which there is a dispute about the comparative qualifications of the plaintiff and the person who was awarded the position in question – and that includes many promotion discrimination disputes – the significance of that dispute is governed by a starkly skewed rule. If the dispute is resolved in favor of the defendant it is dispositive; there is no prima facie case and the defendant therefore wins. If, on the other hand, the dispute is (or could reasonably be) resolved in favor of the plaintiff, it is simply irrelevant, because in practice the difference in qualifications will still be insufficient to meet the "slap in the face" standard.

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[20] We set forth a list of those district court decisions in an Appendix to the petition.

[21] The same standard is set forth in *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1339 (11th Cir. 2000), *Taylor v. Runyon*, 175 F.3d 861, 866 (11th Cir. 1999), and *Wu v. Thomas*, 847 F.2d 1480, 1483 (11th Cir. 1988).

The "slap in the face" standard is also well established in the Fifth Circuit, where it sometimes is articulated with a different but equally vivid metaphor, requiring that the plaintiff's greater

> qualifications leap from the record and cry out to all who would listen that he was vastly – or even clearly – more qualified. . . .

Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993). The "slap in the face" and "cry out to all" metaphors were first formulated in the same 1993 Fifth Circuit decision, and are used interchangeably in that circuit. *Id*.; *Scott v. University of Mississippi*, 148 F.3d 493, 509 (5th Cir. 1998). The Fifth Circuit has applied this standard to direct summary judgment for defendants,[22] to affirm a directed verdict for defendant,[23] to reverse as clearly erroneous trial judge findings of discrimination,[24] and to overturn jury verdicts of discrimination.[25]

Ordinarily the Fifth Circuit insists that it is for judges to decide whether the standard is met. "[U]nless disparities . . . are so apparent as to virtually jump off the page and slap *us* in the face, *we judges* should be reluctant to substitute our views for those of [the employer.]" *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438,

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[22] *E.g., Cook v. Mississippi Department of Human Services*, 108 Fed. Appx. 852, 860 (5th Cir. 2004).

[23] *Cheney v. U.S. Oncology*, 34 Fed. Appx. 962 (5th Cir. 2002).

[24] *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993).

[25] *Scott v. University of Mississippi*, 148 F.3d 493, 510 (5th Cir. 1998); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445 (5th Cir. 1995).

1445 (5th Cir. 1995) (emphasis added) (*quoting Odom v. Frank*, 3 F.3d at 847).

> Disagreements over which applicant is more qualified are employment decisions in which we will not engage in the practice of second guessing. . . . Such disputes do not support a finding of discrimination and have no place in front of a jury.

Scott v. University of Mississippi, 148 F.3d 493, 509-10 (5th Cir. 1998).

In practice the Fifth Circuit's "slap in the face"/"cry out" standard is also virtually impossible to satisfy. No Fifth Circuit panel has ever found that this standard was met. A plaintiff's "better education, work experience, and longer tenure with the company do not establish that he is clearly better qualified." *Price v. Federal Express Corp.*, 283 F.3d 715, 723 (5th Cir. 2002). In eleven cases the Fifth Circuit held that the plaintiff's evidence fell short of this standard.[26] In one case the court of appeals ruled that a jury which returned a verdict for the defendant had been properly instructed that evidence of comparative

[26] *Jenkins v. Ball Corp.*, 2005 WL 1515486 (5th Cir. June 28, 2005); *Cook v. Mississippi Department of Human Services*, 108 Fed. Appx. 852, 860 (5th Cir. 2004); *Carthon v. Johnson Controls Inc.*, 100 Fed. Appx. 993, 997 (5th Cir. 2004); *Snoddy v. City of Nacogdoches*, 98 Fed. Appx. 338, 342 (5th Cir. 2004); *Edwards v. Principi*, 80 Fed. Appx. 950, 952 (5th Cir. 2003); *Price v. Federal Express Corp.*, 283 F.3d 715, 723 (5th Cir. 2002); *Willie v. Wharton County Junior College*, 33 Fed. Appx. 705, 2002 WL 432990 *2 n.2 (5th Cir. 2002); *Grantham v. Albemarle Corp.*, 244 F.3d 137 (5th Cir. 1999), 2000 WL 1901659 (5th Cir. 2000); *Scott v. University of Mississippi*, 148 F.3d 493, 509-11 (5th Cir. 1998); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445 (5th Cir. 1995); *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993).

qualifications had to meet the "slap in the face" standard.[27] In one case the court held that the jury should be directed on remand to apply that standard.[28] In the last six years, among district court decisions in the Fifth Circuit available on Westlaw, the "slap in the face"/"cry out" standard has been applied in 40 cases; in all but one case the district (or magistrate) judge held that the plaintiff's evidence did not meet that standard.[29]

The Tenth Circuit endorsed the "slap in the face" standard in *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1319 (10th Cir. 1999). Unsurprisingly, in *Bullington* and every district court decision in the Tenth Circuit[30] applying the "slap in the face" test, the plaintiff's evidence of comparative qualifications was found insufficient to meet that standard.

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[27] *Deines v. Texas Dept. of Protective and Regulatory Services*, 164 F.3d 277, 280 (5th Cir. 1999).

[28] *Sanders v. Anadarko Petroleum Corp.*, 108 Fed. Appx. 139, 146-47 (5th Cir. 2004).

[29] A list of those decisions is set forth in an Appendix to the petition.

The arguable exception is *Lall v. Perot Systems Corp.*, 2004 WL 884438 (N.D. Tex. April 23, 2004). *Lall* quoted the "slap in the face" standard, after the signal "see", and then denied summary judgment on the ground that the plaintiff had "demonstrated a fact issue as to whether he was 'clearly better qualified' than [the successful applicant.]" 2004 WL 884438 at *7. This falls somewhat short of a determination that the evidence adduced by Lall actually jumped off the page and slapped the court in the face.

[30] *Cowan v. Unified School District 501*, 316 F. Supp. 2d 1061, 1069 (D. Kan. 2004); *Kitchen v. Burlington Northern and Santa Fe Railway Co.*, 298 F. Supp. 2d 1193, 1202-03 (D. Kan. 2004); *Timmermeyer v. Wichita Eagle and Beacon Publishing Co., Inc.*, 90 F. Supp. 2d 1200, 1205-06 (D. Kan. 2000).

The Ninth Circuit, on the other hand, has emphatically rejected this "slap in the face" standard. In *Raad v. Fairbanks North Star Borough School District*, 323 F.3d 1185 (9th Cir. 2003), the district court had granted summary judgment to the defendant, expressly relying on the "slap in the face" standard and on the Fifth Circuit decision in *Odom*. The Ninth Circuit reversed, emphatically rejecting the standard in the Fifth and Tenth Circuits:

> In *Odima* [*v. Westin Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1995)], we held that the plaintiff's superior qualifications *standing alone* were enough to prove pretext. . . . Unlike the Tenth Circuit, *see Bullington v. United Airlines, Inc.*, . . . we have *never* followed the Fifth Circuit in holding that the disparity in candidates' qualifications "must be so apparent as to jump off the page and slap us in the face to support a finding of pretext." *Raad* [district court opinion], slip op. at 43 (citing *Odom v. Frank*. . . .)

323 F.3d at 1194 (emphasis in original); *see Raad v. Alaska State Commission for Human Rights*, 86 P.3d 899, 910 (Alaska 2004) ("The Ninth Circuit rejected the *Bullington* test, and so do we. Evidence of disparity in qualifications need not be sufficient to 'slap' [the trier of fact] in the face to justify a finding of pretext.")

This sharp difference in the standards applied to evidence of comparative qualifications is clearly outcome determinative. The Ninth Circuit has repeatedly overturned awards of summary judgment for defendants, reasoning that the plaintiff had offered sufficient evidence to support a finding of discrimination by adducing evidence that he or she was better qualified than the successful applicant. *Margolis v. Tektronix, Inc.*, 44 Fed. Appx.

138, 141-42 (9th Cir. 2002) ("Margolis' principal argument is that . . . she is more qualified than one or more male managers . . . Margolis' evidence on this point, if believed, is adequate . . . to survive summary judgment. A jury could find that Tektronix' [explanation] is a pretext for discrimination if it believes that Margolis was, in fact, more (or at least as) qualified."); *Haas v. Betz Laboratories, Inc.*, 185 F.3d 866, 1999 WL 451206 *2 (9th Cir. June 23, 1999) ("Haas also has established pretext indirectly by offering evidence that the chosen applicant . . . was not the most qualified applicant for the job."); *Tucevich v. State of Nevada*, 172 F.3d 59, 1999 WL 62735 *1 (9th Cir. Jan. 22, 1999) (reversing award of summary judgment in part because "the evidence indicates that Tucevich was equally qualified, if not more qualified, than the individuals that defendant hired."); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998) ("Facts tending to show that the chosen applicant may not have been the best person for the job are probative as they 'suggest that [the defendant's explanation] may not have been the real reason for choosing [the chosen applicant] over the [plaintiff].'") (*quoting Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991)); *Thomas v. California State Department of Corrections*, 972 F.2d 1343, 1992 WL 197414 *3 (9th Cir. Aug. 18, 1992) ("we find that . . . a rational trier of fact could conclude that Thomas was more qualified [than the person hired] and that the Department's articulated reasons for rejecting him were pretextual."); *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991) ("All of these facts tend to show that [the person promoted] may not have been the best person to lead the group, and they therefore suggest that leadership ability may not have been the real reason for choosing [him] over Lindahl."). Indeed, *Margolis* and *Tucevich* suggest that in the Ninth Circuit evidence that a

plaintiff and the successful applicant were even *equally* qualified would be sufficient to defeat a motion for summary judgment.

In the Ninth Circuit, unlike the Fifth and Eleventh Circuits, the degree to which the qualifications of the plaintiff exceed those of the successful applicant are at least ordinarily matters for consideration by the trier of fact, not a possible basis for summary judgment or judgment as a matter of law. "The closer the qualifications of the candidates, the less *weight* the [trier of fact] should give to perceived differences in deciding whether the proffered explanations were pretextual." *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 602 (9th Cir. 1993) (emphasis added).[31] The Ninth Circuit recognizes the incongruity of permitting an employer to defend a discrimination case by seeking to prove that it hired or promoted the best qualified applicant without allowing the plaintiff to rely on evidence that demonstrates just the opposite.

> Westin claims that the district court improperly substituted its judgment of Odima's qualifications for Westin's. . . . Indeed, it was Westin itself that raised the defense that those it hired over Odima were better qualified. How possibly could the district court rule on this defense without comparing Odima's credentials to those of the persons hired?

Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1492 (9th Cir. 1995).

[31] Because the claims in *Odima* had been determined at a bench trial, the Ninth Circuit referred in this instance to evaluation of the weight of the evidence by the trial court.

The Sixth Circuit has also expressly rejected the "slap in the face" standard. In *Jenkins v. Nashville Public Radio*, 106 Fed. Appx. 991 (6th Cir. 2004), the district court had awarded summary judgment to the defendant, applying the Fifth Circuit's "cry out to all" formulation in *Price v. Federal Express Corp.*, 283 F.3d 715, 723 (5th Cir. 2002). 106 Fed. Appx. at 994. The Sixth Circuit reversed:

> This circuit has never adopted the *Price* requirement that in order to raise a genuine issue as to whether the plaintiff was rejected because of an improper motive rather than because of the exercise of discretionary business judgment, the plaintiff must demonstrate qualifications that are "vastly -- or even clearly" greater than those of the successful applicant. And we cannot readily reconcile the *Price* standard with the well-established principle of *Burdine* that "[t]he 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).

106 Fed. Appx. at 994. Relying on evidence that an employment discrimination plaintiff was better qualified, the Sixth Circuit also overturned district court decisions awarding summary judgment to the defendants in *Zambetti v. Cuyahoga Community College*, 314 F.3d 249, 259 (6th Cir. 2002), and *King v. Healthrider, Inc.*, 194 F.3d 1312, 1999 WL 825122 (6th Cir. Oct. 8, 1999). In *Carberry v. Monarch Marking Systems, Inc.*, 30 Fed. Appx. 389, 392 (6th Cir. 2002), the Sixth Circuit upheld a jury's finding of discrimination largely because of evidence that the plaintiff was the better qualified applicant under the standards

established by the defendant's own written rules. And in *Glenn's Trucking Co. v. N.L.R.B.*, 298 F.3d 502, 506 (6th Cir. 2002), the Sixth Circuit upheld an NLRB finding of discrimination against union members in light of evidence that "the discriminatees appear to be more qualified than those individuals who were hired."

The District of Columbia Circuit has adopted an intermediate standard. In a sharply divided en banc decision, that court of appeals held that

> [i]f a factfinder can conclude that a reasonable employer could have found the plaintiff to be *significantly better qualified* for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate – something employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.

Aka v. Washington Hosp. Center, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) (emphasis added). This standard is more demanding than that in the Ninth Circuit (which does not require that the differences in qualification be *significant*) but less demanding than that in the Eleventh Circuit (which requires differences in qualifications to be overwhelming, and which insists that the court, not the factfinder, should determine if that standard is met.) In *Aka* and *Lathram v. Snow*, 336 F.3d 1085, 1092-93 (D.C. Cir. 2003), the District of Columbia Circuit relied on evidence regarding comparative qualifications to overturn decisions awarding summary judgment to defendants. On the other hand, that circuit has upheld summary judgment for employers where it concluded that a reasonable jury could not find that the plaintiff was "significantly

better qualified." *Carter v. George Washington University*, 387 F.3d 872, 881-82 (D.C. Cir. 2004); *Stewart v. Ashcroft*, 352 F.3d 422, 429-30 (D.C. Cir. 2003).

The "slap in the face" standard, as administered in the Eleventh and Fifth Circuits, is inconsistent with this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The court of appeals in *Patterson* had held that in a promotion discrimination case the plaintiff was *required* to show that he or she was more qualified than the successful applicant. This Court held that plaintiffs were not obligated to prove pretext in that particular manner. But *Patterson* made clear that a plaintiff *could* establish that the defendant's explanation of the disputed promotion was pretextual by proving that the plaintiff was indeed the more qualified applicant.

> [T]he District Court erred when it instructed the jury that petitioner had to prove that she was better qualified than the white employee who allegedly received the promotion. . . . [P]etitioner . . . must . . . have the opportunity to demonstrate that respondent's proffered reasons for its decisions were not its true reasons. . . . In doing so, petitioner is not limited to presenting evidence of a certain type. . . . Indeed, she might seek to demonstrate that respondent'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.

491 U.S. at 187-88. The standard set by this Court in *Patterson* is just "better qualified", not, as the Eleventh and Fifth Circuits hold and as the court below insisted, so much better qualified that the disparities "are so apparent as to jump off the page and slap you in the face." (7a).

II. THERE IS AN IMPORTANT CONFLICT AMONG THE CIRCUIT COURTS REGARDING WHETHER ADDRESSING AN AFRICAN-AMERICAN MAN AS "BOY" IS EVIDENCE OF RACIAL DISCRIMINATION

This second question presented concerns one of the most infamous racial epithets that continues from the era of Jim Crow: addressing an adult African-American man as "boy."

This form of verbal abuse has its origins in the slave era. "Boy" was a term for a black male slave in both the United States and England. Oxford English Dictionary, p. 260 (Compact ed. 1971). In the 1852 novel *Uncle Tom's Cabin*, when Tom as a middle-aged man was being auctioned off, the auctioneer at the slave warehouse summoned him with the words, "Now up with you, boy! d'ye hear?" Harriet Beecher Stowe, *Uncle Tom's Cabin*, p. 478 (Harvard Univ. Press 1962).

After Emancipation, the practice of addressing African-American men as "boy" continued among white southerners as a method of asserting the social, legal and racial inferiority of African-Americans. It was often a routine form of address, but was particularly utilized to intimidate or accost a black man who was doing something to which whites objected. When a civil rights worker visited Amite County, Mississippi in 1961 to register African-American voters, a white man demanded, "Boy, what's your business?", and then led a group of whites in beating him. Seth Cagin and Philip Dray, *And We Are Not Afraid*, p. 49 (1988). In *To Kill a Mockingbird*, the prosecutor questioning Tom Robinson resorted to that epithet when Tom did not testify as desired:

> Had your eye on her a long time, hadn't you, boy?
>
> * * *
>
> Then you say she's lying, boy?
>
> * * *
>
> Are you being impudent to me, boy?

Harper Lee, *To Kill A Mockingbird*, pp. 196-98 (1960).[32] A paper given at a 1964 civil rights conference observed that "The average white person finds it difficult to understand why the Negro resents being called 'boy' . . . because the average white person doesn't realize that he assumes he is superior." *Id*. at 424.

Although the civil rights movement was particularly focussed on ending racially discriminatory practices, it also sought at the personal level to end the widespread, often casual, use of racial epithets by whites. Dr. Martin Luther King recounted one such small effort from his childhood.

> [M]y father. . . . accidentally drove past a stop sign. A policeman pulled up to the car and said: "All right, boy, pull over and let me see your license." My father replied indignantly, "I'm no boy." Then, pointing to me, "This is a boy. I am a man, and until you call me one, I will not listen to you."

James Washington, ed., *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.*, pp. 420-21 (1986).

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[32] *See* Richard Wright, *Native Son*, pp. 154, 213, 268-69 (1998) (originally published in 1940); Carson McCullers, *The Heart Is A Lonely Hunter*, p. 72 (1967) (originally published in 1947); John Howard Griffin, *Black Like Me*, pp. 61, 62, 70 (1989) (originally published 1960).

In the mid-1960's a boycott organized by Baltimore area ministers resulted in a local bakery beginning to address non-white employees as "Mr." instead of "boy." Judge Simon Sobeloff aptly described that change as an "improvement in personal dignity." *N.L.R.B. v. Baltimore Luggage Co.*, 387 F.2d 744, 746 (4th Cir. 1967).

Today, even among whites, "[t]he use of 'boy' to a black American adult now would be considered offensive. This is known to the white speakers who continue to use the term, so that 'boy' in such circumstances must be counted as a positive insult." Leslie Dunkling, *A Dictionary of Epithets and Terms of Address*, 57 (1990). A number of lower court cases illustrate the range of ways in which this racially derogatory term is used. In *Ladner v. State*, 868 S.W. 2d 417, 420 (Tex. Ct. App. 1993), a police officer directed a black prisoner to "Sit down, boy," shortly before beating him to death. In *Clark v. Claremont University Center and Graduate School*, 6 Cal. App. 4th 639, 648, 8 Cal. Rptr. 151, 155 (Ct. App. 2d Dist. 1992), the white department chairman at a dinner party admonished a black college professor to pass the dinner rolls, "boy." In *Pittman v. King's Command Foods, Inc.*, 2003 WL 22073077 *7 (Wash. App. Div. 1 Sept. 8, 2003), a white supervisor admonished the African-American victim of racial harassment, "Boy, you do not have any rights, we are a multimillion dollar company and there is nothing you can do to hurt us as long as you are an employee, you will do what we say, when we say it."

In the teeth of the long and sordid use of this racial epithet, the Eleventh Circuit Court of Appeals in the instant case has held that, when a white person addresses an adult African-American as "boy" (rather than "black boy") "the use of 'boy' alone is not evidence of racial discrimination." (6a).

That holding is not merely wrong; it can fairly be characterized as astounding.

This holding, of course, conflicts with decisions in numerous other courts of appeals. The Fourth Circuit has accurately described "boy," when used as a form of address to an adult African-American, as "racially derogatory." *White v. BFI Waste Services, LLC*, 375 F.3d 288, 297-98 and n.6 (4th Cir. 2004); *Holland v. First Virginia Banks, Inc.*, 1991 WL 125642 *1 (4th Cir. July 12, 1991). The Sixth Circuit recognizes that this use of "boy" is "disrespectful and racist." *Craig v. Ohio Department of Administrative Services*, 1993 WL 303374 *4 (6th Cir. Aug. 9, 1993). The Eighth Circuit has described the actions of a white supervisor in calling an African-American subordinate "boy" as "clearly offensive." *Elmahdi v. Marriott Hotel Services, Inc.*, 339 F.3d 645, 653 (8th Cir. 2003).

In *King v. City of Eastpointe*, 86 Fed. Appx. 790 (6th Cir. 2003), the Sixth Circuit emphasized the evidentiary importance of this epithet. Several African-American youths who had been stopped and assertedly mistreated by police alleged that they had been targeted because of their race. The district court awarded summary judgment, asserting that there was no evidence of any racial motive. The Sixth Circuit reversed, holding that evidence that one officer had addressed a plaintiff as "boy" was sufficient to support the claim of racial motive and preclude summary judgment. 86 Fed. Appx. at 802;[33] *see id*. at 814 (Moore, J., concurring) (use of "boy" a "racial epithet."); *Taylor v.*

[33] "[T]he plaintiffs . . . assert that [the officer's] use of the term 'boy' in reference to [one of the plaintiffs] is evidence of discriminatory intent. Because of a factual issue regarding this assertion, summary judgment was not appropriate."

Jones, 653 F.2d 1193, 1199 (8th Cir. 1981) (use of the term "boy" contributed to a "pervasive atmosphere of prejudice.") Use of the term "boy" was one of the forms of verbal abuse in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). *Morgan v. National Railroad Passenger Corp.*, 232 F.3d 1008, 1013 (9th Cir. 2000).

State courts, as well, have recognized the racially abusive nature of the epithet "boy." In *Sumner v. Goodyear Tire & Rubber Co.*, 427 Mich. 505, 398 N.W. 2d 368 (1986), the Michigan Supreme Court characterized this use of "boy" as a "racially derogatory nam[e]". 427 Mich. at 513, 398 N.W. 2d at 371. The use of that term was deemed such a serious "racial provocation" that dismissing the target because he was provoked into hitting the harasser was held to constitute potentially unlawful discrimination. 427 Mich. at 541, 398 N.W. at 384. In *Tate v. State*, 784 So. 2d 208 (Miss. 2001), the white defendant had been convicted of assaulting a number of individuals, most of them African-American. During the course of the trial, the prosecution introduced evidence that Tate at the time had referred to a black Deputy Sheriff as "boy." 784 So. 2d at 213. The Mississippi Supreme Court labeled that remark a "racial slur." 784 So. 2d at 214. The state Supreme Court reversed Tate's conviction on the ground that evidence of his use of the epithet "boy" and of other racial remarks were unfairly prejudicial in a case tried before a racially mixed jury. 784 So. 2d at 215.

In sum, the decision of the Eleventh Circuit is in conflict with decisions in three circuits as well as decisions of the supreme courts of two states. That conflict alone would warrant a grant of certiorari. But the very unseemliness of the Eleventh Circuit's holding presents the type of exceptional circumstance that justifies the exercise of

this Court's supervisory power over the lower federal courts.

A generation ago Mary Hamilton, an African-American woman, was held in contempt of court in Alabama because she refused to respond to questions when addressed as Mary, rather than by her last name.[34] This Court granted certiorari and summarily overturned her conviction. *Hamilton v. Alabama*, 376 U.S. 650 (1964). Petitioner asserts the same dignity interest as did Mary Hamilton, in this case ignored by a federal court of appeals. The simple right of African-Americans to be addressed in a non-demeaning manner is as important today as it was in 1964, and again warrants review by this Court.

[34] The examination is set out in Ex parte Hamilton, 275 Ala. 574, 574-75, 156 So. 2d 926, 926 (1963):

> Q. What is your name, please?
>
> A. Miss Mary Hamilton.
>
> Q. Mary, I believe – you were arrested – who were you arrested by?
>
> A. My name is Miss Hamilton. Please address me correctly.
>
> Q Who were you arrested by, Mary?
>
> A. I will not answer –
>
> BY ATTORNEY AMAKER: The witness's name is Miss Hamilton.
>
> A. – your question until I am addressed correctly.
>
> THE COURT: Answer the question.
>
> THE WITNESS: I will not answer them unless I am addressed correctly.
>
> THE COURT: You are in contempt of court –
>
> ATTORNEY CONLEY: Your Honor – your Honor –
>
> THE COURT: You are in contempt of this court, and you are sentenced to five days in jail and a fifty dollar fine.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-11695
Non-Argument Calendar

D. C. Docket No. 96-03257-CV-RRA-M

ANTHONY ASH,
JOHN HITHON,

Plaintiffs-Appellants,

EDDIE BULLOCK, et al.,

Plaintiffs,

versus

TYSON FOODS, INC.,
a corporation,

Defendant-Appellee,

THOMAS HARTLEY [sic],
an individual,

Defendant.

Appeal from the United States District Court
for the Northern District of Alabama

(Filed April 19, 2005)

Before DUBINA, CARNES and MARCUS, Circuit Judges.

PER CURIAM.

Appellants Anthony Ash and John Hithon, black males, (collectively "the appellants") appeal the district court's orders (1) granting Tyson Foods, Inc.'s renewed motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(b), on their 42 U.S.C. § 2000e *et seq*. ("Title VII") and 42 U.S.C. § 1981 discrimination claims, and (2) alternatively granting Tyson's motion for a new trial, pursuant to Fed. R. Civ. P. 50(c), on the basis that the jury's punitive and compensatory damages awards were excessive and unsupported by the evidence. We affirm in part and reverse and remand in part.

During the summer of 1995, the appellants, who were superintendents at Tyson's Gadsen, Alabama poultry plant, applied for two shift manager positions at the Gadsen plant. Thomas Hatley, the Gadsen plant manager, decided to hire Randy King and Steve Dade, white males, for the two shift manager positions. Following Hatley's decision to choose King and Dade for the shift manager positions, the appellants filed suit, claiming, *inter alia,* that their failure to be promoted to the shift manager positions violated their rights under Title VII and 42 U.S.C. § 1981.

A. *Judgment as a Matter of Law*

On appeal, the appellants initially argue that the district court should not have granted Tyson's renewed motion for judgment as a matter of law because it had denied the motions for judgment as a matter of law at trial and there were no intervening events to justify the court to change its mind. The appellants then contend that Tyson's reasons for not promoting them were pretextual. In support of the pretext argument, the appellants argue

that: (1) Hatley provided shifting reasons for his decision not to hire them; (2) Hatley used qualifications that (a) were not required by company policy, and (b) excluded the appellants; (3) Hatley only checked references for black candidates and did not review King's or Dade's performance reviews or personnel files; (4) Hatley lied about a college degree requirement for the shift manager position; (5) Hatley offered King the shift manager position before interviewing Hithon for the job; (6) Hatley hand-picked Dade for the shift manager position despite telling the superintendents that he would hold the position open before deciding on the promotion; (7) Tyson failed to prove that the Gadsen plant was losing money when Ash and Hithon were superintendents; and (8) Hatley's decision was made in an atmosphere where black employees were treated differently, including Hatley's cool demeanor toward the appellants and his statements referring to the appellants as "boys."

We review a district court's grant of a Fed. R. Civ. P. 50(b) renewed motion for judgment as a matter of law *de novo* and apply the same standard as the district court. *See Abel v. Dubberly,* 210 F.3d 1334, 1337 (11th Cir. 2000). In reviewing the evidence, we draw all factual inferences and resolve all credibility determinations in favor of the non-moving parties, which in this case are Ash and Hithon. *Munoz v. Oceanside Resorts, Inc.,* 223 F.3d 1340, 1344-45 (11th Cir. 2000). However, "the non-movant must put forth more than a mere scintilla of evidence suggesting that reasonable minds could reach differing verdicts[,]" and must show "[a] substantial conflict in the evidence . . . before a matter will be sent to the jury." *Abel,* 210 F.3d at 1337. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from

the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 150, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000) (citation and internal quotation omitted). "A motion for judgment as a matter of law will be denied only if reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." *Abel,* 210 F.3d at 1337 (citation, internal punctuation and quotation omitted).

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discriminat[ing] against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race. . . . " 42 U.S.C. § 2000e-2(a)(1). Under 42 U.S.C. § 1981, every person in the United States:

> shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a). This statute is interpreted as "afford[ing] a federal remedy against discrimination in private employment on the basis of race." *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 459-60, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295 (1975). When a case of intentional discrimination is brought under either Title VII or § 1981, we employ the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), framework. *See Cooper v. Southern Co.,* 390 F.3d 695, 724 n. 16 (11th Cir. 2004).

Under *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824, the plaintiff must first establish a *prima facie* case of discrimination, which a plaintiff establishes in a failure to promote case by showing that: (1) "he is a member of a protected class"; (2) "he was qualified for and applied for the promotion"; (3) "he was rejected"; and (4) "other equally or less qualified employees who were not members of the protected class were promoted." *Combs v. Plantation Patterns,* 106 F.3d 1519, 1539 n.11 (11th Cir. 1997) (citations omitted). Once a *prima facie* case is developed, the defendant has the burden of producing a legitimate, non-discriminatory reason for its decision. *See Reeves,* 530 U.S. at 142, 120 S.Ct. at 2106. Once these two burdens have been met, the *McDonnell Douglas* framework disappears, and the sole issue is whether the employer acted discriminatorily. *Id.* at 142-43, 120 S.Ct. at 2106. The plaintiff always has the ultimate burden to prove that discrimination existed and may establish discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Id.* (citation and internal quotation omitted). Therefore, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148, 120 S.Ct. at 2109. However, an employer would be entitled to judgment as a matter of law where "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* (citations omitted).

We have held that isolated general racial comments "are not *direct* evidence of discrimination because they are either too remote in time or too attenuated because they

were not directed at the plaintiff, . . . [. However,] we have not held that such comments can never constitute *circumstantial* evidence of discrimination." *Ross v. Rhodes Furniture, Inc.,* 146 F.3d 1286, 1291 (11th Cir. 1998) (citation omitted). When a racial comment is provided as evidence, we examine whether the comment "when read in conjunction with the entire record, [is] circumstantial evidence of those decision makers' discriminatory attitude. If so, the court must then determine whether such circumstantial evidence, along with other evidence . . . , might lead a reasonable jury to disbelieve [the employer's] proffered reason for [not promoting the employee]." *Id.* at 1292. While the use of "boy" when modified by a racial classification like "black" or "white" is evidence of discriminatory intent, *see Browning v. President Riverboat Casino-Missouri, Inc.,* 139 F.3d 631, 635 (8th Cir. 1998) (indicating that the use of "that white boy" was evidence of a discriminatory attitude), the use of "boy" alone is not evidence of discrimination. *See Ruby v. Springfield R-12 Public School Dist.,* 76 F.3d 909, 912 (8th Cir. 1996) (holding that referring to the appellant as "boy" and comments about clothing and blacks committing more crimes were not evidence of pretext); *Bonner v. Home Depot,* 323 F.Supp.2d 1250, 1258-59 (S.D. Ala. 2004), *aff'd,* No. 04-12887 (11th Cir. 2004) (finding that a single reference to a plaintiff as "boy" was not evidence of pretext).

We have noted that "[s]tanding alone, deviation from a company policy does not demonstrate discriminatory animus." *Mitchell v. USBI Co.,* 186 F.3d 1352, 1355-56 (11th Cir. 1999) (citation omitted). However, we have also observed that deviation from company policy can be circumstantial evidence of discrimination, especially where the rules were bent or broken to give a non-minority

applicant an advantage. *See Carter v. Three Springs Residential Treatment,* 132 F.3d 635, 644 (11th Cir. 1998); *see also Berg v. Fla. Dept. of Labor and Employment Sec., Div. of Vocational Rehab.,* 163 F.3d 1251, 1255 (11th Cir. 1998) (suggesting that failure to adhere to or inconsistent application of policies may be circumstantial evidence of discrimination where there is a showing that the policies were applied to others). Additionally, a plaintiff's showing that an employer's reason for not following a company policy was pretextual does not establish intentional discrimination without a finding that the employer acted because of race. *See Clark v. Huntsville City Bd. of Educ.,* 717 F.2d 525, 528 (11th Cir. 1983).

Finally, we have indicated that the issue in discrimination cases is not whether one employee is better qualified than another because we do not sit in judgment of an employer's decision. *See Cooper v. Southern Co.,* 390 F.3d 695, 732 (11th Cir. 2004). As a result, "[i]n a failure to promote case, a plaintiff cannot prove pretext by simply showing that [ ]he was better qualified than the individual who received the position that [ ]he wanted." *See Lee v. GTE Florida, Inc.,* 226 F.3d 1249, 1253 (11th Cir. 2000). Pretext can be established through comparing qualifications only when "the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." *Cooper,* 390 F.3d at 732 (citation and internal quotation omitted). However, an employee's showing that the employer hired a less qualified candidate is probative of whether the employer's reason is pretextual, but not proof of pretext. *Lee,* 226 F.3d at 1253.

After reviewing the record in the present case, we conclude that Ash did not present sufficient evidence for a reasonable jury to find that Tyson discriminated against

him because none of the evidence applicable to his claims establishes discrimination. However, we conclude that Hithon presented a sufficient case of discrimination because he demonstrated that Hatley interviewed him after Hatley had already hired King, indicating that Hatley's stated reasons for rejecting Hithon – his lack of a college degree, his position as a manager at a financially troubled plant, and his lack of experience outside of the Gadsen plant – were pretextual. This evidence of pretext along with Hithon's *prima facie* case of discrimination was sufficient for the jury to decide whether Tyson discriminated. Accordingly, we conclude that the district court did not err in granting Tyson's motion for judgment as a matter of law on Ash's claims, but the court erred in granting the motion for judgment as a matter of law on Hithon's claims.

B. *New Trial*

Because the district court did not err in granting judgment as a matter of law in favor of Tyson on Ash's claims, the issue of whether the court should have alternatively granted a new trial is moot for Ash. However, because we conclude that the district court erred in granting a motion for judgment as a matter of law on Hithon's claims, we turn to his appeal of the district court's alternative grant of a new trial.

On appeal, Hithon argues that the district court erred in alternatively granting Tyson's motion for a new trial because: (1) the court's order provided no basis for its decision, making it impossible for him to appeal specific grounds for the decision or to allow it to be reviewed at the appellate level; (2) the court's decision that the ratio

between the punitive and compensatory damages awards was premature as the court failed to determine back pay and attorney's fees; and (3) he presented sufficient evidence to support the jury's award of compensatory damages. Also, Hithon adopts his district court brief, contesting the district court's decision to grant a new trial.

1. *Standard of Review*

We review a district court's grant of a new trial for an abuse of discretion. *F.D.I.C. v. Stahl,* 89 F.3d 1510, 1514 (11th Cir. 1996). In employing the abuse of discretion standard for granting new trials, we use a more stringent approach. *Id.* The district court "should grant a motion for a new trial when

> the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. . . . Because it is critical that a judge does not merely substitute his judgment for that of the jury, new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great – not merely the greater – weight of the evidence."

Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1186 (11th Cir. 2001) (internal citations and quotations omitted).

2. *Punitive Damages*

"[P]unitive damages 'are awarded solely to punish defendants and deter future wrongdoing.'" *U.S. E.E.O.C. v. W & O, Inc.,* 213 F.3d 600, 616 (11th Cir. 2000) (quoting

Walters v. City of Atlanta, 803 F.2d 1135, 1147 (11th Cir. 1986)). We have held that punitive damages are available under § 1981. *See Claiborne v. Illinois Cent. R. R.,* 583 F.2d 143, 154 (5th Cir. 1978);[1] *see also Johnson v. Railway Express Agency, Inc.,* 421 U.S. at 460, 95 S.Ct. at 1720 (stating in dictum that punitives are available in § 1981 actions). Under Title VII, punitive damages are also available if the plaintiff shows the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *See* 42 U.S.C. § 1981a(b)(1). However, where a plaintiff has both Title VII and 42 U.S.C. § 1981 discrimination claims, the plaintiff is not constrained by the damage caps under Title VII and may recover under § 1981. *See* 42 U.S.C. § 1981a(a)(1), (b)(4). "[A]ny case law construing the punitive damages standard set forth in § 1981a . . . is equally applicable to clarify the common law punitive damages standard with respect to a § 1981 claim." *See Lowery v. Circuit City Stores, Inc.,* 206 F.3d 431, 441 (4th Cir. 2000).

As a result, punitive damages are available under 42 U.S.C. § 1981 when an "employer has engaged in intentional discrimination and has done so with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Kolstad v. American Dental Ass'n,* 527 U.S. 526, 529-30, 119 S.Ct. 2118, 2122, 144 L.Ed.2d 494 (1999) (quotation omitted). "'[M]alice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness

[1] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), we adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

that it is engaging in discrimination." *Id.* at 535, 119 S.Ct. at 2124. "Malice means 'an intent to harm' and recklessness means 'serious disregard for the consequences of [one's] actions.'" *U.S. E.E.O.C. v. W & O, Inc.,* 213 F.3d at 611 (citation omitted) (alteration in original). Intentional discrimination will not rise to the level of maliciousness or recklessness where the employer: (1) is "unaware of the relevant federal prohibition"; or (2) "discriminates with the distinct belief that its discrimination is lawful." *Kolstad,* 527 U.S. at 536-37, 119 S.Ct. at 2125. A plaintiff does not have to show egregiousness or outrageous discrimination to prove punitive damages although this is one form of proof. *Id.* at 538-39, 119 S.Ct. at 2126. Not only must the plaintiff show maliciousness or recklessness, but he must also impute liability to the employer. *Id.* at 539, 119 S.Ct. at 2126. The Supreme Court has held that an employer will not be held liable for punitive damages where "the discriminatory employment decisions of managerial agents . . . are contrary to the employer's good-faith efforts to comply with [42 U.S.C. § 1981]." *See id.* at 545, 119 S.Ct. at 2129 (quotation omitted). In the absence of evidence of a good-faith effort to comply with § 1981, an employer will be liable for actions of its agent when the agent served the employer in a managerial capacity and committed the intentional discrimination at issue while acting in the scope of employment. *See id.* at 542-43, 119 S.Ct. at 2128.

As initial matters, we first conclude that Hithon first cannot adopt arguments from his district court brief contesting Tyson's motion for a new trial. *See Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr S.A.,* 377 F.3d 1164, 1167 n. 4 (11th Cir. 2004) ("reject[ing] the practice of incorporating by reference arguments made to district courts, and . . . hold[ing] that [the appellant] . . .

waived the arguments it ha[d] not properly presented for review"). Second, Hithon's argument that the district court failed to give reasons for its decision to grant a new trial as required by Fed. R. Civ. P. 50(c) is without merit because the court stated its reasons by determining that the compensatory and punitive damages awards were "against the great weight of the evidence and [were] outrageously excessive and shocking to the judicial conscience."

We conclude that the district court did not abuse its discretion in granting a new trial on the basis of the jury's punitive damages award because the evidence was insufficient to support an award of punitive damages as Hithon has failed to present any evidence that Hatley knew he was violating federal law when he failed to promote Hithon. Moreover, because Hithon failed to establish that Hatley acted with malice or reckless indifference to his federal rights, we conclude that the district court did not err in granting a new trial on the punitive damages award.

3. *Compensatory Damages*

This court has stated that "[a]lthough compensable damage must be proven, . . . general compensatory damages, as opposed to special damages, need not be proven with a high degree of specificity." *Ferrill v. Parker Group, Inc.,* 168 F.3d 468, 476 (11th Cir. 1999). "Compensatory damages may be inferred from the circumstances" or proven through testimony. *Id.* (citation and internal quotation omitted). Evidentiary shortcomings go to the amount of loss, not to the issue of damages. *Id.* Under § 1981, compensatory damages encompass: (1) emotional harms such as humiliation and insult; (2) intangible,

psychological injuries; or (3) financial, property, or physical harms. *Id.* (citations omitted). There is no requirement that emotional damages be proven through medical evidence or expert testimony. *See Kim v. Nash Finch Co.,* 123 F.3d 1046, 1065 (8th Cir. 1997) (holding that "medical or other expert evidence was not required to prove emotional distress and that there was sufficient evidence of emotional distress") (persuasive authority).

After reviewing the record, we conclude that the district court did not abuse its discretion in granting the motion for a new trial on the compensatory damages award because Hithon provided insubstantial evidence to support the jury's $250,000 compensatory damages award.

For the foregoing reasons, we affirm the district court's grant of judgment as a matter of law in favor of Tyson on Ash's discrimination claims. We reverse the district court's grant of judgment as a matter of law in favor Tyson on Hithon's discrimination claims. However with respect to Hithon, we affirm the district court's decision to alternatively grant a new trial because there was insufficient evidence to support the jury's punitive damages award and the compensatory damages award was excessive. We remand this case for the district court to conduct further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

ANTHONY ASH, EDDIE BULLOCK, ROBIN DAVENPORT, JOHN HITHON, TRAVIS TANNER, and VIVIAN THORNTON,	)	
Plaintiffs,	)	CIVIL ACTION NO. 96-RRA-3257-M
vs.	)	
TYSON FOODS, INC., a corporation, and THOMAS HATLEY, an individual,	)	
Defendants.	)	

MEMORANDUM OF DECISION

(Filed Mar. 26, 2004)

The jury found in favor of the remaining plaintiffs, Anthony Ash and John Hithon, on their claims of promotion discrimination, and returned identical awards of compensatory damages in the amount of $250,000.00, and punitive damages in the amount of $1,500,000.00.[1] Before the court is the defendant's Rule 50 motion for judgment as a matter of law on the plaintiffs' discrimination claims, their claims for compensatory damages, and their claims

[1] The question of back-pay was reserved for a bench trial, and the court reserved that matter until ruling on the current motion. The claims of Hithon and Ash in question are the only remaining claims, as the other claims remaining after the court's ruling on the defendants' motion for summary judgment have been dismissed. Defendant Halley has been dismissed from the case.

for punitive damages (ct. doc. 247). The defendant filed a memorandum of law in support thereof (ct. doc. 254). The plaintiffs filed their opposition (ct. doc. 259) and a supporting brief (ct. doc. 260), to which the defendant filed a reply (ct. doc. 265). At oral argument, the defendant filed a further response addressing the plaintiffs' particular assertions of pretext (ct. doc. 297).

The court has the duty to grant the defendant's motion and dismiss plaintiffs Hithon's and Ash's discrimination claims if the evidence is insufficient to sustain findings that the plaintiffs were passed over for promotion to shift manager because of their race. Although it is the trial evidence which is under consideration, the standard is the same as if the court were considering a motion for summary judgment. The trial transcript allows the evidence presented to the jury to be carefully considered.

Reasons Given by Hatley for Selecting King and Dade over Hithon

Hatley did not base his promotion decisions on the written qualifications for shift manager. Hatley testified that he based his decisions on these factors: experience in the poultry industry in a successful plant; leadership and organizational skills; experience in more than one plant; having a college degree; and, as the primary consideration, Hatley's belief that it would be better to have as shift managers persons who were not associated with the badly-performing Gadsden facility. With respect to the latter, Hatley strongly relied on what he was told by others (references) in assessing current managers. This was explained by Hatley, in part, when he testified to what he told an applicant who did not get the job:

Q. Did you tell him very clearly what the primary reason he didn't get the job was?

A. I most certainly did.

Q. And what was that? What did you tell him?

A. Again, that we had poor performance at Gadsden. We had a group of managers there that admittedly, no issue that they had been in the business for a long time. You call that knowledge, call that experience, whatever. But the numbers were bad. We were losing money.

And, the huge question mark in my mind is what part did their leadership play in the poor performance and, more importantly, why hadn't the leadership help change that.

Q. Now, how long had you had to observe personally the performance of those two guys?

A. Not very long. Again, these two shift managers –

Q. Did you do anything to double check to be sure that maybe in spite of their association, that there might be – you know, that you shouldn't give so much weight to that?

A. Well, again, John Pittard worked with these guys for a long period of time. As a matter of fact, I think, it's also noted. And I asked him. And my concern – the question mark there based on John's reference was not erased.

Trial Transcript, pp. 439-40.

Ash Was Not Considered

Hatley testified that Ash told him at the beginning that he did not think he was ready to be a shift manager, and, therefore, did not consider Ash for either shift manager opening. Ash's evidence, however, is that he told Hatley that he wanted to be considered for the job. As the non-moving party, Ash's version of the evidence must be taken as true. However, it is Ash's position, and the evidence is uncontroverted, that Hatley did not consider Ash for either shift manager opening.[2] Hatley testified:

> THE COURT: Did you say that Ash did not come to you and tell you that he wanted the second slot that came open?
>
> THE WITNESS: He did not.
>
> THE COURT: Did you consider him even though he didn't come to you and say that? Did you still consider him?
>
> THE WITNESS: Sir, after he told me in the office that he was not ready for the shift manager's position, I didn't consider him beyond that.

Trial Transcript, p. 456. Why did Hatley not consider Ash? The defendant contends that Hatley simply acted on Ash's statement that he was not ready for the job, while Ash asserts discrimination.

[2] Nevertheless, the defendant compares and discusses Ash's qualifications.

Law of Pretext

Because it is believed that the evidence supports a finding that the plaintiffs were qualified to be shift managers, and because Hatley offered legitimate, non-discriminatory reasons – the factors previously enumerated that Hatley stated he based his decisions on – for selecting King and Dade, who are both white, Hithon must show that these considerations were pretextual. It is incumbent on a plaintiff to show pretext as to each and every reason given by the decision-maker for taking the action complained of. In the context of pretext, Hatley's considerations in selecting King and Dade should be considered as one "reason," as Hatley considered them together and overall, not separately. Together, they are deemed "qualifications."

> Pretext "means a lie, specifically a phony reason for some action." *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir.1995). The question is not whether the employer properly evaluated the competing applicants, but whether the employer's reason for choosing one candidate over the other was honest. *Brill v. Lante Corp.*, 119 F.3d 1266, 1273 (7th Cir.1997). "'Pretext for discrimination' means more than an unusual act; it means something worse than a business error; 'pretext' means deceit used to cover one's tracks." *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1005 (7th Cir.2001) (internal citations omitted). Thus, even if IBP's reasons for selecting Harris over Millbrook were "mistaken, ill considered or foolish, so long as [the employer] honestly believed those reasons, pretext has not been shown." Jordan v. Summers, 205 F.3d 337, 343 (7th Cir.2000).

Milbrook v. IBP, Inc., 280 F.3d 1169, 1175 (7th Cir. 2002). The court is "not in the business of adjudging whether employment decisions are prudent or fair. Instead, [its] sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.2d 1354, 1361 (11th Cir. 1999). A plaintiff must show not merely that the defendant's employment decisions were mistaken, but that they were in fact motivated by [improper discriminatory reasons]. *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1253 (11th Cir. 2000). Evidence of pretext might not be enough to prove intentional discrimination:

> [I]f the plaintiff proves at trial that the defendant's proffered reason for its employment decision was false, i.e., pretextual, that is "one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* But "[i]t is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Id.* Thus, as the Supreme Court in *Reeves* stressed, the existence of the prima facie case, coupled with evidence of pretext, is not always enough to satisfy the plaintiff's burden of proving intentional discrimination. Id. at 146-47, 120 S.Ct. 2097 ('This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory.").

Applying *Reeves*, we must first consider whether Millbrook presented sufficient evidence

> of pretext – not because that is dispositive, but because if IBP's asserted justification for selecting Harris were pretextual, that could constitute circumstantial evidence that IBP intentionally discriminated against Millbrook. From there, we review the record as a whole to determine whether the evidence in its entirety supports a reasonable inference of race discrimination. *Id.* at 148, 120 S.Ct. 2097.

Millbrook v. IBP, Inc., 280 F.3d at 1174. "[A] employer would be entitled to judgment as a matter *of* law . . . if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 148. Moreover, the plaintiffs must present evidence that Hatley lied. It is not enough for the factfinder simply to disbelieve Hatley's reasons. "[W]ithout proof of a lie [as to what the employer believed] no inference of discriminatory motive can be drawn." *Millbrook v. IBP, Inc.*, 280 F. 3d at 1181, *quoting Olsen v. Marshal & Ilsley Corp.*, 267 F.3d 597, 602 (7th Cir. 2001).

> [T]his standard is consistent with the plaintiff's ultimate burden of proof in discrimination cases. Such a plaintiff cannot get to a "jury if his only 'evidence' had been that defendants' witnesses were not worthy of belief. That would have made it a no-evidence case, and such a case a plaintiff must lose, because he has the burden of proof." *Equal Employment Opportunity Commission v. G-K-G, Inc.*, 39 F.3d 740, 746 (7th Cir.1994) (internal citations omitted). Rather, "to avoid a directed verdict or a JNOV, a plaintiff must do more than merely argue that the jury might have chosen to disbelieve all of the defendant's evidence. . . . A plaintiff must

> offer substantial evidence to support the argument." *Perfetti v. First National Bank of Chicago*, 950 F.2d 449, 456 (7th Cir.1991) (internal quotations omitted). Thus, "[a] party cannot meet its burden of proof 'by relying on the hope that the jury will not trust the credibility of the witnesses . . . '" *Id.* (internal citation omitted). Yet that is exactly what Millbrook attempts; he seeks to justify the jury verdict based on his contention that the jury could have disbelieved IBP's assertion that it selected Harris because of his superior qualifications. However, without some affirmative evidence calling into question IBP's credibility, Millbrook must lose. *See also*, *Fischbach*, 86 F.3d at 1183 ("Title VII liability cannot rest solely upon a judge's determination that an employer misjudged the relative qualifications of admittedly qualified candidates."). Thus, to reconcile this precedent, we must adopt the standard that we have today – that comparative qualifications do not support a finding of pretext – or we would be allowing plaintiffs to reach the jury based solely on a claim that the employer cannot be believed. We have consistently rejected such claims. *See*, *e.g.*, *Massey v. Blue Cross-Blue Shield of Illinois*, 226 F.3d 922, 926 (7th Cir. 2000) ("It is always possible, of course, that the jury might have disbelieved everything [the employer] said, but we routinely deny summary judgments based on that kind of hope, and consistency requires us also to reject that possibility as a way of saving the jury's verdict.")

Millbrook v. IBP, Inc., 280 F.3d at 1181-82.

The question before the court, then, is whether sufficient evidence was presented at trial to show that Hatley's reason for selecting King and Dade over Hithon was not

real, and that his real reason for selecting King and Dade was to deny Hithon promotion because he is black. Ash must show that the evidence is sufficient to find that Hatley's statement that he did not consider Ash because Ash said he was not ready for the job was pretextual.

Plaintiffs' Assertions of Pretext

The plaintiffs claim that there are several pieces of evidence tending to establish pretext and intentional discrimination. These assertions are set out in the plaintiffs' opposition brief, and the court will comment on most of them.

Qualifications

Hatley did not base his selections on the written qualifications for shift manager.[3] However, failure to follow policy, without more, is not evidence of discrimination. *Mitchell v. USBI Company*, 186 F.3d 1352, 1355-56 (11th Cir. 1994). In this case, Hatley testified that, although he was aware of Tyson's EEOC policy, he was not aware of the written qualifications for the shift manager position.

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[3] *Written qualifications*

The written qualifications were set out as follows:

> Education: Requires education beyond high school including special training, vocational school, and/or college course.
> Experience: 3-5 yrs.
>
> Computer Skills: Requires elementary computer skills. For example, checking electronic mail, entering data into document templates, or creating simple queries.
>
> Travel: 1-5 trips/yr.
>
> Special Skills: (none)

The evidence at trial did not explore whether the applicants met all of these written qualifications.

Hithon contends that the fact that he was not selected based on his qualifications alone is evidence of pretext. In *Lee v. GTE Florida, Inc.*, 226 F.3d 1249 (11th Cir. 2000), the Eleventh Circuit set out the law concerning claims of discrimination based on qualifications:

> Other circuits have more clearly articulated the evidentiary burden a plaintiff must meet in order to prove pretext by showing she was substantially more qualified than the person promoted. *See Fulton County*, 207 F.3d at 1340. In *Deines*, for example, the Fifth Circuit affirmed the district court's instruction to the jury stating that "disparities in qualifications are not enough in and of themselves to demonstrate discriminatory intent unless those disparities are so apparent as virtually to jump off the page and slap you in the face." 164 F.3d at 280. The court explained that the phrase
>
> > "jump off the page and slap [you] in the face" . . . should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question. This evidentiary standard does not alter the plaintiff's evidentiary burden to prove the fact of intentional discrimination by a preponderance of the evidence. Instead, the standard only describes the character of this particular type of evidence that will be probative of that ultimate fact.
>
> *Id.* at 280-281.

Lee, 226 F.3d at 1254. The court held that "[n]one of Lee's proffered evidence established that she was more qualified

than Hines, let alone so clearly more qualified for the position than Hines that a reasonable juror could infer discriminatory intent from the comparison. *Id.* at 1255. Also, it is perfectly acceptable for the decision-maker to base his decision on subjective factors as long as they are subject to objective evaluation. *Chapman v. AI Transport*, 229 F.3d 1012, 1034-35 (11th Cir. 2000). "[I]ndeed, for higher level executive and managerial promotions, subjective factors may play a very substantial role." *Denney v. City of Albany*, 247 F.3d 1172, 1185 (11th Cir. 2001).

The qualifications of Ash, Hithon, King, and Dade, which are stated in the parties' submissions, are set out generally as follows:

Hithon joined the poultry industry in 1982. His work experience was limited to the Gadsden plant, where, as a superintendent for five years, he was responsible for 500-600 people. Hithon had military experience in the National Guard. He did not have a college degree. Comments on Hithon from "higher-ups" were negative.

Ash joined Tyson in 1980. His only experience outside Gadsden was as a member of a group of 12 employees who trained at the Blountsville plant for three months. In 1995, Ash had been a superintendent for just over one year. He supervised a total of 350 workers. Ash helped start the debone operation at the Gadsden plant, and later helped start the IQF department. He did not have a college degree.

King had worked in two successful Arkansas plants, where he had been a shift manager. He did not have a college degree. He was highly recommended, as will be discussed later.

Dade joined Tyson in 1993. He had held numerous positions at the Boaz plant, including Personnel Manager, Production Superintendent, First and Second Shift Superintendent, and Assistant Plant Manager, some of which positions were held simultaneously. He was transferred to Gadsden as maintenance supervisor in May of 1995. He achieved the rank of Lieutenant Colonel after fourteen years in the United States Marine Corps. In addition to a Bachelor's degree, Dade held a Master's Degree in Management and Human Relations.

It is concluded that even if it could be found that Hithon was more qualified than King or Dade, the disparity would not be so great as to allow a finding of discrimination based on the difference. In fact, the evidence shows that King and Dade were more qualified, considering the emphasis Hatley placed on wanting to bring in new management and the recommendations he received.[4] Whether Ash's qualifications were so superior to Dade or King that Hatley, out of a discriminatory intent, wanted to avoid considering Ash by claiming that Ash told him that he was not ready to be a shift manager, and whether other asserted instances of pretext are evidence of such intent, will be discussed later.

Other Claimed Evidence of Pretext

The plaintiffs claim that there is certain evidence which establishes racial animus on the part of Hatley and calls into doubt the reasons he gave for not selecting Hithon or considering Ash. The plaintiffs refer to evidence

[4] Recommendations are discussed, *infra*, pp. 14-15.

that Hatley spoke or ate with whites only. Hatley's testimony that Hithon would come by his office and that they would talk in the office and in the break room about Hithon's military experience and the things he would like to do if he were shift manager was undisputed. This evidence is hardly probative of a racial animus. The plaintiffs also point to the testimony that on one occasion Hatley called Hithon "boy," and on two occasions he called Ash "boy." In a production meeting, Hatley said "Hey, boy" as Hithon was walking through the door. *Trial Transcript*, p. 150. In the cafeteria, Hatley said to Ash, "Boy, you think you've got enough starch in those jeans?" *Trial Transcript*, p. 252. Ash's wife told Hatley that her husband was not a boy, and Hatley laughed. Neither Ash nor Hithon complained about the statements. Even if Hatley made these statements, it cannot be found, without more, that they were racial in nature.

The plaintiffs refer to other alleged evidence of discrimination. They state that at the time in question there had never been a black shift manager at the Gadsden plant. This statement is unsupported with statistical evidence sufficient to allow an inference of discrimination, and is, therefore, meaningless. Moreover, Hatley, the sole decision-maker, had nothing to do with the selection of management personnel before he came to the Gadsden plant.

The plaintiffs claim that the shift manager positions were never posted. Hatley's testimony that he instructed Tyson's resource manager, Ever Higgins, a black woman, to post both openings, is uncontradicted.[5] Certainly the

[5] King and Dade testified that they saw the postings.

plaintiffs knew of the availability of the jobs, whether they were posted or not. Moreover, Hatley talked to them about the openings.

Hithon testified that he was made sanitation superintendent before July, 1985, given more duties than the white person who previously held that position, and then was ignored when credit for the clean-up was given to Dade. Dade testified that Hatley told him that Purdle had complimented Dade as the person mainly responsible for the effort. Hatley, the decision-maker, had nothing to do with the things about which Hithon complains.

The plaintiffs state that Hatley interviewed Hithon and Blake on the same day he hired King. The apparent implication is that Hatley's interviews with Hithon and Blake, black men, were shams, because King had already been hired. In his testimony, Hatley explained that he simply did not record his interviews with Hithon and Blake at the time they were interviewed, which was before King was hired. The evidence shows that Hatley was not always orderly or punctual in his note taking or the recording of his notes, but that is not evidence of discriminatory intent.

There was evidence that Hatley said he was going to work with the superintendents, one of whom was white, for six months, evaluate them, and then fill the second position.

However, Dade was given the job less than a month later, which was before Hatley had been on board at Gadsden a full six months. The plaintiffs apparently contend that the fact that Hatley did not wait for six months indicates that he did not intend to give them a fair evaluation. It is just as likely, however, that Hatley, who

was told to get the situation in Gadsden corrected as soon as possible, who was hesitant to hire a manager at the Gadsden plant as a shift manager, and who received negative recommendations on Hithon, simply decided it was not necessary or prudent to wait six months to make a decision. Hatley, of course, was under no obligation to wait six months or any set amount of time to make his decision. Hatley testified to the pressure he was under:

Q. Now, who told you that they wanted you to go in and manage that plant?

A. Well, I was first contacted by Mark. After the interview process, he said I had been selected for the job.

Q. What was the potential future of that plant if it continued to lose the kind of money that it was losing the month you took over?

A. If we continued to lose that kind of money at Gadsden, at some point, Tyson Foods, they would have had to rationalize that plant. They would have had to do a major significant product change or think about closing the plant.

Q. Did that concern you?

A. Sure, it did.

Q. Why?

A. Well, we had twelve to thirteen hundred people whose livelihood depended on working at that plant.

Q. So what was your mission? Did anybody explain to you what your mission was when they sent you to the plant?

A. The first monthly meeting that we had after I came to the plant was shortly after that. It was made very clear to me by Mr. Purdle in that meeting – again, you know, we're ranking all the plants up there –

MS. WALKER: Judge, we would object to hearsay.

MR. LACY: We don't offer it for the truth, just the fact there was a meeting where he was given – he was given business instructions, Your Honor. I think it's also permissible to show what he was told he was supposed to do in his job.

THE COURT: Overruled.

Q. Go ahead, Mr. Hatley.

A. And, again, in this meeting, Gadsden was pretty well on the lower third on all the parameters you could look at.

MS. WALKER: Objection. It's nonresponsive, Your Honor.

THE COURT: Overruled.

Q. Go ahead, Mr. Hatley.

A. And I remember very distinctly in that meeting Mr. Purdle looking at me and saying, you know, Tom, you don't have long to get this turned around. So that was my mission was to get it turned around.

Q. That was in May, early May or late May?

A. The monthly meeting would have been in May, yes.

Q. Were you periodically reminded of the performance of the plant and the mission?

A. Yes, I was.

Q. Tell the jury some examples of those reminders.

A. Well, certainly Mark Waller, he was my complex manager. We would talk almost daily. But I worked quite a few Saturdays there at the plant. I had quite a bit going on.

There were quite a few Saturdays where Mr. Lovett, who was then the senior vice-president of operations for Tyson, would call me at the plant, and, you know, remind me of what I had to get done and asked me how I was going to get it done, that I didn't have a lot of time to get it done.

Trial Transcript, pp. 410-13.

The plaintiffs also state that Hatley said that a college degree was needed, and point out that King did not have one. When asked whether a degree was absolutely required, Hatley testified that "[i]t was a criteria we looked at, a requirement we looked at, but it was not an absolute prerequisite, no." *Trial Transcript* at 438. Lola Hithon, the plaintiff's wife, testified that Hatley was under considerable pressure to improve the ratio of managers at the plant with college degrees but that a degree was not a requirement for promotion. John Hithon himself testified that there was pressure from above to get persons with

college degrees, particularly from Mark Waller, the complex manager (manager of several plants).[6] Finally, King was already a shift manager at the Pine Bluff, Arkansas, plant, and, therefore, being awarded the same position at Gadsden would be considered a lateral move, not a promotion.

The plaintiffs even contend that the evidence was disputed as to whether the plant had been losing money. The evidence that the plant was losing money was clear. Even Hithon testified that he would rate the Gadsden plant very much below average for the past two years. In any event, it is without dispute that Hatley was sent to Gadsden for the very purpose of improving the plant's poor financial performance.

Hatley testified that he considered the negative comments about Hithon from John Pittard, a former Gadsden plant manager who had supervised Hithon for eight years. Pittard told Hatley that Hithon's performance was less than standard. Hatley further testified that "John's recommendation was that he would most definitely not recommend, at all, that John [Hithon] works hard, but that he couldn't grasp the whole picture." *Hatley Trial Testimony*, p. 445. In response, Hithon points to a 1990 letter written by Pittard, commending his job performance. Hatley, however, was not even aware of the five-year old letter's existence. On the other hand, Hatley testified that in addition to the fact that King was already working at a successful plant as a shift manager, King had very positive references from Tyson's executive vice-president of

[6] Hatley advised Hithon to take leadership classes and work on a college degree.

operations and senior vice-president of operations. Speaking of King, Hatley testified:

> And, again, the leading factor was that he was a shift manager already in a successful Tyson plant. In making phone calls to ask about Randy, I got recommendations from a number of people, including our executive vice-president of operations at the time, and the senior vice-president said, Tom, if you can get this young man, you need to do that.

Trial Transcript, p. 446. Hatley also received strong recommendations in favor of Dade. Waller highly recommended him, and the Senior Vice-President of Operations and the Executive Vice-President of Operations both recommended that Dade be given "a shot" as shift manager. *Trial Transcript*, p. 540. Hatley testified that these recommendations had "an awful lot to do with" selecting Dade. *Id.* at 454. Also, based on his observation of Dade's performance at the Gadsden facility, Hatley gave Dade exceptional praise for his work ethic and ability to motivate and lead people.

The plaintiffs state that the fact that Ash provided Dade some training in second processing is by itself reason enough to disbelieve Hatley's "proffered reason for the failure to select Mr. Ash as shift manager."[7] The court disagrees. The fact that Dade received some training from Ash does not contradict the factors Hatley stated he

[7] As previously discussed, Hatley testified that he did not consider Ash because Ash said that he was not ready for the position.

considered, especially his desire to bring in new management and the emphasis he placed on recommendations.[8]

Conclusion

It is concluded that the evidence of pretext is insufficient to support a finding that the reasons given by Hatley for making King and Dade shift managers were lies intended to cover-up racial discrimination against Hithon. It is further concluded, assuming that Ash told Hatley that he wanted to be interviewed and considered for shift manager, that the evidence is insufficient to find that Hatley's failure to consider Ash was the result of an intent to discriminate against him. Indeed, Hatley interviewed black managers whom he believed wanted to be considered. Also, Ash's qualifications were not a reason not to consider him, because Hatley could have selected Dade or King over Ash and a comparison of their respective qualifications would not have indicated discrimination. In short, there is an insufficiency of evidence to support a finding of intentional racial discrimination by Hatley against either Hithon or Ash.

Wherefore, Tyson's motion for judgment as a matter of law on Ash's and Hithon's discrimination claims is due to be granted, and those claims are due to be dismissed. A final

Wherefore, Tyson's motion for judgment as a matter of law on Ash's and Hithon's discrimination claims is due to

[8] Any other assertion of discrimination not commented on is no more probative of discrimination than the assertions discussed.

be granted, and those claims are due to be dismissed.[9] A final order in accordance with this memorandum of decision will be entered.

DONE this 26th day of March, 2004.

/s/ Robert R. Armstrong
Robert R. Armstrong, Jr.
United States Magistrate Judge

[9] Dismissal, of course, will moot the jury's verdicts and the need for any further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

ANTHONY ASH, EDDIE BULLOCK, ROBIN DAVENPORT, JOHN HITHON, TRAVIS TANNER and VIVIAN THORNTON,	)	
Plaintiffs,	)	CIVIL ACTION NO. 96-RRA-3257-M
vs.	)	
TYSON FOODS, INC., a corporation; and THOMAS HATLEY, an individual,	)	
Defendants.	)	

ORDER

(Filed May 18, 2004)

The defendant's Rule 50(b) motion for judgment as a matter of law has been granted. Pursuant to Rule 50(c), the court now alternatively GRANTS the defendant's motion for a new trial. It is determined that the jury's verdict of discrimination is against the great weight of the evidence. It is additionally determined that the evidence does not come close to supporting the amount of the award of compensatory damages or the amount of the award of punitive damages, and that both awards are against the great weight of the evidence and are outrageously excessive and shocking to the judicial conscience.

DONE this 18th day of May, 2004.

/s/ Robert R. Armstrong
Robert R. Armstrong, Jr.
United States Magistrate
Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-11695-AA

ANTHONY ASH, JOHN HITHON,

Plaintiffs-Appellants,

EDDIE BULLOCK, et al.,

Plaintiffs,

versus

TYSON FOODS, INC., a corporation,

Defendant-Appellee,

THOMAS HARTLEY [sic], an individual,

Defendant.

On Appeal from the United States District Court
for the Northern District of Alabama

(Filed June 23, 2005)

BEFORE: DUBINA, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

DISTRICT COURT DECISIONS IN THE ELEVENTH CIRCUIT APPLYING THE "SLAP IN THE FACE" STANDARD

Aldabblan v. Festive Pizza, Ltd.,
380 F. Supp. 2d 1345 (S.D.Fla. Aug. 9, 2005)

Haley v. Potter,
2005 WL 1618549 *5 (M.D.Ala. July 6, 2005)

Brewer v. Dupree,
356 F. Supp. 2d 1261, 1266 (M.D.Ala. 2004)

Twilley v. Burlington Northern & Santa Fe Railway Co., Inc.,
351 F. Supp. 2d 1299, 1307 (N.D.Ala. 2004)

Labady v. Gemini Air Cargo., Inc.,
350 F. Supp. 2d 1002, 1014-15 (S.D.Fla. 2004)

Dalmau v. Vicao Aerea Rio-Grandense, S.A.,
337 F. Supp. 2d 1299, 1309 (S.D.Fla. 2004)

Alexander v. Chattahoochee Valley Community College,
325 F. Supp. 2d 1274, 1286, 1287 (M.D.Ala. 2004)

Thomas v. Troy City Bd. of Education,
302 F. Supp. 2d 1303, 1308-09 (M.D.Ala. 2004)

White v. Verizon South, Inc.,
299 F. Supp. 2d 1235, 1242 (M.D. Ala. 2003)

Harrington v. The Children's Psychiatric Center, Inc.,
2003 WL 23356396 *10-*11 (S.D.Fla. Dec. 9, 2003)

Dorrego v. Public Health Trust of Miami-Dade County,
293 F. Supp. 2d 1274, 1284-85 (S.D.Fla. 2003)

Green v. Miami-Dade County,
2003 WL 22331877 *8-*9 (S.D.Fla. Sep. 9, 2003)

Cooper v. Southern Co.,
260 F. Supp. 2d 1258, 1268 (N.D.Ga. 2003)

Cooper v. Southern Co.,
260 F. Supp. 2d 1334, 1344 (N.D.Ga. 2003)

Cooper v. Southern Co.,
260 F. Supp. 2d 1352, 1362 (N.D.Ga. 2003)

Etienne v. Muvico Theaters, Inc.,
2003 WL 21184268 (S.D.Fla. March 11, 2003)

Norrell v. Waste Away Group, Inc.,
246 F. Supp. 2d 1213, 1223-24, 1226 (M.D.Ala. 2003)

Gaddis v. Russell Corp.,
242 F. Supp. 2d 1123 (M.D.Ala. 2003)

Robinson v. Regions Financial Corp.,
242 F. Supp. 2d 1070, 1083 (M.D.Ala. 2003)

Walker v. Elmore County Bd. of Education,
223 F. Supp. 2d 1255, 1262-63 (M.D.Ala. 2002)

Ward v. State of Florida,
2002 WL 31955981 *5-*6 (N.D.Fla. 2002)

Rossi v. Troy State University,
330 F. Supp. 2d 1240, 1251 (M.D.Ala. 2002)

LeBlanc v. The TJX Companies, Inc.,
214 F. Supp. 2d 1319, 1329-30 (S.D.Fla. 2002)

Clark v. Alfa Insurance Co.,
2002 WL 32366291 *2 (N.D.Ala. May 28, 2002)

Hall v. Alexander,
2002 WL 655317 *3-*4 (M.D.Ala. March 25, 2002)

Miller v. Bed, Bath & Beyond,
185 F. Supp. 2d 1253, 1270 (N.D.Ala. 2002)

McFadden v. Lockheed Martin Information Systems,
2002 WL 596352 *7 (M.D.Fla. 2002)

Jones v. Siegelman,
2001 WL 1772159 *4-*5 (M.D.Ala. Dec. 26, 2001)

Rogers-Libert v. Miami-Dade County,
184 F. Supp. 2d 1273, 1281 (S.D.Fla. 2001)

Dancy-Pratt v. School Board of Miami-Dade County,
2001 WL 1922063 *7-*8 (S.D.Fla. Dec. 13, 2001)

Humphrey v. Potter,
162 F. Supp. 2d 1354, 1363 (S.D.Fla. 2001)

Dowell v. Prime Healthcare Corp.,
2001 WL 611198 *9 (M.D.Ala. 2001)

Taylor v. Williams,
2000 WL 1844698 *3 (S.D.Ala. 2000)

Pennington v. City of Huntsville, Alabama,
93 F. Supp. 2d 1201, 1217-18 (N.D.Ala. 2000)

Burney v. Rheem Mfg. Co., Inc.,
196 F.R.D. 659, 675, 677 (M.D.Ala. 2000)

DISTRICT COURT DECISIONS IN THE FIFTH CIRCUIT APPLYING THE "SLAP IN THE FACE"/"CRY OUT" STANDARD

SEPTEMBER 1, 1999 TO SEPTEMBER 1, 2005

Ricketts v. Champion Chevrolet,
2005 WL 1924372 *6 (S.D.Tex. Aug. 11, 2005)

Raper v. FMC Technologies, Inc.,
2005 WL 1566184 *5 (N.D.Miss. June 30, 2005)

Piper v. United States Dept. of Agriculture,
2005 WL 1309053 *3-*5 (E.D.La. May 17, 2005)

Thompson v. Secretary, Dept. of the Interior, MMS
2005 WL 767883 (E.D.La. March 24, 2005)

Torres v. City of San Antonio,
2005 WL 356950 *10 (W.D.Tex. 2005)

Boyce v. Bank of America Technology and Operations, Inc.,
2004 WL 2545015 *5 (N.D.Tex. Nov. 10, 2004)

Butler v. Munsch Hardt Kopf & Harr, P.C.,
2004 WL 2468964 *6 (N.D.Tex. Nov. 1, 2004)

Pacheco v. Mineta,
2004 WL 2537400 *3 (W.D.Tex. Sept. 14, 2004)

Capers v. Dallas Independent School District,
2004 WL 1856830 *4 (N.D.Tex. Aug. 18, 2004)

Reed v. Efficient Networks, Inc.,
2004 WL 1717369 *7, *11 (N.D.Tex. July 30, 2004)

Pippins v. Tangipahoa Parish Council,
2004 WL 1575410 *8 (E.D.La. July 13, 2004)

Todd v. Waste Management of Texas, Inc.,
2004 WL 1465771 *4 (W.D.Tex. June 30, 2004)

Dailey v. Vought Aircraft Industries, Inc.,
2004 WL 1637009 *5 (N.D.Tex. June 28, 2004)

Moultrie v. Laboratory Corporation of America,
2004 WL 957941 (W.D.Tex. May 5, 2004)

Brown v. Farmers Insurance Exchange,
2004 WL 952396 *5 (W.D.Tex. May 3, 2004)

Nelson v. Bank of America,
2004 WL 942238 *6-*9 (N.D.Tex. April 30, 2004)

Lall v. Perot Systems Corporation,
2004 WL 884438 *7 (N.D.Tex. April 23, 2004)

Reynolds v. City of Dallas,
2004 WL 893425 *7-*9 (N.D.Tex. April 23, 2004)

Roy v. Veneman,
2004 WL 551212 *3-*5 (E.D.La. March 18, 2004)

Hall v. Pitney Bowes, Inc.,
2004 WL 389093 *6 (N.D.Tex. Feb. 27, 2004)

Washington v. Veneman,
2004 WL 170315 *4-*6 (E.D.La. Jan. 27, 2004)

Mayes v. Office Depot, Inc.,
292 F. Supp. 2d 878, 891-92 (W.D.La. 2003)

Legania v. East Jefferson General Hospital Dist., No. 2,
2003 WL 21277127 *8 (E.D.La. May 29, 2003)

Ratcliff v. Exxonmobil Corporation,
2002 WL 1315625 *7 (E.D.La. June 13, 2002)

Kimble v. Georgia Pacific Corp.,
245 F. Supp. 2d 862, 878 n. 26 (M.D.La. 2002)

Belcher v. Roche,
2002 WL 31374658 *8 (W.D.Tex. Sept. 30, 2002)

Jerge v. City of Hemphill, Texas,
224 F. Supp. 2d 1086, 1094 (E.D.Tex. 2002)

Kokes v. Angelina College,
220 F. Supp. 2d 661, 666-67 (E.D.Tex. 2002)

Daniels v. Home Depot, Inc.,
2002 WL 1398643 (E.D.La. June 26, 2002)

Gant v. Sabine Pilots,
204 F. Supp. 2d 977, 988-89 (E.D.Tex. 2002)

Murphree v. Potter,
226 F. Supp. 2d 826, 836-37 (N.D.Miss. 2002)

Scally v. The Burlington Northern and Santa Fe Rwy. Co.,
2001 WL 1577626 *5 (N.D.Tex. Dec. 10, 2001)

Powell v. Delaney,
2001 WL 1910556 *8 and n. 7 (W.D.Tex. June 14, 2001)

Solorzano v. Shell Chemical Co.,
2000 WL 1252555 *8 (E.D.La. Aug. 31, 2000)

Harah v. Summers,
2000 WL 33348734 *7 (W.D.Tex. 2000)

McVicker v. Albemarle Corp.,
2000 WL 1034541 *6-*7 (M.D.La. June 26, 2000)

Haire v. United States,
101 F. Supp. 2d 478, 484 (N.D.Miss. June 6, 2000)

McCaulla v. City of Marks,
2000 WL 33907867 *4-*5 (N.D.Miss. Feb. 15, 2000)

Gonzalez v. Conoco, Inc.,
2000 WL 251744 (S.D.Tex. Feb. 1, 2000)

Martin v. Kroger Co.,
65 F. Supp. 2d 516, 547-48 (S.D.Tex. 1999)