

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

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|------------------------------|---|------------------|
| EQUAL EMPLOYMENT OPPORTUNITY |) | |
| COMMISSION, |) | |
| |) | |
| Plaintiff, |) | |
| |) | No. 00-2923 Ma/A |
| v. |) | |
| |) | |
| AUTOZONE, INC., |) | |
| |) | |
| Defendant. |) | |
| |) | |

ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, the Equal Employment Opportunity Commission ("the EEOC"), brings suit against Defendant AutoZone, Inc. ("AutoZone") on behalf of twenty-five individuals. The EEOC alleges that AutoZone has engaged in discrimination in hiring and promoting employees based on race and sex in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq.

AutoZone filed a motion for summary judgment on November 22, 2006, to which the EEOC responded on December 21, 2006. AutoZone filed a reply on January 18, 2007, and the EEOC filed a sur-reply on February 28, 2007. For the reasons below, AutoZone's motion is GRANTED in part and DENIED in part.

I. Jurisdiction

The Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4).

II. Summary Judgment Standard

Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986). The moving party can meet this burden, however, by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of its case. See Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. A genuine issue for trial exists if the evidence is such that a reasonable jury

could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party opposing the motion must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party may not oppose a properly supported summary judgment motion by mere reliance on the pleadings. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Instead, the nonmoving party must present "concrete evidence supporting its claims." Cloverdale Equip. v. Simon Aerials, Inc., 869 F.2d 934, 937 (6th Cir. 1989). The district court does not have the duty to search the record for such evidence. See Interroyal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989). Parties have the duty to point out specific evidence in the record that would be sufficient to justify a jury decision in their favor. Id.

III. Evidence Considered

In its motion for summary judgment, AutoZone introduces each claim with a "Statement of Material Facts to Which There is No Genuine Dispute." The EEOC urges the Court to disregard those statements because they do not contain citations to the record as required by Local Rule 7.2(d)(2)¹ and are mere legal conclusions.

¹ Local Rule 7.2(d)(2) provides, in relevant part, as follows: "On every motion for summary judgment, in addition to citations to appropriate legal authorities, the proponent of the motion shall submit in a separate document affixed to the memorandum each material fact upon which the proponent relies in support of the motion by serial numbering, and shall affix to the memorandum copies of the precise portions of the record relied upon as

Although AutoZone's statements of material fact do not contain citations to the record, AutoZone's analysis of each claim, in sections entitled "Discussion," provides extensive citation to the record. Therefore, AutoZone's motion contains the citations required by Local Rule 7.2(d)(2). The titles that AutoZone has given to the various sections of its brief do not create confusion; regardless of the section heading, the Court can distinguish factual assertions supported by citations to the record from legal conclusions. There is, therefore, no need to disregard the statements. Any purported "facts" that are mere legal conclusions will be considered argument, not evidence.

Each party has attached dozens of exhibits to its memorandum in support of or in opposition to AutoZone's motion. Many of those exhibits include documents that have not been authenticated, including various employment applications and personnel records. Unauthenticated documents cannot be considered on a motion for summary judgment. Baugham v. Battered Women, Inc., No. 05-6051, 2006 WL 3780295, at *8 n.5 (6th Cir. 2006); see also Fed. R. Civ. P. 56(e). The Court will not consider any unauthenticated documents in deciding this motion.

IV. Claims

A. Failure to Promote

A plaintiff can establish a discrimination claim under Title

evidence of each material fact."

VII by producing either direct or circumstantial evidence of discrimination. White v. Columbus Metro. Hous. Auth., 429 F.3d 232, 238 (6th Cir. 2005). To establish a Title VII discrimination claim based on a failure to promote using circumstantial evidence, the plaintiff must demonstrate that: (1) the employee is a member of a protected class; (2) the employee applied for and was qualified for a promotion; (3) the employee was considered for and was denied the promotion; and (4) an individual of similar qualifications who was not a member of the protected class received the job at the time the employee's request for the promotion was denied. White, 429 F.3d at 240.

If a company does not provide a formal mechanism for employees to apply for particular promotions, "the company is held to a duty to consider all those who might reasonably be interested in a promotion were its availability made generally known." Dews v. A.B. Dick Co., 231 F.3d 1016, 1022 (6th Cir. 2000).

"The prima facie burden of showing that a plaintiff is qualified can . . . be met by presenting credible evidence that his or her qualifications are at least equivalent to the minimum objective criteria required[.]" Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 575-76 (6th Cir. 2003). "Although the specific qualifications will vary depending on the job in question, the inquiry should focus on criteria such as the

plaintiff's education, experience in the relevant industry, and demonstrated possession of the required general skills." Id., 371 F.3d at 576.

When a plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to put forth a legitimate, nondiscriminatory reason for its action. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Once an employer has offered such a reason, the plaintiff must show that this reason is merely a pretext. Id. at 805.

Because the EEOC has not introduced direct evidence of discrimination, the White test is the applicable standard governing the EEOC's failure-to-promote claims.

The EEOC alleges that AutoZone failed to promote seven African-American employees because of their race and failed to promote one female employee because of her sex. The Court will address each claim individually.

1. Charles Benson

The EEOC alleges that Charles Benson ("Benson") was discriminated against on the basis of his African-American race when he was denied a promotion to the position of pricing research manger that was given to Terry Baker ("Baker"), a Caucasian.

a. Facts

Benson was hired by AutoZone as a store manager in March

1988. (Benson dep., 29:11-15, 33:10-11.) Benson had graduated from high school in 1964 and had earned approximately seventy-nine credit hours from community colleges, but had not earned a college degree.² (Id., 11:15-12:16.)

Benson served in multiple positions during his first few years at AutoZone. He served as a store manager (33:10-34:10), an acting store manager in another store (id., 154:11-17), a data processor (id., 44:9-18), an assistant data processing manager (id., 47:24-48:5), and a manager working on the company's computer system help desk (id., 46:1-47:12, 55:14-20). At various times, he supervised multiple employees. (Id., 47:9-12, 56:17-19.)

Benson developed a good reputation within the company. (Id., 91:3-4.) When Benson worked on the help desk, he reported to Stephen Valentine ("Valentine"). (Valentine dep., 122:21-123:24.) Valentine testified that Benson was not a "technical person" by trade but that, through trial and error during his time at AutoZone, he had acquired some technical knowledge. (Id., 124:18-125:4.) Benson and two or three other people were responsible for developing solutions to various problems faced by AutoZone

² Benson testified that he earned sixty-three or sixty-four credit hours from a community college in California and about fifteen credit hours from a community college in Tennessee. (Id., 12:4-16.) He did not explain how many credit hours were required to graduate or how the credit hours converted to years of college credit.

Citing a document it refers to as Benson's employment application, the EEOC asserts that Benson had attended three-and-one-half years of college. (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 8.) Because the referenced document is not authenticated, the Court will not consider it.

stores.³ (Id., 123:8-19.)

Eventually Benson moved into the Pricing Research Department as an analyst under Dave Bennett ("Bennett").⁴ (Benson dep., 86:18-22.) Benson was the most junior of the four analysts in the department. (Id., 87:12-88:2.) Analyst work was different from the technical work Benson had done previously, but Benson did not think the analyst work was difficult. (Id., 92:5-21.)

Bennett left the Pricing Research Department about six or seven months after Benson arrived, and Bennett's departure created an opening for a new manager in the department. (Id., 87:6-16.) Before Bennett left, he told Benson that he had recommended to Ron Ayotte ("Ayotte"), a senior vice president of operations, that Benson replace Bennett because Benson had been a "real help" to the department. (Id., 74:12-19, 89:8-18.) Benson did not discuss with Ayotte the possibility that Benson might replace Bennett. (Id., 89:22-24.)

Benson did not receive the price research manager position; it was given to Baker, who had previously been serving as an area adviser in the Operations Department. (Id., 90:1-12.) Baker told

³ Relying on Valentine's testimony, the EEOC asserts that Benson was "one of only two or three Autozoners with specialized technical skills involving logistics, store support, and pricing." (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 10.) The record does not support this assertion. Valentine testified that Benson was part of a team with two or three other people who were responsible for dealing with technology logistics issues and solving problems faced by AutoZone stores. (Valentine dep., 123:8-19.) The testimony does not suggest that no other AutoZone employees were capable of performing the same functions.

⁴ The parties' submissions do not indicate when Benson joined the Pricing Research Department.

Benson that Baker did not know why he had gotten the job instead of Benson. (Id., 90:21-91:2.)

Baker was hired by AutoZone in May 1987, ten months before Benson was hired. (2d Branum decl., ¶ 14.)⁵ Before receiving the price research manager position, Baker had worked in various positions throughout the company. (Hanemann decl., ¶ 2.)⁶

Former AutoZone president Thomas Hanemann ("Hanemann"), who worked with Baker in the early to mid-1990's, was impressed by Baker's work ethic, performance, enthusiasm, and leadership skills. (Id., ¶¶ 2, 3.) Hanemann recommended Baker for a promotion to the area advisor position, which Baker received.⁷ (Id.) An area advisor is responsible for supervising the operation and management of eight to ten AutoZone stores. (2d Branum decl., ¶ 14.)

b. Analysis

AutoZone asserts that the EEOC cannot establish that Benson

⁵ Shirley Branum is a relocation specialist for AutoZone and worked as a recruiter for AutoZone in 1994-95. (2d Branum decl., ¶ 1.)

⁶ Thomas Hanemann is a former AutoZone employee who served as President of the company in 1995. (Hanemann decl., p. 1.)

⁷ Hanemann's declaration suggests that Baker served as an area advisor before receiving the price research manager position. It is not clear whether Hanemann was President of AutoZone when he recommended Baker for the area advisor position or when Baker received the price research manager position. Although AutoZone asserts that Hanemann was "instrumental in getting Baker . . . placed in the position of manager of pricing research[,]" AutoZone does not cite any evidence to support that claim. (Def.'s Mem. in Supp. of Mot. for Summ. J., p. 13.) Hanemann's declaration states that he recommended Baker for the area advisor position, and that Baker ultimately received the price research manager position because of his positive traits, such as his enthusiasm and attitude. (Hanemann decl., ¶ 3.)

was qualified for the position of pricing research manager or that Benson had qualifications similar to Baker's.

There is no evidence in the record indicating that Benson was qualified for the position of pricing research manager. Although AutoZone did not maintain formal descriptions for positions in the company, the required qualifications for each position were determined by department managers.⁸ (2d Branum decl., ¶¶ 4, 5; Def.'s Resp. to Pl. EEOC's Req. for Admis. of Fact No. 13.) There is no evidence that the department managers responsible for determining the required qualifications for the pricing research manager position had failed to do so, or that they relied on subjective qualifications alone in determining whether an applicant was qualified for the position. Therefore, there is no basis on which to conclude that there were no objective qualifications for the position. There is also no evidence of what the objective qualifications for the pricing research manager position were. There is no testimony from the relevant department managers or any other evidence describing the minimum qualifications that the department managers had established.

There is no evidence that there were prerequisites for the pricing research manager position and, if so, whether Benson had

⁸ Branum stated that AutoZone did not maintain formal job descriptions in 1994 or 1995. (2d Branum decl., ¶¶ 4-5.) It is not clear from the record when Baker was made pricing research manager.

or had not fulfilled them. Therefore, there is no basis from which a reasonable jury could conclude that Benson was qualified for that position.

The EEOC asserts that, "[f]ederal courts have held that when there is no evidence of the requisite qualifications for a position, the burden is on the Defendant to show that the Plaintiff was not qualified." (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 13.) In support of this argument, the EEOC quotes Walker v. Mortham, 158 F.3d 1177, 1193 (11th Cir. 1998), which states:

if the employer utilized subjective qualifications in making the challenged decision, there is no way for the plaintiff employee to determine how he "ranked" according to those subjective qualifications in the decisionmaker's mind. It is therefore appropriate to place the burden of articulating those qualifications -if relevant-on the employer, not the employee.

Walker does not relieve the EEOC of its burden to establish, as part of its prima facie case, that Benson was qualified for the position for which he applied. Although subjective qualifications are properly considered at the second stage of the McDonnell Douglas analysis, the EEOC must show that Benson satisfied AutoZone's objective qualifications for the pricing research manager position to establish its prima facie case. White, 429 F.3d at 242 n. 6. Qualifications such as years of experience, educational background, or previous management experience are measured objectively and, therefore, are properly

considered at the prima facie stage. The burden is on the EEOC to show that Benson was qualified.

The EEOC asserts that AutoZone has "failed to show the qualifications for management positions." (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 13.) That the EEOC also has failed to do so makes it impossible for the EEOC to establish its prima facie case.⁹ It could have shown that Benson was qualified for the pricing research manager position by producing evidence that the position had no minimum objective qualifications or by producing evidence showing what the minimum objective qualifications were and that Benson had met them. It has done neither. Based on the record now before the Court, no reasonable jury could determine whether Benson had satisfied the minimum objective qualifications for the pricing research manager position because there is evidence of what those qualifications were, or that there were no such qualifications.

There is also no evidence indicating that Benson and Baker were similarly situated with regard to the pricing research manager position. Although the two men were hired within one year of each other, they had served in different positions before Baker was given the job. There is no evidence from which to conclude that Benson's experience was similar to Baker's with

⁹ The EEOC does not argue and has not presented any evidence that AutoZone has failed to respond to discovery requests about the qualifications for the relevant positions or that AutoZone does not have minimum objective qualifications for any of its positions.

respect to the relevant qualifications for the pricing research manager position. Therefore, the EEOC cannot establish its prima facie case. AutoZone's motion for summary judgment as to the EEOC's failure-to-promote claim on behalf of Benson is GRANTED.

2. Carolyn Lanton Neeley

The EEOC alleges that Carolyn Lanton Neeley ("Neeley") was discriminated against on the basis of her African-American race when she was denied a promotion to the position of document management coordinator that was given to Jeff Mitchell ("Mitchell"), a Caucasian.

a. Facts

Neeley was hired by AutoZone into the decision support group as an SQO programmer in November 1994.¹⁰ (Id., 15:5-15, 35:12-21, 36:18-23.) As an SQO Programmer, Neeley learned how to write computer code for AutoZone computer databases and how to teach AutoZone office employees to use the databases. (Id., 35:16-36:16.)

In April 1997, Neeley was transferred from decision support to the micro systems group as a technical support employee. (Id., 51:12-22, 52:9-13, 59:11-22.) In the technical support position, Neeley was responsible for troubleshooting computers, fixing installations, and setting up new computers. (Id., 52:14-17.) She

¹⁰ The record does not explain what, if anything, the acronym "SQO" represents.

reported to Michael Dunn ("Dunn"), a manager in the micro systems group. (Id., 54:14-18.)

Dunn was serving as a temporary employee when he joined the micro systems group, and he was eventually promoted to manager over other micro systems employees who had been in the group longer than he. (Id., 87:2-13, 96:11-16.) Neeley would have applied for the position of supervisor of the micro systems group had she known that it was available. (Id., 96:17-19.)

Mitchell worked in the micro systems group with Neeley and held the same position as Neeley. (Id., 68:24-69:9.) Neeley and Mitchell worked in the micro systems group until that group disbanded in October 1997. (Id., 60:20-61:11, 63:11-18.)

In October 1997, Neeley and Mitchell were both transferred into the document management group, and Mitchell was made supervisor of that group and Neeley's manager. (Id., 60:20-61:14.) Neeley did not learn that the supervisor position was open until she saw that Mitchell had received that position. (Id., 71:13-15.)

The document management group was not created until the micro systems group disbanded. (Id., 72:12-19.) Neeley, Mitchell, and another employee named TJ Herren ("Herren") were the only employees in the document management group, and they were responsible for electronically scanning documents. (Id., 62:4-23, 72:8-11, 63:24-64:5.) Neeley testified that she believes Herren

had had some experience scanning documents before he was transferred to the document management group but that she does not believe Mitchell had had any scanning experience. (Id., 75:11-18.) Neeley had not had any experience with scanning documents before being transferred to the document management group. (Id.)

Neeley continued to work in the document management group until she resigned on December 26, 1997. (Id., 61:6-62:2.)

b. Analysis

AutoZone asserts that the EEOC cannot establish that Neeley applied for or was qualified for the position of supervisor of the document management group or that Neeley had qualifications similar to Mitchell. In its reply memorandum, AutoZone also asserts that the Court should disregard the EEOC's argument in its response brief that Neeley was denied the promotion to supervisor of the micro systems group that was awarded to Dunn. AutoZone argues that the EEOC had not raised a claim based on Dunn's promotion before its response to AutoZone's motion for summary judgment.

Assuming that the EEOC's claims based on Dunn's and Mitchell's promotions are both properly before the Court, those claims fail because the EEOC has not established that Neeley was qualified for the positions Dunn and Mitchell received. There is no evidence before the Court of what objective minimum

qualifications the relevant department managers had established for an employee to be qualified to supervise the micro systems group or the document management group. There is also no evidence that there were no minimum objective qualifications for the positions of micro systems group manager or document management group supervisor.

The EEOC asserts that, when Mitchell became supervisor of the document management group, Mitchell had more unrelated experience than Neeley, but that Neeley had a degree in a relevant field. The Court has no basis for determining whether either of those qualifications would be necessary or sufficient to qualify an employee to supervise the document management group. Similarly, the Court has no information about the qualifications relevant to supervising the micro systems group. Therefore, the EEOC cannot establish its prima facie case. AutoZone's motion for summary judgment as to the EEOC's failure-to-promote claims on behalf of Neeley is GRANTED.

3. Donald Dowell

The EEOC alleges that Donald Dowell ("Dowell") was discriminated against on the basis of his African-American race when he was denied a promotion to the position of project leader that was given to Mike McConkey ("McConkey"), a Caucasian.

a. Facts

Nearly all of the documents on which the parties rely in

discussing the EEOC's claim on behalf of Dowell are unauthenticated.¹¹ The parties agree that Dowell began working for Autozone in November 1992 and that he had worked in various positions with other companies before joining AutoZone.

McConkey joined AutoZone in 1994. (McConkey dep., 22:1-9.) McConkey testified that he believed his original title had been project lead or project leader, but it might have been "special projects." (Id., 21:15-19, 22:10-12, 23:5-21.) The EEOC asserts that McConkey received a promotion to project leader on August 29, 1994. AutoZone asserts that McConkey's title did not change to project leader until September 2, 1995.

b. Analysis

AutoZone asserts that the EEOC cannot establish that Dowell was qualified for the position the McConkey held or that Dowell had qualifications similar to McConkey.

Although the parties dispute when and if McConkey received a promotion at AutoZone, the disputed facts are not material. Assuming that McConkey was promoted to project leader on August

¹¹ AutoZone cites Exhibits F, G, and H to its memorandum in support of its motion for summary judgment. AutoZone describes those exhibits as containing Dowell's employment application and other employment records (Exhibit F), McConkey's employment records (Exhibit G), and a document indicated Dowell's and McConkey's pay increases in 1994 (Exhibit H). None of those documents is authenticated.

The EEOC cites Exhibits 9 through 13 to its memorandum in opposition to AutoZone's motion for summary judgment. The EEOC describes Exhibit 9 as Dowell's employment application, Exhibit 10 as Dowell's performance evaluation, and Exhibits 13a-e as an Analysis of hiring and promotions at AutoZone conducted by Burt Barnow. Those documents are not authenticated. Exhibit 11 is McConkey's deposition and Exhibit 12 is McConkey's employment status record, which is authenticated at pages 22 and 23 of McConkey's deposition. The Court will consider Exhibits 11 and 12.

29, 1994, as the EEOC asserts, there is no evidence in the record indicating that Dowell was qualified for that position or that Dowell and McConkey were similarly situated as to the objective qualifications necessary for the position. Because the EEOC cannot establish its prima facie case, AutoZone's motion for summary judgment as to the EEOC's failure-to-promote claim on behalf of Dowell is GRANTED.

4. Michael Ray Powell

The EEOC alleges that Michael Ray Powell ("Powell") was discriminated against on the basis of his African-American race when he was denied a promotion to Director of Help Desk Operations that was given first to Farlon Williams ("Williams") and then to Roger Hendrickson ("Hendrickson"),¹² both Caucasian.

a. Facts

The parties agree that Powell was hired by AutoZone in 1990 as a Systems Manager for System Technical Support. Before accepting the position at AutoZone, Powell had spent ten years working for the Holiday Inn Corporation doing computer-related work. (Powell dep., 25:4-13, 26:21-28:19.)

In July 1992, Powell transferred to a position on the AutoZone help desk. (Id., 70:11-21.) Help desk employees are responsible for resolving technical problems experienced by

¹² Although the parties use the spelling "Hendrickson," Powell testified that the name is spelled "Hendrixson." The Court will use the parties' spelling. (Powell dep., 93:7-8)

employees in AutoZone stores. (Id., 72:15-73:3.) Most of the calls received by the help desk involve technical questions and working on the help desk is a very technical job. (Id., 94:12-23.)

When Powell first transferred to the help desk he reported to Valentine. (Id., 84:25-85:7, 88:15-18.) At some point, Valentine told Powell to report to Williams, the director of help desk operations.¹³ (Id., 88:25-89:2, 89:22-90:3.) Williams remained director of help desk operations for about six months, and shortly after Williams left the position he was replaced by Hendrickson. (Id., 90:15-20, 93:10-94:3.)

Williams was hired by AutoZone in October 1981. (Williams dep., 11:23-25.) Over the next thirteen years he worked in various positions around the company, including several years as a store manager. (Id., 14:4-15:5.) In 1994, Williams interviewed with Valentine for the position of manager of the help desk. (Id., 23:11-18.) In the interview Valentine and Williams talked about, among other things, "[Williams's] qualifications; that I was in store management and a lot of calls that came in was from the store." (Id., 23:19-24:14.)

When Williams became the help desk manager he did not have a technical background, but he had experience working in AutoZone

¹³ It is not clear from the record when Williams became Powell's supervisor.

stores. (Powell dep., 89:16-21.) Williams testified that “[i]t wasn’t necessary that I had to know the technical side of computers because that was the techs position to solve those issues. I think my job when I moved into the position was more of managing and ensuring that we had the proper coverage of techs to be on position during call-in times.” (Williams dep., 28:2-9.)

Hendrickson had “very little technical background” when he was assigned to direct the help desk, but he had experience working in AutoZone stores. (Valentine dep., 107:1-20.) Valentine was not seeking a technology person because “we had a whole team of technology people there that could actually do that work. We were looking for somebody to build processes, the skill sets, all from the store point of view.” (Id., 110:10-21.) When Valentine decided to give the director position to Hendrickson, Valentine considered several candidates, including Powell. (Id., 107:21-108:3, 112:15-19.) Powell was not selected to direct the help desk because Valentine was “looking for somebody with AutoZone store operations” background. (Id., 112:15-22, 113:23-114:1.)

Powell testified that he felt better qualified to run the help desk than Williams or Hendrickson because neither Williams nor Hendrickson had a technical background. (Powell dep., 191-16-192:3.)

b. Analysis

AutoZone asserts that the EEOC cannot establish that Powell

had similar qualifications to those of Williams and Hendrickson for the position of Director of Help Desk Operations or that AutoZone's asserted reasons for giving the position to Williams and Hendrickson were pretextual.

The EEOC cannot establish its prima facie case because it has not shown that Powell had similar qualifications to Williams or Hendrickson. The undisputed evidence shows that experience working in AutoZone stores was a relevant, objective qualification for the position of Director of Help Desk Operations. Although answering calls on the help desk was a very technical job, the job of supervising the help desk did not require technical skill or a technical background. Instead, Valentine, the manager who created the objective qualifications for the position, wanted the help desk directors to bring a "store point of view" to the position.

The EEOC argues that AutoZone's argument is "completely contradicted by the evidence" because Powell testified that the job was technical and because Valentine acknowledged that Williams and Hendrickson did not have technical backgrounds. Powell's testimony is that the calls coming to the help desk were technical and that the job of working on the help desk was very technical. This evidence indicates that employees answering help desk calls needed to have a technical background. Powell's testimony does not suggest that the director of the help desk

would have been more effective if he or she had a technical background.

The EEOC also argues that Valentine promoted two Caucasian males, Mitchell and Brian Mallory ("Mallory"), who had little store experience. With this argument, the EEOC appears to suggest that store experience is not a relevant qualification that AutoZone considers in making promotions. However, the EEOC does not indicate what positions Mitchell and Mallory were promoted to occupy. In the EEOC's claim on behalf of Neeley, the EEOC asserts that Mitchell was promoted to document management coordinator. Assuming that is the promotion to which the EEOC refers in this claim, there is no reason to believe that AutoZone store experience would be a useful qualification for the position of document management coordinator. It is reasonable to assume that store experience is a relevant qualification for some positions and not for others.

Because AutoZone does not contest that Powell was qualified to be director of the help desk, it appears that store experience was not a required minimum qualification for the position. However, the undisputed evidence shows that experience working in AutoZone stores was an objective qualification that Valentine strongly preferred directors of the help desk to have. Williams and Hendrickson satisfied that qualification. Powell did not. Therefore, Powell did not have similar qualifications to Powell

and Hendrickson.

The EEOC has failed to establish its prima facie case. AutoZone's motion for summary judgment as to the EEOC's failure-to-promote claim on behalf of Powell is GRANTED.

5. Cecelia Taylor

The EEOC alleges that Cecelia Taylor ("Taylor") was discriminated against on the basis of her African-American race when she was denied a promotion to the position of help desk manager that was given to Brian Mallory ("Mallory"), a Caucasian.

a. Facts

In January 1996, Taylor was hired by AutoZone as a help desk analyst, answering calls from AutoZone stores and solving problems the stores were experiencing. (Taylor dep., 30:9-12, 26:8-27:13.)

Mallory was hired by AutoZone in 1992 into a management training program. (Mallory dep., 12:1-3, 13:6-12, 14:21-23.) Mallory left AutoZone after four or five months and was rehired in 1995. (Id., 15:16-19, 16:19-21.) When Mallory returned to AutoZone in 1995, he worked in AutoZone stores as a parts service manager and an assistant manager. (Id., 16:22-24, 27:20-28:13.) In April 1996, Mallory moved from store operations to technical support in the position of data center coordinator. (Id., 26:14-25.) In February 1997, he became manager of the help desk. (Id., 38:23-39:1.)

Mallory first learned about the help desk manager position from Jack Ingram ("Ingram"), the manger of operations and technical supports, and from Valentine. (Id., 38:22-39:2.)

Valentine explained that he and Ingram were:

looking for somebody that had store operations experience, management experience in the stores that had a knowledge and experience of dealing with the help desk and knew the issues that store personnel were dealing with; that could apply that knowledge to make the changes to the existing help desk, bringing that knowledge to the help desk.

(Id., 39:12-21.) Bascom, who was involved in the decision to move Mallory to the help desk supervisor position, testified that Mallory's experience as an assistant store manager helped make him a good candidate for the help desk supervisor position.

(Bascom dep., 75:2-12, 83:10-15.) Valentine offered Mallory the position, which Mallory accepted. (Mallory dep., 40:5-9.)

As help desk manager, Mallory supervised the managers who supervised the help desk analysts, handled employee discipline, and wrote performance appraisals. (Id., 45:24-47:8.) Answering calls to the help desk was not in his job description and he did not do so unless the help desk was short-handed. (49:22-50:12.) The supervisors who managed the help desk technicians helped Mallory learn how the help desk worked. (Id., 50:16-20.)

Taylor felt that she was more qualified than Mallory to be manager of the help desk because she had worked at the help desk longer than Mallory and because, when he first became manager, he

asked the help desk analysts for help. (Mallory dep., 37:9-15.) Taylor testified that she believes a qualified help desk manager should be capable of filling in for missing analysts, which Mallory was not able to do. (Id., 37:16-20.)

b. Analysis

AutoZone asserts that the EEOC cannot establish that Taylor had similar qualifications to Mallory for the position of help desk manager or that AutoZone's asserted reason for giving the position to Mallory was pretextual.

The EEOC has not established its prima facie case because there is no evidence that Taylor had similar qualifications to Mallory. Although Taylor had worked on the help desk longer than Mallory had, Mallory had experience working in AutoZone stores, which Taylor did not. Store experience was a qualification that Valentine wanted the help desk manager to have. That Taylor believes her help desk experience made her more qualified than Mallory does not indicate that Taylor and Mallory had similar qualifications for the help desk supervisor position. AutoZone's motion for summary judgment as to the EEOC's failure-to-promote claim on behalf of Taylor is GRANTED.

6. John Williams

The EEOC alleges that John Williams ("Williams") was discriminated against on the basis of his African-American race when he was denied promotions that could have led him to a

director's position and eventually the position of vice-president of design and construction received by David Gilmore ("Gilmore"), a Caucasian, in 1997.

a. Facts

Williams was hired by AutoZone in 1990 as a facility manager. (Williams dep., 35:24-36:10.) His responsibilities in that position included supervising employees and assisting with store construction design. (Id., 38:6-23.) Williams remained in that position until he left AutoZone in 1996 or 1997. (Id., 39:19-24.)

Williams testified that he was not treated as well as his Caucasian co-workers during his tenure at AutoZone. (Id., 44:5-46:10.) Williams's supervisor Jonathan Formanek ("Formanek") asked Williams to make sure that the plants and grounds were watered, which Williams found humiliating and degrading. (Id., 44:11-18.) Williams did not believe that Formanek would have made a similar request using the same demeanor and inflection to a Caucasian employee. (Id., 46:5-10.) Williams also complained that the way Lonnie Evans ("Evans"), a member of AutoZone senior management, spoke and acted towards Williams made him "extremely uncomfortable," and that Evans's behavior was racially motivated. (Id., 48:22-24, 50:14-51:12.)

Gilmore began working for AutoZone in 1984 as a manager trainee. (Gilmore dep., 15:22-24.) After approximately two years,

Gilmore left AutoZone and worked for a different company for two years. (Id., 17:12-18, 20:11-23.) In 1989 Gilmore returned to AutoZone. (Id., 22:5-10.) Over the next several years, Gilmore worked as an area supervisor managing several stores, a real estate manager, a regional real estate manager, director of store maintenance, and, finally, vice-president of real estate. (Id., 22:2-10, 22:14-17, 24:18-21, 30:2-4, 34:4-12, 42:22-43:2.)

b. Analysis

The EEOC asserts that, but for the "glass ceiling" in place at AutoZone, Williams might have enjoyed the "magic carpet ride into the AutoZone hierarchy" experienced by Gilmore. AutoZone argues that the EEOC cannot show that Williams was qualified for any of the various promotions Gilmore received, that Williams had similar qualifications to Gilmore, or that AutoZone's asserted reasons for promoting Gilmore are pretextual.

The EEOC's arguments about Williams's general poor treatment are not relevant to whether it can establish a prima facie failure-to-promote claim. Although alleged humiliating and degrading treatment might form the basis for a hostile-work-environment claim, a failure-to-promote claim requires evidence that the defendant failed to promote a particular employee to a particular position.

To establish its prima facie case, the EEOC must identify particular positions for which Williams was qualified and for

which he was rejected in favor of a non-African-American of similar qualifications. There is no evidence that Williams was qualified for any of the positions in which Gilmore worked, or that Williams and Gilmore had similar qualifications at any point in their careers. Therefore, the EEOC cannot establish its prima facie case based on any of the promotions given to Gilmore.¹⁴ AutoZone's motion for summary judgment as to the EEOC's failure-to-promote claim on behalf of Williams is GRANTED.

7. Mitzie Spell

The EEOC alleges that Mitzie Spell ("Spell") was discriminated against on the basis of her African-American race when she was denied promotions to the position of help desk manager, which was given to Mallory, and to the position of document management coordinator, which was given to Mitchell.

a. Facts

Spell was hired by AutoZone as a programmer in 1994. (Spell dep., 39:5-40:24; Spell employment application.¹⁵) As a programmer, Spell was responsible for writing and testing computer code. (Spell dep., 41:17-22.) She worked as a programmer

¹⁴ The EEOC asserts that "Williams should have been considered for a number of higher-level management positions[,] but that, "[f]or sake of brevity, Plaintiff presents here only the progression that could have led to a Director's position and eventually the Vice President of Design and Construction position given to David Gilmore[.]" (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 22.) Because the EEOC has not identified any promotions given to employees other than Gilmore, the EEOC cannot establish a prima facie case based on such promotions.

¹⁵ This document is attached as Exhibit 3 to Spell's deposition.

for the duration of her employment at AutoZone. (Id., 43:13-17.)

Before being hired by AutoZone, Spell had earned a bachelor's degree in computer science and had worked for the North Carolina Highway Patrol doing programming and for Northern Telecom developing tests for telephone switches. (Id., 24:16-23, 30:2-17.)

Mallory became help desk manager in February 1997, after having spent some time working in AutoZone stores. (Mallory dep., 38:23-39:1.) Valentine hired Mallory, in part, because Mallory had store operations experience. (Id., 39:12-21.)

Mitchell became the document management coordinator in October 1997. (Neeley dep., 60:20-61:14.) He had previously worked in the micro systems group as a support analyst and in the decisions support group. (Mitchell dep., 20:4-7, 21:19-23.)

b. Analysis

AutoZone asserts that the EEOC cannot show that Spell was qualified for the positions of help desk manager or document management coordinator or that Spell had similar qualifications to Mallory and Mitchell. AutoZone also asserts that the EEOC cannot show that AutoZone's asserted reasons for promoting Mallory and Mitchell were pretextual.

The EEOC asserts the "[t]he evidence is clear that Spell was qualified" for the positions of help desk manager and document management coordinator. That Spell had received a bachelor's

degree in computer science and had several years of experience as a programmer does not indicate that she satisfied the minimum objective criteria for the positions Mallory and Mitchell received. There is no evidence in the record showing what the minimum objective qualifications for those positions were and, therefore, there is no basis from which a reasonable jury could conclude that Spell had satisfied those qualifications.

There is also no evidence that Spell had qualifications similar to Mallory or Mitchell. The evidence indicates that experience working in AutoZone stores was a relevant objective qualification for the help desk supervisor position. Because Mallory had that experience and Spell did not, they did not have similar qualifications. Spell and Mitchell did not work in any of the same positions at AutoZone, and there is no evidence that they had similar qualifications as to any relevant objective qualification for the document management coordinator position.

Because the EEOC cannot establish its prima facie case, AutoZone's motion for summary judgment as to the EEOC's failure-to-promote claim on behalf of Spell is GRANTED.

8. Lisa Loesel

The EEOC alleges that Lisa Loesel ("Loesel") was discriminated against on the basis of her female sex when she was denied a promotion to the position of senior real estate manager when five males were promoted to that position.

a. Facts

Loesel was hired by AutoZone in April 1993 as a real estate manager. (Loesel dep., 25:3-12, 33:11-16, 33:20-22.) In that position, Loesel was involved in selecting property for AutoZone to acquire, ensuring that the property was zoned properly, and acquiring the property. (Id., 41:14-42:5.) After AutoZone had purchased a property, Loesel would transfer that property to an AutoZone architect. (Id., 43:12-18.) Those transfers were called "exchanges." (Id., 43:16-18.) All real estate managers were expected to meet department goals by making a certain number of exchanges over a certain period of time. (Id., 43:8-23.)

David Barczak ("Barczak") was Loesel's supervisor from her hiring until he was promoted in approximately 1994 or 1995. (Id., 40:22-24, 44:8-19, 46:5-13.) Loesel then reported to Jack Willis for approximately two years. Bart Watt became her supervisor in approximately May 1996. (Id., 44:8-13, 45:14-19, 46:15-21.)

In September 1994, Barczak gave Loesel a performance evaluation stating that she needed improvement in attention to detail, analysis, patience, and use of resources. (Id., 48:3-49:15; September 1994 performance evaluation.¹⁶) The evaluation states that Loesel's overall performance "achieves requirement," meaning that she had met the "[e]xpected performance with occasional direction and supervision." (September 1994

¹⁶ This document is attached as Exhibit 2 to Loesel's deposition.

performance evaluation.) Loesel testified that the evaluation was a fair appraisal of her work at the time. (Loesel dep., 48:22-24.)

In October 1996, Watt and Barczak gave Loesel a performance evaluation stating that she needed improvement in completing projects and tasks in a timely manner, completing pending deals before taking on new projects, and time management. (Id., 51:4-52:3, 53:17-54:1.) Watt had concerns about the number of exchanges Loesel was completing. (Id., 52:19-21.) Loesel's managers also had some concern about her teamwork and ability to work with other employees. (Id., 68:9-12.) Loesel's overall performance was rated as achieving job expectations, and she received a \$2,500 raise. (Id., 54:11-16.)

On April 4, 1997, Barczak created a new position of senior real estate manager and promoted five real estate managers into that position. (Id., 60:22-61:18; April 11, 1997 Loesel letter.¹⁷) A senior real estate manager performed the same functions as a real estate manager and also trained younger real estate managers. (Loesel dep., 63:2-10.)

In a meeting, Barczak announced the creation of the position and the promotion of the five employees. (Id., 60:8-16, 61:10-15.) The five employees promoted into the new position were Jim Newberry ("Newberry"), Grant Reed ("Reed"), Rexford Martin

¹⁷ This document is attached as Exhibit 5 to Loesel's deposition.

("Martin"), Earl Grubbs ("Grubbs"), and Robert Guera ("Guera").¹⁸ (Id., 68:19-21, 73:2-4.) Loesel testified that Barczak said he promoted those employees "he believed were proficient in real estate." (Id., 61:6-9.)

On April 11, 1997, Loesel wrote a letter to Barczak stating that she believed that the promotions were unjust and asking him to give "an explanation to me and all other team members of your decision and the basis thereof[.]" (April 11, 1997 Loesel letter.)

On May 7, 1997, Loesel filed a charge of discrimination with the EEOC, stating that she believed she was denied a promotion to the senior real estate manager position based on her sex. (Loesel EEOC charge.)¹⁹ In the charge, Loesel states that Barczak told her that she had not been promoted because she lacked sufficient communications skills and the ability to train others. (Id.)

Loesel testified that there were no criteria for the job description of senior real estate manager and that Barczak chose which people to promote into that position entirely in his discretion. (Loesel dep., 74:19-75:2.) She also testified that

¹⁸ AutoZone asserts that the EEOC contends that Loesel was more qualified than Jerry Wagley for the senior real estate manager position. (Def.'s Mem. in Supp. of Mot. for Summ. J., p. 48.) However, Wagley was not one of the five employees promoted to senior real estate manager in April 1997, and the EEOC does not mention Wagley in its response memorandum. Wagley's testimony also suggests that he did not serve as a senior real estate manager; Wagley testified that he was promoted from real estate manager to regional real estate manager. (Wagley dep., 17:5-9.) Therefore, it appears that the EEOC does not intend to assert a claim based on Wagley's possible promotion to senior real estate manager.

¹⁹ This document is attached as Exhibit 7 to Loesel's deposition.

she did not know what criteria Barczak used to determine whom to promote, including whether he considered organizational skills, getting along with coworkers, communication skills, or teamwork. (Id., 76:10-14.)

When the promotions to senior real estate manager were made, Loesel's quota for exchanges to make in the year had been reduced because she had not met her previous goals. (Id., 65:16-66:14.) Loesel testified that "what counts is exchanges" in determining whether a real estate manager should be promoted and she "may have had more exchanges and experience than some of the members that were promoted." (Id., 75:25-76:3.) She also testified that she did not know whether she had more experience or exchanges than the people who were promoted, and she did not know whether any of those men had had their exchange goals reduced. (Id., 75:25-76:9.)

While earning her undergraduate degree Loesel spent her summers helping her father manage the commercial and residential real estate that he owned, including finding tenants and leasing and managing properties. (Id., 18:25-20:18.) While working towards earning a master's degree, Loesel worked part time for a builder construction company. (Id., 22:18-24:23.) Loesel earned her master's degree in business administration with a concentration in real estate in 1993. (Loesel dep., 21:15-22:9.) Immediately after earning her master's degree, Loesel joined

AutoZone. (Id., 24:25-25:8.)

Loesel testified that she had no information about Reed's real estate background or qualifications and she believed that Martin had "real estate and educational background." (Id., 72:5-18.) She also testified that she believed she had more real estate experience and education background than Grubbs (70:3-8.) The basis for her belief was that she understood that he had retired from the military and worked for an appraisal company before joining AutoZone. (Id., 70:16-24.) Loesel also testified that she knew she had more real estate and educational background than Guera, although she did not know anything about his background or job performance. (Id., 73:12-23.)

Grubbs earned a master's degree in transportation management in 1980 and worked in real estate from 1991 until 1994 before joining AutoZone as a real estate manager in 1995. (Grubbs dep., 10:23-11:6, 12:2-22, 17:15-19.) He testified that he believed Loesel had as much real estate education and experience as any of the other real estate managers. (Id., 19:22-20:4, 24:13-14.) Grubbs also testified that he believed that Barczak "was not overly fond" of Loesel and that Barczak's decision not to promote her was "personality driven." (Id., 21:9-10, 24:17-19.)

b. Analysis

AutoZone asserts that the EEOC cannot show that Loesel was qualified for the position of senior real estate manager or that

Loesel had similar qualifications to any of the males who were promoted. AutoZone also asserts that the EEOC cannot show that AutoZone's asserted reasons for promoting the five males were pretextual.

Loesel testified that there were no objective criteria for the position of senior real estate manager and that Barczak used his discretionary assessment of subjective criteria to determine whom to promote. Therefore, a question of material fact remains about whether there were any objective criteria for the position.

Only objective criteria can be considered at the prima facie stage to determine whether an employee was qualified for a position or had similar qualifications to any other employee. If there were no minimum objective requirements for the position of senior real estate manager, Loesel would be qualified for the position. There is also a disputed question of material fact about whether Loesel had similar qualifications to any of the men who were promoted. Both Loesel and Grubbs had masters degrees in potentially relevant fields and, while Grubbs had worked in real estate for three years before joining AutoZone, Loesel had acquired real estate experience working part-time and during the summers while she went to school. Loesel and Grubbs both testified that Loesel had similar education and experience to the other real estate managers. Because a reasonable jury could find that Loesel had similar objective qualifications to the men who

were promoted, the EEOC has established its prima facie case.

AutoZone asserts that it has a legitimate, non-discriminatory reason for promoting other employees over Loesel: Loesel lacked sufficient communication skills and the ability to train others.

The EEOC asserts that AutoZone's asserted reason for failing to promote Loesel is pretextual. Pretext can be established by showing one of the following: (1) that the proffered reason had no basis in fact; (2) that the proffered reason did not actually motivate the adverse action; or (3) that the proffered reason was insufficient to motivate the adverse action. Tuttle v. Metro. Gov't of Nashville, 474 F.3d 307, 319 (6th Cir. 2007). A court may not reject an employer's explanation unless there is a sufficient basis in the evidence for doing so. Gray v. Toshiba Am. Consumer Prods., 263 F.3d 595, 600 (6th Cir. 2001).

There is no evidence in the record to suggest that AutoZone's asserted reason for failing to promote Loesel was pretextual. Loesel testified that her supervisors were concerned about her dedication to teamwork and her ability to work with other employees. Grubbs testified that Barczak's decision not to promote Loesel was based on her personality. There is no evidence that Barczak or other supervisors had concerns about the abilities of Newberry, Reed, Martin, Grubbs, or Guera, or their personalities, teamwork skills, or ability to work with others.

The EEOC argues that Loesel's inter-personal skills were insufficient to prevent her promotion because AutoZone "was willing to tolerant [sic] work traits in [Newberry] that it sharply criticized in Ms. Loesel." (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 33.) In support of this argument, the EEOC cites unauthenticated copies of Newberry's employment evaluations.²⁰ These documents cannot be considered on a motion for summary judgment.

Even if the unauthenticated Newberry employment evaluations could be considered, they would not indicate pretext. None of the evaluations reflects concerns about Newberry's interpersonal or teamwork skills. Newberry's October 1996 evaluation, completed six months before the promotions to senior real estate manager, states that Newberry "consistently exceeds expectations" in communication and cooperation, including working well as a teamplayer and demonstrating effective interpersonal skills and two-way communication.²¹ Loesel's evaluation for October 1996 indicates that Loesel achieved job expectations in communication

²⁰ Attached as Exhibit Y to AutoZone's memorandum in support of its summary judgment motion are documents that appear to be Newberry's employment application to AutoZone and various performance evaluations for Newberry. Performance appraisals for Newberry are also included as Exhibit 39 to the EEOC's response in opposition to AutoZone's motion for summary judgment. None of these documents is authenticated.

²¹ The EEOC also cites an unauthenticated copy of Newberry's September 1999 evaluation, which states that Newberry needed to improve his cooperation with other departments. Because this evaluation was made more than two years after Newberry had been promoted to senior real estate manager, it has no relevance in establishing whether Newberry had problems working as a team player when he was promoted.

and cooperation and that she needed to improve at working as a team player.

Because there is no evidence indicating that AutoZone's asserted legitimate, non-discriminatory reason for failing to promote Loesel was pretextual, AutoZone's motion for summary judgment as to the EEOC's failure-to-promote claim on behalf of Loesel is GRANTED.

B. Failure to Hire

To establish a failure-to-hire claim through circumstantial evidence, the plaintiff must show that: (1) the applicant belongs to a protected class; (2) the applicant applied and was qualified for a job for which the employer was seeking applicants; (3) despite the applicant's qualifications, he or she was rejected; and (4) the applicant was rejected in favor of another person with similar qualifications who was not a member of the applicant's protected class. McDonnell Douglas, 411 U.S. at 802; Betkerur v. Aultman Hosp. Ass'n, 78 F.3d 1079, 1095 (6th Cir. 1996). If the position was not filled at the time the applicant was rejected, the plaintiff can establish the fourth prong of its prima facie case by showing that "the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." White, 429 F.3d at 240 n.3 (quoting McDonnell Douglas, 411 U.S. at 802).

When a plaintiff has established a prima facie case of

discrimination, the burden shifts to the employer to put forth a legitimate, non-discriminatory reason for its action. McDonnell Douglas, 411 U.S. at 802. Once an employer has offered such a reason, the plaintiff must show that this reason is merely a pretext. Id. at 805.

Because the EEOC has not presented any direct evidence of discrimination, the McDonnell Douglas test is the applicable standard in considering the EEOC's failure-to-hire claims.

The EEOC alleges that AutoZone failed to hire one African-American male because of his race and sixteen female applicants because of their sex. The Court will address each claim individually.

1. Marion McClendon

In its "Statement of Remaining Issues and Designation of Remaining Claimants" filed October 17, 2006, the EEOC stated that it intended to pursue a claim for failure to promote because of African-American race on behalf of Marion McClendon ("McClendon"). The EEOC did not assert that it intended to file a failure-to-hire claim on McClendon's behalf.²²

Relying on the EEOC's stated intentions, AutoZone sought summary judgment on the EEOC's failure-to-promote claim on behalf of McClendon. In its response to AutoZone's motion, the EEOC

²² McClendon was hired by AutoZone in late 1995 after unsuccessfully applying for a position with the company in early 1995. (McClendon dep., 30:9-31:12, 48:6-8.)

asserts that "[a]t the outset it should be noted that the Commission inadvertently listed Mr. McClendon as having a claim that Defendant failed to promote him instead of failing to hire him." (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 19.) In its reply brief, AutoZone asserts that the EEOC "should be held to its designation and should not be allowed to change its position at this critical point in the case." (Def.'s Reply Mem. in Supp. of Mot. for Summ. J., p. 8.)

The EEOC asserts that it should be permitted to pursue a failure-to-hire claim on McClendon's behalf because AutoZone "has not been prejudiced or blindsided by the EEOC's error." (Pl. EEOC's Sur-Reply to Def.'s Reply for Summ. J., p. 3.) The EEOC filed a motion for summary judgment in this case on July 8, 2005, to which the EEOC responded on July 25, 2005. In its response, the EEOC asserted that AutoZone discriminatorily hired Peter Stein ("Stein") as a construction project manager in the spring of 1995 instead of McClendon.²³ (EEOC's July 25, 2005 response in opposition to Autozone's July 8, 2005 motion for summary judgment, p. 33.) AutoZone addressed the EEOC's claim based on the hiring of Stein in its August 12, 2005 reply brief.

a. Facts

In 1994, McClendon earned a bachelor's degree in engineering

²³ In its July 8, 2005 motion for summary judgment, AutoZone had indicated that it believed the EEOC was asserting that the job for which McClendon had applied was given to Timothy Jagneaux. (Memorandum in support of AutoZone's July 8, 2005 motion for summary judgment, p. 84.)

construction technology. (McClendon dep., 8:12-9:4.) After graduating, he mailed his resume to AutoZone several times. (Id., 21:21-22:10, 24:12-23, 25:3-8, 26:7-10.) McClendon was not responding to particular advertisements for positions, but was "cold mailing" his resume to AutoZone's human resources department. (Id., 21:23-22:10, 24:13-16, 26:7-13.)

In the spring of 1995, AutoZone interviewed McClendon for two positions, a drafting position and a project manager position. (Id., 30:7-11, 31:5-12.) At the interview, the interviewers told McClendon, "in a roundabout way," that he didn't have the skills or qualifications that they needed.²⁴ (Id., 31:13-23.) McClendon was not hired for the drafting or the project manager position. (Id., 38:15-18.)

Stein applied for and received a construction project manager position with AutoZone in April 1995. (Dobbs decl., ¶ 2;²⁵ Stein employment application.²⁶) James Dobbs ("Dobbs") approved Stein's hiring for the position.²⁷ (Dobbs. decl., ¶ 2.)

²⁴ McClendon could not recall who interviewed him in the spring of 1995. (McClendon dep., 30:13-24, 35:24-36:2.)

²⁵ James R. Dobbs served as AutoZone's Director of Store Construction in 1995. (Dobbs decl., ¶ 1.)

²⁶ This document is attached as Exhibit 1 to Dobbs's declaration.

²⁷ The EEOC "objects to the introduction of Mr. Dobb's [sic] evidence, as Defendant never disclosed Mr. Dobbs as a potential witness so that the EEOC could have deposed him." (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 41.)

AutoZone first relied on Dobbs's declaration in its memorandum in support of its July 8, 2005 motion for summary judgment. (Def.'s July 8, 2005 Mem. in Support of Mot. for Summ. J., p. 67.) The EEOC contends that AutoZone is not prejudiced by the EEOC's assertion of a failure-to-hire claim on

Stein had recently received a bachelor's degree in construction management, and he was recommended for hire by an existing AutoZone field project manager, Carter Vecerer ("Vecerer"). (Dobbs decl., ¶ 2.)

In the fall of 1995 McClendon again sent his resume to AutoZone, this time in response to an advertisement for a project manager position. (McClendon dep., 26:23-27:13.) AutoZone contacted McClendon in late 1995 and scheduled an interview. (Id., 44:15-22.) Dobbs interviewed McClendon for a construction estimator position, which was a position in which McClendon was interested. (Id., 45:11-46:3.) Dobbs offered McClendon the job on the spot. (Id., 49:21-24.) McClendon began working for AutoZone in February 1996. (Id., 21:14-16.)

b. Analysis

For purposes of this motion, the Court assumes, arguendo, that the EEOC's failure-to-hire claim on McClendon's behalf is properly presented.

AutoZone asserts that there is no evidence indicating that its stated legitimate, non-discriminatory reason for hiring Stein was is pretextual.²⁸ AutoZone asserts that it hired Stein for the

McClendon's behalf because that claim was raised in the EEOC's July 25, 2005 response to AutoZone's July 8, 2005 motion. By the same logic, the EEOC is not prejudiced by AutoZone's reliance on Dobbs's declaration, which was disclosed before the EEOC asserted its failure-to-hire claim.

²⁸ Because AutoZone does not dispute that the EEOC can establish its prima facie case, the Court does not address that issue.

project manager position because he was qualified and because Vecerer recommended Stein for the position. A reasonable jury could find that a current employee's recommendation of a particular applicant is a legitimate, non-discriminatory reason to prefer that applicant over another.

There is no evidence in the record indicating that AutoZone's asserted reason for hiring Stein is pretextual. There is no evidence that the recommendation did not occur, and thus that the asserted reason has no basis in fact. There is also no evidence that Vecerer's recommendation did not actually motivate Dobbs to hire Stein instead of McClendon. Finally, there is no evidence that AutoZone routinely ignored hiring recommendations from employees or from Vecerer specifically. Because there is not a sufficient basis in the evidence for rejecting AutoZone's explanation for hiring Stein over McClendon, the Court is not free to do so.

Because there is no evidence that AutoZone's stated legitimate, non-discriminatory reason for hiring Stein instead of McClendon is pretextual, AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of McClendon is GRANTED. Because the EEOC states that it did not intend to assert a failure-to-promote claim on McClendon's behalf, AutoZone's motion for summary judgment on that claim is also GRANTED.

2. Katie Berry

The EEOC alleges that Katie Berry ("Berry") was discriminated against on the basis of her female sex when Robert Anno ("Anno"), a male, was hired instead of Berry to be a transportation manager for AutoZone in October 2000.

a. Facts

Berry sent two copies of her resume to AutoZone in July 2000. (Berry dep., 9:8-22, 10:5-10.) Although Berry intended to apply for a traffic coordinator or traffic manager position, she did not fill out an application for employment. (Id., 9:8-10.) She did not receive an interview or any other response from AutoZone, and she did not telephone AutoZone to ensure that they had received or reviewed her resume. (Id., 10:16-25.)

Before applying to AutoZone, Berry had completed three years of undergraduate college education and had earned a one-year certification in telecommunications. (Id., 14:8-20.) She had not earned a college degree. (Id., 15:15-16.) For four years, until January 2000, Berry owned and operated a trucking company called KDS Express Delivery.²⁹ (Id., 22:12-14.) Although Berry had significant other work experience, none of her other experience was in the transportation industry when she sent her resume to

²⁹ Although neither party cites admissible evidence stating when Berry created KDS Express, the parties agree that Berry owned and operated the company for four years. (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 33; Def.'s Reply Mem. in Supp. of Mot. for Summ. J., p. 13.)

AutoZone.³⁰ (Id., 16:6-15, 18:3-9, 20:1-18, 21:12-22:6.)

In July 2000, AutoZone hired Anno as an "operations manager transportation," also known as a "regional transportation manager."³¹ (Anno dep., 23:13-16, 54:16-19.) Before applying to AutoZone, Anno had worked in transportation for Frito Lay for at least five years.³² (Id., 17:1-24, 18:12-15.) He had also run a warehouse for Frito Lay (id., 18, 1-9), but it is not clear how long he held that position or whether Anno worked with transportation while in that position. Anno had also earned a college degree and taken at least some graduate level courses.³³ (Id., 15:5-7, 22:3-12, 35:14-18.)

When Anno applied to AutoZone, he sent his application to Terry Lawrence, an AutoZone employee with whom Anno had attended

³⁰ In July 2000, the same month that Berry sent her resume to AutoZone, she also crated a new company called Bandella that does the same trucking work that KDS Express did. (Id., 22:5-21.)

³¹ The EEOC asserts that "regional transportation manager" and "operations manager of transportation" are different positions. (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 34.) In support of this assertion, the EEOC cites Anno's testimony that "[t]he exact job title is operations manager transportation." (Anno, 39:19-20.) However, Anno also testified that he applied for a specific position, which was "either advertised as a regional transportation manager or operations manager transportation." (Id., 23:9-16.) This indicates that the two titles refer to the same position, and there is no evidence to the contrary.

³² Anno testified that he worked as a logistics network supervisor for two years, and a fleet safety manager for three years (Anno dep., 17:1-24, 18:12-19:10.) AutoZone asserts that Anno had eleven years of experience as a fleet manager, but the evidence does not support that assertion. Although Anno worked for Frito Lay for approximately eleven years (id., 16:8-10, 21:13-18, 54:16-18), it is not clear that all of that time was spent in transportation. AutoZone cites Anno's employment application in support of the assertion that he had eleven years of transportation experience, but the application is not authenticated and, therefore, cannot be considered on a motion for summary judgment.

³³ It is not clear from the record whether Anno earned a graduate degree or in what field he took graduate courses.

graduate school. (Id., 22:3-12.) Lawrence submitted Anno's resume through the AutoZone referral system, and Anno was later contacted by an AutoZone supervisor who had received the referral from Lawrence. (Id., 22:16-23:5.)

Although both parties have submitted purported job descriptions for the position of regional transportation manager,³⁴ the documents are not authenticated and, therefore, cannot be considered on a motion for summary judgment.

b. Analysis

AutoZone asserts that the EEOC cannot establish that Berry applied for or was qualified for the transportation manager position or that she had similar qualifications to Anno. AutoZone also asserts that the EEOC cannot show that AutoZone's asserted reasons for hiring Anno are pretextual.

AutoZone cannot establish its prima facie case. There is no evidence that Berry applied for the regional transportation manager/operations manager transportation position. Berry testified that she submitted her resume for the positions of traffic coordinator or traffic manager, and there is no evidence that those positions are the same as the position given to Anno. Because Berry did not fill out an application, it was not clear

³⁴ AutoZone submitted a job description dated June 20, 2001 for "Regional Transportation Manager" as Exhibit GG to its memorandum in support of its motion for summary judgment. The EEOC submitted an undated job description for "Manager, Transportation Regional DC" as Exhibit 43 to its response in opposition to AutoZone's motion for summary judgment.

to AutoZone for which position Berry intended to apply.

There is also no evidence that Berry was qualified for the regional transportation manager position. Because there is no admissible evidence in the record showing the required qualifications for that position, there is no evidence from which a reasonable jury could conclude that Berry was qualified for the position. The burden is on the EEOC to produce evidence that Berry was qualified for the regional transportation manager position, and it has failed to do so.

Because the EEOC has not established its prima facie case, AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Berry is GRANTED.

3. Nina Sue Holland Williamson

The EEOC alleges that Nina Sue Holland Williamson ("Williamson") was discriminated against on the basis of her female sex when Kenneth Stokes ("Stokes"), a male, was hired instead of Williamson to be a security guard for AutoZone in January 1999.

a. Facts

Williamson twice applied for a security officer position at AutoZone, first in 1995 or early 1996 and again in 1998.

(Williamson dep., 23:13-24:5, 40:7-14.) She did not receive any response to either application from AutoZone, and she did not telephone AutoZone to inquire about the status of her

application. (Id., 31:5-24, 40:15-17.)

Williamson had earned a bachelor's degree in criminal justice in 1990, and she had attended one semester of graduate school.³⁵ (Id., 13:5-14.) From 1988 through 1997, Williamson worked in security for the Memphis Housing Authority ("MHA"), and for that position she attended and was graduated from the Memphis police academy. (Id., 23:24-24:5, 24:20-25:1.) From 1996 to 1998, Williamson also worked as a corporate security officer for Memphis Light, Gas & Water.³⁶ (Id., 23:16-24:16.)

In 1997, Williamson's supervisors at the MHA told her that they were beginning an investigation into something that they believed she had done. (Id., 28:22-29:6.) Williamson was never told what her supervisors were investigating. (Id., 29:14-15.) She was placed on leave for six months, and her employment was terminated in 1998. (Id., 29:4-6, 23:24-24:5.) No charges were ever brought against Williamson. (Id., 29:7-13.)

The parties agree that AutoZone hired Kenneth Stokes ("Stokes") as a security guard in 1999, but that Stokes failed to show up for work on his first day and was never put to work. AutoZone does not have Stokes's application on file, and there is no evidence in the record of Stokes's qualifications.

³⁵ The subject of Williamson's graduate school courses is not clear from the record.

³⁶ The evidence suggests that Williamson worked part-time for Memphis Light, Gas & Water while working for the MHA. (Williamson dep., 29:24-30:17.)

b. Analysis

AutoZone asserts that the EEOC cannot establish that Williamson was qualified to be a security guard for AutoZone or that Williamson had similar qualifications to Stokes. AutoZone also asserts that the EEOC cannot show that AutoZone's stated reason for hiring Stokes instead of Williamson was pretextual.

The EEOC cannot establish its prima facie case because there is no evidence that AutoZone gave the security guard position for which Williamson applied to a male with similar qualifications. The record contains no evidence of Stokes's educational background, security experience, or other qualifications.³⁷ Therefore, no reasonable jury could find that Williamson and Stokes had similar qualifications.

The EEOC also asserts that, "[c]onsidering her objective qualifications in 1995 [when she first applied to AutoZone], Ms. Holland-Williamson was better qualified than most of the men who were hired by AutoZone during that year." AutoZone's policy in 1995 was to consider employment applications active for ninety days after they were submitted. (2d Branum decl., ¶ 7.) After ninety days, the application would not be considered unless the applicant submitted a renewed application. (Id.)

Because it is not clear when in 1995 or early 1996

³⁷ The EEOC has not alleged that AutoZone has withheld or improperly disposed of Stokes's application or other records.

Williamson applied to AutoZone, it is not clear whether AutoZone hired any male security guards while Williamson's application was active or, if so, whether Williamson had similar qualifications to the men who were hired. Therefore, the EEOC has not established its prima facie case based on Williamson's 1995 or 1996 application.

Because there is no evidence that Williamson was rejected for a security guard position in favor of a male with similar qualifications, the EEOC cannot establish its prima facie case. AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Williamson is GRANTED.

4. Lucinda Jones

The EEOC alleges that Lucinda Jones ("Jones") was discriminated against on the basis of her female sex when Scott Lawhorn ("Lawhorn"), a male, was hired instead of Jones to be a construction project manager for AutoZone in August 1999.

a. Facts

The parties agree that Jones applied for a field construction manager or site development manager job at AutoZone in 1994.³⁸ When she applied to AutoZone, Jones had five years of

³⁸ AutoZone asserts that Exhibit JJ to its memorandum in support of its motion for summary judgment contains "Jones Documents." Exhibit JJ does not contain those documents and is, instead, a document entitled "Plaintiff Equal Employment Opportunity Commission's Expert Witness Disclosure." None of the attachments to AutoZone's memorandum appears to contain employment documents pertaining to Jones, except that Jones's resume is attached as Attachment 2 to AutoZone's Exhibit KK, which is the Declaration of James R. Dobbs Concerning Employment of Scott Lawhorn.

The EEOC cites the following documents in support of its argument on

experience in the development and construction of two regional malls in Louisiana and eleven years of experience dealing with municipal officials and organizations to obtain favorable zoning classifications for real estate projects. (Jones resume.)³⁹

Lawhorn applied for a project manager position at AutoZone in July 1994. At the time of his application, Lawhorn had two years of experience as an assistant project manager on construction projects. (Lawhorn employment application.)⁴⁰

Dobbs was responsible for hiring Lawhorn as a construction project manager in 1994. (Dobbs decl. re. Lawhorn, ¶ 2.) The position was an entry-level position, which "coincided with Mr. Lawhorn's relatively short tenure in the business." (Id.) Dobbs stated that, based on her resume, "Jones was overqualified for the entry level position filled by Mr. Lawhorn."⁴¹ (Id., ¶ 3.)

b. Analysis

AutoZone asserts that the EEOC cannot establish that Jones applied for or was qualified for the construction project manager

behalf of Jones, all of which are exhibits to its memorandum in opposition to AutoZone's motion for summary judgment: (1) Exhibit 51, various personnel documents related to Jones; (2) Exhibit 52, a document entitled "New Hires"; and (3) Exhibit 53, an application for employment at AutoZone apparently filled out by Lawhorn. None of those documents is authenticated.

³⁹ This document is attached as Attachment 2 to the Declaration of James R. Dobbs Concerning Employment of Scott Lawhorn.

⁴⁰ This document is attached as Attachment 1 to the Declaration of James R. Dobbs Concerning Employment of Scott Lawhorn.

⁴¹ Although Dobbs did not recall reviewing Jones's resume when he hired Lawhorn, Dobbs reviewed Jones's resume before creating his declaration. (Dobbs decl. re. Lawhorn, ¶ 3.)

position or that she had similar qualifications to Lawhorn. AutoZone also asserts that the EEOC cannot show that AutoZone's asserted reason for rejecting Jones for the position was pretextual.

Assuming that the EEOC can establish its prima facie case, it has failed to show that AutoZone's asserted reason for hiring Lawhorn instead of Jones is pretextual. Where an employer asserts that a job applicant was over qualified, "[a]lthough that means [the applicant] was qualified for purposes of the prima facie case, once the burden shifts to [the defendant], [the applicant's] over-qualification constitutes a legitimate, non-discriminatory reason for rejecting [her] for the open positions." Sembos v. Philips Components, 376 F.3d 696, 701 n.4 (7th Cir. 2004).

The EEOC asserts that "[a] jury might decide that being 'overqualified' for this position was a pretext for discrimination." However, there is no evidence in the record indicating that AutoZone's explanation is pretextual, and a jury may not reject an employer's explanation unless there is a sufficient basis in the evidence for doing so. Gray, 263 F.3d at 600. Here, there is no basis in the evidence for rejecting AutoZone's assertion that Lawhorn was hired instead of Jones for the construction project manager because Jones was overqualified.

Because there is no evidence that AutoZone's proffered

legitimate, non-discriminatory reason for failing to hire Jones is pretextual, AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Jones is GRANTED.

5. Nancy Murray

The EEOC alleges that Nancy Murray ("Murray") was discriminated against on the basis of her female sex when Neil Loftiss ("Loftiss"), a male, was hired instead of Murray to be a manager of compensation for AutoZone in 1997.

a. Facts

Murray applied for a human resources position with AutoZone in the spring of 1997. (Murray dep., 24:11-14, 25:8-16.) About one week after mailing her resume to AutoZone, Murray called the company to verify that it had received her application and to inquire if interviews were being scheduled. (Id., 28:17-21.) She was told that AutoZone had received her resume and that it was in the process of scheduling interviews. (Id., 28:19-21.) Murray called AutoZone again two weeks later and was told that interviews had been scheduled and that she would not be interviewed. (Id., 29:7-9.) When Murray asked if she could speak with someone about why she did not receive an interview, she was told that she could not. (Id., 29:9-11.) She was not given an explanation of why she would not be interviewed. (Id., 29:16-20.)

When Murray applied to AutoZone she had a master's degree in industrial and organization psychology. (Id., 13:1-9.) She also

had extensive experience in recruiting and employee compensation and had attended numerous corporate training courses. (Id., 13:11-14:21, 17:5-24, 18:8-17, 20:7-22:9.)

Loftiss was hired by AutoZone as a manager of compensation in August of 1997. (Loftiss dep., 16:16-20.) At that time he had a bachelor's degree in human resources. (Id., 10:5-7.) In 1982 Loftiss began working for Federal Express, where he worked until transferring to AutoZone in 1997. (Id., 10:16-20.) Loftiss served in various positions at Federal Express, including manager of personnel information systems and compensation advisor. (Id., 12:24-25, 14:3-5.) He had also attended several compensation seminars and training courses. (Id., 15:8-21.)

While working as a compensation advisor at Federal Express, Loftiss worked with AutoZone on a project in which AutoZone was "benchmarking" its human resources systems and compensation procedures with Federal Express. (Id., 16:23-17:4.)

"Benchmarking" involves two companies sharing information about their systems, processes, and procedures to determine if either company could benefit from the other's knowledge. (Id., 17:11-23.) One of the people at AutoZone with whom Loftiss worked on the benchmarking project was Libby Rabun, then AutoZone's Director of Compensation and Benefits. (Id., 17:23-18:14; Rabun decl., ¶ 1.)

In early 1997, Rabun called Loftiss and told him that

AutoZone was seeking a manager of compensation and asked whether Loftiss would be interested in applying. (Loftiss dep., 17:5-10, 18:1-6.) Loftiss submitted his resume to Rabun and, after attending several interviews, was offered and accepted the position. (Id., 18:15-19:22.)

Rabun states that she and Buck Brown ("Brown"), the Vice President of Human Resources at AutoZone, were very impressed with Loftiss when they worked with him on the benchmarking project. (Rabun decl., ¶ 2.) Based on their experience with him, Rabun and Brown agreed that Loftiss "would be ideal" for the compensation manager position. (Id.) Rabun asserts that Loftiss was hired "because of his education, certifications and work experience, and particularly because of his knowledge concerning the Federal Express compensation program[,] which we were looking to implement to a large extent." (Id.)

b. Analysis

AutoZone asserts that the EEOC cannot establish that Murray was qualified for the compensation manager position or that she had similar qualifications to Loftiss. AutoZone also asserts that the EEOC cannot show that AutoZone's asserted reason for giving the position to Loftiss was pretextual.

Assuming that the EEOC can establish its prima facie case, it cannot succeed on its failure-to-hire claim on Murray's behalf because there is no evidence that AutoZone's stated reason for

hiring Loftiss instead of Murray was pretextual. AutoZone asserts that Loftiss was hired because of his particular knowledge about Federal Express's compensation program and because he had previously worked with and impressed senior managers within AutoZone's human resources department. There is no evidence in the record that suggests these legitimate, non-discriminatory reasons are pretextual. Therefore, AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Murray is GRANTED.

6. Deborah Gilbert-Fortune

The EEOC alleges that Deborah Gilbert-Fortune ("Gilbert-Fortune") was discriminated against on the basis of her female sex when Stein was hired instead of Gilbert-Fortune to be a construction project manager for AutoZone in May 1995.⁴²

a. Facts

The EEOC asserts that Gilbert-Fortune applied for a field project manager position at AutoZone in March 1995.⁴³ AutoZone does not contest that Gilbert-Fortune applied for the position.

Stein applied for and received a construction project manager position with AutoZone in April 1995. (Dobbs decl., ¶ 2;

⁴² That AutoZone hired Stein for the construction project manager was also the basis for the EEOC's failure-to-hire claim on behalf of McClendon. See *supra*, p. 40.

⁴³ In support of this assertion, the EEOC cites Exhibit 58 to its memorandum in opposition to AutoZone's motion for summary judgment, which appears to be a copy of Gilbert-Fortune's resume and a cover letter to AutoZone. These documents are not authenticated.

Stein employment application.⁴⁴) Dobbs approved Stein's hiring for the position. (Dobbs. decl., ¶ 2.) Stein had recently received a bachelor's degree in construction management, and he was recommended for hire by an existing AutoZone field project manager, Carter Vecerer ("Vecerer"). (Id.)

Dobbs states that he does not recall viewing Gilbert-Fortune's resume when considering the position ultimately filled by Stein. (Id., ¶ 3.) Based on viewing her resume in 2005 when creating his declaration, Dobbs states that Gilbert-Fortune was over qualified for the entry-level position filled by Stein because she had sixteen years of experience. (Id.) The EEOC asserts that Gilbert-Fortune had fourteen years of project management experience. (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 41.)

b. Analysis

AutoZone asserts that the EEOC cannot establish that Gilbert-Fortune was qualified for the position of construction project manager or that AutoZone's asserted reason for giving the position to Stein was pretextual.

Assuming that the EEOC can establish its prima facie case, it cannot succeed on its failure-to-hire claim on Gilbert-Fortune's behalf because there is no evidence that AutoZone's asserted reasons for hiring Stein instead of Gilbert-Fortune are

⁴⁴ This document is attached as Exhibit 1 to Dobbs's declaration.

pretextual. AutoZone states that Gilbert-Fortune was over qualified for the entry-level position given to Stein and that Stein was recommended for the position by an existing AutoZone employee.

The EEOC asserts AutoZone's asserted reasons might be pretextual because "it is curious that the Defendant has a pattern of claiming that females are 'over qualified' for certain positions because of their education and experience, but males never appear to be 'over qualified.'" (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 41.) The evidence does not support a finding of pretext. AutoZone has asserted that it rejected two women as over qualified: Jones and Gilbert-Fortune. Both women complain of being denied construction project manager positions. The evidence indicates that that position was an entry level position and that Dobbs declined to hire people whom he felt were over qualified for that position.

In support of its argument that males "never appear to be over qualified," the EEOC cites AutoZone's argument that Anno was hired over Berry to be a regional transportation manager because Anno had more experience. There is no evidence that the regional transportation manager position was an entry-level position. The EEOC does not cite any instances in which AutoZone has asserted that it prefers candidates with considerable experience for entry-level positions. That AutoZone prefers experienced

employees for more senior positions does not suggest that it would also prefer experienced employees for entry-level positions. The EEOC's argument does not support an inference that AutoZone's asserted reason for hiring Stein over Gilbert-Fortune is pretextual.

Because there is no basis in the evidence for finding AutoZone's asserted legitimate, non-discriminatory reasons for hiring Stein over Gilbert-Fortune to be pretextual, AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Gilbert-Fortune is GRANTED.

7. Theresa McPherson

The EEOC alleges that Theresa McPherson ("McPherson") was discriminated against on the basis of her female sex when Mark Palazola ("Palazola"),⁴⁵ a male, was hired instead of McPherson to be a project manager for AutoZone in October 1995 and when Merle Voigt ("Voigt"), a male, was hired instead of McPherson to be a manager of DC human resources for AutoZone in June 1995.

a. Facts

In approximately 1995, McPherson applied for a human resources trainer position at AutoZone.⁴⁶ (McPherson dep., 66:3-

⁴⁵ The EEOC spells the name "Palazola," while AutoZone spells the name "Palozola."

⁴⁶ McPherson could not recall when in 1995 she applied to AutoZone. (*Id.*, 49:1-7, 53:13-16, 62:9-14.) AutoZone asserts that McPherson submitted her resume on May 26, 1995, but the personnel documents AutoZone cites are not authenticated.

9.) She received an interview but was not offered the position. (Id., 67:22, 73:14-23.)

McPherson is a high school graduate who spent six years in an undergraduate program but did not earn a college degree. (Id., 11:5-25.) Before applying to AutoZone, McPherson had worked for approximately twenty years for Century Management, a company that owns various McDonald's restaurants. (Id., 15:4-16:14.) She had worked as a restaurant manager, a training manager, and an operations manager for Century Management. (Id., 16:22-19:25.) McPherson also had some experience working as an operations manager for a food processing company. (Id., 35:15-36:15, 46:16-23.)

The parties agree that Palazola was hired by AutoZone as a project manager in October 1995 and that Voigt was hired as a manager of DC human resources in approximately June 1995. In describing Palazola's qualifications, AutoZone cites Exhibit UU to its memorandum in support of its motion for summary judgment, which is described as consisting of Palazola's personnel documents, and the EEOC cites Exhibit 61 to its response in opposition to AutoZone's motion, which is described as consisting of Palazola's status record and application. In describing Voigt's qualifications, AutoZone cites Exhibit VV to its memorandum in support of its motion for summary judgment, which is described as consisting of Voigt's personnel documents, and

the EEOC cites Exhibit 62 to its response in opposition to AutoZone's motion, which is described as Voigt's performance review. None of these documents is authenticated. Therefore, they cannot be considered on a motion for summary judgment.

b. Analysis

AutoZone asserts that the EEOC cannot establish that McPherson applied for or was qualified for the positions filled by Palazola or Voigt or that she had similar qualifications to them. AutoZone also asserts that the EEOC cannot show that AutoZone's asserted reason for hiring Palazola and Voigt over McPherson is pretextual.

McPherson applied for a human resources trainer position, not a project manager or manager of DC human resources position. In considering which applicants to interview for particular positions, AutoZone considers all applicants whose qualifications match the qualifications of the open position, even if the applicant did not express interest in the open position on his or her application. (Branum dep., 22:2-18.) The EEOC asserts, therefore, that McPherson should have been considered for the project manager and manager of DC human resources positions.

Even if the Court were to conclude that McPherson's application for the human resources trainer position served as an application for the project manager and manager of DC human resources positions also, the EEOC could not establish its prima

facie case. Because there is no evidence in the record about the objective qualifications required for the positions of project manager or manager of DC human resources, there is no basis on which a reasonable jury could conclude that McPherson was qualified for those positions. There is also no evidence that the Court can consider that illustrates the qualifications of Palazola or Voigt. Therefore, no reasonable jury could conclude that McPherson's qualifications were similar to those of Palazola or Voigt.

The EEOC cannot establish its prima facie case. Therefore, AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of McPherson is GRANTED.

8. Female Security Guard Claimants

The EEOC asserts that the following ten women were discriminated against on the basis of their female sex when they were not hired for security guard positions at AutoZone in 1994 and 1995, when various male applicants were hired: Mary Cooper ("Cooper"), Annette Rogers ("Rogers"), Shelly Sheets ("Sheets"), Annette Thomas ("Thomas"), Gloria Haynes ("Haynes"), Brenda Johnson ("Johnson"), Sheila Gunn ("Gunn"), Bettie Hammond ("Hammond"), Barbara Lumpkin ("Lumpkin"), and Betty Tate ("Tate") (collectively, the "female security guard claimants").

The female security guard claimants applied for security guard positions at AutoZone between November 30, 1994 and April

28, 1995. (2d Branum decl., ¶ 6.) AutoZone's policy during that time was to consider employment applications active for ninety days after they were submitted. (Id., ¶ 7.) After ninety days, the application would not be considered unless the applicant submitted a renewed application. (Id.)

AutoZone did not have a formal job description for security guards in 1994 or 1995; the qualifications for that position were determined by the managers who would be supervising the new security guards. (Id., ¶ 4.) The managers instructed the recruiters to consider the following qualifications: (1) prior AutoZone employment; (2) whether the applicant had been referred by an existing AutoZone employee; (3) military experience; (4) security experience; (5) overall employment history; (6) communication skills; (7) medical training; (8) availability for work during AutoZone work shifts; (9) integrity; (10) employment references; and (11) security-related education and training. (Id.)

The evidence shows that the AutoZone recruiters considered and weighed the entirety of each applicants' credentials rather than requiring applicants to meet particular minimum objective criteria to be considered for security guard positions. Therefore, all applicants were qualified for the position of security guard for purposes of meeting the second prong of the prima facie case. AutoZone does not dispute that each of the

female security guard applicants is a member of a protected class, applied for the security guard position, and was considered for and was denied the position.

The EEOC asserts that the Court cannot compare the female security guard claimants' qualifications to those of the male candidates who were hired because this would "impermissibly conflate the first stage and second stage of the McDonnell Douglas paradigm." (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 4.) This argument was addressed and rejected in White, in which the court held that, "in order to satisfy the fourth prong of the prima facie burden . . . it is incumbent upon the plaintiff to establish that she and the non-protected person who ultimately was hired for the desired position had similar qualifications."⁴⁷ 429 F.3d at 242.

The EEOC seeks to distinguish White, arguing that the court in White was able to compare the objective qualifications of the plaintiff and the successful candidate only because "there was a detailed, published description of the contested position." (Pl. EEOC's Resp. in Opp'n to Def.'s Mot. for Summ. J., p. 45.) Here, the EEOC asserts that the advertisements for AutoZone's security guard positions did not include detailed job descriptions.⁴⁸

⁴⁷ Although White was decided in the context of a failure-to-promote claim, the court's reasoning applies equally to failure-to-hire claims.

⁴⁸ The EEOC cites Exhibit 63 to its response in opposition to AutoZone's motion for summary judgment, which appears to include copies of an advertisement for the AutoZone security guard position. As the documents are

The EEOC has not cited, and the Court is not aware of, any cases in which the plaintiff has been relieved of its burden to establish every element of its prima facie case. Although AutoZone did not publish a detailed job description for the security guard position, the Court is capable of comparing the objective qualifications of the female security guard applicants and the successful male applicant to determine whether the qualifications differ in material and relevant respects.

AutoZone asserts that the EEOC cannot establish that any of the female security guard claimants were qualified for the security guard positions or that they had similar qualifications to the men who were hired. AutoZone also asserts that the EEOC cannot show that AutoZone's asserted reasons for hiring the male applicants instead of the female security guard claimants are pretextual.

i. Mary Cooper

Cooper applied to AutoZone on November 30, 1994, seeking part-time work. (Cooper application.)⁴⁹ When she applied to AutoZone, Cooper had four years of experience working as a deputy jailer for the Shelby County Sheriff's Department. (Id.) She left blank a section on her application that requested information about any relevant schooling or course work she might have had.

not authenticated, they cannot be considered on a motion for summary judgment.

⁴⁹ This document is attached as Exhibit 10 to Branum's second declaration.

(Id.)

Based on AutoZone's policy of considering applications "active" for ninety days, Cooper's November 30, 1994 application was "active" until March 1, 1995. AutoZone asserts that Cooper was not similarly qualified to any of the male security guard applicants who were hired while her application was active. It also asserts that Cooper was not available for security guard shifts at AutoZone because her application stated that she was only available to work Monday through Friday from 8 a.m. to 4 p.m.

Assuming that the EEOC could establish its prima facie case, it has not shown that AutoZone's asserted reason for hiring any of the male security guard applicants instead of Cooper is pretextual. AutoZone ran three shifts of employees in 1994 and 1995, and the shifts ran from 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., and 11 p.m. to 7 a.m. (2d Branum decl., ¶ 5(h).) Cooper's application stated that she was available to work Monday through Friday from 8:00 a.m. to 4:00 p.m. and that she was not available to work on Saturday or Sunday. (Cooper application.) Given the hours of availability that Cooper listed on her resume, she was not available to work during any of AutoZone's eight-hour security guard shifts at any time during the week.

Although several of the male applicants who were hired had stated in their applications that they were only available during

limited hours, each of those applicants was available during an entire AutoZone shift. For example, Sterling Stone III ("Stone") was available from 11 p.m. to 7 a.m. on any day (Stone application),⁵⁰ and Costello Hayslett ("Hayslett") and Jay McCarty ("McCarty") were available on weekends.⁵¹ (Hayslett application;⁵² McCarty application.⁵³) There is no evidence that AutoZone has ever hired a male security guard whose application indicated that he was not available to work during any AutoZone shift. Therefore, there is no evidence that AutoZone's asserted reason for declining to hire Cooper is pretextual. AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Cooper is GRANTED.

ii. Annette Rogers

Rogers applied to AutoZone on December 7, 1994, seeking part-time work. (Rogers application.)⁵⁴ Her application states that she was available Monday, Tuesday, Thursday, Friday, and Saturday from 5 p.m. to 1 a.m., and she was not available on

⁵⁰ This document is attached as part of Exhibit 4(b) to Branum's second declaration.

⁵¹ Hayslett sought only part-time work (Hayslett application), and McCarty was interested in either full or part-time work (McCarty application).

⁵² This document is attached as Exhibit 5 to Branum's second declaration.

⁵³ This document is attached as Exhibit 6 to Branum's second declaration.

⁵⁴ This document is attached as Exhibit 13 to Branum's second declaration.

Wednesday or Sunday. (Id.)

AutoZone asserts that Rogers was not available to work any security guard shift at AutoZone. Assuming that the EEOC could establish its prima facie case, there is no evidence that AutoZone's asserted legitimate, non-discriminatory reason for declining to hire Rogers is pretextual. AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Rogers is GRANTED.

iii. Shelly Sheets

AutoZone received Sheets's resume on November 30, 1994; there is no evidence that Sheets ever submitted a formal application to AutoZone. (2d Branum decl., ¶ 9.) When Sheets applied to AutoZone, she had served for two years as a senior correctional officer for the Federal Bureau of Prisons and for five-and-a-half years in the United States army. (Sheets resume.)⁵⁵ She had attended the Federal Law Enforcement Academy and taken courses in disturbance and riot control, self-defense, and firearms. (Id.) Sheets was C.P.R.-qualified and had taken basic medical and first aid training. (Id.) Her military experience did not include security duty. (Id.)

Based on AutoZone's policy of considering applications "active" for ninety days, Cooper's November 30, 1994 application

⁵⁵ This document is attached as Exhibit 11 to Branum's second declaration.

was "active" until March 1, 1995. The evidence shows that, from November 30, 1994 through March 1, 1995, AutoZone hired the following male security guards: Royal Bowhay ("Bowhay"), Darrell Harvey ("Harvey"), Phillip Logan ("Logan"), John Williamson ("Williamson"), Garry Hicks ("Hicks"), Hayslett, Billy Jones ("Jones"), Robert Flynn ("Flynn"), Morris Priora ("Priora"), McCarty, Mark Mullins ("Mullins"), and Stone. (List of Male Security Guard Hires.)⁵⁶ The parties agree that AutoZone also hired the following male security guards between November 30, 1994 and March 1, 1995:⁵⁷ Walter Sanders ("Sanders"), Gerald Holmes ("Holmes"), Keith McElfresh ("McElfresh"), Steven Schillacci ("Schillacci"), and Charles Robinson ("Robinson").

A reasonable jury could conclude that Sheets had similar qualifications to some of the male security guards who were hired while her application was active. McCarty applied to AutoZone on February 23, 1995 and was hired on the same day. (2d Branum decl., ¶ 8.) When he applied to AutoZone, McCarty had served in the United States Navy for fourteen years and was a qualified E.M.T.⁵⁸ (McCarty employment app.)⁵⁹ His military career did not

⁵⁶ This document is attached as Exhibit 3(a) to Branum's second declaration.

⁵⁷ The documents on which the parties rely in discussing these male security guards are not authenticated.

⁵⁸ In the context of Branum's second declaration, the acronym "E.M.T." appears to stand for "emergency medical technician."

⁵⁹ This document is attached as Exhibit 6 to Branum's second declaration.

include any security duty, and he did not list any relevant schooling or course work. (Id.)⁶⁰

Although McCarty had spent more time in the military than Sheets had, his military experience did not include security training. A reasonable jury could conclude that additional years of military experience unrelated to security did not render McCarty more qualified to be an AutoZone security guard. Sheets also had experience as a senior corrections officer, which McCarty did not have. McCarty had more medical training than Sheets in that he was E.M.T.-qualified whereas she was C.P.R.-qualified and had basic medical and first aid training. However, Sheets had taken courses in disturbance and riot control, self-defense, and firearms, which a jury could consider relevant training that McCarty lacked. Comparing Sheets's and McCarty's qualifications, a reasonable jury could conclude that their different credentials rendered them similarly-qualified for the position of security guard.

A reasonable jury might also conclude that Sheets had similar qualifications to Stone. When he applied to AutoZone, Stone had five-and-a-half years of experience as a correctional officer at the Shelby County Correctional Center. (Stone application.) Although Sheets had fewer years of experience as a

⁶⁰ Although McCarty was recommended for the position by Williamson, who was working as an AutoZone security guard when McCarty applied (2d Branum decl., ¶ 8), Williamson's recommendation is not relevant to whether McCarty and Sheets had similar qualifications.

correctional officer, she had served as a "senior correctional officer," whereas Stone stated that his job title was "officer." Stone also had a bachelor's degree with a minor in criminal justice and had taken some graduate level courses in criminal justice. (2d Branum decl., ¶ 8; Stone application; Stone interview worksheet.⁶¹) He did not, however, have any medical training or any training in disturbance and riot control, self-defense, or firearms. Stone also had no military experience. A reasonable jury could conclude that Sheets and Stone were similarly-qualified for the position of security guard.

AutoZone asserts that it did not hire Sheets because her resume reflected two gaps in her employment history, from December 1993 to November 1994 and from May 1987 to October 1987. (2d Branum decl., ¶ 9.) The EEOC contends that AutoZone's asserted reason is pretextual because several of the men whom AutoZone hired also had gaps in their employment history. For example, Bowhay had a gap of a year and nine months in his employment history, from February 1993 to October 1994 (Bowhay application),⁶² and Mullins had a seven-month gap in his employment history, from January 1991 to August 1991. (Poynter

⁶¹ This document is attached as part of Exhibit 4(b) to Branum's second declaration.

⁶² This document is attached as Exhibit 1 to William Poynter's ("Poynter") declaration. Poynter worked as a corporate recruiter for AutoZone from September 1994 to September 1997. (Poynter decl., ¶ 2.)

decl., ¶ 3; Mullins application.⁶³) That AutoZone hired several male security guards whose employment histories included gaps suggests that gaps in an applicant's employment history are insufficient to prevent that applicant from being hired by AutoZone. Therefore, a reasonable jury could conclude that AutoZone's asserted reason for declining to hire Sheets is pretextual. AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Sheets is DENIED.

iv. Annette Thomas

Thomas applied to AutoZone on December 28, 1994. (Thomas application.)⁶⁴ When she applied to AutoZone, she had six-and-a-half years of experience as a deputy jailer for the Shelby County Sheriff's Department. (Id.)

Based on AutoZone's policy of considering applications "active" for ninety days, Thomas's December 28, 1994 application was "active" until March 28, 1994. Stone was one of the male security guards hired by AutoZone while Thomas's application was active, and a reasonable jury could conclude that Thomas and Stone had similar qualifications for the security guard position. Stone had worked as a corrections officer for five-and-a-half years, and Thomas had worked as a jailer for six-and-a-half years. Neither Stone nor Thomas had military or other security

⁶³ This document is attached as Exhibit 8 to Poynter's declaration.

⁶⁴ This document is attached as part of Exhibit 14 to Branum's second declaration.

experience. Although Stone had an educational background in criminal justice, it is not clear that such schooling is a relevant qualification for a corporate security guard position. Although the evidence shows that AutoZone was seeking applicants with security-related education and training, there is no evidentiary basis in the record from which to conclude that an undergraduate minor in criminal justice or graduate course work in that field qualifies as security-related education. Therefore, a reasonable jury could find that Thomas and Stone were similarly-qualified for the security guard position.

AutoZone asserts that Thomas had limited availability that "could have presented a problem" and a four-month gap in her employment history, "which would have been a concern." (2d Branum decl., ¶ 9; Thomas application.) The EEOC has presented evidence from which a reasonable jury could conclude that AutoZone's asserted reasons for not hiring Thomas were pretextual. Although Thomas's application stated that she had limited availability, she was available to work the 3 p.m. to 11 p.m. shift any day of the week. Because AutoZone hired several male security guards who were only available for particular shifts, a reasonable jury could conclude that Thomas's limited availability was insufficient to preclude her from employment as an AutoZone security guard. AutoZone also hired several male employees who had more significant gaps in their employment history than

Thomas. Therefore, a reasonable jury could conclude that the gaps in Thomas's employment history were insufficient to motivate AutoZone's decision not to hire her.

Because a reasonable jury could conclude that the EEOC has established its prima facie case and that AutoZone's asserted reason for declining to hire Thomas is pretextual, AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Thomas is DENIED.

v. Gloria Haynes

Haynes applied to AutoZone on November 30, 1994 seeking part-time work. (Haynes application.)⁶⁵ Her application states that she was available to work from 3 p.m. to 7 p.m. only. (Id.)

AutoZone asserts that Haynes was not available to work any security guard shift at AutoZone. Assuming that the EEOC could establish its prima facie case, there is no evidence that AutoZone's asserted legitimate, non-discriminatory reason for declining to hire Haynes is pretextual. AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Haynes is GRANTED.

vi. Brenda Johnson

There is no evidence of when Johnson applied for a position at AutoZone. Although AutoZone received a resume from Johnson,

⁶⁵ This document is attached as Exhibit 12 to Branum's second declaration.

the resume does not indicate when it was created or received, except that it states that Johnson had worked for the Shelby County courthouse from "1995 to present." (Johnson resume;⁶⁶ 2d Branum decl., ¶ 9.) There is no other evidence in the record about when Johnson submitted her resume. There is no evidence that Johnson submitted a formal application to AutoZone. (2d Branum decl., ¶ 9.)

Because there is no evidence of when Johnson applied to AutoZone, no reasonable jury could conclude that a similarly-qualified male was hired when she was rejected or that the security guard position remained open and AutoZone continued to seek applicants with Johnson's qualifications. Therefore, the EEOC cannot establish its prima facie case, and AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Johnson is GRANTED.

vii. Sheila Gunn

Gunn applied to AutoZone on January 12, 1995 seeking part-time work. (Gunn application.)⁶⁷ When she applied to AutoZone, she had six years of experience as a correctional officer.

Based on AutoZone's policy of considering applications "active" for ninety days, Gunn's January 12, 1995 application was

⁶⁶ This document is attached as Exhibit 15 to Branum's second declaration.

⁶⁷ This document is attached as Exhibit 16 to Branum's second declaration.

"active" until April 12, 1995. Stone was one of the male security guards hired by AutoZone while Gunn's application was active, and a reasonable jury could conclude that Gunn and Stone had similar qualifications for the security guard position. Stone had worked as a corrections officer for five-and-a-half years, and Gunn had worked as a correctional officer for six years.

AutoZone asserts that it did not hire Gunn because she was not available to work any security guard shift at AutoZone. Gunn's application states that she was available to work any evening and Thursday and Friday during the day. (Gunn application.) It also states that she was available to work from 5 p.m. to 11 p.m. and that she was unable to work before 5 p.m. due to her daytime job. (Id.) Reading Gunn's resume in a light most favorable to the EEOC, Gunn was available to work any shift on Thursday or Friday, including shifts before 5 p.m.

The EEOC has presented evidence that AutoZone hired several male employees who were available to work only during particular AutoZone shifts. A reasonable jury could conclude that Gunn was available to work during some AutoZone shifts and that her limited availability was insufficient to preclude her from employment at AutoZone.

Because a reasonable jury could conclude that the EEOC has established its prima facie case and that AutoZone's asserted reason for declining to hire Gunn is pretextual, AutoZone's

motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Gunn is DENIED.

viii. Bettie Hammond

Hammond applied to AutoZone on February 24, 1995. (Hammond application.)⁶⁸ When she applied to AutoZone, she had ten-and-a-half years of experience as a correctional sergeant for the Tennessee Department of Corrections. (Id.)

Based on AutoZone's policy of considering applications "active" for ninety days, Hammond's February 24, 1995 application was "active" until May 25, 1996. Stone was one of the male security guards hired by AutoZone while Hammond's application was active, and a reasonable jury could conclude that Hammond and Stone had similar qualifications for the security guard position.

Although AutoZone asserts that Thomas had limited availability, Hammond was available to work the 11 p.m. to 7 a.m. shift. Because AutoZone hired several male security guards who were only available for particular shifts, a reasonable jury could conclude that Hammond's limited availability was insufficient to preclude her from employment as an AutoZone security guard.

Because a reasonable jury could conclude that the EEOC has established its prima facie case and that AutoZone's asserted

⁶⁸ This document is attached as part of Exhibit 18 to Branum's second declaration.

reason for declining to hire Hammond is pretextual, AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Hammond is DENIED.

ix. Barbara Lumpkin

Lumpkin applied to AutoZone on January 18, 1995, seeking part-time work. (Lumpkin application.)⁶⁹ Her application states that she was available to work only from 5 p.m. to 10 p.m. on weekdays. (Id.)

AutoZone asserts that Lumpkin was not available to work any security guard shift at AutoZone. Assuming that the EEOC could establish its prima facie case, there is no evidence that AutoZone's asserted legitimate, non-discriminatory reason for declining to hire Lumpkin is pretextual. AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Lumpkin is GRANTED.

x. Betty Tate

Tate applied to AutoZone on April 28, 1995 seeking part-time employment. (Tate application.)⁷⁰ When she applied to AutoZone, she had five-and-a-half years of experience as a correctional sergeant for the Tennessee Department of Corrections. (Id.)

Based on AutoZone's policy of considering applications

⁶⁹ This document is attached as part of Exhibit 17 to Branum's second declaration.

⁷⁰ This document is attached as part of Exhibit 19 to Branum's second declaration.

"active" for ninety days, Tate's April 28, 1995 application was "active" until July 27, 1995. The evidence shows that, from April 28, 1995 through July 27, 1995, AutoZone hired the following male security guards: Brian Gates ("Gates"), George Ingram ("Ingram"), and Don Hill, Sr. ("Hill"), and Walter Sanders ("Sanders"). (List of Male Security Guard Hires.)

A question of material fact exists about whether Tate had similar qualifications to any of the male security guards hired while her application was active. When Ingram applied to AutoZone, he had served as a yeoman in the Navy for twenty-three years. (Ingram application.)⁷¹ Ingram described his "duties and responsibilities" as "clerical," although he also stated that he had "stood various military watches" including gate guard and building security. (Id.) The extent of Ingram's security experience is unclear from his application. He did not have any other security-related experience.

Both Tate and Ingram had some experience in areas tangentially related to corporate security. A reasonable jury could find that an applicant who had minimal security duty during a substantially clerical military career had similar qualifications for a corporate security position to an applicant with five-and-a-half years of experience as a correctional

⁷¹ This document is attached as part of Exhibit 8 to Branum's second declaration.

sergeant.

Although AutoZone asserts that Tate had limited availability, she was available to work "any hours" on Wednesday, Thursday, and Friday. (Tate application.) Because AutoZone hired several male security guards who were only available for particular shifts, a reasonable jury could conclude that Tate's limited availability was insufficient to preclude her from employment as an AutoZone security guard.

Because a reasonable jury could conclude that the EEOC has established its prima facie case and that AutoZone's asserted reason for declining to hire Tate is pretextual, AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claim on behalf of Tate is DENIED.

V. Conclusion

For the foregoing reasons, AutoZone's motion for summary judgment is GRANTED in part and DENIED in part.

AutoZone's motion for summary judgment as to the EEOC's failure-to-promote claims on behalf of Benson, Neeley, Dowell, Powell, Taylor, Williams, Spell, Loesel, and McClendon is GRANTED. AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claims on behalf of McClendon, Berry, Williamson, Jones, Murray, Gilbert-Fortune, McPherson, Cooper, Rogers, Haynes, Johnson, and Lumpkin is GRANTED. AutoZone's motion for summary judgment as to the EEOC's failure-to-hire claims on

behalf of Sheets, Thomas, Gunn, Hammond, and Tate is DENIED.

So ordered this 13th day of August 2007.

s/ Samuel H. Mays, Jr.

SAMUEL H. MAYS, JR.

UNITED STATES DISTRICT JUDGE