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The IADC

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## Verbal Abuse: Supreme Court Slaps Down Discriminatory Standard

***By Eve B. Masinter and Thomas L. Watson***

Attorneys often grapple with nebulous legal concepts handed down by courts. While one might, for example, know when the facts require the "rational basis test" as opposed to "strict scrutiny," it is often difficult to articulate a case that would be decided differently depending on which test applies. Likewise, it often seems odd when courts invoke the phrase "totality of the circumstances," as if at times the facts might require application of a "partiality of the circumstances" standard, in which a court comes to its conclusion by disregarding pertinent evidence.

Not all courts, however, come up with standards that involve sliding scales, shifting burdens, or reasonably prudent people. This is the story of one circuit that sought to formulate a test that was instinctive and instructive. The circuit applied the test, often known as the "jump off and slap you" test, in Title VII promotion and failure to hire cases, holding that a plaintiff can prove pretext based solely on a disparity in qualifications only if such a disparity was so apparent that it could be said to "jump off the page and slap you in the face." The "jump off and slap you" test caught on nationwide and was used by courts from Denver to Puerto Rico for more than a decade, before the Supreme Court, like a parent with petulant children misbehaving, upbraided the courts for such language and sent them to time-out to figure out a less violent and more dignified standard.

### Origin of the Standard

The "jump off and slap you" standard appears to have been

the brainchild of Fifth Circuit Judge Jacques Loeb Wiener, Jr. The first known sighting of this standard is in Judge Wiener's opinion in *Odom v. Frank*, 3 F.3d 839 (5th Cir. 1993). In *Odom*, The Postmaster General (Frank) sought appellate review of an order of the district court, which found that defendant discriminated against plaintiff on the basis of his race and age in his bid for a promotion. The district court held that the proffered explanation for the denial of the position was a pretext for the Postmaster's discriminatory actions. The Fifth Circuit reversed and held that plaintiff failed to produce sufficient evidence to prove that the reasons given by the Postmaster for not promoting plaintiff were a pretextual smokescreen masking racial or age-based discrimination. The plaintiff in *Odom* did not possess a higher degree of experience or education than the successful applicant. The court also found that there was no statistical data which indicated that the Postmaster had, in the past, excluded blacks and persons over the age of 40 from selection for higher level positions.

> Generally, a court's belief that an unprotected applicant who has been promoted is less qualified than a protected applicant who has been passed over, will not in and of itself support a finding of pretext for discrimination. If, however, the passed over applicant who is protected against discrimination is clearly better qualified for the position in question, a finding of pretext masking discrimination can be supported by the promotion of the less qualified person.

*Id.* at 845.

In making a comparison, the court placed the qualifications of the plaintiff and the hired applicant side by side. The hired applicant had significant recent experience in several areas that were more relevant to the new position. Plaintiff's prior experience was primarily irrelevant to the new position. Further, testimony of review panel members indicated that experience was legitimately relevant and significant to the panel's determination. The Fifth Circuit held that, at best, there was no "glaring distinction that would support a finding that [plaintiff] was 'clearly better qualified [than the successful applicant] for the … position." *Id.* at 846.

Judges, the court held, are not as well suited to evaluate qualifications for high level promotion in other disciplines as those who have been trained and work in that field:

> Unless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, judges should be reluctant to substitute their views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise in the field in question.

*Id.* at 847.

The *Odom* court used less violent language to articulate the "clearly superior" standard:

> We find that neither singly nor collectively do [plaintiff's] qualifications leap from the record and cry out to all who would listen that he was vastly — or even clearly — more qualified for the subject job than was [the successful applicant].

*Id.*

While this "leaping" test has been cited somewhat extensively in the 5th Circuit (often in conjunction with the "jump off and slap you"

test), it has not been as popular until perhaps now.

Over the next few years, the Fifth Circuit continued to cite the "jump off and slap you" standard. *See, e.g., Scott v. University of Mississippi*, 148 F.3d 493, 508 (5th Cir. 1998); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445 (5th Cir. 1995). In *EEOC*, the Fifth Circuit affirmed the decision of the lower court, which granted a motion for judgment as a matter of law to the employees after a jury verdict in favor of the plaintiff. Citing *Odom*, the court held that the plaintiff's qualifications were not "so superior to those of the selectees to allow an inference of pretext." *Id.* at 1445.

A few years later, the Fifth Circuit further defined the "jump off and slap you" test in *Deines v. Texas Dept. of Protective and Regulatory Servs.*, 164 F.3d 277 (5th Cir. 1999). In *Deines*, plaintiff, a Hispanic male, was denied a job that was given instead to a white female. Plaintiff alleged national origin discrimination. The jury returned a verdict in favor of the employer, holding that discrimination was not a motivating factor. The Fifth Circuit, citing *Odom* and *EEOC*, affirmed and further explained the "jump off and slap you" standard:

> The phrase "jump off the page and slap [you] in the face" is simply a colloquial expression that we have utilized to bring some degree of understanding of the level of disparity in qualifications required to create an inference of intentional discrimination. In its essence, the phrase should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question. This evidentiary standard does not alter the plaintiff's evidentiary burden to prove the fact of intentional discrimination by a preponderance of the evidence. Instead, the standard only describes the character of this particular type of evidence that will be probative of that ultimate fact.

*Id.* at 280-281.

**Jumping Off the Page And Slapping in the Face Becomes A National Craze**

After the Fifth Circuit's decision in *Odom*, other circuits began to take notice of the standard. Some circuits adopted it, as it used visual imagery to articulate an otherwise nebulous concept. The following are some of the more notable cases that embraced or discussed the standard.

In *Ruiz v. Posadas*, 124 F.3d 243 (1st Cir. 1997), the First Circuit applied the "jump off and slap you" standard. *Ruiz* was an appeal of summary judgment on an age discrimination claim. Plaintiff was a team leader who was terminated, according to defendant, because the employer hotel was undergoing financial difficulties. Defendant proffered testimony that plaintiff was selected because his employment record was the weakest among all team leaders. Shortly after plaintiff was terminated, another team leader position opened up. Defendant did not notify plaintiff of the opening and promoted a younger employee to the position. Plaintiff asserted a failure to hire claim, which was dismissed. On appeal, the First Circuit cited *Lehman v. Prudential*, 74 F.3d 323, 329 (1st Cir. 1996), which appears to be the first First Circuit case to adopt the "jump off and slap you" standard, and held that it would refuse to second-guess a hiring decision "absent clearer evidence of irrationality." The court, citing *Odom*, held that the disparities in the employment records of the plaintiff and the new team leader did not rise to the level of jumping off the page and slapping

it in the face.

In *Jaramillo v. Colorado Judicial Dept.*, 427 F.3d 1303 (10th Cir. 2005), the Tenth Circuit adopted the "jump off and slap you" standard. Plaintiff, a probation officer, sued defendant, a state agency, alleging it subjected her to disparate treatment on the basis of sex when it passed her over for a promotion. The district court granted summary judgment, finding that defendant provided a legitimate, nondiscriminatory reason for its decision to promote the successful candidate, specifically, the other candidate's superior qualifications. The evidence presented contradicted Jaramillo's claim that she was clearly more qualified than the other candidate. The successful candidate had additional certification, was bilingual, and had superior experience. The district court held a jury could not have found the employee's explanation pretextual, and the fact that one of the explanations turned out to be incorrect did not create a genuine issue of material fact as to pretext. The Tenth Circuit agreed, holding:

> A plaintiff demonstrates pretext by producing evidence of such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.

*Id.* at 1308. The court noted that evidence of pretext may include a defendant's prior treatment of plaintiff; the employer's policy and practice regarding minority employment (including statistical data); disturbing procedural irregularities (*e.g.*, falsifying or manipulating criteria); and the use of subjective criteria. The Tenth Circuit expressed that courts may not act as a "super-personnel department" that second-guesses employers' business judgments. Holding that minor differences between a plaintiff's qualifications and those of a successful applicant are not sufficient to show pretext, the Tenth Circuit concluded that the disparity must be overwhelming and must virtually jump off the page and slap the court in the face. *Id.*

The Eleventh Circuit also adopted the "jump off and slap you" standard in *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004), in which plaintiffs appealed a district court decision denying class certification and entering summary judgment dismissing the plaintiffs' allegations of race discrimination. Plaintiffs alleged discrimination in connection with promotion opportunities, performance evaluations, and compensation and that defendant tolerated a racially-hostile work environment. With regard to the promotion claims, the court held that a plaintiff cannot establish pretext simply by showing that he is more qualified than the person who was hired or promoted. Rather, the court held that "the plaintiff must offer evidence that the disparity in qualifications is so apparent as to virtually jump off the page and slap you in the face." The Eleventh Circuit further articulated this principle by quoting the elucidative language in *Deines*. The court then looked at the alleged individual instances of failure to promote and applied the "jump off and slap you" standard. One plaintiff, Edwards, complained that he suffered discrimination when he was denied a promotion after thirteen years of employment. Four interviewers ranked applicants based on their "gut feeling" in response to six structured, job-related questions, and one of the interviewers stated that she had reservations about Edwards's job performance, as she had frequently seen him socializing while other employees were in the field. The person who was offered the position scored higher than Edwards on the interview and had relevant job experience and familiarity with the required work. The court found that petitioner Edwards did not offer evidence showing that he was "so clearly more qualified for the position… that a reasonable juror could infer discriminatory intent from the comparison."

Not all circuits, however, embraced the "jump off and slap you" test. The Ninth Circuit refused to let any words jump off and slap it in the face, despite the fact that its own test was substantially similar. In *Raad v. Fairbanks North Star Borough*, 323 F.3d 1185 (9th Cir. 2003), the Ninth Circuit held that its view was that a plaintiff's qualifications must be "clearly superior to the qualifications of the candidate selected." Although no different than the Fifth Circuit standard, the Ninth Circuit stated, "we have never followed the Fifth Circuit in holding that the disparity in candidates' qualifications 'must be so apparent as to jump off the page and slap us in the face.'" While this may indeed be the case, the Ninth Circuit failed to mention that its "clearly superior" standard was the same standard the Fifth Circuit articulated in the *Odom* decision, which spawned the "jump off and slap you" standard. In that sense, the Ninth Circuit's disapproval of the Fifth Circuit standard appears to be one of linguistics, not substance.

**The *Ash v. Tyson* Decision**

Last February, the United States Supreme Court in a brief *per curiam* opinion smacked down the "jump off and slap you" standard. In *Ash v. Tyson*, 126 S.Ct. 1195 (2006), plaintiffs, two black males, filed suit against their employer for violation of Title VII. Plaintiffs were superintendents at a poultry plant and had both applied for shift manager positions. Two white males were hired instead. The jury returned a verdict in favor of plaintiffs. The employer filed a motion for judgment as a matter of law and, in the alternative, a motion for a new trial. The trial court granted the motion, and in the alternative, ordered a new trial as to both plaintiffs. On appeal, the Eleventh Circuit, citing *Cooper*, noted that "the issue is not whether one employee is better qualified than another because we do not sit in judgment of an employer's decision," and stated that pretext cannot be proven merely by showing that the plaintiff was better qualified than the successful applicant. Rather, "[p]retext can be established through comparing qualifications only when 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.'" In reviewing the evidence, the court affirmed judgment as a matter of law as to plaintiff Ash, holding that the trial evidence was insufficient to show pretext. As to the other plaintiff, however, the Eleventh Circuit held that there was enough evidence for the trial to go to a jury and affirmed the district court's alternative remedy of a new trial. The court based this determination on the fact that plaintiff Hithon had presented evidence showing that the plant manager interviewed him after the successful applicant was hired, "indicating that [the plant manager's] stated reasons for rejecting Hithon… were pretextual."

The Supreme Court reversed and remanded, holding that while the Eleventh Circuit may be correct in its final analysis, its opinion "erred in two respects, requiring that it be remanded for further consideration." First, there was evidence that defendant's plant manager had referred to the plaintiffs as "boy." The Eleventh Circuit held that this did not evidence racial *animus*, without some sort of modifier, such as "black boy." The Supreme Court disagreed, noting that although it is true the word "boy" would not always be evidence of racial *animus*, "it does not follow that the term, standing alone, is always benign."

Second, the Supreme Court held that the Eleventh Circuit erred in its articulation of the pretext standard. Specifically with regard to the "jump off and slap you" standard, the Court stated:

> The visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications.

The Supreme Court then recited a number of

bland legal standards, including the "clearly superior" and "reasonable employer" standards cited in both *Raad* and *Cooper*. The Court refused to define the precise standard, stating, "[t]his is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications," holding only that rather, "some formulation other than the test the Court of Appeals articulated in this case would better ensure that trial courts reach consistent results."

The Supreme Court did not explain why the *Ash* case did not merit its articulation of a clearer standard, nor did it articulate how the "jump off and slap you" standard led to imprecise results. The "jump off and slap you" standard was merely illustrative of the "clearly superior" or the "reasonable employer" standards articulated in *Odom*, *Deines*, and *Cooper*, and, because it has been cited in both "clearly superior" and "reasonable employer" cases, it has kept those two standards uniform. Nor was it necessary to nix the standard in order to decide the case. The Supreme Court could have acknowledged that the more colorful language merely elaborated on its statement that it will not sit in judgment of an employer's decision. It seems that the "jump off the page and slap you in the face" standard did not die on substance but rather on style.

**CONCLUSION**

Where does the *Ash* decision leave employers attempting to defend against a Title VII promotion or failure to hire claim? It is doubtful that the decision does any more than to make the landscape of failure to promote or hire cases a little less colorful. The circuits will likely continue to apply the same standards as before with less explicit imagery.

Perhaps all is not yet lost for those who enjoy a clever turn of phrase in legal opinions, as there may be another illuminative standard patiently waiting in the wings, as the Court did not touch the other standard expressed in *Odom:* the "leap from the record and cry out" standard. At least one post-*Ash* case has cited this standard. *Watkins v. Texas Dept. of Criminal Justice*, ___ F.Supp.2d ___ (S.D.Tex. 2006). So while jumping and slapping may be out, records that leap and cry may still be in vogue.