PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1656

MICHEALL LYONS,

Plaintiff – Appellant,

v.

CITY OF ALEXANDRIA, A municipal corporation organized under the laws of the Commonwealth of Virginia,

Defendant – Appellee.

UNITED STATES OF AMERICA,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, Senior District Judge. (1:19-cv-00576-LO-MSN)

Argued: October 28, 2021 Decided: May 31, 2022
Amended: June 1, 2022

Before WILKINSON, WYNN, and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Judge Richardson wrote the opinion in which Judge Wilkinson and Judge Wynn joined.

ARGUED: Stephen B. Pershing, PERSHING LAW PLLC, Washington, D.C., for Appellant. Ronda Brown Esaw, GREENBERG TRAURIG, LLP, McLean, Virginia, for Appellee. Anna Marks Baldwin, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae. **ON BRIEF:** Laura Metcoff Klaus, Washington, D.C., Michelle D. Gambino, Michael A. Hass, GREENBERG TRAURIG, LLP, McLean, Virginia, for Appellee. Eric S. Dreiband, Assistant Attorney General, Alexander V. Maugeri, Deputy Assistant Attorney General, Tovah R. Calderon, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Sharon Fast Gustafson, General Counsel, Jennifer S. Goldstein, Associate General Counsel, Sydney A.R. Foster, Assistant General Counsel, Anne W. King, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

RICHARDSON, Circuit Judge:

Micheall Lyons alleges that his employer, the Alexandria Fire Department, intentionally discriminated against him because of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. While already serving as a firefighter, Lyons sought to become a paramedic. With the Fire Department's help, he completed an educational process and eventually passed the two required examinations. This made him eligible for the required one-year paramedic internship. But five months passed before the Fire Department promoted him to the internship. During that wait, an employee of the Fire Department told Lyons that firefighters were usually placed in the paramedic internship program on a "first come, first serve[d]" basis after becoming eligible.

After Lyons saw white colleagues on other Fire Department shifts receive internships before him, he believed that the Fire Department was violating its placement practice and delaying his promotion because he is Black. But the Fire Department explains that the first come, first served practice is *shift-specific*. Lyons offers no evidence to prove that the Fire Department's explanation—which is supported by its practice—is pretextual. So we affirm the district court's grant of summary judgment to the Fire Department.

I. Background

Micheall Lyons is a firefighter for the City of Alexandria's Fire Department.[1] In August 2016, Lyons began the lengthy process of becoming a paramedic. Paramedic applicants must meet the certification requirements of both the Committee on Accreditation

[1] Though the City is the actual defendant here, we refer to the Fire Department for ease of understanding.

of EMS Professionals and the National Registry of Emergency Medical Technicians ("National Registry").

Paramedic training begins with several classes and hundreds of hours of supervised on-the-job training. Then the applicant must pass the National Registry examination, which has separate practical and written components. Once an applicant passes this examination, Virginia's Office of Emergency Medical Services issues a State Paramedic Certification. With this certification, an applicant must then complete a one-year Advanced Life Support Internship Program. Only then is an applicant a full-fledged paramedic.

Lyons began the paramedic certification process with the Fire Department's support. The Fire Department provided Lyons with the required educational courses, and it transferred him to a medic unit so that he could complete the required on-the-job training. Once Lyons completed his coursework and training, he also passed the practical component of the National Registry examination. But the written component of the examination proved harder. After failing that test three times, the National Registry required him to complete remedial training before he could take the test again. Undeterred and determined to pass the test, Lyons paid for the required remedial training out of pocket. Even so, he still failed the examination on his fourth and fifth attempts. He finally passed the examination on his sixth attempt in August 2017.

Later that month, he received his State Paramedic Certification. That made him eligible to start the Internship Program. But eligibility did not translate to immediate

placement. It would be five months before Lyons received a spot. During this delay, he went without the increased pay and rank that came with being a paramedic intern.

Lyons alleges that Fire Department higher-ups told him that the Department used a first come, first served practice to place interns. And, according to Lyons, that practice was not followed in his case, leading to the placement of three white interns ahead of him. If white applicants were allowed to skip over Lyons in line for the internship, that might support an inference of discrimination as white applicants would be treated better than Lyons.

The Fire Department disagrees with those allegations. According to the Fire Department, Chief Lawrence Schultz, its Assistant Chief of Operations, had the discretion to place interns as he saw fit. But Chief Schultz almost always followed a practice of placing interns in the first internship spot available *on that applicant's shift*, and the Fire Department provided evidence that Chief Shultz followed that typical practice when placing Lyons. The Fire Department has three shifts—A, B, and C. Thus, an applicant on shift A will not be placed into an internship until a spot on shift A becomes available. Interns are assigned to a supervising field training officer who oversees a single intern, so placements are dependent on, and necessarily limited by, the availability of field training officers on each shift.

Lyons responds by claiming this explanation is false. In other words, he claims the Fire Department does not have a shift-specific practice and instead typically assigns interns to the first available field training officer regardless of shift.

The district court found that Lyons failed to create a genuine question of material fact that the Fire Department does not have a shift-specific placement practice. Thus, the court granted summary judgment to the Fire Department on his discrimination claim.

II. Discussion

A. Summary Judgment

Summary judgment is proper only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party, and a fact is material if it might affect the outcome of the suit under the governing law." *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018) (cleaned up). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

The district court may properly rely on the nonmoving party's own deposition testimony, affidavits, or declarations to reject summary judgment. *Gray v. Spillman*, 925 F.2d 90, 95 (4th Cir. 1991). But "a plaintiff's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for an adverse employment action." *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 456 (4th Cir. 1989); *see Wai Man Tom v. Hosp. Ventures LLC*, 980 F.3d 1027, 1037 (4th Cir. 2020) ("[C]onclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion.").

B. Analysis

Lyons alleges that the Fire Department intentionally discriminated against him based on his race in violation of Title VII.[2] Lyons puts forward no direct evidence of discrimination, arguing instead that race-based discrimination may be inferred from the assignment of later-certified white firefighters to internships before him. Without direct evidence of intentional discrimination, a plaintiff may use the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to develop an inferential case of discriminatory intent. *Spencer v. Va. State Univ.*, 919 F.3d 199, 207 (4th Cir. 2019). The *McDonnell Douglas* framework has three steps. First, the plaintiff must establish a prima facie case of racial discrimination. *See McDonnell Douglas*, 411 U.S. at 802. Then the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *Id.* Finally, the burden shifts back to the plaintiff to show that the employer's proffered legitimate, nondiscriminatory reason is a pretext. *Id.* at 804. "Although intermediate evidentiary burdens shift back and forth under this framework, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (cleaned up).

[2] "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1).

A plaintiff proves a prima facie case of discrimination for a delay in promotion by proving that (1) he is a member of a protected group; (2) he applied for the position at issue; (3) he was qualified for the position; and (4) the delay occurred under circumstances giving rise to an inference of unlawful discrimination. *See Brown v. McLean*, 159 F.3d 898, 902 (4th Cir. 1998). Lyons meets the first three requirements of the prima facie case. He is an African American, he applied for the Internship Program, and he was qualified once he became state certified.

To establish the fourth element of his prima facia case, an inference of unlawful discrimination, Lyons claims that the Fire Department had a practice of placing applicants with the first available field training officer regardless of shift, but the Department placed three later-certified white firefighters into the program ahead of him. This claim, if true, might support such an inference. The Fire Department responds by disputing the premise, putting forward evidence that its general practice was to place interns on a first-come, first-served basis *by shift*. And if the Fire Department is correct, then the white firefighters were assigned in accordance with the practice and no reasonable inference of discrimination exists.[3]

[3] When an employer attacks the essential factual premise of the employee's discrimination claim, the "same evidence is germane" to both the prima facie case and pretext inquiries. *Smith v. City of Toledo*, 13 F.4th 508, 516 (6th Cir. 2021) (quoting *McCarthy v. Ameritech Publ'g, Inc.*, 763 F.3d 469, 482 (6th Cir. 2014)). And there is "no impermeable barrier that prevents the employer's use of such evidence at different stages of the *McDonnell Douglas* framework." *See Warch v. Ohio Cas. Ins.*, 435 F.3d 510, 516 (4th Cir. 2006). On these facts, it does not matter if you consider the Department's rebuttal evidence to attack the prima facia case or if you consider the Department to have put forward evidence of a legitimate, nondiscriminatory reason that Lyons cannot show is (Continued)

But at the summary judgment stage, we are not deciding who is right. Instead, we are examining whether Lyons has raised a genuine question of whether a non-shift-specific assignment practice existed. Start with the evidence Lyons relies on to support a general first-come, first-served assignment practice. Lyons testified that both Captain Lisa Simba, the Fire Department's Emergency Medical Services Training Officer, and Chief Byron Andrews, the Fire Department's Deputy Chief of Emergency Medical Services, told him that the Fire Department placed interns on a "first come, first serve[d]" basis. J.A. 304–05, 325.[4] That statement is consistent with either a shift-specific practice or a practice of assigning without regard to shift. So Lyons tries to complete the circle by testifying that he understood those statements to mean that the intern placement practice was not shift-specific.

But Lyons' alleged understanding of Captain Simba's statement is not enough to raise a material issue of fact given the Fire Department's evidence. *See Williams*, 871 F.2d

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pretextual (i.e., a shift-specific first come, first served practice). *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 298 (4th Cir. 2004) (en banc), *overruled in part on other grounds by Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

[4] Because Lyons failed to depose Captain Simba or Chief Andrews, he is left to rely on nothing other than his own testimony about their statements. "[H]earsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment." *Md. Highways Contractors Ass'n v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991). But a statement is not hearsay if "[t]he statement is offered against an opposing party and . . . was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(D). "The corporation's agent need not have authority to make the statement at issue, but rather the subject of the statement must relate to the employee's area of authority." *United States v. Brothers Constr. Co. of Ohio*, 219 F.3d 300, 311 (4th Cir. 2000). Accordingly, we assume here that Captain Simba's and Chief Andrews' statements are admissible.

at 456; *Wai Man Tom*, 980 F.3d at 1037. The Fire Department's evidence supports its claim that it places interns with training officers on a first-come, first-served basis *within each shift*. *See Strag v. Bd. of Trs., Craven Cmty. Coll.*, 55 F.3d 943, 947–48 (4th Cir. 1995) (relying on affidavit attestations to support summary judgment). First, the Fire Department leadership submitted declarations that a shift-specific first-come, first-served practice existed. Chief Schultz stated that an internship applicant is generally placed on a waiting list behind others that received a state certification before him, but "because a training officer serves on one of three shifts (A, B, or C) there are separate wait lists for prospective interns on each shift." J.A. 100. And Chief Andrews agreed that the Fire Department followed that general practice. They also explained that training officers were unevenly distributed among the shifts, so internship applicants on certain shifts had to wait longer for internship placement than their colleagues on other shifts.

These declarations are supported by the evidence of assignment here. When Lyons first applied for the internship, he was a member of shift B. But in early November 2017, Lyons requested a voluntary transfer to shift A, and the Fire Department granted that request, making it effective December 2, 2017. Entering the internship was a year-long commitment. So assignment by shift would be forward looking: What shift would the intern be on over the next year? Before Lyons' transfer request, he was not skipped over for internship placement in favor of an applicant who was certified after him. After the transfer, Lyons was placed first on the A-shift waitlist, and it is undisputed that Lyons received the first available internship on shift A. All this supports the Department's declarations that it followed a shift-specific first-come, first-served practice.

Lyons seeks to undermine this conclusion by pointing to assignments that he claims were not done on a first-come, first-served basis based on shift. Of the twenty-two applicants from September 2016 to May 2018, Lyons points to three white firefighters whose assignments he alleges deviated from a shift-specific placement practice. None hold up.

Lyons first points to Joseph Konczal and Jodi Renner. Konczal qualified later than Lyons and was placed earlier than Lyons. But Konczal was on shift C and took an internship in shift C, while Lyons was on shift B. So Lyons' evidence that Konczal received an internship before him not only fails to undermine the shift-specific practice, it exemplifies it. Lyons' use of Renner as a comparator suffers from a similar problem. Renner was on shift B with Lyons in November 2017. But she received her internship placement on shift B in January 2018 after Lyons had transferred to shift A in December. Because Lyons was on a different shift than Renner when she received her internship, she likewise does not undermine the shift-specific practice.

Lyons' third alleged comparator is Ryan Kilner who also received his certification after Lyons. Before Lyons requested a transfer from shift B, he and Kilner worked that shift together. But only after Lyons requested the transfer did Kilner receive a shift-B internship. So that too seems consistent with the shift-specific practice. But Kilner's assignment was awarded in the gap between Lyons' requested transfer and its effective date. So, Lyons argues, both he and Kilner were technically on the same shift when Kilner received the assignment, although Lyons was slated to transfer three weeks later. Lyons

thus argues that the Fire Department violated its shift-specific practice by skipping over him because of his impending transfer.

Chief Schultz explained that it would have been "impossible" for the Fire Department to honor Lyons' transfer request while also placing him in a shift B internship because "had he taken the spot on the B shift, he would have had to immediately leave the program upon his transfer to A shift a couple weeks later." J.A. 102–03. So the Fire Department was left with two possibilities: (1) it could require Lyons to remain on shift B and take the shift B internship; or (2) it could allow Lyons to transfer to shift A and get the next available shift A internship. And by the time the internship was given to Kilner, Lyons had made his preference to transfer to shift A clear, while not communicating anything about a potential interest in staying on shift B if it meant getting the internship a little bit earlier. In the end, Kilner's assignment as a shift-B intern before Lyons' transfer is only evidence of the Fire Department's attempt to comply with Lyons' wish to transfer to shift A; the most recent indication of what he wanted.

Lyons argues that he was not informed that transferring to shift A would delay his internship placement, and if he had known, he would not have sought the transfer (i.e., he would have chosen to remain on shift B to get the internship earlier). But the pertinent question is whether Lyons offers any evidence that suggests the Fire Department granted his transfer request as a pretext to delay his internship placement. He does not. Nor does he offer any evidence that the Fire Department used the pending transfer request as a pretext to favor his white colleague, Kilner. The Fire Department had no reason to know

that Lyons misunderstood that its first come, first served practice was shift-specific, and Lyons could have asked about the consequences of the transfer himself.

Finally, Lyons suggests that other rationales offered by the Fire Department for his five-month wait undermine its claim that it followed a shift-specific assignment practice. A plaintiff can establish pretext by "show[ing] that an employer's proffered nondiscriminatory reasons for the [delayed promotion] are inconsistent over time." *Sempowich v. Tactile Sys. Tech., Inc.*, 19 F.4th 643, 652 (4th Cir. 2021) (quoting *Haynes v. Waste Connections, Inc.*, 922 F.3d 219, 225 (4th Cir. 2019)). But a finding of pretext is appropriate "only where the other evidence of discrimination is sufficiently strong to ensure that the employer is held liable for unlawful discrimination and not merely for inconsistent statements." *See Price v. Thompson*, 380 F.3d 209, 217 n.5 (4th Cir. 2004) (holding that the employer's four nondiscriminatory justifications were not inconsistent and did not establish pretext), *abrogated on other grounds by Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013). Employers may have multiple, legitimate reasons for their actions. *See Tidwell v. Cater Prods.*, 135 F.3d 1422, 1428 (11th Cir. 1998) ("[T]he existence of a possible additional non-discriminatory basis for [an employee's] termination does not, however, prove pretext."). And an employer's multiple reasons do not create the inference of pretext where "there has been no retraction of any of its reasons . . . nor are any of its reasons inconsistent or conflicting." *Johnson v. Nordstrom, Inc.*, 260 F.3d 727, 733–34 (7th Cir. 2001).

To begin with, the Fire Department attributed Lyons' placement delay to a "waiting list" in August 2017, J.A. 330, which is the practice of assigning interns based on a shift-

specific first come, first served waiting list that it has maintained throughout this litigation. "This is important because the fact[] that an employer 'never changed its story' and that its 'explanation has been consistent from the moment' it took the adverse action tend[s] to support its argument that it did not act pretextually." *Dawson v. Wash. Gas Light Co.*, No. 19-2127, 2021 WL 2935326, at *5 (4th Cir. July 13, 2021) (unpublished) (quoting *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 217 n.7 (4th Cir. 2007)).

Still Lyons argues that the Fire Department's justifications have shifted. In an October 2017 email, Chief Schultz noted that Lyons would not be considered for an internship until all other July students were placed ahead of him. And Lyons argues that Chief Schultz's email reflects a shifting justification for his delayed placement. But this email fails to undermine the shift-specific placement practice. Chief Schultz had final decision-making authority over internship placements, and although he typically followed the shift-specific first-come, first-served practice, he had the power to sometimes make exceptions. This email reflects his belief that Lyons needed to wait behind others in the July class because "[f]urther investment of time and money must be based on a reasonable expectation of success." J.A. 336. And based on Lyons' repeated failure to pass the written exam, Chief Schultz was uncertain that Lyons would succeed.

But nothing about Chief Schultz's email suggests that the Fire Department's shift-specific placement rationale is false or pretextual. *See Westmoreland v. TWC Admin. LLC*, 924 F.3d 718, 726 (4th Cir. 2019) (noting that the plaintiff bears the burden to prove pretext). And the record here does not identify the members of the July 2017 class, so we have no way to know whether the Fire Department followed through on Chief Schultz's

email. At most, Chief Schultz's email simply shows that a separate reason could also have explained a delay in placing Lyons in an internship. In addition to waiting behind those on *his shift* certified before him, he might also have to wait behind those on his shift certified in the July 2017 class. Those reasons are not inconsistent with one another, and Lyons puts forth no evidence to suggest that both are not true here. *See Price*, 380 F.3d at 214–17. Whether or not Chief Schultz followed through on his email suggesting that Lyons should wait behind the July 2017 class members, neither outcome would undermine the shift-specific practice. Rather than prove that the Fire Department's proffered reasons for the delay are "inconsistent over time," Lyons only identifies a possible alternative lawful rationale. *See id.*; *Tidwell*, 135 F.3d at 1428.[5]

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Title VII serves as an important bulwark against invidious discrimination. But when the plaintiff fails to produce evidence which creates a genuine dispute of material fact, this Court must ensure that employers are not punished for implementing lawful and nondiscriminatory business practices. On the record before us, the evidence only shows

[5] Even if Lyons' delay were attributable to Chief Schultz's instruction, Chief Schultz's email reflects the common-sense notion that a person who passed the examination on the first attempt has a greater aptitude for the material, and is thus more likely to succeed in the internship, than a person who took six tries. Title VII permits employers to consider employee qualifications when deciding who to hire and promote. *See Hux v. City of Newport News*, 451 F.3d 311, 317–18 (4th Cir. 2006) (holding that hiring a candidate with better qualifications is a legitimate, nondiscriminatory justification). And employers can consider the relative qualifications of each candidate rather than whether each merely meets the basic requirements for the job. *See id.* So even if Chief Schultz delayed Lyons' internship as a result of his exam performance, that would not be evidence of racial discrimination.

that Lyons misunderstood the Fire Department's internship placement practice. That does not suffice. Accordingly, the district court's judgment is

AFFIRMED.