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.	)

On Appeal from the United States District Court
For the Western District of North Carolina
Hon. Martin L. Reidinger, District Judge
1:17-CV-00123

REPLY BRIEF OF APPELLANT ROBERT LOUIS GARY

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INTRODUCTION

After a review of the moving parties' Brief, it is apparent that Appellees Wayne Hawkins (hereafter "Hawkins") and Facebook, Inc. (hereafter "Facebook" seek to turn the summary judgment standard on its head. They ask this Court to review the factual record and credit only the evidence which is favorable to them, and further ask this Court to draw all reasonable inferences from the conflicting facts in their favor.

Specifically, Appellees want this Court to rely on certain statements made by a Facebook supervisor, Mr. Hamrick, about the promotion denial decision, but then to discredit both all the contradictory statements Hamrick made, as well as all the contradictory statements offered by Managers Hawkins and Faccone, and Appellant Gary's evidence that contradicts Facebook's alleged reasons for the decision here.

In deciding whether summary judgment should be granted the Court "must disregard all evidence favorable to the moving party that the jury is not required to believe" and must "give credence to the evidence favoring the nonmovant …." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000).

Here, Appellees Hawkins'[1] have recited only a small portion of the evidence on the material issues, leaving out, for example, the contradictions in appellees' own witness statements on a key issue in this case, who made the decision to deny Gary a promotion. Moreover, Hawkins' Brief relies on testimony offered by managers who did not even work for Facebook at the time of the events in question, and who thus offer inadmissible testimony about procedures which Facebook had in place in years after the decisions at issue. Fed R. Civ. P. 56 (c)(2), (4). [2]

When this Court reviews all file materials, it will see that the evidence which has been offered in support of summary judgment is directly contradicted by ***other*** evidence provided by Facebook's managing agents—and thus, that much of the

[1] Appellees Facebook, Inc. and Wayne Hawkins jointly filed their brief. For ease of reference, Robert Gary refers to both parties as "Hawkins" when referring to the statements in their joint Brief.

[2] Several examples of this misuse of testimony embellish the Facebook brief. Thus, Hawkins' brief repeatedly cites to the declaration of Ms. Jean Normandy, (JA 199-209) who began working for Facebook at the FRC facility in December, 2015, six months after Hawkins' termination, and who Facebook uses to describe employment policies which Facebook would have this Court accept as evidence for the relevant time period (see Appellees' Brief at pps. 5-7). Facebook also cites to the declaration of Jesse Singh, who began working in HR for Facebook in 2016 (JA 210) and who Facebook uses to describe its allegedly effective anti-discrimination policies. The policies are dated 2016. (Appellees' Brief at p. 4-5, JA 210-224

evidence favorable to the Hawkins and Facebook is evidence "that the jury is not required to believe." *Reeves*, 530 U.S. at 151. [3]

During a Court's evidence review process, "[t]he court must draw all reasonable inferences in favor of the nonmoving party." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). As stated in *Moore's Federal Practice*, Sec. 56-24[2] (2018), p. 56-79, "[i]n deciding a motion for summary judgment, the court may not weigh the evidence to resolve factual disputes…. or choose which inferences to draw from the facts." *See*, *Williams v. Staples*, 372 F.3d 662, 667 (4th Cir. 2004) (in context of a 42 U.S.C. 1981 case involving store's refusal to cash an out of state check for a black customer, the district court erred by granting summary judgment to defendant.)

A reasonable jury will likely find that Facebook and Hawkins violated 42 U.S.C. 1981 by denying Robert Gary a promotion and pay raise because of his race. A reasonable jury also might conclude that, even if Facebook's decisionmakers concluded that Gary was somewhat lacking in initiative and

[3] Several of Hawkins' depictions of the evidence are flatly false. For example, at their Brief at p 8, Hawkins states that Hamrick began working on the third shift in June, 2013. This is not correct. For this proposition, Hawkins cites Gary's deposition (JA 98:11-13), yet Gary's testimony on that page shows that Gary said he was the one working on the night shift. Moreover, while on the night shift, Gary worked alone. (JA 332, 1111-1113) The importance of this distinction is that Hamrick, as a new supervisor who did not work the same shift as Gary, did not observe Gary's work directly.

communications, such a negative assessment of him was motivated by his race, or that the decision to deny Gary a promotion was a result of mixed motives including race. Because each of these outcomes recognizes that a reasonable jury could indeed conclude that race played a role in the denial of a promotion to Robert Gary, summary judgment should be denied. [4]

ARGUMENT

I. Defendant Wayne Hawkins, the Racist Manager who Referred to Gary as a "Lazy N----- who Wanted Everything Handed to Him" Was the Key Decisionmaker in the Employment Decision here.

A. Hawkins' Overt Racism Is Compelling Evidence of His Bias in the Employment Decision At Issue Here

Hawkins and Facebook do not dispute Gary's evidence that Hawkins routinely used racial slurs, including the terms "Nigger", "monkey" and chimpanzee, to refer to African Americans who worked at FRC. [5] Mr. Hawkins

[4] Appellees contend that this case involves only one promotion decision, the Q1 2014 decision. While the summary judgment briefing has been focused on this decision, as discussed in Gary's Opening Brief at pp. 37-38, Mr. Gary has lagged behind similarly situated white employees in promotions and pay, suggesting that the denial of promotion had a lingering affect. As of Q1 2014 Gary was the lowest paid CFT or CFE. Three years later, in 2017, almost all of Gary's fellow CFEs who were white and hired at the same time or after him, were making far more than him (Gary Opening brief p. 37, fn 16, 3 JA 1304), and many were promoted to IC 4 or IC 5 while Gary is now an IC3. The only lower paid CFE was Gary's African American brother.

[5] Hawkins, while at the helm of the FRC facility, openly and repeatedly referred to African American employees by racial epithets including "Niggers", chimpanzees, and monkeys. [2JA538, 2JA 485-487, 496-502 515-520]

told his subordinate employee Brian Gill that Mr. Gary was a "lazy nigger with his hand out" or "a lazy nigger who always wanted something." (2 JA 421-422**)**

As this Court recognized in *Boyer-Liberto v Fontainebleau Corp*., 786 F.3d 264, 280 (4th Cir. 2015), the word "nigger" is an "unambiguously racist epithet" and "is pure anathema to African- Americans." "Perhaps no single act can more quickly alter the conditions of employment" than the "use of an unambiguously racist epithet such as "nigger" by a supervisor in the presence of his subordinates" *Boyer-Liberto*, 786 F3d. at 280, citing *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001), (quoting *Rodgers Western Southern Life Ins, Co.*, 12 F.3d, 668, 675 (7th Cir. 1993)). *See also*, *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013), *Ellis v. Houston*, 742 F.3d 307, 325-26 (8th Cir. 2014).

Use of the word "nigger" is always evidence of bias against African Americans. This is recognized in cases such as *Cooper v. Paychex*, 960 F.Supp. 966, 970 (E.D. Va. 1997) aff'd *Cooper v. Paychex*, 1998 U.S. App. LEXIS 21383(4th Cir. 1998). The district court found that repeated use of the "n" word and reference to an employee as a "lazy black ass" tended to show that a decision-

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Facebook, after interviewing numerous employees, (e.g., 2JA 525-526), concluded that Hawkins did indeed make such remarks. (2JA 574, 581, 589-592, 539-540). Hawkins singled out Gary as a "lazy nigger that wants everything handed to him", referred to his Assistant Facilities Manager Baron Duffy as a "nigger" within a month of Duffy's hire (2JA421-422) and referred to Stencil Quarles, who is also African-American, as a monkey (2JA538 and 539-540).

maker was biased against blacks, and that this evidence was admissible because the speaker "had a significant impact in the decision to fire". *See also*, *EEOC v. Dilgencorp*., LLC 2015 U.S. Dist. LEXIS 12571 (S.D. Miss. 2015).

Hawkins not only repeatedly referred to African Americans as "nigger", he also referred repeatedly to an African American supervisor as a "monkey" and a "chimpanzee." As stated by this Circuit in *Boyer-Liberto*,

> describing an African-American as a 'monkey,' and thereby 'suggest[ing] that a human being's physical appearance is essentially a caricature of a jungle beast[,] goes far beyond the merely unflattering; it is degrading and humiliating in the extreme.' *Id*. (citing to *Spriggs*); *see also, e.g.*, *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 911, (8th Cir. 2006)

The *Boyer –Liberto* Court concluded that "the use of [the supervisor's] Chubb's chosen slur — 'porch monkey' — is about as odious as the use of the word 'nigger'", citing *Spriggs v. Diamond Auto Glass*, 242 F.3d 185 (4th Cir. 2001). .

Wayne Hawkins, the key decisionmaker here, as discussed below, freely used odious racial epithets within the Facebook FRC facility. Hawkins' bias against all African Americans, including Gary, would allow a reasonable factfinder to infer that Hawkins' highly subjective criticisms of Gary's performance were motivated in whole or in part because of Gary's race, especially when coupled with [6] a review of events immediately preceding the denial of promotion which provide

[6] Hawkins brief repeatedly contends that Robert Gary never heard Hawkins make any racial comments. (Appellees Brief p. 15, citing Gary Edwards Declaration, and p. 28). This is false. Gary heard Hawkins refer to Quarles as a

further evidence of the connection between Hawkins' racial animus against Gary and Hawkins' decision to deny Gary a promotion. *See* pps.13-14 of Gary's Opening brief. Hawkins expressed hostility to Gary's efforts to get a raise, even after Hawkins told Gary that he was getting a promotion. Thus, in about June, 2013, Mr. Hawkins told Gary that he was being promoted to Night Shift Engineer, a position in which Gary worked alone in his building, responsible for monitoring the Forest City data center operation. (3JA379-380, 1074-1076). F

Further evidence that Hawkins saw the night shift appointment as a *de facto* promotion is provided in Gary's Q3 2013 Performance summary, where Hawkins describes Gary as a "[CFT] who has recently been moved to a Critical Facilities Engineer Position" and Hawkins testimony that the difference between Critical Facility Technicians [CFTs] and Critical Facilities Engineers [CFEs] was experience, stating that CFT's were hired at IC 1 and CFE's at IC2 or IC3. [3JA 1164-1165]. Therefore, according to Hawkins' own description of the promotion system, Gary was already working at an IC2 level, beginning in June 2013, even before the Q1 2014 evaluation. Gary emailed Mr. Hawkins asking if the position change to night shift engineer included a raise: Mr. Hawkins never responded to

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monkey. (1JA 320-21) Facebook's own investigative documents show that Gary told human resources in early 2014 that he heard Hawkins refer to Quarles as a monkey. *See* Marcieri's notes, showing that Gary reported the Hawkins' "monkey" remark to her during her 2014 investigation of his pay complaint (2JA 553-556, 623-625).

Gary's email. Soon after, Mr. Hawkins told another managerial employee, Stencil Quarles, that he was "upset that Gary was even asking about a raise." (3 JA 1053-54, 1058-59, 3JA 1116, 3 JA 553.] [7]

B. Whether Appellee Wayne Hawkins Drove the Employment Decision Here Is a Genuine Issue of Material Fact

As predicted in Robert Gary's opening brief (p. 17) the main argument Hawkins offers is the contention that Facebook managers other than Hawkins, especially Mr. Hamrick, collectively made the denial of promotion decision. (Hawkins' Brief p. 7-8) [8]

Hawkins brief falsely states that "[i]n June, 2013, while working third shift,

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[7] Gary immediately followed up with Mr. Hawkins, and assured Hawkins that he was not "all about the money", but just wanted to know whether and what he would get as a raise with the new job. Mr. Hawkins' said Mr. Gary would not see any money until he worked his full six month review cycle(in the night engineer role), and had a good review. (3JA 1116, 2JA 553). Yet Hawkins failed to honor this commitment, and again denied Gary a raise at the next, Q1 2014, review cycle.

[8] Facebook acknowledges that "promotion of a CFE from one IC level to another results in a salary increase." Hawkins Brief p. 7. (See also 1JA 201, 3JA 1050-51, 1174-1174) The better the performance evaluation rating, the more pay was increased; pay raise computation was based on individual performance reviews. (3JA 1050-51) As stated on the Facebook Performance Summary Reviews:

> At Facebook, performance is the main driver of compensation. Your salary increase and refresher equity are calculated formulaically by averaging your two most recent performance assessments.

(3 JA 1333).

Hamrick became Gary's primary evaluator." (citing JA 98, ll. 11-13) [9]

This is a complete misstatement of the record evidence. Hamrick neither worked the night shift, nor did he become Gary's "primary evaluator" until the following year. Hawkins' citation is to Gary's testimony that ***Gary*** worked third shift: Gary did not state that Hamrick worked third shift. (JA 98, lines 11-13) Hamrick, in fact, worked the first shift during this period, as he had for some time. (3JA 1109, 1111]). The record evidence shows that third shift Critical Facility Engineers like Gary worked that shift alone. (1 JA 379-380, 3 JA 1184, 1111-1113)

Second, Hamrick was not Gary's primary "evaluator" until *after* the Q1 2014 evaluation, as discussed at length in the opening brief, pps. 17-21. In support of that conclusion, Hamrick testified to the following:

1. "again in this Q1'2014 evaluation, I was not the person that performed the evaluation…." (JA 1110).

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[9] Hawkins also states (Brief p. 5-6, citing to JA 201) that under Facebook's procedures, "CFE performance reviews are performed by the Chief Building Engineer who supervises the CFE". This is false. If this were true, this would help Facebook's depiction of events, because at the relevant time Gary's Chief Building Engineer was Hamrick. Yet it is offered by a manager, Ms. Normandy, who did not even work for Facebook at the time of the events in question. Because she did not work there at the time, her description of procedures at a later date is irrelevant. Additional inadmissible evidence is woven throughout Hawkins' brief. For example, Facebook includes the results of their investigation into Gary's complaint, Appellee's Brief p. 13, citing to JA 229, 235-236, supposedly as evidence of what happened before and at the time of the promotion decisions, yet these citations are to the Affidavit of Sandy Marcieri, which was written in April 2018, and purports to recount unrecorded conversations she had with FB managers back in 2014. This is inadmissible hearsay evidence. (F.R.E. 802, *Williamson v. U.S.*, 512 U.S. 594, 598 (1994).

2. That the first performance evaluation of Gary that Hamrick did was the second evaluation process after Hamrick became a supervisor, JA 1059-1061;

3. That the Q3 2014 evaluation was "the first one I performed of Gary as a manager" (JA 1070-1072, 3 JA 1289, 1015)

4. That when Hamrick was first made Chief Building Engineer for FRC 1 (in or about June 2013) the evaluations were "performed by Wayne Hawkins" and Hamrick just "provide[d] input." (JA 1060-1062, 1101, 1107-1108.

Further support for the conclusion that it was not Hamrick who did the Q1 2014 evaluation, (or was the primary "evaluator") comes from Facebook's agents, Hawkins and Marcieri, the HR representative sent to investigate Gary's pay complaint. Marcieri's notes state that Hamrick told her, in May, 2014, that "Wayne [Hawkins] gave the review [to Gary in Q1 2014] because Hamrick was not Gary's manager." (3JA-1100-1101, see also 2JA 521). Hawkins signed off on the Q1 2014 evaluation letter, made the entry "not right now" regarding promotion on the performance summary, and gave it to Gary (3JA 1143-1154, 1166-67, 3 JA 1279-1293).[10] Mr. Randall (Gary's co-worker and comparator)'s evaluation was also signed by Wayne Hawkins. [3 JA 1338]

Hawkins' control over the decision may also be inferred by his management over the other committee members who he identified as being present, and the fact that one committee member, Mr. Gordon, did not work with Gary at all and gave

[10] As discussed in the opening brief, Mr. Hawkins admitted that Mr. Gordon had no significant input into Gary's review. At the time of the Q1 2014 Gordon supervised another building, FRC 3, and had limited interaction with Gary. (3JA 1155, and 3 JA 1178].

no input. The mere fact that a committee met does not void the fact that a jury could readily conclude that it was Hawkins who drove the decision to deny Gary a promotion.

Because the evidence on who made the Q1 2014 evaluation decision is in dispute, the Court must disregard that portion of the evidence which is favorable to Hawkins and Facebook, the moving parties. Thus, there is a genuine issue of material fact as to whether it was Hawkins who made or was primarily responsible for the denial of promotion decision here.

II. Gary Has Made out a Prima Facie Case, and Has Provided Ample Evidence of Pretext--the Evidence is Completely Controverted as to Whether Facebook was Motivated by Any Performance Deficiencies in Denying Gary's Promotion

A. Gary has Made out A Prima Facie Case

Appellees do not dispute that Gary has established two of the four elements of the prima facie case: that as an African American, Gary is in a protected group, and he suffered the adverse action of denial of promotion. Appellees' articulated reasons as to why Gary was not promoted are discussed below, within the section discussing pretext.

The Fourth Circuit, following Supreme Court precedent, recognizes multiple ways that a party can establish the fourth element of a prima facie promotion case: first, he can show that he was not selected while a similarly situated employee

outside his protected class was selected. In addition, as recognized by this Court in *EEOC v. Sears Roebuck*, 243 F.3d 846, fn. 2 (4th Cir. 2001):

> The Supreme Court has made it clear that because the facts of given cases "necessarily will vary" this formula is "not necessarily applicable to differing factual situations."……What is critical with regard to the 4th element is that the plaintiff demonstrated he was ……(not promoted) under circumstances which give rise to an inference of unlawful discrimination.

citing Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Here the fourth element of the prima facie case may be established in two alternate ways: first, by multiple pieces of evidence, including but not limited to Hawkins' racial bias against Gary and other African Americans, coupled with the evidence that Hawkins was the primary decisionmaker, and the evidence that Hawkins was upset by Gary's efforts to get a raise even after Hawkins had elevated Gary to a job in which he was performing IC2 duties, and second by comparison of Gary to Randall.

B. There Is Ample Evidence of Pretext

1. There is A Genuine Issue of Material Fact as to Whether Gary's Alleged Lack of Communication and Initiative Motivated the Decision Here

The articulated reasons given by Facebook for his non promotion in Q1 2014 are that Robert Gary did not show initiative and lacked enough communication.

Pretext may be shown by such weaknesses, implausibility, inconsistencies, incoherencies, or contradictions in a Defendant's proffered reasons for its actions that a reasonable person could rationally find them unworthy of credence and hence infer that Defendant did not act for the asserted non-discriminatory reasons.

Here, the reasons articulated are extremely subjective; where the employer's decision turns solely on highly subjective reasons, such reasons are more easily subject to a showing of pretext. *See, McManamy v. Select Med. Corp*., 2016 U.S. Dist. LEXIS 161419 (W.D. Pa. 2016).

A plaintiff alleging a failure to promote can prove pretext by showing that he was better qualified than those who were given promotion, or by amassing circumstantial evidence that otherwise undermines the credibility of the employer's stated reasons. *See Anderson v. Westinghouse,* 406 F.3d 248,269 (4th Cir. 2005): *Dennis v. Columbia Colleton Med. Ctr., Inc.,* 290 F.3d 639, 648-49 & n.4 (4th Cir.2002). Gary has recited numerous pieces of evidence which together undermine the credibility of the employer's stated reasons. (Gary Opening Brief pp. 43-52). That evidence includes the following:

a. At the Time of The Decision, Hamrick Did Not Agree with the Decision Not to Promote

Tellingly, Hawkins brief does not even address Hamrick's statement that he asked why Gary could not be promoted (JA 1108). By itself, this piece of evidence allows a jury to find pretext, as it shows that at the time, ***Hamrick did not agree*** with the decision that Gary should not be promoted. Hamrick was asked:

> Q. Did you agree with Mr. Hawkins' assessment that Mr. Gary meets all expectations for Q1 2014?
>
> A. We had a discussion about it . ***I asked why we couldn't move forward with the promotion, and I was told there wasn't enough impact to warrant a promotion.*** (3JA 1108, emphasis added).

At the very least, this testimony from Hamrick raises an inference from which the fact-finder could conclude that Hamrick did not agree with the decision to deny Gary a promotion in Q1 2014. "Drawing inferences from historical facts is also a function for the trier of fact, as long as the inference to be drawn is legally permissible." Moore's Sec. 56.24[4][b]. *See, Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986).

Hamrick admitted the only input he had into Gary's evaluation was his peer summary form (3JA 1107, 1108, 1316), which provides only positive remarks about Gary, referring to him as a "great watchman" who "saved our team and company great expense and anguish", and suggesting Gary should be "tasked with more project work… because he wants to make a difference and make the job easier for his fellow employees." (JA 1107).

Hawkins' purported strongest piece of evidence, on p. 10 of Hawkins' Brief, is Hamrick's testimony about weaknesses in Gary's performance. Yet Hawkins Brief fails to note that Hamrick testified not to any weaknesses that he observed—but only what the Q1 2014 evaluation (which Hamrick did not do) identified. Again, Hawkins brief cites to only a part of the relevant testimony. The full relevant testimony of Hamrick on this page was:

> Q. What were the weaknesses you recall of Mr. Gary's performance as of Q1 2014?
>
> A. Lacking communication, not necessarily the content of the communication but not as much verbal or written communication and he did what was required, but he wasn't doing anything that, in the evaluation's opinion, was above and beyond.
>
> Q. And did that affect your assessment of his impact as you evaluated his performance?
>
> A. Again, in this Q1 '14 evaluation, I was not the person that performed this evaluation.

Thus, Hamrick again states that he did not do the evaluation, and he refused to claim ownership of an assessment of Gary's weaknesses, even when pressed by his own attorney. A jury could reasonably draw the inference that Hamrick did not independently find Gary's communication lacking, but was merely later echoing what Hawkins told him.

Hamrick was very careful to testify that he only had a perception of Gary, including the perception "there wasn't as much action" (p. 168, Hamrick depo. p. 125)

Hamrick admitted that his perception of Gary's performance came directly from Hawkins:

A. "…..the perception came from what I was briefed on when I became Robert's manager"

Q. "And you were briefed by Hawkins?"

A. "Yes." (JA 1113).

b. Faccone's Statements Contradicting Hawkins and Hamrick Contribute to Genuine Issues of Material Fact About the Promotion Decision

Completely contradicting the Appellee's contentions, Manager Faccone testified that Gary was initially on a promotion list, (3JA 1200-1207), that after the promotion list with Gary's name on it was sent up to headquarters in Menlo Park (MPK), MPK decided there were too many employees on the Q1 promotion list, and Gary was selected to be taken off after all the employees were reevaluated for their "technical capabilities". (JA 1205-1208)

Faccone repeatedly testified Gary was taken off the list due to technical abilities. At deposition p 50, Faccone states: (JA 1206):

A. He was taken off the list, yes.
Q. So tell me what steps you took and when you took them that led to him being taken off the promotion list.
A. There was a more thorough conversation and evaluation regarding technical capabilities.

Faccone stated in response to a follow-up question:"[to repeat my answer from before, it was a more tighter evaluation of the technical capabilities of the employees." (JA 1207)

In trying to avoid this obvious material contradiction with their contentions, Facebook misleadingly contends that Faccone backed away from his contention that it was technical capabilities which was the basis for the promotion denial. Instead, Faccone stated he could not recall what training or experience he felt Gary needed to address these technical abilities. (JA 1208).

Such inconsistencies by different managers in describing both the alleged reasons for, and the procedures leading up to the adverse action are very strong circumstantial evidence of pretext, see *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 852-53 (4th Cir. 2001) ("Indeed, the fact that Sears has offered different justifications at different times for its failure to hire Santana is, in and of itself, probative of pretext.") and *Nwaebube v. ESC of N.C.*, 2011 WL 2270891 (E.D.N.C. 2011).

The incentive of Facebook to deny that "technical abilities" was the criteria for promotion is clear—Gary's technical abilities were far and away better than Randall's. Gary had years of technical experience working in electrical, mechanical and HVAC positions, including education that gave him the technical abilities. He had worked at the Facebook facility for over three years (3JA 802,

807, 1140-1143), including as a facility Technician, doing work just like at Facebook but for a contractor [3JA 803-804]. Randall had no relevant work background or experience, and had worked at Facebook less than two years. Due to his prior work at Siemons and earlier hire date, at the time of the Q1 2014 evaluation Gary had nearly twice Randall's experience in the Critical Facility Engineer role. Randall was made a Night Shift Engineer months after Gary, in October 2013, and Gary observed that Randall could not put an email together, he had exceptionally poor grammar, he did not know the equipment worked, and he could not perform trouble shooting techniques. (3 JA 1117). Randall's resume shows no work experience in HVAC, electrical or related work. Instead, Randall's resume shows that in the ten years before FB he worked in janitorial and cleaning roles (Randall Resume, 79-2).

c. Appellees' Post Hoc, and Shifting Explanations of the Promotion Denial Support a Findng of Pretext.

1. <u>The Late Addition of Alleged Communication Problems</u>

Gary's alleged communication issues were not ever raised with him until after the Q1 2014 evaluation was complete and Gary had repeatedly complained about it. The *only* reason listed in the written performance documents for Gary's denial of promotion in 2014 is Wayne Hawkins' statement that Gary "needed to be more of a self starter" and find projects of his own. Hawkins Q1 2014

Performance Summary copied Hamrick's words of praise from the Peer Summary Hamrick had completed, but Hawkins then added:

> Robert works at a level commensurate with his IC level. In the future he will be tasked with greater projects and continue to grow. 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 things are done. I believe Robert has shown great achievement in his time here and is a solid member of the FRC team.
>
> [3 JA 1287-1288]

Hawkins' brief asserts that Gary was told by Hamrick that the reason for the non promotion was communication, yet Hawkins' brief omits the important timing of these comments. In fact, Hamrick did not even mention communication issues with Gary until the second or third time that Gary complained to Hamrick about the pay discrepancy between Gary and Randall. Gary raised his concerns as soon as he learned of the denial of promotion and comparatively low raise, complaining at least twice to Matt Hamrick between about February to April, 2014. [1 JA 110-1123JA 821-824] In their first conversation Hamrick gave no reason for Gary's low raise, only saying "that's what I got". [3 JA 822-823.]

In the second conversation Hamrick stated "I hate you got overlooked" and admitted that "we dropped the ball". [3JA 822-826, 2 JA 521, see also, 3 JA 553-554). It was not until the April conversation that Hamrick may have contended that Gary's "communication maybe wasn't there." [3 JA 827]

Certainly by the time that Gary had complained twice or more, it is reasonable to infer that Hamrick and Hawkins would have conferred, and searched for an allegedly valid explanation for the adverse decision. Faecbook also asserts that Hawkins told Gary that he had difficulty communication issues to work on (JA p. 846-849), yet this conversation too did not take place until April, 2014, long after Gary was denied the promotion. [11]

This sort of "post hoc justification of a decision made on other grounds" is indicative of pretext. *Dennis v. Columbia Colleton Med. Ctr. Inc.*, 290 F.3d 639, 647 n.2 (4th Cir. 2002). Shifting explanations—such as here where Hamrick moved from "you got overlooked" to "communication maybe wasn't there" for an adverse decision are evidence of prevarication and thus of pretext. See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 852-53 (4th Cir. 2001) ("Indeed, the fact that

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[11] Hawkins brief (p. 10) also cite Gary's self assessment to try and show he was lacking in initiative and communication, yet it does not support that conclusion. Gary candidly recognized that there is "always room for improvement" and he wanted to "learn all he can" and how you can "just go with the flow at times" when you are busy. Yet a read of the full self assessment, which is very lengthy, shows Gary as a very candid, highly conscientious, energetic, hardworking and diligent employee. Mostly, he was very aware of the critical nature of his role as the only person working at night: "with me working at night alone, I try to put the majority of my focus on situations on critical equipment and critical situations that may occur when running the building alone." The self evaluation also shows his initiative, "I also try to show newly hired employees everything that I know to try and get them up to speed." (JA 332)

Sears has offered different justifications at different times for its failure to hire Santana is, in and of itself, probative of pretext.").

Importantly, the reasons given by Hawkins to Gary for the non denial also shifted at the April meeting. Initially, Hawkins could not tell Gary why he was not promoted. (JA 846, Dep. pp. 120 ll. 7-18) Only later in the meeting did Hawkins say that Gary's communication lacked—to which Gary immediately responded by telling Hamrick he had never told him that. (JA 849.)

d) There is Ample Evidence that Gary had Initiative and Good Communication Skills, Where Randall was Sorely Lacking in Communication.

As discussed in the opening brief, there is ample evidence that Gary had excellent drive and initiative, and that Facebook was aware of it. (3 JA 1084-1085) Hamrick stated that Gary's "notes and his vigilance of that system led to improvements." (Id.). Gary's initiative "saved the company from outages and other emergency situations" during the six months before the Q1 2014 evaluation (1 JA 318-219, 3JA 1118-1119). Co-worker Gill stated, "[i]f there is a question about something, inevitably Mr. Gary has the notes that apply to the situation, and notes he keeps has been very helpful. " (2 JA 421-422) During this time frame, Hamrick thanked Gary for covering and working for absent employees, and admitted that this was not a required task. (3JA 1083, 1084, 1305-13153JA 1083)

Hamrick's notes to Gary included thanks for tasks that were not part of his daily obligations, including "the DC maps verification process", "thanks for moving fast to make things happen at FRC 1 so we could get capacity where it should be", and thanks for "emergency prefilter changes in FRC 1 C/D". [3 JA 1305-1315] Gary was given very positive verbal feedback on his performance by both Mr. Hamrick and Mr. Hawkins. [3 JA 1117] He was told that he was "doing good" and "keep up the good work." [Id.] (1 JA 316]. Importantly, Hawkins testified that in the six month period before the Q1 2014 evaluation, Gary had done a very good job on the project they now criticize him for (Appellee Brief, p. 23)

> [Gary] had done this project with the RO room, then the thought process was that, hey, in this six months period he did this, *he did a good job*, so let's give him more projects to do to continue to push him towards getting to the next level.

(3 JA 1187)

Facebook cannot deny that Randall had serious communication problems. Hamrick admitted that Randall lacked communication skills [3 JA 1089-1090] and at times, according to Hamrick, that lack of communication skills was a performance problem. (3 JA 1092). At the April 30 meeting regarding Gary's pay promotion complaint, Gary provided Hawkins with two documents, one written by him, one by Randall, but with the names crossed out, and asked Hawkins to compare them and say which writer would receive a job. Hawkins said it would

"not be difficult" to reject Randall's document, because he didn't "know how to use proper English… he can't even use correct grammar." (JA 846-847).

e) Randall (and Walker) did not meet the Facebook job qualifications

Facebook misconstrues its own "Job Description-Critical Facilities Technician" (Appellee's Brief p.34-35 The description does provide a minimum qualifications list, [1JA 337-338] but also states:

> US ONLY-BASIC QUALIFICATIONS"
> ; Two years experience in a data center or other Critical Environment
> ; Three years Journeyman level HVAC or Electrical experience

Gary met and exceeded these basic qualifications for the CFT position. **[**1 JA 328-329, 3 JA 793,796 1279-1283, 3 JA 797,799, 1 JA 328-329) (3JA 1210, 1102). Randall did not meet any of them, was employed as a janitor before his hire, and was trained by Gary in the duties of the job. (3 JA1101) Walker also did not have the articulated "two years experience in data center or critical environment" (3 JA 1267-1268, 1 JA 568-569) and had no HVAC experience, had very limited electrical experience by his own admission, and was not qualified to be an electrician. (3 JA 1267-1268(3 JA 1254-1257), yet he was hired as an IC 2 after a three month internship. The only reasons given to Walker for his being hired in as an IC2 was wholly subjective. He was told that "they saw a lot of potential in me" ((3 JA 1269). An employer's deviation from its own written

policies or established practices is further evidence of pretext. *Weaks v. N.C. Dept. of Transportation*, 761 F.Supp. 2d 289, 304 (M.D.N.C. 2011).

C. Facebook Repeatedly Cites to Inadmissible Hearsay to Support its Allegations

The evidence offered by Facebook to support its denial of promotion to Mr. gary in Q1 2014 is very thin, and also fully controverted. Perhaps recognizing this, Facebook attempts to bolster their defense by repeatedly citing to statements allegedly made to Marcieri, a Human resources staffperson from out of town (who had nothing to do with the promotion decision). *See* Appellees' Brief, p. 13 and 23-24, citing JA 229, 235, 236. The cited parts of Marcieri's affidavit (JA 228-237) are inadmissible hearsay as offered by Facebook, and should be disregarded by this Court. [12]

CONCLUSION

As stated in *Moore's Federal Practice*, "the Court decides whether, under the undisputed facts, the movant is entitled to judgment as a matter of law. If so,

[12] Thus, the contentions in Appellee's Brief (pp. 23), based on the Marcieri Affidavit, that Hamrick "explained to Gary the importance of going above and beyond what was required of basic job responsibilities" and "[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 231-232,] are inadmissible hearsay and should not be considered by this Court in making the decision on summary judgment.

the court may grant the motion; if not, the motion must be denied." *Moore's Federal Practice*, 56.4 [2] (2018), at p. 56-79.

The record evidence shows that a jury could readily conclude that Facebook's articulated reasons for Mr. Gary's denial of promotion are simply a pretext for Mr. Hawkins' racial *animus* toward Gary. Gary has offered evidence from which a fact-finder would readily conclude that his race was a motivating factor in Defendant Facebook's decision to deny Plaintiff a promotion and pay raise, even if other factors also motivated Defendant's decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252, 258 (1989); *Hill v. Lockheed Martin*, 354 F.3d 277, 284-285 (4th Cir. 2004).

Appellant respectfully requests that this Court reverse the decision of the District Court, and deny the Appellees' motions for summary judgment.

Respectfully submitted this the 15th day of February, 2019.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she has on this date electronically filed the foregoing Reply Brief with the Clerk of Court using the CM/ECF system which will send notification of the filing to the following counsel of record for the Defendants-Appellees:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume requirements set forth in the Federal Rules of Appellate Procedure Rule 32(a)(7(B). This Reply Brief of Appellant contains **6446** words as determined by the Microsoft Word Processing Progam, with 14-point proportionally spaced type.

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