

RECORD NO. 18-1994

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

ROBERT LOUIS GARY,

Plaintiff-Appellant,

v.

FACEBOOK, INC. and WAYNE HAWKINS,

Defendants-Appellees,

**BRIEF OF APPELLEES FACEBOOK, INC. and
WAYNE HAWKINS**

[PUBLIC/REDACTED VERSION]

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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(appellant/appellee/petitioner/respondent/amicus/intervenor)

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If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
If yes, identify all such owners:

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5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Charles E. Johnson

Date: January 25, 2019

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CERTIFICATE OF SERVICE

I certify that on January 25, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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PRELIMINARY STATEMENT

This case concerns a single employment decision by Facebook, Inc. (“Facebook”) in early 2014: the decision to wait six months to promote Robert Gary “(Gary)” to the IC2 level during the next review cycle. As explained below, and as the district court concluded, Facebook had a legitimate nondiscriminatory reason as to why Gary was not selected for promotion in early 2014: Gary lacked initiative, needed to improve his communication style, and fell short of the superior work performance of his comparator, Greg Randall. The undisputed evidence shows that Facebook would have waited to promote Gary until the next review cycle regardless of his race.

The district court properly granted summary judgment to Facebook and Wayne Hawkins (“Hawkins”), the former facilities operations manager at Facebook’s Forest City, North Carolina facility. The district court analyzed Gary’s claims and correctly determined that Gary failed to establish a prima facie case of race discrimination and that, even if he had done so, Facebook’s reason for declining to promote Gary was not a pretext for discrimination. Summary judgment should be affirmed.

JURISDICTIONAL STATEMENT

Jurisdiction is proper under 28 U.S.C. § 1331, as this appeal arises from a judgment dismissing a civil action in the United States District Court for the

Western District of North Carolina alleging violations of 42 U.S.C. § 1981. JA 786. The district court entered a final judgment granting Facebook's and Hawkins' motions for summary judgment on July 25, 2018. *Id.* A notice of appeal was timely filed on August 24, 2018. JA 787. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court correctly grant Facebook's and Hawkins' motions for summary judgment because Gary failed to present a prima facie case of race discrimination under 42 U.S.C. § 1981 where Gary lacked the qualifications of the individual who received a promotion and who was his only comparator?

2. Did the district court correctly grant Facebook's and Hawkins' motions for summary judgment where Facebook's legitimate non-discriminatory reason for not promoting Gary—that the individual who received a promotion exhibited superior work performance and Gary was lacking in initiative and communication skills—was not a pretext for race discrimination?

STATEMENT OF THE CASE

Facebook and Hawkins note the following additions to Gary's Statement of the Case: This case was transferred to the Western District of North Carolina on May 4, 2017. JA 42. Gary dismissed Defendant James Swensen on April 30, 2018.

JA 78. Gary abandoned his claims under 42 U.S.C. § 1981 of hostile work environment and that he was denied equal terms and conditions of employment based on his race. JA 762.

On July 25, 2018, the district court granted the motions for summary judgment of Facebook and Hawkins, determining that Gary had failed both to establish a prima facie case of discrimination and to show that Facebook's legitimate nondiscriminatory reason for failing to promote Gary was a pretext for discrimination. JA 761-85.

STATEMENT OF THE FACTS

I. Facebook Hires Gary as an Entry-Level Employee.

Facebook is a global technology company that provides a social networking service for users worldwide. JA 199-200. Facebook operates data centers that house the company's large computer storage systems, including the Forest City, North Carolina facility where Gary is still employed. *Id.*; JA 94:2-95:6. Hawkins, who is white, was formerly the facilities operations manager at the Forest City data center. JA 174:20-175:3.

Before his employment with Facebook, Gary, who is African-American, was a contractor with the Siemens Corporation ("Siemens"). JA 802-803. Siemens helped build Facebook's Forest City data center and Hawkins oversaw the Siemens contract. *Id.* Facebook eventually offered Gary a position as a critical facilities

technician (later called critical facilities engineer (“CFE”)) at the IC1 level at the Forest City data center. JA 96:19-21. Hawkins was part of a group of managers who interviewed Gary and collectively decided to offer him a position at Facebook. JA 764-765, 803. Gary began his employment with Facebook on November 12, 2012. JA 96:7-15. Facebook hired Gary at an entry-level position, which was IC1. *Id.*

From November 2012 to February 2013, Gary worked third shift. JA 808. Based on his performance in the first and second quarters of 2013, Gary received a “meets all expectations” rating from his chief building manager, Hawkins, and he was awarded a bonus. JA 966. In February 2013, Gary transferred to first shift for a few months. JA 99:1-10. Then, in June 2013, Gary moved back to third shift, which entitled him to a shift differential pay raise. JA 814-815. When Gary returned to third shift, Matt Hamrick (“Hamrick”) was his direct supervisor. JA 98:11-13. Gary continued to work in his third shift position until mid-2014, when Hamrick offered Gary another first shift position. JA 101:24-102:20.

II. Facebook’s Employment Policies.

As stated in Facebook’s Equal Employment Opportunity Policy, Facebook is dedicated to creating an environment where people can share their diverse backgrounds and perspectives, and Facebook prohibits discrimination based on race and other protected categories. JA 212-213. Facebook also believes it is

essential to provide all employees with a respectful and safe working environment. JA 211. Facebook prohibits all forms of harassment, and it provides employees with multiple outlets for reporting any suspected harassment or policy violation, including an anonymous hotline. *Id.* Facebook promptly investigates and responds to all complaints, and it takes immediate, appropriate disciplinary action against any employee who violates Facebook's policies prohibiting discrimination or harassment. JA 211-212.

Facebook hired Gary as an IC1. JA 96:24. Each CFE at the Forest City data center is assigned an IC (individual contributor) level based on the quality of employee's performance. JA 200. Facebook will consider a CFE for a promotion to the next IC level once the employee has succeeded at his or her existing IC level, and after the employee has consistently demonstrated the skill necessary to succeed at the next level. JA 200-201.

Facebook conducts formal employee evaluations twice a year, during the first quarter (Q1) and the third quarter (Q3). JA 213. Performance evaluations provide feedback to employees on their individual impact for the prior six-month period only. *Id.* Each performance cycle includes a 360-degree feedback evaluation process, which means employees are evaluated based on a self-review, feedback from their peers, and feedback from their managers. *Id.* CFE performance reviews are performed by the chief building engineer who supervises the CFE. JA 201.

Managers analyze and consider all reviews collected during the 360-degree feedback process to recommend the employee's performance rating score and whether the employee should be considered for a promotion. JA 2013. Promotion decisions are based on three primary requirements: (1) the employee has sustained consistent performance at the next level for one or two quarters; (2) the employee's scope of work is aligned at the next performance level; and (3) Facebook has a business need for the position. JA 214. Promotion decisions are based on past performance and determined on an individualized basis during each performance cycle. *Id.*

The manager reviews are then subjected to a calibration process. JA 215. This process includes a meeting among the facilities operations manager, chief building engineers, and the human resources business partner to consider all employees and ensure that the CFEs are being evaluated consistently. *Id.* Following that facility-based calibration, chief building engineers at all Facebook data center facilities attend company-wide calibration sessions with other facilities operations managers and Facebook's regional directors. *Id.* After company-wide calibrations are held, Facebook makes final determinations regarding the performance review and promotion of each CFE. *Id.*

Managers in the Forest City data center do not set pay for other employees. JA 213. Instead, any changes in compensation for a CFE are calculated by

Facebook's compensation department under a formula that considers several factors, including the CFEs' existing salary, performance review and IC level. *Id.* Promotion of a CFE from one IC level to the next level results in a salary increase, which is calculated by Facebook's compensation department under a formula. *Id.*

III. Facebook Does Not Promote Gary in Q1 2014.

In December 2013, Facebook conducted performance reviews of its Forest City employees (the "Q1 2014" reviews), which were based on the employees' performance in the prior six months from June to December 2013. JA 108:9-11. As a result of the Q1 2014 reviews, Facebook promoted Greg Randall from IC1 to IC2. JA 309:1-5. Facebook declined to promote Gary at that time, but it promoted Gary in the next performance cycle six months later. JA 308:7-25.

Gary maintains, with no citation to the record, that Hawkins "controlled the promotion decision" and was the "key decision-maker." Gary Brief at 17, 50. In fact, as the district court found, a selection panel—including Facebook managers Swensen, Hawkins, Hamrick, Wesley Gordon ("Gordon"), and James Faccone ("Faccone")—collectively made the promotion decisions in Q1 2014. JA 747:13-21; 766. The panel considered several factors in evaluating candidates for promotion, and it followed the guidelines in Facebook's Career Expectations chart. JA 330. For the IC2 level, the chart indicates candidates are evaluated by many factors, including "leads by example, understands the importance and impact of

individual actions on the team,” “seeks opportunities to collaborate with others,” “flexible, collaborative, and responsible,” and “communicates well with the rest of the team.” *Id.* As one panel member recalled, the meeting included “a lively conversation” where “everybody participate[d]” to reach a “consensus decision.” JA 750:5-751:5. None of the panel members considered the candidates’ race in reaching the decisions. JA 167:6-168:10, 235, 757:21-758:6. Because Facebook’s compensation department controls all pay decisions pursuant to a company-wide formula, no Forest City manager, including Hawkins, played a role in setting Gary’s pay.

In June 2013, while working third shift, Hamrick became Gary’s supervisor and primary evaluator. JA 98:11-13. The Q1 2014 promotions were based on performance during the previous six months, while Hamrick supervised Gary. JA 121:14-18. Hamrick testified that during this period Gary was “[l]acking communication, not necessarily the content of communication but not as much verbal or written communication.” JA 169:6-12. Hamrick also said that Gary did not take initiative, performing only “what was required,” and “he wasn’t doing anything that, in the evaluation’s opinion, was above and beyond.” *Id.* As the district court found, when Gary agreed to take on a special project of creating a numbering system, he struggled to stay on task, failed to provide complete information when requested, and did not stay motivated. JA 232-233, 776.

Similarly, Hawkins testified that Gary's lack of initiative and communication skills kept him from receiving a promotion. JA 755:5-756:17. Faccone testified that although he "could not remember the specifics" of why Gary did not receive the promotion and the selection panel "weighed a lot of different options," JA 749:15-750:10, someone reported to him that Gary "had some communication issues." JA 751:8-18.

In his statement of facts, Gary tries to circumvent this undisputed evidence by misconstruing the record and taking out of context a portion of a statement by Hamrick. As he did in the district court, Gary argues here that Hawkins was the "key decision-maker" who "controlled the promotion decision" and "the reasonable inference to draw is that it was Wayne Hawkins' briefing of Hamrick about Gary that led Hamrick to articulate a 'perception'" about Gary. Gary Brief at 17, 50. But, as the district court found, Gary has offered no competent evidence that Hamrick's descriptions of Gary's work performance were based solely on Hawkins' reports, rather than his own observations. J.A. 777.

A reading of all the evidence makes clear that Hamrick made his own observations and formed his own opinions. Hamrick became Gary's supervisor in June 2013, months before the Q1 2014 evaluations. JA 98:11-13. Hamrick testified that he observed Gary's performance relative to Randall's performance shortly after he began supervising Gary: "After I got in the seat and started interacting

with the people, that's when I started noticing the performance." JA 167:16-22. He also testified that he could recall weaknesses in Gary's job performance including his lack of communication and lack of initiative. JA 169:2-12. Hamrick's observations were neither based on nor tainted by Hawkins' statements.

In deposition, Gary admitted that he understood Facebook's legitimate, non-discriminatory reasons for not promoting him included his work performance. JA 120:17-19 ("To them, it was my work performance, but anybody can put anything in a review."). Gary admitted to receiving feedback from his supervisor, Hamrick, that he "wasn't performing" and his "communication was lacking." JA 112:3-9. Gary also testified that Hawkins told him his peer, Randall, exhibited more initiative. JA 111:21-112:2. Gary's Q1 2014 written evaluation stated Gary was working "at a level consummate with his IC level" (IC1) and "in order to achieve the next level Robert will need to be more of a self-starter and find projects on his own to improve the way in which things are done." JA 1287-1288. Gary wrote in his self-evaluation for Q1 2014: "[t]o me there is always room for improvement in every aspect. One of my main goals is to learn learn learn all i can." JA 332. He also wrote: "its easy some times to just go with the flow of things and do as you are told. You can get left behind if you arent careful. There is times when you are too busy to really learn and ask about all the things you want to know about." *Id.*

As the district court found, the evidence was undisputed that at the time of the Q1 2014 promotions, Randall was already exhibiting many skills necessary for the IC2 level. JA 775. According to Hamrick, who managed both Randall and Gary, Randall demonstrated initiative and significant hands-on experience in the same job. *Id.* Randall “worked with vendors, was very busy around the facility, and was handling multiple situations” during the six months before his Q1 2014 promotion. JA 166:4-7. Hamrick testified that Randall’s “strength was verbal communication, holding vendors accountable, making sure things were passed on, and making sure the facility remained running at a very busy time.” JA 169:22-170:1. Randall had strong interpersonal skills, and “he was upbeat, he was interactive, he was present, he was in the mix.” JA 168:2-3. Randall’s initiative, high level of engagement, and demonstrated leadership, combined with his hands-on experience, supported Facebook’s decision to promote him to IC2 in Q1 2014.

IV. Facebook’s Investigation of Gary’s Promotion Complaint.

After receiving his Q1 2014 performance review, Gary met with his supervisor, Hamrick, to discuss his review. JA 821-822. Although they discussed Gary’s Q1 2014 performance evaluation, Gary was not satisfied. JA 822-823. Gary requested a second meeting with Hamrick to discuss the same topic. JA 823. They met again, and Gary was again unhappy with Hamrick’s explanation. JA 823, 825-826. Hamrick told Gary he needed to improve his communication skills. JA 112:3-

24. Gary then requested a meeting with Faccone, the global facilities manager. JA 829-830. During their meeting, Faccone asked Gary whether he thought the difference in pay and promotion between Randall and Gary was due to Gary's race. Gary told him "no." JA 833-834. Still upset about his performance evaluation, Gary asked to meet with a different supervisor, Robert Baron Duffy ("Duffy"),¹ who only advised Gary to keep accurate records if Gary thought he was being wronged. JA 827-828.

On April 30, 2014, Gary, Hamrick, Duffy, and Hawkins met to discuss Gary's grievances about his pay and not receiving a promotion. JA 845-846. During the meeting, Gary confronted Hawkins and Hamrick with his concerns about pay, and Hawkins told him the difference stemmed from different experience levels between Gary and other CFEs, and that Gary had some difficult communication issues to work on. JA 846-849.

On May 1, 2014, Gary complained to Facebook's human resources department that he was paid less and ranked lower than a white co-worker Randall. JA 124:8-25, 159-161. Gary alleged that Randall received a promotion and pay

¹ Gary cites no competent evidence to support his allegation that Duffy, who dismissed his claims against Facebook and is no longer a party to this action, was "demoted and resigned from Facebook." Gary Grief at 8, n. 6. The hearsay statements contained in Duffy's EEOC Charge of Discrimination and interview notes should not be considered as evidence.

raise during the Q1 2014 performance cycle, while Gary did not, and that the disparity was due to Gary's race. *Id.*

Immediately upon receiving Gary's complaint, Facebook investigated Gary's claims. JA 229. Facebook's investigation team interviewed five employees, including Gary, analyzed performance evaluations and compensation data for Gary and Randall, and reviewed the total number of work tickets closed by each CFE in the Forest City data center in 2013. *Id.* Facebook's investigator concluded that management's decision to promote Randall and not Gary was based on legitimate business reasons: Randall's superior work performance and demonstrated initiative, and Gary's lack of initiative and need to improve his communication skills. JA 235-236. The investigator found the decision to promote Randall and not Gary had nothing whatsoever to do with Gary's race. JA 235. The investigator also learned that Gary's performance had improved and he was already scheduled for promotion in the next performance review cycle in Q3 2014. JA 236.

The investigator conveyed the results of her investigation to Gary on May 29, 2014, and she met with him several times thereafter. JA 858-860. On June 8, 2014, Gary emailed the investigator stating he could "respect [her] decision" that the failure to promote him was not discriminatory. JA 335.

In August 2014, Gary was promoted to IC2 as scheduled, and his pay was raised accordingly. JA 130:21-131:23. Early in 2016, Gary and Randall were

promoted to the next level (IC3) and received the same pay rate. JA 1000-1002. Thereafter, Randall and Gary were ranked at the same IC3 level, and Gary now earns more than Randall. *Id.* Gary has not complained about his reviews, salary or promotions since the Q1 2014 performance cycle.² Indeed, Gary testified in deposition he has continued working at Facebook, received two promotions, and was satisfied with each of his reviews and salary increases after Q1 2014. JA 130:13-132:5, 132:21-140:13, 966-974. Gary has attended multiple workplace training sessions, including respectful workplace training, the Winter Institute (a two-day workshop on diversity, inclusion, and implicit bias), and Facebook's black leadership events in California. JA 153:4-154:15, 156:22-157:11.

Gary's pay and IC level were lower than Randall's pay and IC level for only six months—from February to August 2014. JA 1001-1002. When Gary was promoted to IC2 in August 2014, he received an increase to the same salary as Randall. *Id.* On December 17, 2015, Facebook paid Gary the gross amount of \$[REDACTED], which was equivalent to the difference between Gary's pay and Randall's pay before Gary was promoted to IC2 as a gesture of goodwill. JA 1003. Thus Facebook made Gary whole for the amount he claimed he was underpaid.

² In July 2015, Gary reiterated his promotion complaint for Q1 2014 in a charge of discrimination filed with the EEOC, which the EEOC subsequently dismissed. JA 143:19-145:8, 162. Although he received a right-to-sue letter from the EEOC, Gary did not assert a claim under Title VII of the Civil Rights Act of 1964.

V. Facebook Investigates a Separate Incident and Fires Hawkins.

In a separate incident, on June 30, 2015, former Facebook manager Duffy complained about inappropriate conduct in the workplace by Hawkins, including alleged inappropriate racial statements to other Facebook employees. JA 241. Upon receiving Duffy's complaint, Facebook immediately conducted an internal investigation, sending company investigators to the Forest City data center to interview multiple witnesses, including Gary. *Id.*

The investigation revealed that Gary never heard Hawkins make any racial comments. *Id.* Instead, in July 2015, Gary allegedly read a statement from a co-worker, Brian Gill ("Gill"), claiming that Hawkins had made various racially charged comments. JA 146:16-147:24. From Gill's statement, Gary learned that, at some unspecified time, Gill claimed to have heard Hawkins refer to Gary as a "lazy n----- that wants everything handed to him" and that Hawkins had made other racially charged comments. *Id.* But, as Gary testified, he never heard Hawkins, or any other Facebook employee, make racial comments about him directly. JA 127:21-128:11, 146:20-21, 149:16-18.

Although Gary has submitted an affidavit by Gill which references the statement allegedly made by Hawkins about Gary, the affidavit does not indicate when the statement allegedly was made. JA 421-422. Moreover, as the district court noted, there is no indication in the record that the alleged statement was made

near the time of the promotion decision in Q1 2014. JA 780. Other statements in Gary's brief attributed to Hawkins are unsupported by competent evidence in the record, and there is no evidence as to when they were allegedly made. *See* Gary Brief at 10-11, 14. These statements are both irrelevant and inadmissible for purposes of summary judgment. Fed. R. Civ. P. 56(c)(2), (4).

Based on the investigation, Facebook concluded that Hawkins had made offensive racial and sexual comments to others (but not Gary). JA 241-242. Accordingly, Facebook removed Hawkins from the Forest City site on July 16, 2015, suspended him, and terminated his employment on August 5, 2015. *Id.*; JA 176:20-177:13. Hawkins was the only employee found to have made inappropriate racial or sexual comments at the Forest City data center, and Facebook has received no complaints of alleged racial harassment at Forest City since Hawkins was removed from the premises. JA 207.

STANDARD OF REVIEW

This Court reviews "the district court's grant of summary judgment de novo, applying the same standards as the district court." *Walker v. Mod-U-Kraf Homes, LLC*, 775 F.3d 202, 207 (4th Cir. 2014). Summary judgment is proper where, as here, "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). A plaintiff may not rest on mere allegations or denials, but rather must convincingly demonstrate that a triable issue of fact exists. *Shaw v. Stroud*, 13 F.3d 791, 798

(4th Cir. 1994) (citations omitted). A party “must present affirmative evidence in order to defeat a properly supported motion for summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S. Ct. 2505, 2514 (1986). Further, a plaintiff may not create a genuine issue of material fact “through mere speculation or the building of one inference upon another.” *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

The non-movant “must do more than simply show that there is some metaphysical doubt as to the material facts,” because “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986)). Because Gary cannot demonstrate that a genuine, triable issue exists regarding any material fact, the district court properly granted summary judgment for Facebook and Hawkins, and the decision should be affirmed.

SUMMARY OF ARGUMENT

To support a prima facie claim alleging race discrimination under 42 U.S.C. § 1981, there must be evidence that the employee was denied the promotion and pay raise under circumstances giving rise to an inference of unlawful discrimination. Without direct evidence of bias (and there is none here), Gary was

obligated to “establish that [he] was *the better qualified candidate* for the position sought,” *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996)(emphasis added), or that the employer’s explanation was a “post hoc justification of a decision made on other grounds” “in light of the totality of the evidence.” *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 647, n.2 (4th Cir. 2002). The undisputed record evidence, however, shows that regarding the experience and qualities Facebook evaluated for the promotion, Gary was less qualified than those selected. Gary’s repeated claims he was “better educated,” “had extensive relevant [prior] work experience” and trained Randall are simply irrelevant; Gary cannot decide which criteria Facebook should have emphasized in making its promotions. *Hux v. City of Newport News, Va.*, 451 F.3d 311, 318 (4th Cir. 2006).

Because “whether the proffered comparators are similarly situated goes to the core of [Gary’s] prima facie case,” he must “demonstrate that similarly situated employees were not treated equally.” *Hurst v. D.C.*, 681 F. App’x 186, 191 (4th Cir. 2017) (unpublished) (quoting *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258, 101 S. Ct. 1089, 1089 (1981)). But Gary was not similarly situated to Randall in Q1 2014. Moreover, the undisputed evidence shows that Gary was treated the same as or better than Randall at all times after Q1 2014.

Gary, therefore, has not made out a prima facie case of race discrimination, and Facebook and Hawkins are entitled to summary judgment.

Further, to survive summary judgment, an employee must prove that an employer's legitimate, nondiscriminatory reason for its employment decision was a pretext for race discrimination. Gary, however, failed to adduce evidence of pretext. The supposed evidence of pretext offered by Gary did not raise any doubt as to Facebook's articulated and consistent explanation for its decision to promote Randall and not Gary in Q1 2014. Pretext evidence is useful in a discrimination case only where it "undermines the credibility of *the employer's stated reasons*" for the challenged decisions. *Heiko v. Colombo Sav. Bank*, 434 F.3d 249, 259 (4th Cir. 2006) (emphasis added). The supposed evidence of pretext asserted by Gary is entirely unrelated to Facebook's "stated reasons" for selecting Randall. Rather, the undisputed evidence shows that the managers who made the "consensus decision" determined in good faith that Randall was more qualified for the IC2 promotion at that time, and Facebook likewise based subsequent pay decisions on performance. Thus the district court properly granted summary judgment to Facebook and Hawkins, and its decision should be affirmed.

ARGUMENT

Gary sued under 42 U.S.C. § 1981, which prohibits race discrimination in the making and enforcement of contracts. Claims of discrimination under 42

U.S.C. § 1981 are subject to the burden-shifting framework developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). To make out a prima facie case of failure to promote based on race, Gary must establish that: (1) he belongs to a protected class; (2) he applied for the position in question; (3) that he was qualified for the job; and (4) that the defendant rejected his application under circumstances that give rise to an inference of unlawful discrimination. *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 319 n.6 (4th Cir. 2005)). Here Gary cannot establish a prima facie case because it is uncontroverted that Facebook correctly viewed Randall as more qualified for promotion than Gary in Q1 2014, and thus it did not reject Gary's application under circumstances that give rise to an inference of unlawful discrimination. Further, Facebook based its promotion and pay decisions on legitimate, nondiscriminatory business reasons, and race played no role whatsoever in its decisions.

I. Gary Has Failed to Establish a Prima Facie Case Because He Cannot Show that He Was Treated Less Favorably than a Similarly Situated Candidate of Another Race.

A. Gary was not as qualified for the IC2 promotion as the candidate selected.

Gary alleges Facebook failed to promote him on time and paid him less than a single white comparator, Randall, and that the pay disparity was due to Gary's race. JA 19-20, 114:4-6 ("Q. Did you compare your raise to that of anyone other

than Mr. Randall? A. No, not in comparison like that.”). But Gary has failed to offer evidence that any similarly situated non-African-American employees were treated more favorably, and summary judgment for Facebook was proper for that reason alone. *Bryant v. Bell Atlantic Maryland, Inc.*, 288 F.3d 124, 133-34 (4th Cir. 2002).

As both this Court and the Supreme Court have stated, an employer is entitled “to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria.” *Wileman v. Frank*, 979 F.2d 30, 38 (4th Cir. 1992) (quoting *Burdine*, 450 U.S. at 259, 101 S. Ct. at 1097). To raise an inference of bias in a promotion case, Gary must “establish that [he] was the better qualified candidate for the position sought,” *Evans*, 80 F.3d at 960, or that the employer’s explanation was a “post hoc justification of a decision made on other grounds” “in light of the totality of the evidence.” *Dennis*, 290 F.3d at 647, n.2. *See also Gbenoba v. Montgomery Cty. Dep’t of Health & Human Servs.*, 209 F. Supp. 2d 572, 577 (D. Md. 2002), *aff’d*, 57 F. App’x 572 (4th Cir. 2003) (reconciling *Evans* and *Dennis*). The “fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose” the employer to liability. *Wileman*, 979 F.2d at 38 (quoting *Burdine*, 450 U.S. at 259, 101 S. Ct. at 1097).

Gary was obligated to show that he was superior with respect to the factors Facebook thought most important. On appeal, Gary argues that he had more

relevant HVAC experience, was better educated, and was senior to Randall, whom he helped train. Gary Brief at 28-29, 30-35. But those uncorroborated and conclusory contentions are irrelevant. Facebook considered factors such as work performance, demonstrated initiative, and communication skills, instead of seniority and education, in making its promotion decision, which was Facebook's prerogative.

As this Court has stated, “[i]t is not within [the Court’s] authority to dictate the factors that employers must weigh in making a promotion” *Hux*, 451 F.3d at 318. “[I]n a suit alleging failure to promote, a plaintiff seeking to rebut an employer’s reliance on inferior job qualifications cannot simply compare [himself] to other employees on the basis of a single evaluative factor artificially severed from the employer’s focus on multiple factors in combination.” *Id.* at 315. Section 1981 does not permit Gary to “establish [his] own criteria for judging [his] qualifications for the promotion. [He was obligated to] compete for the promotion[s] based on the qualifications established” by Facebook. *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 269 (4th Cir. 2005).

It is undisputed that at the time of the Q1 2014 promotions, Randall was already exhibiting many skills necessary for the IC2 level. According to Hamrick, who managed both Randall and Gary at the time, Randall demonstrated initiative and significant hands-on experience in the same job. During the six months before

the Q1 2014 promotions, Randall “worked with vendors, was very busy around the facility, and was handling multiple situations.” JA 166:4-7. Randall’s “strength was verbal communication, holding vendors accountable, making sure things were passed on, and making sure the facility remained running at a very busy time.” JA 169:22-170:1. Randall had strong interpersonal skills, and “he was upbeat, he was interactive, he was present, he was in the mix.” JA 168:2-3. Randall’s high level of engagement, initiative, and demonstrated leadership, combined with his hands-on experience, made him a strong candidate for promotion to IC2 in Q1 2014.

By contrast, Gary lacked Randall’s demonstrated initiative and strong interpersonal skills. JA 168:4-7. Gary failed to show initiative, even though his supervisor, Hamrick, explained to Gary the importance of going above and beyond what was required of his basic job responsibilities. JA 231-232. When Gary agreed to take on a special project, he struggled to stay on task, failed to provide complete information, and did not stay motivated. JA 232-233.

Gary’s argument he “has lagged behind in his promotions and pay in comparison to similarly situated white employees” contradicts his own testimony and the uncontroverted evidence. Gary Brief at 42. Gary’s pay and IC level were lower than Randall’s pay and IC level for only six months, from February to August 2014. JA 1000-1002. Before February 2014, Gary was paid more than Randall (Gary’s annual salary of \$[REDACTED] compared to Randall’s annual salary

of \$[REDACTED]). *Id.* Gary was promoted to IC2 in August 2014, and he received a pay increase to an annual salary of \$[REDACTED]. *Id.*; JA 130:21-131:23. By August 2014, Gary and Randall were both earning \$[REDACTED] at the IC2 level. JA 1000-1002. Gary and Randall were promoted to IC3 at the exact same time in Q1 2016 at the same rate of pay. *Id.* Since then, Gary and Randall have continued to hold the same IC3 level, but Gary has been paid slightly *more* than Randall. *Id.* Moreover, Facebook paid Gary for the six-month period in 2014 when he was paid less than Randall. JA 142:2-9, 1003.

B. Gary has identified no other similarly situated comparator.

Apparently because Randall and Gary were promoted to IC3 at the same time and Gary was subsequently paid *more* than Randall, Gary has suggested a new potential comparator: Kevin Walker. But Walker, as the district court noted, is not similarly situated to Gary for several reasons. JA 778. First, Walker was hired in June 2013 after completing a three-month internship at Facebook, which allowed Facebook managers to directly observe Walker's work ethic before he was formally hired as an employee. JA 190:25-192:6, 195:15-22, 204. Second, after Walker was hired as a full-time Facebook employee, Walker and Gary worked in different buildings and had different supervisors. JA 98:14-16, 99:5-10, 100:20-25, 101:6-10, 102:10-14, 104:15-16, 196:19-24, 198:3-5. Third, prior to joining Facebook, Walker worked in the construction business for several years and ran his

own flooring business for over a decade. JA 187:22-189:12. Finally, Walker, unlike Gary, has been an exceptional employee, exhibiting outstanding work performance and earning Exceeds Expectations or Greatly Exceeds Expectations on every performance review since Q3 2014. JA 204-207. Walker's "outstanding performance has earned him rapid promotions that have outpaced all other CFEs at the Forest City facility." JA 204.

"The similarity between comparators . . . must be clearly established in order to be meaningful." *Lightner v. City of Wilmington*, 545 F.3d 260, 265 (4th Cir. 2008). *See also Burdine*, 450 U.S. at 258, 101 S. Ct. at 1096 ("[I]t is the plaintiff's task to demonstrate that similarly situated employees were not treated equally."). That showing typically includes evidence that the employees "dealt with the same supervisor, . . . [were] subject to the same standards[,] and . . . engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct." *Hurst*, 681 F. App'x at 191 (citations omitted). While a comparator does not have to be "an exact match," there must be "enough common features between the individuals to allow for a meaningful comparison." *Haywood v. Locke*, 387 F. App'x 355, 360 (4th Cir. 2010) (unpublished) (citations and internal quotations marks omitted).

As the district court stated, Gary has failed to show that any "meaningful comparison" can be made between Walker and him. JA 779. Further, Gary offers

no evidence whatsoever that Gary “was treated worse than white [unnamed] comparators” or that “other [unnamed] white employees” are sufficient comparators of Gary. Gary Brief at 45, 48. Gary’s generalized, blanket assertions fail to cite to the record because the uncontroverted competent evidence supports the opposite conclusion: Gary was treated the same as, and in some instances better than, his only comparator, Randall. JA 1000-1002. Because “whether the proffered comparators are similarly situated goes to the core of [Gary’s] prima facie case,” Gary must “‘demonstrate that similarly situated employees were not treated equally.’” *Hurst*, 681 F. App’x at 191 (quoting *Burdine*, 450 U.S. at 258, 101 S. Ct. 1089). Thus the district court properly held that Gary failed to establish a prima facie case of discrimination. JA 779.

Tellingly, in deposition Gary did not challenge any pay or promotion decisions following his Q1 2014 performance evaluation, after which Gary continued to receive performance evaluations of either Meets All Expectations or Exceeds Expectations. JA 130:21-132:5, 132:21-140:13, 966-974. Gary testified that he agreed with each and every performance review he received after Q1 2014, and he had no complaints about his reviews, salary increases, or promotions. *Id.* No evidence supports Gary’s contention that Facebook’s failure to promote him in Q1 2014 held him back or prevented him from receiving a subsequent promotion earlier than he did.

II. Gary Cannot Show that Facebook's Legitimate Nondiscriminatory Reason for Its Decision Was a Pretext for Race Discrimination.

Even if Gary could make out a prima facie case of discrimination, Facebook has presented evidence that its decision not to promote him in Q1 2014 was based on a legitimate nondiscriminatory reason: Gary was not ready for promotion due to his lack of initiative, communications issues, and inferior job performance as compared to Randall. "Job performance and relative employee qualifications are widely recognized as valid, non-discriminatory bases for any adverse employment decision." *Evans*, 80 F.3d at 960. Accordingly, under the *McDonnell Douglas* framework, the burden shifts to Gary to show that Facebook's reasons for not promoting him during Q1 2014 are a pretext for race discrimination. *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 214 (2007). This he has failed to do.

To show pretext, Gary must "amass[] circumstantial evidence that . . . undermines the credibility of *the employer's stated reasons*" for the challenged decisions, not of anything an employer witness might have to say. *Heiko*, 434 F.3d at 259 (emphasis added). A "plaintiff cannot seek to expose [the employer's] rationale as pretextual by focusing on minor discrepancies that do not cast doubt on the explanation's validity, or by raising points that are wholly irrelevant to [that explanation]. The former would not create a 'genuine' dispute [and] the latter would fail to be 'material.'" *Hux*, 451 F.3d at 315 (internal citation omitted); *see also Holland*, 487 F.3d at 216 (same). "A plaintiff fails to meet [his] burden for

showing pretext if ‘the record conclusively revealed some other, non-discriminatory reason for the employer’s decision, or 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.’” *Miller-Jones v. Prince George’s Cmty. Coll.*, 691 F. App’x 705, 706 (4th Cir. 2017) (unpublished) (quoting *Dennis*, 290 F.3d at 649). Gary has failed to carry his burden.

A. Hawkins did not control Facebook’s promotion decision.

As putative evidence of pretext, Gary first cites a statement by a white co-worker, Gill, alleging that Hawkins at an unspecified place and time called Gary a “lazy n-----.” Gary Brief at 46; JA 421. But Gary testified multiple times that no one at Facebook, including Hawkins, ever directed any racial epithets to him or made any race-based comments to him.

Q. You’ve never heard anyone call you by that word at Facebook, have you?

A. No, sir.

Q. Did you hear anyone call you that?

A. No. . . .

Q. You never heard him call you a name, did you?

A. No. He never -- he never called me anything to my face.

JA 127:21-128:11, 146:20-21, 149:16-18. Gary offered only hearsay testimony about comments allegedly made to others, which he did not hear. Gary’s reference to Gill’s statement of an alleged statement by Hawkins is not evidence of race

discrimination as to Facebook's Q1 2014 promotion decision.

Significantly, the statement attributed by Gill to Hawkins does not concern the employment decision at issue: Facebook's decision not to promote Gary in Q1 2014. As the district court stated, "[t]here is no indication in the record when this alleged statement was made or, more importantly, that this alleged statement was made near the time of the promotion decision in Q1 2014." JA 780. Further, Hamrick, *not Hawkins*, was Gary's direct supervisor during relevant period for the Q1 2014 evaluations. JA 98:11-13. Even if Hawkins had made the statement near the time of the Q1 2014 (which is unsupported by the record), Hawkins did not have the authority to set Gary's pay or control Facebook's promotion decisions. The evidence was undisputed that a selection panel—including Facebook managers Swensen, Hawkins, Hamrick, Gordon, and Faccone—collectively made the promotion decisions in Q1 2014. JA 747:13-21, 780. As Faccone testified, the meeting included "a lively conversation" where "everybody participate[d]" and "it was all very vocal around the table." JA 750:5-751:5. The panel of managers, including Hamrick, collectively reached a "consensus decision." *Id.* The panel members did not consider the candidates' race in reaching the decisions. JA 167:6-168:10, 235, 757:21-758:6. Moreover, Facebook's compensation department controls all pay decisions. JA 213. Managers in the Forest City data center do not set pay for other employees. *Id.* Thus, as the district court found, Gill's vague,

undated statement about Hawkins and Hawkins' involvement in the selection panel do not demonstrate pretext. JA 780-781.

Gary's citation of *Wall v. City of Durham* does not help him. Gary Brief at 49; 169 F. Supp. 2d 466 (M.D.N.C. 2001) (granting summary judgment for the employer because employee failed to establish a prima facie case of discrimination and also failed to establish pretext). Like the employee in *Wall*, Gary, "while giving very little in the way of argument or citation to the record, has advanced a laundry list of proposed reasons to find that defendant's proffered reason for his termination was a pretext." *Id.* at 482. But "when these reasons are reviewed closely" his "arguments add up to nothing and a weak attack on [Hawkins'] credibility is too slim to re[a]d to support his entire case." *Id.*

B. Facebook's articulated reasons for not promoting Gary are consistent.

Gary attempts to show pretext by arguing "Facebook has offered conflicting explanations for Gary's non-promotion" in Q1 2014. Gary Brief at 47. Gary claims that Facebook has offered conflicting statements about the process for selecting candidates for promotion and the reasons for not promoting Gary. Gary Brief. at 47. He argues that Faccone testified Gary was placed on a promotion list, then removed once employees were reevaluated, while Hawkins "denies that Gary was ever on a promotion list in Q1 2014." *Id.* Gary also contends that Facebook has offered conflicting evidence about who participated in the conversation. But this

argument reflects a fundamental misunderstanding of the role of pretext in discrimination litigation. Gary cannot survive summary judgment by showing a putative factual dispute unconnected to Facebook's non-discriminatory rationale for the promotion decision he challenges; he must adduce sufficient "evidence [from which] the trier of fact [might reasonably decide] to disbelieve [Facebook's] legitimate, nondiscriminatory explanation for its action." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 137, 120 S. Ct. 2097, 2103 (2000).

Gary's twist on Hawkins' testimony does not create an issue of fact. When asked by Gary's attorney whether another witness's testimony about Gary being on a promotion list "ring[s] any bells," Hawkins, Hawkins answered, "It does not." JA 1177. Responding to the immediately preceding questions about who was in the evaluation room, Hawkins said, "Again, if my memory serves me correct, it would have been myself, either Stencil or Matt and Wesley." *Id.* And, when asked if anyone else was in the room, Hawkins responded, "I don't remember" *Id.* Hawkins' lack of memory about a conversation that occurred three and half years earlier does not create an issue of fact. *Id.* Further, Gary's contention that "Faconne explained . . . Gary was selected to be taken off after all the employees were reevaluated for their 'technical abilities'" misconstrues his testimony. Gary Brief at 21. In fact, when Gary's attorney pressed him to concede this point, Faccone disagreed. JA 749:1-9.

More importantly, Gary's contentions about who was in the room and whether Gary was removed from a promotion list do not contradict Facebook's legitimate non-discriminatory reasons for not promoting Gary. The alleged discrepancies claimed by Gary in no way undermine Facebook's rationale for its promotion decision. Indeed, they do not pertain to the decision at all. Thus, even if Hawkins' testimony about the promotion decision process conflicted with other evidence, his testimony related to "points that are wholly irrelevant" to Facebook's non-discriminatory explanation. Any such discrepancies, therefore, would be irrelevant to pretext and the motion for summary judgment. *Hux*, 451 F.3d at 315. No jury could reasonably conclude that such minor discrepancies are evidence of pretext. *Pearlman v. Pritzker*, 564 F. App'x 716, 720 (4th Cir. 2014) (unpublished) (evidence of alleged pretext was in fact "a red herring because [the alleged pretext evidence] was never the basis for" the adverse employment action).

Gary also argues that Facebook provided conflicting explanations of why Gary was not promoted. Gary Brief at 46-48. But Facebook at all times has maintained that Randall was better qualified for promotion under applicable Facebook policies and procedures. Based on the candidates' work experience at Facebook, interpersonal skills, demonstration of initiative, communication skills, and overall individual contributions to the company, a panel of Facebook managers

properly determined that Randall, and not Gary, was qualified for promotion to IC2 in February 2014. JA 201, 235-236.

As the district court noted, Facebook has offered a consistent explanation. JA 781. In June 2013, Hamrick became Gary's supervisor and primary evaluator. JA 98:11-13. Hamrick testified that Gary was "[l]acking *communication*, not necessarily the content of communication but not as much verbal or written communication." JA 169:6-12 (emphasis added). Gary did not take *initiative*, performing only "what was required," and "he wasn't doing anything that, in the evaluation's opinion, was above and beyond." *Id.* Gary testified that Hamrick told him he needed to improve his *communication*. JA 111:21-112:24. Gary's Q1 2014 written evaluation states "in order to achieve the next level Robert will need to be more of a *self starter* and find projects on his own to improve the way in which things are done." JA 1287-1288 (emphasis added).

Similarly, Hawkins testified that Gary's lack of *initiative* and *communication* skills kept him from receiving a promotion. JA 755:5-756:17. Gary testified that Hawkins told him Randall exhibited more *initiative*. JA 111:21-112:24.

Gary's self-evaluation for Q1 2014 concedes his lack of *initiative*, as it states in part "its easy some times to just go with the flow of things and do as you are told. You can get left behind if you arent careful. There is times when you are too

busy to really learn and ask about all the things you want to know about.” *Id.* The numerous typos and grammatical mistakes in his written self-evaluation reflect his poor *communication* skills. *Id.*

Faccone’s testimony was consistent on this point, as the district court noted. JA 782. Faccone testified that he “could not remember the specifics” of why Gary did not receive the promotion and the selection panel “weighed a lot of different options, and I don’t remember what those options were.” JA 749:15-750:10. Faccone later testified that someone reported to him that Gary “had some *communication* issues.” JA 751:8-18 (emphasis added). Because Faccone’s testimony does not contradict the reasons for Facebook’s promotion decision in Q1 2014 given by the Facebook managers who remembered the specifics—that Gary lacked *initiative* and *communication* skills—it does not create an issue of fact. *See Hux*, 451 F.3d at 315 (noting that minor discrepancies in an employer’s rationale do not show pretext).

The evidence does not support Gary’s assertion that Facebook’s “articulated CFT job description” and “fail[ure] to follow its own protocol for evaluating employees” demonstrate pretext.³ As an initial matter, the initial hiring

³ Gary’s reliance on *Weeks v. N. Carolina Dep’t of Transp.*, 761 F. Supp. 2d 289, 304 (M.D.N.C. 2011) is misplaced. Gary Brief at 48. Although *Weeks* recognized that deviation from “regular procedures” can be evidence of pretext, the district court held the employee’s “unsupported assertion . . . cannot create a genuine

requirements in the job description are irrelevant because this is a case about a *promotion*, not a *hiring* decision. And, even if they were relevant, Facebook adhered to the only “requirement” in the job description: that the applicant have a “high school diploma or equivalent.” JA 337. The remaining “qualifications” such as two years’ experience in a data center were “preferred,” not required. *Id.* Similarly, Facebook managers followed the guidelines listed in its Career Expectations chart. JA 330. For the IC2 level, the guidelines state that candidates are evaluated on many subjective factors, including “leads by example, understands the importance and impact of individual actions on the team,” “seeks opportunities to collaborate with others,” “flexible, collaborative, and responsible,” and “communicates well with the rest of the team.” *Id.* These written guidelines are consistent with Facebook’s articulated reasons for not promoting Gary. Gary lacked *initiative* (“seeks opportunities to collaborate with others” and “leads by example”) and *communication* skills (“communicates well with the rest of the team”). *Id.*

Even if Facebook’s reasons were inconsistent, which they are not, this Court has affirmed summary judgment for employers where the employers’ explanation has changed over time when the given reasons are not materially inconsistent. *See,*

dispute of material fact” about whether the employer followed its own policy and whether it was evidence of pretext. *Id.*

e.g., *Freeman v. N. State Bank*, 282 F. App'x 211, 216–17 (4th Cir. 2008) (unpublished) (upholding summary judgment where plaintiff “assert[ed] that the [defendant’s] reasons were inconsistent” because “although the [defendant’s] explanations may have varied in depth and detail, they were not materially inconsistent”); *Baldwin v. England*, 137 F. App'x 561, 564 (4th Cir. 2005) (unpublished) (employer’s “proffer of consistent, though varying, reasons that [plaintiff] could not be promoted fails to support an allegation that any of those reasons are false, much less that all of them are a pretext for discrimination”).

By contrast, Gary cites cases where employers in litigation offered explanations for their actions that differed materially from their earlier explanations. Such cases are inapposite. For example, in *Dennis v. Columbia Colleton Medical Center, Inc.*, the employer’s decision maker offered a new justification at trial after stating in his deposition there were no other qualities that distinguished the promoted employee from the plaintiff. 290 F.3d at 646–47 n.1. Similarly, in an action under the Americans with Disabilities Act in *Jacobs v. N.C. Admin. Office of the Courts*, the employer’s purported justifications that the employee “slept on the job and failed to follow procedures for calling in sick” were only “raised during the course of litigation” and were neither documented nor

“raised at the time of termination.” 780 F.3d 562, 576 (4th Cir. 2015).⁴ In *EEOC v. Sears Roebuck & Co.*, the relevant supervisor admitted that she gave an inaccurate reason for her employer’s failure to hire plaintiff to the EEOC. 243 F.3d 846, 850 (4th Cir. 2001). Unlike the employers *Dennis*, *Jacobs* and *Sears*, Facebook has articulated consistent reasons for not promoting Gary in Q1 2014. Those reasons are consistently stated in Gary’s Q1 2014 self-evaluation, Gary’s written Q1 2014 evaluation, Gary’s multiple conversations in 2014 with Hamrick, Hawkins, and Faccone, and during the litigation in testimony by Gary, Hamrick, Hawkins and Faccone.

Gary’s citation to *Johnson v. Toys “R” US-Delaware, Inc.*, 95 F. App’x 1 (4th Cir. 2004) (unpublished), misstates the holding in that case. Gary Brief at 47. While this Court evaluated “whether a jury could reasonably infer from [an employee’s] statement that Toys “R” Us deactivated the gift cards because [the plaintiff-customer] is an African-American,” *Johnson*, 95 F. App’x at 6-7, it did not hold that “the trier of fact can reasonably infer from the falsity of defendant’s explanation that the defendant is dissembling to cover up a discriminatory purpose.” Gary Brief at 47. Rather, in affirming summary judgment for the

⁴ Gary’s argument that “when a Defendant’s key witnesses or witness are not credible that witnesses’ testimony need be given no weight” misconstrues the holding in *Jacobs*. Gary Brief at 51. Moreover, Hawkins is not Facebook’s “key witness.” In any event, Hawkins’ testimony regarding the reasons why Gary was not promoted in Q1 2014 is consistent with that of Facebook’s other witnesses.

defendant, the Court determined that the employee's comments were "too speculative" to constitute direct evidence of race discrimination, and the plaintiff customer failed to show pretext. *Johnson*, 95 F. App'x at 7-9.

C. Gary's self-serving speculation does not create an issue of fact.

Gary's testimony boils down to nothing more than his unfounded belief that his race was a factor in the decision not to promote him in Q1 2014. He testified:

[s]o until they couldn't give me an explanation after me keep asking, then my thing was, *if you can't tell me what it was, you can't put nothing in front of me to show me, then yeah, it was because of my race. What else could it been?*

JA 116:13-19 (emphasis added). Asked what evidence he had to support his claim that Facebook's promotion or pay decisions were based on race, other than his own belief, Gary said:

Because I worked super hard that -- that cycle. . . . *So after I kept asking for explanations, then if you can't give it to me, then yeah, you did this because of my race.*

JA 117:18-118:6 (emphasis added). When asked whether he gave Facebook, at the time of his 2014 complaint, any evidence to support his belief that race was a factor in Facebook's pay or promotion decisions, Gary said only "[p]retty much it was more the question to them," and when he was not satisfied with Facebook's explanations "there's only one other option left, and that's my race." JA 122:17-123:14. His testimony is nothing more than self-serving speculation.

Gary's refusal to accept Facebook's legitimate explanation as to why he was not promoted is not evidence of race discrimination. "Job performance and relative employee qualifications are widely recognized as valid, non-discriminatory bases for any adverse employment decision." *Evans*, 80 F.3d at 960 (citations omitted). "An employer's good faith belief that another candidate is better qualified due to job performance and experience is a legitimate nondiscriminatory reason for not promoting someone." *McDougal-Wilson v. Goodyear Tire & Rubber Co.*, 427 F. Supp. 2d 595, 608 (E.D.N.C. 2006) (citing *Evans*, 80 F.3d at 960). And simply being a member of a protected class does not give rise to a race discrimination claim. *See, e.g., Autry v. N.C. Dep't. of Human Res.*, 820 F.2d 1384, 1386 (4th Cir. 1987) ("[Plaintiff] would have to show that she was not promoted *because of* her race, not that she was a member of the black race *and* was not promoted.") (emphasis in original).

Gary admitted he was told that Q1 2014 promotions were based on performance during the previous six months. JA 121:14-18. Gary understood Facebook's legitimate reason for not promoting him was his work performance. JA 120:17-19. Gary admitted to receiving feedback from his supervisor, Hamrick, that he "wasn't performing" and his "communication was lacking." JA 112:6-12. Gary also admitted that when Faccone asked him in April 2014 if he believed race was a factor in Facebook's decision not to promote him, he "told him no" JA 120:6-

21. Gary's belief that he was discriminated against, without evidence, does not raise genuine issue of material fact. *Shaw*, 13 F.3d at 798; *Featherstone v. U.P. Servs., Inc.*, 56 F.3d 61 (4th Cir. 1995) ("unsupported allegations as to motive do not confer talismanic immunity from [Rule 56]").

The only other "evidence" Gary offers to support his contentions of race discrimination is his own unsupported belief that he was more qualified than Randall for the IC2 promotion based on his education and prior work experience. But, based on the requirements Facebook deemed important, Randall was more qualified than Gary at the time

Regardless of whether Gary had a superior educational background or more relevant work history than Randall, Facebook was entitled to determine which objective and subjective factors it would consider in determining who to promote. *Burdine*, 450 U.S. at 259, 101 S. Ct. at 1097 ("[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to [] liability"). Facebook may "properly take into account both the objective factors of [Randall's] outstanding performance . . . and the more subjective factors like his good interpersonal skills and his ability to lead a team." *Amirmokri v. Baltimore Gas and Elec. Co.*, 60 F.3d 1126, 1130 (4th Cir. 1995) (affirming summary

judgment on a failure to promote claim because even if the plaintiff's education was superior to the selectee's, the employer could properly consider both objective and subjective factors).

Another case cited by Gary, *Anderson v. Westinghouse Savannah River Co.*, makes clear that an employee "cannot establish her own criteria for judging her qualifications for employment. She must compete for the promotion based on the qualifications established by her employer." 406 F.3d at 269. Like the employee in *Anderson*, Gary cannot "rely on [his] educational background to establish that the defendant's reason[] for promotion [of another employee] was a pretext for discrimination." *Id.* at 270. Gary "may not choose the areas in which [he] wants to compete with [another employee] for the promotion; those areas are for the employer's choosing." *Id.*

Gary's belief he was more qualified for promotion than Randall is not relevant. *See Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 518 (4th Cir. 2006) (citing numerous cases that hold a plaintiff's self-assessment about his performance is irrelevant and only the decision maker's perception is relevant to determine whether discrimination in the selection process occurred).

Gary asks this Court to sit in judgment of Facebook's personnel decisions, even though the Fourth Circuit has made clear that discrimination claims are "not a vehicle for substituting the judgment of a court for that of the employer." *Hawkins*

v. PepsiCo, Inc., 203 F.3d 274, 281-82 (4th Cir. 2000) (quoting *Jiminez v. Mary Washington College*, 57 F.3d 369, 377 (4th Cir. 1995)). To conduct its business, Facebook must be able to supervise, review, criticize, demote, promote, discipline and hire employees based on its business judgment and necessity. *See Hawkins*, 203 F.3d at 281-82 (quoting *Johnson v. Merrell Down Pharms.*, 965 F.2d 31, 34 (5th Cir. 1992); *see also Rowe v. Marley Co.*, 233 F.3d 825, 831 (4th Cir. 2000) (recognizing the “importance of giving an employer the latitude and autonomy to make business decisions, including workplace reorganization”). It is not the Court’s role to “sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination. . . .” *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (quoting *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir. 1997)). The law does not require that Facebook’s decisions be “wise, fair, or even correct” as long as they are not based on any reasons prohibited by law. *Id.* (citations omitted).

Gary attacks the sufficiency and credibility of the reasons given for failing to promote him as evidence of pretext. But Gary’s own speculative contentions and beliefs cannot overcome Facebook’s articulated legitimate nondiscriminatory reasons on which its decisions were based. Because Gary has not met his burden of establishing that Facebook’s reasons were pretextual and that race discrimination

was the real reason he was not promoted, summary judgment in favor of Facebook and Hawkins was proper. *Evans*, 80 F.3d at 960-61 (affirming summary judgment for employer on plaintiff's failure to promote claims where plaintiff's "unsubstantiated allegations and bald assertions concerning her qualifications and the shortcomings of her co-workers fail to disprove [employer's] explanation or show discrimination.").

CONCLUSION

The district court properly granted Facebook's and Hawkins' motions for summary judgment. The decision should be affirmed.

This 25th day of January, 2019.

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Party Name Facebook, Inc. & Wayne Hawkins

Dated: 1/25/2019

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2019, I caused this BRIEF OF APPELLEES to be filed electronically with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 25th day of January, 2019, I filed the required number of copies of this BRIEF OF APPELLEES with the Clerk of Court by first class mail.

/s/ Charles E. Johnson
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