United States Court of Appeals

for the

Third Circuit

Case No. 24-1007

DONNA GLAESENER,

Appellant,

– v. –

PORT AUTHORITY OF NEW YORK AND NEW JERSEY;
PORT AUTHORITY TRANS-HUDSON,

Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, HONORABLE WILLIAM J. MARTINI, U.S. DISTRICT JUDGE

BRIEF FOR DEFENDANTS-APPELLEES

JUAN M. BARRAGAN
MATTHEW MALYSA
PORT AUTHORITY LAW DEPARTMENT
Attorney for Defendants-Appellees
4 World Trade Center
150 Greenwich Street, 24th Floor
New York, New York 10007
(212) 435-3529

CP COUNSEL PRESS (800) 4-APPEAL • (326765)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

Plaintiff-Appellant Donna Glaesener ("Plaintiff"), an employee of Port Authority Trans-Hudson Corporation ("PATH") since 1996, alleges that in 2018 she was wrongfully denied promotion to the positions of System Safety and Environmental Manager ("Safety Manager") and Chief Operations Examiner ("COE") due to race discrimination. Plaintiff also claims that she was retaliated against for complaining of discrimination when she was not promoted to the positions of Principal Programs and Training Coordinator ("PPT Coordinator") in 2019 and Superintendent of Transportation in 2022.

On November 30, 2023, the Honorable William J. Martini, U.S.D.J., granted summary judgment to Defendants-Appellees Port Authority of New York and New Jersey ("Port Authority") and PATH (collectively "Defendants"), correctly concluding that Plaintiff failed to proffer any evidence from which a reasonable juror could find that Defendants discriminated against Plaintiff based on race or unlawfully retaliated against her.

The extensive record conclusively shows that Plaintiff was not promoted to these four positions because she was not the most qualified candidate. As such, it is respectfully submitted that the judgment of the lower court be affirmed.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the district court's decision to grant summary judgment to Defendants is a final decision. (A16).

COUNTER-STATEMENT OF THE ISSUES

1. Was the district court correct in rejecting Plaintiff's claim that she was not promoted to Safety Manager due to race-based discrimination? (A9-A11).

2. Was the district court correct in rejecting Plaintiff's claim that she was not promoted to the position of COE due to race-based discrimination? (A11-A12).

3. Was the district court correct in rejecting Plaintiff's claim that she was not promoted to the position of PPT Coordinator due to retaliation? (A13-A14).

4. Was the district court correct in rejecting Plaintiff's claim that she was not promoted to the position of Superintendent of Transportation due to retaliation? (A15-A16).

5. Was the district court correct in granting summary judgment to Defendants and dismissing Plaintiff's amended complaint? (A16).

STATEMENT OF RELATED CASES AND PROCEEDINGS

Defendants adopt and incorporate Plaintiff's statement of related cases and proceedings as if it was their own.

COUNTER-STATEMENT OF THE CASE

A. Background

The Port Authority is a body corporate and politic created by Compact between the States of New York and New Jersey with the consent of the United States Congress. (A70, A78). PATH is a heavy rail rapid-transit system operating in New York and New Jersey, and a wholly owned subsidiary of the Port Authority. (A70).

Plaintiff began working at PATH in 1996 as a train conductor and was promoted to: (i) Train Engineer in 1997, (ii) acting terminal dispatcher in 2002, (iii) Operations Examiner ("OE") also in 2002, (iv) Assistant Trainmaster in 2008, (v) chief safety supervisor in 2016, and (vi) acting Superintendent of Night Operations in January 2020. (A5). Plaintiff interviewed for and was promoted to Superintendent of Night Operations—a senior management position at PATH—on a permanent basis in November 2020; this is the position she currently holds. (A130 at 45:7-14, A131 at 48:9-12).

Besides Plaintiff, there are numerous other African Americans in senior management positions at PATH, including: (a) Clarelle DeGraffe, the General Manager/Director of PATH, which is the highest position at PATH (A131 at 49:8-22), (b) Raishea Haines, previously the Assistant Superintendent of Transportation and currently the Superintendent of Transportation (A132 at 52:10-14), and (c)

Alexis Hargrove, the Assistant Director of Communications. (A132 at 50:1-50:22, A569).

Therefore, Plaintiff's claim that there are only two African Americans in senior management positions at PATH is without merit; it is also unsupported by the documents Plaintiff cited in support thereof. (Plaintiff's Brief ("Pl. Br.") at 11).

i. Promotions Through the Direct Departmental Option

Human Resources Procedure ("HRP") 3.06 governs the Port Authority's and PATH's Human Resources Department's procedure for the internal recruitment and placement of all non-executive management and supervisory positions. (A336-A337).

HRP 3.06 allows a director or hiring manager to fill a particular vacancy with a qualified candidate from the subject department through the direct departmental option ("DDO") when "there are qualified candidates within his/her department . . ." (A337). To fill a vacancy through the DDO, HRP 3.06 allows the director/hiring manager to either "post the position vacancy within his/her department to request qualified candidates to apply" or "not to post the position vacancy and make a selection based on a review of the candidate's qualifications and job performance." (A337).

The Port Authority's manual titled "Direct Departmental Options Job Aid for Users" for Oracle PeopleSoft 9.2 explains that "[u]nder certain circumstances, a job

opening at the Port Authority of New York and New Jersey is filled internally without a formal recruiting process. When this happens, an employee is selected by management from within his/her department to fill the role which is open, or which is to be vacated by the current employee. These recruitments are referred to as 'Direct Departmental Options'." (A341).

The manual explains how to use Oracle PeopleSoft's online recruiting module—instead of the hard copy form—to complete the DDO process, which requires collaboration amongst three different groups of people. (A341). These are: (a) the creator of the DDO, "who is most often a Business Manager"; (b) reviewers of the DDO, "who are typically Hiring Managers within the department. . . . [and] provide commentary as to the reason why they wish to select the recommended candidate without a formal competitive recruiting process"; and, (c) Approvers of the DDO; a DDO "must be approved by a member of Human Resources Operations Partner division. Again, this approval step provides transparency and oversight to ensure the validity of an internal hire that bypasses a formal recruiting process." (A341).

Between September 2017 and January 2020 there were 344 uses of the DDO at the Port Authority; out of these 344 uses, the DDO was used 153 times to promote non-Caucasian persons. (A1408, A1410-A1413). 47 of the 153 DDO uses were used to promote African Americans. (A1408, A1410-A1413). Within PATH, the

DDO was used 14 times between September 2017 and January 2020; out these 14 uses, the DDO was used seven times to promote non-Caucasian employees. (A1408, A1410-A1413).

ii. Safety Manager

In 2015, David J. Volk, a Caucasian male, joined PATH's System Safety and Environmental Management Division ("Safety Division") as the Safety Programs Coordinator; in this position, Volk's responsibilities involved the administration of all safety training for all PATH divisions to ensure compliance with regulatory (Occupational Safety Health Administration, Federal Railroad Administration, and Environmental Protection Agency) mandated training, serving as the primary back-up for PATH's drug and alcohol coordinator, and emergency preparedness. (A393).

Prior to joining PATH, Volk was the Director/Chief of the City of Perth Amboy Fire Department ("PAFD") from 2009 to 2013. (A393). As Director/Chief of the PAFD, Volk oversaw a $7 million operating budget and a $2 million capital budget; he also managed 50 career employees, 55 volunteers, and 35 EMS employees. (A393). From 1991 to 2009, Volk occupied the positions of Training Officer and Division Commander of Administration/Training with the PAFD, which gave him extensive experience in safety training and compliance, dealing with regulatory agencies such as OSHA, NIOSH, FEMA, and the Department of Homeland Security. (A393). While Volk was a Training Officer for the PAFD from 1991 to 1999, he

created, implemented, and administered various safety training and emergency preparedness exercises and programs. (A393).

At the end of 2016, Louis Dulfer was promoted to the position of Safety Manager. (A401 at 22:6-10, A402 at 26:19-27:1, A404 at 36:4-8, A437-438). At the time Dulfer became Safety Manager, the organizational chart of the Safety Division was a straight line, with everyone reporting to Dulfer. (A409 at 54:7-11). This, however, was not considered the best use of the Safety Division's resources. (A440).

Thereafter, Dulfer proposed restructuring the Safety Division to maximize the use of its resources by allowing its staff to report to two senior managers "who would be responsible for the division's staff and responsibilities as well as allow them to be in line for succession planning." (A437). The two senior managers would, in turn, report to Dulfer. (A410 at 57:19-24, A437).

In February 2017, Dulfer met with the General Manager/Director of PATH at the time, Mike Marino, and business manager, Flora Heun, to discuss the Safety Division's reorganization; at the conclusion of same, Marino directed Heun and Dulfer to move forward with the reorganization. (A437). Upon approval, Volk and Marco Salcedo were promoted to Principal Safety and Training Coordinator and Principal Safety and Environmental Coordinator, respectively. (A393, A410 at 58:4-9).

Plaintiff was not considered for the position of Principal Safety and Training Coordinator[1], which was awarded to Volk in 2017, because Plaintiff's promotion to Chief Safety Supervisor in February 2016 was the first role that she held where her primary task changed from oversight of train operations to that of safety training and compliance. (A126 at 27:1-22, A126 at 28:21-29:22, A127 at 30:11-24, A127 at 31:8-15, A128 at 35:15-25, A128 at 36:7-16, A129 at 38:8-22, A129 at 39:7-21, A129 at 41:24-42:8, A130 at 42:25-43:8, A130 at 44:15-45:1, A1320-A1322).

At the time Plaintiff first joined the Safety Division as a Chief Safety Supervisor, her "skill set based around her experience in the transportation division as an OE and as a scheduler." (A404 at 33:2-5, A1320-A1322).

According to Dulfer, "[w]e all come with a skill set. All skill sets are mixed. They need to be developed. At that point I think Donna [Glaesener] was in the right position as the safety chief and from a development standpoint as she developed through that position would indicate whether she was ready for the next step." (A403 at 32:14-33:1).

In short, Plaintiff was "familiar with policies and procedures that pertained to the transportation division", but not to the Safety Division. (A404 at 35:10-11).

[1] Plaintiff withdrew her claim that she was not promoted to the Principal Safety and Training Coordinator position because of race-based discrimination. (A7 at n.3).

Contrary to Plaintiff's assertion, Volk, as Director/Chief of the PAFD, had developed the majority of safety responsibilities he would have at PATH (A408 at 49:18-21) because "[s]afety is universal. It goes from one organization to the other." (A408 at 49:16-17). And, Dulfer was very familiar with Volk's resume (A408 at 49:22-25), and how Volk's skillset and experience would translate to the job at PATH. (A408 at 49:16-21).

In June 2018, Dulfer announced his intention to retire from PATH. Dulfer was subsequently asked by Marino to postpone his retirement until February 2019. (A406 at 41:18-42:16).

Dulfer testified that following his initial announcement regarding his retirement, Plaintiff expressed interest in the Safety Manager position. (A406 at 43:3-11). At the time, Dulfer already had two individuals in mind to replace him: Volk and Salcedo. (A406 at 44:1-6). Dulfer did not consider Plaintiff for the position because he did not believe Plaintiff's "skill set was at that point up to that position. She had experience as an OE. She had experience as a safety chief. Limited interaction with regulators. No managerial experience from the standpoint of developing budget, capital programs, no experience with direct employees. She just at that point was not ready." (A406 at 44:13-22). Moreover, Dulfer testified that he did not recall Plaintiff ever asking to shadow him. (A435 at 157:18-23).

Dulfer also testified that "yes, I would have given her the opportunity [to shadow me had Plaintiff asked]." (A435 at 157:24-158:5).

By email dated August 17, 2018, Dulfer advised Marino that he intended to retire in the early part of 2019, and that "[i]n keeping with the Port Authority and PATH philosophy of developing our bench strength for succession[,] it was my intention to mentor both Dave [Volk] and Marco [Salcedo] as potential replacement candidates upon my retirement. Unfortunately, Marco was deployed to active military duty in December 2017 and will not return until December 2018." (A437).

According to Dulfer, Volk "has formed strong working relations with department and division staff as well as both senior management and represented staff. He is seen as the go to person in my absence. His demonstrated managerial skills have been an asset to the Safety Division and PATH. Dave was as [*sic*] an outstanding performer in 2017 and continues to be an outstanding performer in 2018. Dave addresses all assignments regardless of size with professionalism, focus and a sense of urgency. He thinks outside the box and is always looking for ways to improve the process." (A438).

On August 28, 2018, PATH submitted a request to the Human Resources Department to appoint Volk as the Safety Manager through use of the DDO. (A440-A441). Under the section titled "Business Discussion and Notes", the request stated, in relevant part, that since the reorganization of the Division, "[t]he Principal

Programs + Training Coordinator, David Volk, employee ID 49014, has been involved in all aspects of the division's business. He has attended senior staff meetings, capital program reviews, Port Authority Safety and Security initiatives as well as internal and external regulatory audits. He has also been part of the department budget process for the last two years and handled the responsibilities associated with the overall management of the division." (A440-A441).

The request also stated that Volk had taken the lead in: (a) the implementation of the revised 49 CFR Part 219 Control of Alcohol and Drug Use including contractor compliance, (b) overseeing new 49 CFR Part 243 Training submissions, (c) overseeing 49 CFR Part 270 Safety Program Plan revision, (d) the acquisition of the Safe Track compliance monitoring program, (e) organizing the formation of an Engineer and Conductor training certification group for compliance with 49 CFR Parts 240 and 242, and (f) revising the PATH Respiratory Protection Program and overseeing the equipment purchase to provide for required annual fit testing within PATH. (A441).

The request to appoint Volk as Safety Manager through use of the DDO was approved by the Human Resources Department on September 17, 2018. (A441).

Plaintiff contends that her 2016 and 2017 evaluations support her discrimination claim. (Plaintiff's Brief ("Pl. Br.") at 8-9). However, for each of

those years, Plaintiff received an overall rating of three out of five (A1000, A1009), which is the lowest possible score that is deemed satisfactory. (A1415).

Plaintiff's claim that she was qualified for the Safety Manager position—a mere two years after she obtained her first job in the field of safety training and compliance—is likewise without merit. (A1320-A1322). As previously explained, Plaintiff simply did not have the requisite experience in safety training and compliance because her primary duty in all her positions prior to becoming Chief Safety Supervisor in February 2016 involved train operations. (A1320-1322). In comparison, Volk had been working in safety training and compliance since 1991. (A393). And Plaintiff had no experience in managing employees, developing budgets or capital programs, and limited experience in dealing with regulatory agencies, all of which were required for the Safety Manager position. (A10, A406 at 44:13-22).

iii. Chief Operations Examiner

On July 23, 2018, PATH posted a job bulletin for the position of COE. (A447-A448). The job posting required "5 years' experience as an Operations Examiner in PATH or a combination of experience including Dispatcher/Tower/Engineer totaling 10 years and/or 5 years of Supervisory experience." (A447). For education, a high school or equivalency diploma was required. (A447). The job posting indicated that Ben Lau was the recruiter for this position. (A448).

As a recruiter, Lau is responsible for reviewing the open job positions, reviewing the job descriptions for open positions, vetting résumés submitted for the open positions, and forwarding the qualified résumés to the hiring manager for review. (A475 at 10:4-14). Lau was also involved in the creation of the job posting with the hiring manager. (A475 at 10:15-24).

Plaintiff applied for the COE position and was one of four candidates invited to interview; the other three were Monica Lam, Shawn Greene, and Michael Moran. (A151 at 129:2-6, A451).

At his deposition, Lau testified that only candidates that possess the minimum qualifications for the job are invited to interview for the position. (A489 at 68:9-25, A490:69:1-5). Lau further testified that Plaintiff and Moran were invited to interview for the COE position because they were both qualified for it. (A486 at 55:6-16). In fact, Plaintiff acknowledged that Moran met the qualifications for the COE position. (A152 at 132:8-9).

Plaintiff and the other candidates were interviewed by then PATH Superintendent of Transportation, Kevin Lejda and Lau. (A151 at 129:7-9, A451, A453-A466). As part of the interview process, the interviewers— Lejda and Lau— were provided with the "Interview Question Sheet and Instructions". (A468-A471). This document contained five interview questions specifically tailored for the COE position; two were for general competency and three for technical knowledge.

(A468-A469). It also contained optional icebreaker questions, follow-up questions if needed to clarify a candidate's response, and the script to follow for opening, during, and after the interview. (A468-A471).

Lejda and Lau were each provided with notetaking and rating forms to complete. (A453-A466). These forms allowed each interviewer to take notes and assign a score from one to five for the candidate's responses to each question and communication skills. (A453-A466).

As indicated in the interview scoring sheet, the final score that each candidate receives is determined by averaging the score that Lejda and Lau gave for each question and communication skills. (A451). Plaintiff's total score was 24; whereas Lam, Greene, and Moran each received a total score 25, 22, and 27, respectively. (A451). It is worth noting that Plaintiff is not claiming that the interview process was biased or that awarding a higher score to Moran was a pretext for discriminatory animus. (Pl. Br. at 17-20, 43).

Lau testified that he recalled that during her interview, Plaintiff appeared nervous and gave disorganized answers to some questions. (A486 at 53:4-12, A505 at 131:24-132:3). Whereas Moran appeared "[c]alm, cool and collected" and provided responses to the questions asked "in an organized step-by-step fashion." (A485 at 52:8-17, 52:25, A486 at 53:1-12).

At her deposition, Plaintiff was asked: "Is it fair to say job duties and responsibilities of operations examiner are the ones most closely aligned to the job duties and responsibilities of a Chief Operations Examiner?" (A152 at 130:19-22). In response, Plaintiff testified: "They're closely aligned, yes." (A152 at 130:23).

At the time Moran applied for COE, he was an OE and had held that position for approximately 14 years. (A151 at 129:10-13, A531). Conversely, Plaintiff had not been an OE for approximately a decade, having held that position from 2002 to 2008. (A152 at 130:13-18).

Plaintiff testified that awarding the COE position to Moran was discriminatory "[b]ecause he was Caucasian and I was the ideal candidate for the position and met the qualifications and exceeded the qualifications." (A152 at 132:24-133:4). However, having or exceeding the qualifications for a position does not automatically you to that position; according to Lau, "the résumé and the experience is essentially the ticket to getting the interview because it would outline the overall experience required of the position. The interview itself is the main determining factor of selecting a finalist for the position." (A481 at 35:22-36:4). DeGraffe reiterated this when she testified that the most qualified candidate for a position is typically determined by the interview panel. (A807 at 174:7-22). This makes sense given that during the interview for the COE position, candidates were asked two

general competency and three technical knowledge questions and scored based upon their responses and communication skills. (A451, A453-A466).

On October 15, 2018, Plaintiff emailed Lau, stating, "I received your message when I got in tonight. You may not be aware, I'm on the midnights now until the end of the year. I think I know why you called me though. I'm hearing M. Moran was offered the Chief OE job. If so, great choice! He's a great & hard worker." (A534). At her deposition, Plaintiff was asked about the October 15, 2018 email; in response, Plaintiff testified that "Moran was a great, hard worker. They made a choice, I'm not going to say bad choice, you discriminated against me, great choice." (A153 at 134:2-135:4). When asked whether there was any mention of being discriminated against in the October 15, 2018 email, Plaintiff responded: "No there isn't." (A153 at 135:5-7).

iv. Office of Equal Opportunity Compliance, Diversity & Inclusion Investigation

On April 4, 2018, Plaintiff met with Heun to discuss her concerns on various topics regarding her employment at PATH. (A549 at 56:5-14). On September 18, 2018, Heun sent an "EEO Complaint Summary" containing Plaintiff's grievances to the Office of Equal Opportunity Compliance, Diversity & Inclusion ("OCDI"). (A564-A567).

On October 9, 2018, Plaintiff emailed Wayne Turner and Natalynn Dunson-Harrison of OCDI, and attached a document titled "Unfair Hiring Practices" where

Plaintiff complained about Volk's promotion through the use of the direct departmental option and about other incidents. (A571-A575).

After investigating Plaintiff's complaints, Dunson-Harrison, General Manager of OCDI, advised Plaintiff that "we are unable to conclude that you have been discriminated against by PATH on the basis of race and/or gender or retaliated against in violation of Title VII or the Agency's relate[d] EEO Policy. Specifically, we could not conclude that candidate selections for other positions you applied for or wanted to apply for were determined on any basis that violated Title VII or related agency policies or were evidence of blatant unfair promotional/racial discrimination practices as alleged." (A443).

Plaintiff was further advised that "[t]here is no legal or Agency requirement that every position be filled by a competitive process. A department director has the discretion to fill a position through either a competitive process or use of a direct departmental option." (A444).

v. Principal Programs and Training Coordinator

On December 6, 2018, PATH posted the job bulletin for the vacant position of PPT Coordinator. (A577-A578). The job posting indicated that Lau was the recruiter for this position. (A578). The minimum requirements for the PPT Coordinator position were that the candidate have five years of supervisory

experience and three years of regulatory compliance with "FRA/OSHA/EPA/NFPA regulations." (A577).

During his deposition, Lau was shown the job posting for the position of PPT Coordinator and asked: "Does that mean that the candidate had to have three years' experience of regulatory compliance with FRA and OSHA and EPA and NFPA?", In response, Lau, as the recruiter for the position, testified: "No, because if that was the case, you would have commas for FRA, comma after OSHA, comma after EPA and then the word and or the ampersand for NFPA." (A514 at 168:9-16). Lau further testified that "the slash indicates or." (A514 at 168:23-24).

The job posting also indicated that applicants are expected to meet the following timeframes: at least 18 months in the current position if it is a within-band promotion or 12 months in the current position if it is a band-to-band promotion. (A577). However, as Lau explained: "if there was a candidate that met the requirements of the position outside of what's being stated in front here to be eligible, there is discretion from the head of that department to say we would still like to interview this person for this position as well." (A488 at 63:18-23). In short, the head of the department has the ultimate authority in determining whether or not a candidate who may not meet those within-band or band-to-band promotion requirements can still interview for a position if the candidate otherwise meets the minimum qualifications for the position. (A488 at 61:13-25, A489 at 65:7-12).

Lau's testimony regarding the time and role requirements for band-to-band and within-band promotions is corroborated by Christopher Wolff, who has been employed with the Port Authority's Human Resources Department since January 16, 2018, and is fully familiar with the Port Authority's and PATH's band system. (A864-A866).

Haines applied for the PPT Coordinator position because she met the minimum requirements; she met the five years of supervisory experience because she supervised yard supervisors, dispatchers, engineers, and conductors on a day-to-day basis as OE from 2010 until June 2014, and supervised all operating personnel as an Assistant Trainmaster from June 2014 to at least May 2018. (A732 at 16:3-24, A737 at 34:5-7, A760). Haines also met the three years of experience for regulatory compliance with FRA regulations, including FRA regulations 240 and 242, as an OE, which she held on a temporary and permanent basis from 2010 until June 2014. (A732 at 16:3-24, A735 at 25:15-26:9, A737 at 34:8-35:3, A760).

As Haines did not meet the band-to-band minimum time requirements, Lau brought this to the attention of Heun and Volk and advised them that in order to move forward with Haines' interview, the head of PATH would have to approve it. (A513 at 164:18-25). Marino, who was head of PATH at the time, allowed Haines to interview for the position. (A514 at 165:15-166:1).

Plaintiff also applied for the position and was one of three candidates interviewed; the other two were Wendy Wright and Haines, all of whom are African American. (A580-A582, A154 at 139:19-140:3).

Plaintiff and the other candidates were interviewed by Joy Chiu, Walter Jones, Barbara Iorio, and Lau. (A154 at 139:8-14). As part of the interview process, the interviewers were provided with the "Interview Question Sheet and Instructions". (A632-A634). For the PPT Coordinator position there were 10 questions; four were for general competency and six for technical knowledge. (A632-A633).

Chiu, Jones, Iorio, and Lau were each provided with notetaking and rating forms to complete for each candidate, which allowed each interviewer to take notes and assign a score from one to five for the candidate's responses to each question and for communication skills. (A453-A466).

As indicated in the interview scoring sheet, each interviewer assigns a score from one to five for the candidate's response to each of the 10 questions and for communication skills, which was incorrectly written under the column titled "Interview Score". (A580-A582). The final score for each candidate is computed by averaging the total score each interviewer gave that candidate. (A580-A582). Plaintiff's final interview score was 41; whereas Haines and Wright received a score of 42.75 and 29, respectively. (A580-A582). As a result, the position was offered to Haines. Similarly to the COE position, Plaintiff is not claiming that the interview

process was biased or that awarding a higher score to Haines was a pretext for retaliatory animus. (Pl. Br. at 22-23, 45-49). Plaintiff was informed that she was not selected on February 15, 2019. (A636).

vi. Superintendent of Transportation

On April 28, 2022, PATH posted the job bulletin for the Superintendent of Transportation position. (A644-A645). The job posting indicated that Ripdaman Kaur was the recruiter for this position. (A645). Plaintiff, who was the Superintendent of Night Operations at the time, applied for the position and was one of four candidates invited to interview for it; the other three were Haines, Shawn Greene, and Dominick Lombardi. (A647). Plaintiff and the other candidates were interviewed by Cynthia Bacon, Evelyn Perez, and Joseph Vartolone. (A311 at 40:17-19).

Plaintiff was interviewed on September 9, 2022. (A661). At the time Plaintiff was interviewed, Bacon was the Chief Negotiator of Labor Relations at PATH; she retired in October 2022 and at the time of her deposition, she was working as a consultant for PATH. (A684 at 7:10-24). Vartolone began working at PATH as its Deputy Director on March 13, 2022. (A701 at 7:13-20, 24:5-15). Perez joined the Port Authority in January of 2020 as an Executive HR Business Partner. (A815 at 7:3-14).

As part of the interview process, each interviewer was provided with the "8 Interview Questions & Rating Form" for each candidate. (A649-A660). This document contained eight questions specifically tailored for the Superintendent of Transportation position, as well as optional icebreaker questions, and the script to follow for opening, during, and after the interview. (A649-A660). Each candidate was evaluated based on the answers provided to the questions and communication skills. (A647).

Bacon testified that during the interview, Plaintiff was "very flustered. She was emotional. There were tears. She kind of slapped the table a few times out of maybe frustration. There – at the end of the interview she asked we discount the entire interview because she felt she did poorly and asked the panel to consider her other qualifications. It was very challenged unfortunate interview in that regard." (A694 at 45:4-15).

According to Perez's typed notes, "[a]t beginning of interviews said she was nervous. Said it again at middle of interview. This may indicate lack of confidence in high pressure situations when dealing with leaders above her. Often, Donna's answers lack cohesion and organization. Throughout the interview she kept stopping in the middle of her sentences and would ask the question again. At the end of the interview, Donna admitted that while she didn't interview well, she believed that given her experience she was the best for the job. In one of the examples she gave

around a recent conflict she dealt with, she shared that someone else said a curse. Instead of just saying an expletive was used, she shared the actual expletive." (A661).

Vartolone testified the following about Plaintiff's communication skills during the interview: "I didn't get a lot of coherence in the responses on the questions. There was a lot of changing shifts, just a lot of thoughts being thrown out or a lot of ideas or commentary. Also the thing that jumped out at me on this part was that Donna said it doesn't matter what happens at this interview, the job's basically been awarded already or something like that. So it became a very awkward interview, like I said earlier, probably by the second or third question. I think Donna was very nervous. . . . It seemed like she struggled to convey her thoughts coherently, her thoughts and ideas coherently, and there was a lack of logical flow in the responses." (A723 at 95:15-96:5).

Plaintiff claims that she gave similar answers to Haines. (Pl. Br. at 24). However, that is not the case. For instance, question No. 1 asked the interviewee to list the management styles required to succeed in the position. (A1196). Rather than doing this, Plaintiff's response was to list "job progression" instead of discussing "style or accomplishments" as the question called for. (A688 at 23:4-12, A688 at 24:21-25). Whereas Ms. Haines discussed the various required management styles to succeed in the position. (A695 at 50:14-51:14, A1163).

When asked about Plaintiff's response to question No. 1, Bacon testified: "Here's what I recall about the question and the response. It was a very long response. Donna was very nervous. She was not cohesive in her response and she was struggling with communication." (A689 at 25:6-13). Ms. Bacon's testimony is corroborated by Ms. Perez's interview notes. (A965).

Vartolone testified that in answering question No. 1, Plaintiff would mention "the need to ask Joe [Vartolone] and Clarelle [DeGraffe] for guidance." (A713 at 56:8-10). According to Vartolone, as a candidate for the Superintendent of Transportation, "I would have looked for a little bit more of a stronger feeling of independence through the interview process." (A714 at 57:3-6). Bacon echoed Vartolone's sentiment; she testified that Plaintiff's answers were "[t]actical rather than strategic. Searching for answers. Asked time and again to reread the questions and stating—asking Joe and Clarelle to guide her with ideas." (A689 at 27:17-20). Bacon did not fault Plaintiff for wanting or seeking guidance from the director and deputy director of PATH, but "[t]he question in the interview was how would you manage all of this. And my interpretation of somebody saying, well, I'll ask my boss how to do it did not strike me as a very positive response." (A689 at 28:1-10).

For Plaintiff's response to question No. 2, Vartolone wrote in his notes that Plaintiff "Lack Direct Report Exp … Did not convey how manages time … Lacked Examples/Scenarios" and rated Plaintiff as "Needs Development." (A1259).

Vartolone testified that "[t]his is where I think I remember Donna was extremely nervous during the interview and this is around the time when I think we had to repeat this question three times, and the response was – it just wasn't coherent. It didn't flow. This is I think the point where the interview -- where it became difficult. The interview became very difficult for Donna and us … I don't think she understood the question and then I think it just -- just the response wasn't coherent to the question." (A716 at 65:22-66:9).

Question No. 3 asked, in part: "What do you believe your biggest challenge in this role? As you onboard in the first 30, 60, 90 days, what would be your process to ensure these challenges have an action plan?" (A1240). As reflected in Vartolone's notes, Plaintiff did not break down the process to 30, 60, and 90 day increments. (A717 at 72:7-11, A1260). Whereas Haines did, even if it is not fully reflected in Vartolone's notes; Vartolone testified to that effect. (A717 at 69:1-6, A717 at 69:23-70:21). Perez testified to this as well; according to her, Haines "spoke to it. Again, maybe not fully captured in my notes but what she spoke to was specifically about some of the things she would work through in that time frame." (A834 at 81:22-25).

As another example, question No. 7 dealt with hurricane preparedness and asked the candidate about the steps he/she would take to ensure that PATH is prepared for the storm in 24-hours increments beginning 72 hours before the

predicted landfall. (A1244). Haines broke down her answer into three 24-hour increments, which is what the question called for; this is reflected in Bacon's interview notes for Haines for this question. (A1169). Plaintiff did not do this, even though she was reminded that she needed to break down her answer in 24-hour increments. (A692 at 38:11-17).

As indicated in the "Final Selection & Applicant Rating Sheet", the score that a candidate received for each question and for oral communication skills was calculated by averaging the score each interviewer gave for that specific item. (A647). Plaintiff's total score was 18, Green's was 18, Lombardi's was 20 and Haines's was 44. (A647). As a result, the position was offered to Haines.

Plaintiff incorrectly believes that longevity of employment at PATH should be given 80% of the weight in determining whether someone should be promoted. (A175 at 222:3-20). However, as testified by DeGraffe, "[w]hen you're in management, it's all about qualifications and sometimes it's very difficult for an employee that moves from the represented rank that moves into the management rank to get that out of their heads. They keep thinking it's about how long I'm here. As a management employee, it's never about how long you're here. It's about your qualifications. Are you the most qualified? And a lot of people are qualified in PATH. That's what they do day in, day out; however, are you the most qualified for the position that you are applying for, and that is typically determined by a[n]

[interview] panel." (A807 at 174:7-22). And, "the whole purpose of an interview is to determine how someone communicates and reacts under pressure." (A825 at 45:6-12).

B. Procedural History

Defendants adopt and incorporate Plaintiff's procedural history as if it was their own and supplement it with the following additions.

In the November 30, 2023 Opinion, the lower court initially noted that Plaintiff withdrew her claims "that Defendants failed to promote her in 2016 and 2017 . . . and has also stipulated to the dismissal of her punitive damages claim." (A5).

i. The district court's decision regarding Plaintiff's discrimination claim for the Safety Manager position

The court determined that Plaintiff failed to identify any evidence that she was denied promotion to the position due to race-based discrimination. (A9). The court agreed that a department director has discretion to fill a position by a competitive process or DDO, which Defendants have used to promote African Americans and non-Caucasian employees. (A9-A10). Even if Plaintiff can establish a *prima facie* case, Defendants presented sufficient uncontroverted evidence of a legitimate non-discriminatory reason for promoting Volk to the role of Safety Manager. (A10). Specifically, Volk was more experienced than Plaintiff in safety training and compliance and possessed experience in developing budgets and capital programs,

managing employees, and dealing with regulatory agencies such as OSHA and NIOSH, which Plaintiff lacked and were required for the Safety Manager position. (A10). In addition, Plaintiff had not developed any safety compliance or emergency management programs during her career. (A10). Whereas Volk had done so. (A5, A10).

In addressing Plaintiff's argument that Defendants' legitimate, non-discriminatory reason to hire Volk as Safety Manager was pretextual given what she alleged to be her superior qualifications, the court noted Plaintiff's reliance on her own 22-year career at PATH ignored Volk's employment history prior to joining PATH. (A10). Moreover, the court correctly reasoned that "even if Defendants' decision to promote Volk was wrong or mistaken, Plaintiff offered no credible evidence upon which a jury could conclude that Defendants' legitimate non-discriminatory reasons for promoting Volk were pretext for racial animus." (A11).

ii. The district court's decision regarding Plaintiff's discrimination claim for the Chief Operations Examiner position

The court determined that Defendants articulated a legitimate, non-discriminatory reason for promoting Moran rather than Plaintiff; namely, that Moran received the highest interview score and thus was the most qualified candidate. (A11). Citing to *Evans v. Port Auth. of New York and New Jersey*, 438 F. App'x 117 (3d Cir. 2011) and *Alcantara v. Aerotek, Inc.*, 765 F. App'x 692, 697 (3d Cir. 2019),

the court found Plaintiff's poor interview performance to be a legitimate, non-discriminatory reason for promoting Moran over Plaintiff. (A11).

The court also addressed Plaintiff's arguments that the selection of Moran was a pretext for discrimination because (a) Plaintiff was allegedly significantly more qualified than Moran; and, (b) subjective interview scoring is susceptible to abuse and serves to mask discriminatory animus. (A11).

The court found the first argument unavailing because Moran met all the requirements for the position—a fact that Plaintiff does not dispute—and as testified to by two of Defendants' witnesses—Lau and DeGraffe—performance in the interview itself is the main determining factor for selecting a candidate for a position. (A12, A481 at 35:22-36:4, A807 at 174:7-22, A825 at 45:6-12).

Addressing Plaintiff's second argument that subjective interview scoring is susceptible to abuse, the court cited *Williams v. Rohm & Haas Co.*, 90 F. App'x 627, 629 (3d Cir. 2004) for the proposition that an interview process is always subjective so that alone cannot be the criteria for determining whether it is pretext for discrimination, and to *Boykins v. SEPTA*, 722 F. App'x 148, 155 (3d Cir. 2018) to reject Plaintiff's assertion of pretext because Plaintiff was unable to point to any evidence to support the claim. (A12).

iii. The district court's decision regarding Plaintiff's retaliation claim for the Principal Programs and Training Coordinator position

The court concluded that Plaintiff could not establish a *prima facie* case because she did not proffer any evidence from which causation could be inferred. (A13). The court addressed Plaintiff's argument that the temporal proximity between the selection of Haines to the PPT Coordinator position in February 2019 and Plaintiff's complaints about discrimination in April 2018 and December 2018 established causation; it concluded that temporal proximity by itself is insufficient to show causation. (A13). The two to ten-month period between Plaintiff's protected activity and the alleged adverse employer action was by itself "not an 'unusually suggestive' temporal proximity that alone creates an inference of a causal link." (A13). Furthermore, Plaintiff made no allegations nor submitted any evidence of any ongoing antagonism following her complaints of discrimination and she failed to identify any evidence that credibly supports any but-for causation underlying the subject decision. (A13-A14).

Even if Plaintiff could establish causation to meet her *prima facie* burden, Defendants offered a legitimate non-discriminatory reason for the selection of Haines, namely that among the three candidates interviewed, Haines had the highest score, which was based on retaliation-neutral questions of general competency, technical knowledge, and oral communication skills. (A14).

The court addressed Plaintiff's argument that the selection of Haines was pretext for retaliation because (a) Haines did not engage in protected activity, (b) had less seniority and experience, and (c) was not as qualified as Plaintiff for the position. (A14). The court found these three arguments to be without merit. The fact "that Haines received the promotion because she had not engaged in protected activity is pure speculation as it lacks any factual basis." (A14).

Haines met the requisite five years of supervisory experience as OE from 2010 to 2014 and as Assistant Trainmaster from June 2014 to at least May 2018. (A14). She also had three years of regulatory experience with "FRA/OSHA/EPA/NFPA" through her experience with FRA regulations as an OE from 2010 to 2014. (A14). And, the head of PATH at the time, Marino, authorized the requisite override to allow Haines, who had been in her current position at the time for less than 12 months, to interview for the position, which would be a "band to band" promotion. (A14).

The court found Plaintiff's claim that she was the most qualified candidate for the position due to her longevity at PATH unavailing because—as testified to by Lau and DeGraffe—the interview panel determines who is the most qualified candidate for the position. (A14).

iv. The district court's decision regarding Plaintiff's retaliation claim for the Superintendent of Transportation position

The court rejected Plaintiff's attempt to establish causation through temporal proximity of the years-long time gap between the protected activity and the allegedly

adverse decision due to Plaintiff's failure to cite to any supporting caselaw and the lack of any evidence or "pattern of antagonism or any credible evidence sufficient for a reasonable juror to infer causality between any protected activity and the failure to promote Plaintiff to Superintendent of Transportation years later, particularly in view of her promotion to Superintendent of Night Operations in November 2020 after she had filed her discrimination claims." (A15).

Even if the jury could infer a causal connection, the undisputed evidence showed that Plaintiff did not receive the highest interview score for the position because of her poor performance in the interview. (A15). The deposition testimony of the members of the interview panel and their notes established that Plaintiff was denied promotion for specific reasons unrelated to retaliation. (A15).

In its analysis, the court rejected Plaintiff's contention that the interview notes from the interview panel reveal inconsistencies that evidence pretext, finding instead that the notes, scoring, and deposition testimony were consistent with Defendants' non-retaliatory explanation that Plaintiff did not interview as well as the selected candidate, Haines. (A15-A16). While the court agreed that the interview notes may not completely document the detail for each candidate's every response, they did not amount to inconsistencies that substantiate a causal link or show that Defendants' proffered reasons for not promoting Plaintiff were weak, implausible, or so inconsistent to be unworthy of credence. (A16).

SUMMARY OF ARGUMENT

The lower court was correct in granting summary judgment to Defendants. Taken in turn, Plaintiff failed to identify any evidence showing that she was not promoted to Safety Manager due to race-based discrimination. (A9). Defendants' policies allow a department director to fill a position through a competitive process or DDO (A337, A444), which has been used extensively to promote African Americans and non-Caucasian employees. (A1408, A1410-A1413). Even if Plaintiff can establish a *prima facie* case, the undisputed evidence shows that Defendants promoted Volk over Plaintiff because Volk was more experienced in safety training and compliance (A393-A394, A1320-A1322); he also possessed extensive experience in developing budgets and capital programs, managing employees, dealing with regulatory agencies, and developing and implementing safety compliance and emergency management programs, which Plaintiff lacked and were required for the position. (A393-A394, A135 at 62:20-25, A135 at 64:17-21, A404 at 33:2-5, A406 at 44:18-21, A440-A441, A1320-A1322).

Second, Defendants articulated a legitimate nondiscriminatory reason for promoting Moran over Plaintiff to the COE role because Moran had the highest interview score, which was based on answers to questions relating to general competency, technical knowledge, and oral communication skills. (A451). This made him the most qualified candidate for the position. (A481 at 35:22-36:4, A807

at 174:7-22). The fact that there is a degree of subjectivity involved in awarding a score alone cannot be the criteria for determining whether it is a pretext for discrimination, given that an interview is always subjective.

Third, Plaintiff did not proffer any evidence of causation between her protected activity and not being awarded the PPT Coordinator position. The two to ten-month lapse between Plaintiff's protected activity and the decision not to promote her to the PPT Coordinator position is by itself insufficient to show causation. Even if Plaintiff could establish same, the uncontroverted evidence shows that Haines, who met the requirements for the position, was promoted to PPT Coordinator because she received the highest interview score (A580-A582) based upon neutral questions relating to general competency, technical knowledge, and oral communication skills. (A481 at 35:22-36:4, A807 at 174:7-22).

Fourth, Plaintiff failed to establish a causal connection between her protected activity and the decision not to promote her to the Superintendent of Transportation position years later because there is no evidence that would support such a finding; this is especially so given that Plaintiff was promoted to the position of Superintendent of Night Operations in November 2020 after all the protected activity had taken place. (A130 at 45:7-14, A131 at 48:9-12). Even if the jury could infer a causal connection, the undisputed evidence in the form of the deposition testimony and notes of the members of the interview panel show that Plaintiff did not interview

as well as the selected candidate, Haines. (A688 at 24:17-25, A661, A689 at 25:6-13, A694 at 45:6-10, A716 at 65:22-66:9, A723 at 95:17-20, A965).

ARGUMENT

Standard of Review

The Third Circuit employs a *de novo* or "plenary standard in reviewing orders entered on motions for summary judgment, applying the same standard as the district court." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014) (citations omitted). Accordingly, this Court may affirm the lower court "on any grounds supported by the record, even if the court did not rely on those grounds." *Id*. (quoting *Nicini v. Morra*, 212 F.3d 798, 805 (3d Cir. 2000)).

Point I

The lower court correctly found that Plaintiff failed to identify any evidence showing that she was not promoted due to race-based discrimination or that any of the articulated reasons were pretext

To prevail on a discrimination claim under Title VII, a plaintiff must satisfy the three-step burden-shifting inquiry established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). First, plaintiff must establish a *prima facie* case for failure to promote. To do that, a Title VII plaintiff must show "that (a) she was a member of a protected class, (b) she was qualified for the . . . job to which she applied, and (c) another, not in the protected class, was treated more favorably." *E.g.*,

Scheidemantle v. Slippery Rock Univ. State Sys. of Higher Educ., 470 F.3d 535, 539 (3d Cir. 2006) (citing *McDonnell Douglas Corp.*, 411 U.S. at 802-03).

If the plaintiff succeeds in making a *prima facie* case, the burden shifts to the defendant-employer to proffer a legitimate, non-discriminatory reason for the failure to promote. *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994) (quoting *McDonnell Douglas Corp.*, 411 U.S. at 802 (quotation marks omitted)). The defendant-employer satisfies this "relatively light burden by articulating a legitimate reason" for failing to promote plaintiff. *Id*. To satisfy this burden, the defendant-employer "need not prove that the tendered reason *actually* motivated its behavior, as throughout this burden-shifting paradigm the ultimate burden of proving intentional discrimination always rests with the plaintiff." *Id*. (citing *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253-54, 256 (1981)).

Once the defendant-employer satisfies its burden, the plaintiff must point to direct or circumstantial evidence, "from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Iadimarco v. Runyon*, 190 F.3d 151, 165-66 (3d Cir. 1999) (quoting *Fuentes*, 32 F.3d at 764).

As to the quantum of evidence required to rebut the defendant-employer's proffered legitimate reasons and defeat summary judgment, a plaintiff must produce

competent evidence to allow a reasonable factfinder "to infer that each of the employer's proffered nondiscriminatory reasons was either a post hoc fabrication or otherwise did not actually motivate the employment action." *Id*. at 166 (quoting *Fuentes*, 32 F.3d at 764). Showing that the defendant-employer's decision was wrong or mistaken will not suffice. *Fuentes*, 32 F.3d at 765 (citations omitted). The plaintiff must show that defendant-employer's proffered reasons contain such "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" that a reasonable factfinder could not find them truthful. *Iadimarco*, 190 F.3d at 166 (quoting *Fuentes*, 32 F.3d at 764).

Moreover, an "employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability . . . ." *Burdine*, 450 U.S. at 259 (citation omitted); *Finizie v. Shineski*, 351 F. App'x 668, 673 (3d Cir. 2009) ("It is well-established that, under Title VII, an employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria."). And, statistical evidence of an employer's pattern and practice of promoting minorities may be relevant to establishing the absence of pretext. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 542 (3d Cir. 1992).

In sum, "[t]he task of the Court is not to second-guess employment decisions, but is instead to determine whether the employment decisions were motivated by an illegal discriminatory purpose." *Maxwell v. Springer*, 274 F. App'x 186, 188 (3d Cir. 2008) (citing *Ezold*, 983 F.2d at 525-27). Accordingly, the standard required to defeat a motion for summary judgment is onerous because it arises from the inherent tension between the objectives of discrimination law and society's commitment of allowing employers to freely make decisions regarding their economic affairs. *Fuentes*, 32 F.3d at 765 (quoting *Ezold*, 983 F.2d at 531 ("We are not unmindful of the difficult task a plaintiff faces in proving discrimination in the application of subjective factors. It arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs." (quotation marks omitted))).

A. Defendants did not discriminate against Plaintiff by failing to promote her to the position of Safety Manager because Plaintiff lacked the experience and skills required for the position

The lower court properly determined that "Plaintiff fails to identify any evidence that shows that Plaintiff was not promoted to Safety Manager due to race-based discrimination." (A9). "There is no legal or Agency requirement that every position be filled by a competitive process. A department director has the discretion to fill a position through either a competitive process or use of a direct departmental option." (A444). This is memorialized in the HRP manual, which states that a

director or hiring manager may fill a particular vacancy with a qualified candidate from the subject department through the DDO when "there are qualified candidates within his/her department . . . ." (A337).

Between September 2017 and January 2020 there were 344 uses of the DDO at the Port Authority. (A1408, A1410-A1413). Out of those 344 uses, the DDO was used 153 times to promote non-Caucasian persons of which, 47 were African Americans. (A1408, A1410-A1413). Within PATH, the DDO was used 14 times between September 2017 and January 2020, out of which seven were to promote non-Caucasian employees. (A1408, A1410-A1413). Plaintiff's claim that none of the seven positions were management positions is not supported by the documents she cited in support thereof. (Pl. Br. 11).

Even if Plaintiff can establish a *prima facie* case, the lower court correctly found that "the undisputed evidence clearly demonstrates that any requisite experience Plaintiff possessed in safety training and compliance was less than that of Volk." (A10).

When Volk joined PATH, his prior experience focused on safety training and compliance. (A393-A394). Volk began working at the PAFD in the field of safety training and compliance in 1991 as a Training Officer, then was promoted to Division Commander in 1999, and to Director/Chief of PAFD in 2009. (A393). Through these positions, Volk obtained extensive experience in creating,

implementing, and administering safety training and emergency preparedness exercises and programs and dealing with regulatory agencies such as OSHA, NIOSH, FEMA, and the Department of Homeland Security. (A393). And, as Director/Chief of PAFD, Volk oversaw a $7 million operating budget and a $2 million capital budget and managed 50 career employees, 55 volunteers, and 35 EMS employees. (A393).

Plaintiff, on the other hand, had very limited experience in safety training and compliance because her promotion in February 2016 to Chief Safety Supervisor (A130 at 42:3-15) was the first role she held where her primary job duties changed from train operations to safety training and compliance. (A126 at 27:1-22, A126 at 28:21-29:22, A127 at 30:11-24, A127 at 31:8-15, A128 at 35:15-25, A128 at 36:7-16, A129 at 38:8-22, A129 at 39:7-21, A129 at 41:24-42:8, A130 at 42:25-43:8, A130 at 44:15-45:1, A1320-A1322).

At the time Plaintiff first joined the Safety Division as Chief Safety Supervisor in 2016, her "skill set based around her experience in the transportation division as an OE and as a scheduler." (A404 at 33:2-5, A1320-A1322). "She was familiar with policies and procedures that pertained to the transportation division", but not for safety training and compliance (A404 at 35:10-11), which Volk had extensive experience in. (A393-A394).

Moreover, Plaintiff had "[l]imited interaction with regulators. No managerial experience from the standpoint of developing budget, capital programs, no experience with direct employees", all of which were required to successfully carry out the duties of Safety Manager. (A406 at 44:18-21, A440-A441). Whereas Volk had extensive experience in dealing with regulatory agencies, overseeing budgets, capital programs, and directly managing employees. (A393).

Further, Plaintiff had never developed or implemented any safety compliance or emergency management program. (A135 at 62:20-25, A135 at 64:17-21). Conversely, Volk had developed, implemented, and administered such programs while he was a Training Officer at the PAFD (A393) and at PATH. (A440-A441).

Therefore, even assuming *arguendo* that Plaintiff establishes a *prima facie* case of discrimination for the Safety Manager position, the uncontroverted evidence shows that the legitimate, non-discriminatory reason for promoting Volk to Safety Manager was because his qualifications and relevant experience made him the best candidate for the role. *See e.g.*, *Shahin v. Delaware* 531 F. App'x 200, 203 (3d Cir. 2013) (holding that even if plaintiff establish a *prima facie* case, her discrimination case would fail because of plaintiff's lack of relevant experience relative to the hired candidate).

In addition, the record is devoid of anything that could give rise to an inference that the decision to promote Volk was pretextual. Without such evidence, the Court

is not in a position to second guess Defendants' employment decisions. *See Springer*, 274 F. App'x at 188 ("The task of the Court is not to second-guess employment decisions, but is instead to determine whether the employment decisions were motivated by an illegal discriminatory purpose.").

Finally, there is no evidence that Dulfer's decision to restructure the Safety Division that led to Volk's eventual appointment as Safety Manager was a pretext for racial discrimination against Plaintiff. (Pl. Br. at 34). Dulfer reorganized the Safety Division when he became Safety Manager in order to maximize the use of the division's resources by having its staff report to two senior managers instead of Dulfer only as was the case before the reorganization. (A409 at 54:7-11, 437, 440). The two managers "would be responsible for the division's staff and responsibilities", which would improve efficiency and alleviate Dulfer's workload. (A437).

In sum, Volk was promoted to the position of Safety Manager because he was more experienced than Plaintiff in safety training and compliance and had experience in developing budgets and capital programs, managing employees, creating and implementing safety compliance and emergency management programs, and dealing with regulatory agencies, which Plaintiff lacked and were required for the position. Therefore, Defendants had a legitimate business reason for promoting Volk to Safety Manager.

B. Defendants did not discriminate against Plaintiff by promoting Moran to the Chief Operations Examiner position because he received the highest interview score and there is no evidence of pretext

Plaintiff is not contending that the interview process was biased or that awarding a higher score to Moran was a pretext for discriminatory animus. (Pl. Br. at 17-20, 43). And even if she was, Plaintiff has not pointed to any competent evidence to support such a claim. *See Fuentes*, 32 F.3d at 764 (noting that in order to survive summary judgment, a plaintiff must point to "evidence from which a factfinder could reasonably conclude that the defendant's proffered reasons were fabricated (pretextual).").

Instead, Plaintiff claims the decision to pass her over for the chief operations examiner position was motivated by race discrimination because (a) the scoring was subjective leaving it susceptible to abuse; (b) she was objectively the ideal candidate for the job based on her qualifications and education; and, (c) Lejda, the hiring manager, had the discretion to promote her instead of Moran because the score difference between her and Moran was less than five points. (Pl. Br. at 42-45).

The lower court appropriately found these arguments lacked merit. First, other than claiming the interview process "can be subjective", Plaintiff has not pointed to evidence from which a juror could reasonably conclude that the subjective criteria was a mask for discrimination. As noted by the lower court, "an interview process is always subjective so that alone cannot be the criteria for determining

whether it is a pretext for discrimination." (A12); *see Williams v. Rohm & Haas Co.*, 90 F. App'x 627, 629 (3d Cir. 2004) (affirming the trial court's finding "that the use of subjective criteria alone does not establish pretext, and that plaintiff must identify 'some other evidence' from which a reasonable juror could consider the subjective criteria to be a mask for discrimination."); *Boykins v. SEPTA*, 722 F. App'x 148, 155 (3d Cir. 2018) (rejecting plaintiff's pretext claim because plaintiff "can point to no evidence in the record suggesting . . . scoring was influenced by prejudice and 'belief alone is insufficient to raise an issue of material fact.'" (quoting *Bray v. Marriott Hotels*, 110 F.3d 986, 996 (3d Cir. 1997)).

Second, Plaintiff was not objectively the ideal candidate for the position because she scored lower in the interview than Moran. (A451). While Plaintiff does not dispute that Moran possessed the minimum qualifications for the COE position (A152 at 132:8-9) and that the job duties and operations of an OE and COE were closely aligned (A152 at 130:19-23), she contends that she was more qualified because she possessed a bachelor's and master's degrees whereas Moran did not. (Pl. Br. at 43). However, as set forth in the job posting for COE, only a high school diploma was required (A447), which Moran possessed. (A532). And, having or exceeding the minimum qualifications for COE does not automatically grant you that position; according to Lau, who was the recruiter for the position, "the résumé and the experience is essentially the ticket to getting the interview because it would

outline the overall experience required of the position. The interview itself is the main determining factor of selecting a finalist for the position." (A481 at 35:22-36:4; A807 at 174:7-22).

Finally, the fact that Lejda had the option, but decided against promoting Plaintiff over Moran is insufficient to establish that Defendants' proffered reasons were pretextual. *See Fuentes*, 32 F.3d at 765 ("To discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.").

In sum, the COE position was offered to Moran because he scored the highest in an interview where the candidates were graded based upon their responses to two general competency questions and three technical competency questions and their communication skills. (A451).

Point II

The court below appropriately concluded that Plaintiff failed to present any evidence that would permit a reasonable jury to find that Defendants unlawfully retaliated against her or that any of the articulated legitimate reasons were pretext

At the summary judgment stage, retaliation claims under Title VII are analyzed under the *McDonnell Douglas* burden-shifting framework. *See Moore v. City of Philadelphia*, 461 F.3d 331, 342 (3d Cir. 2006). However, unlike

discrimination claims, "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m)." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013). This more stringent analysis requires the plaintiff to establish that "his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Id*. at 362.

To establish a *prima facie* claim of retaliation, a plaintiff must present competent evidence showing that: (1) she engaged in protected activity; (2) the employer took an adverse action "either after or contemporaneous with the employee's protected activity;" and, (3) there is a causal connection between the employee's protected activity and the employer's adverse action. *E.g.*, *Daniels v. Sch. Dist. of Philadelphia*, 776 F.3d 181, 193 (3d Cir. 2015) (quoting *Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 300 (3d Cir. 2007) (quotation marks omitted)).

If the plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the defendant-employer to provide a legitimate, non-retaliatory reason for its conduct. *Moore*, 461 F.3d at 342. If the defendant-employer does so, the burden shifts back to plaintiff, who "must be able to convince the factfinder both that the employer's proffered explanation was false, and that retaliation was the real reason for the adverse employment action." *Id*. (quoting *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 500-01 (3d Cir. 1997)).

To survive a motion for summary judgment, a plaintiff must comply with the difficult burden of either (i) producing direct or circumstantial evidence that discredits defendant-employer's proffered reasons; or, (ii) identifying direct or circumstantial evidence that shows that retaliation was more likely than not a motivating or determinative cause for the adverse action. *Id*. (citing *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994) ("While this standard places a difficult burden on the plaintiff, it arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs.")).

A. Defendants did not retaliate against Plaintiff by promoting Haines to the Principal Programs and Training Coordinator position because she was the most qualified candidate and there is no evidence of pretext

In her brief, Plaintiff claims that less than two months passed between the time she interviewed—January 29, 2019—for the PPT Coordinator position less than two months after she filed her EEOC charge on December 10, 2018. (A93, Pl. Br. at 45-46). However, the date of the interview is not the date of the adverse employment decision. That date would be on February 15, 2019 (A636), when Plaintiff was informed that she was not selected for the position. *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 853 (3d Cir. 2000) (adverse employment action occurred on the date that employee was informed of the operative decision to terminate). Furthermore, Plaintiff's attempt to use the date of the interview ignores the role of hiring manager

in selecting the candidate. As testified to by Lau, the hiring manager can select a candidate that "scored five points below the top-rated score." (A508). Significantly, there is no evidence that the decision to select Haines for the PPT Coordinator position took place on a date earlier than February 15, 2019.

Therefore, the lower court correctly found that a "two to ten-month lapse between Plaintiff's protected activity and the alleged adverse employer action is not an 'unusually suggestive' temporal proximity that alone creates an inference of a causal link". (A13); *see Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 759-60 (3d Cir. 2004) (agreeing with lower court that adverse employment action occurring two months after the protected action was not unusually suggestive to create a causal link) superseded by statute on other grounds; *Thomas v. Town of Hammonton*, 351 F.3d 108, 114 (3d Cir. 2003) (three weeks is not unusually suggestive); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 233 (3d Cir. 2007) (three months not "unduly suggestive temporal proximity").

More importantly, Plaintiff has not adduced evidence to support a causal connection between her complaints and not being selected for the subject position. *Blakney v. City of Philadelphia*, 559 F. App'x 183, 186 (3d Cir. 2014) ("The mere fact that adverse employer action occurs after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events.") (quoting *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1302 (3d

Cir. 1997)). It is causation and not temporal proximity itself that is an element of plaintiff's *prima facie* case, and "causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific." *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 178 (3d Cir. 1997).

The record in this action is devoid of evidence that any of Defendants' personnel who participated in the subject interview panel—Chiu, Jones, and Lau—knew that Plaintiff had filed an EEO complaint with Defendants or a complaint with the EEOC when they selected Haines for the position. *See Shahin v. Delaware*, 531 F. App'x 200, 203 (3d Cir. 2013) (finding that plaintiff failed to make a *prima facie* case of retaliation because she "did not point to evidence reasonably suggesting a causal link . . . . and the record is devoid of evidence that the individuals involved in the interviewing process had any knowledge of her prior charges.").

As such, Plaintiff "cannot establish that there was a causal connection without some evidence that the individuals responsible for the adverse action knew of the plaintiff's protected conduct at the time they acted." *Daniels v. Sch. Dist. Of Phila.*, 776 F.3d 181, 196 (3d Cir. 2015); *see also Andreoli v. Gates*, 482 F.3d 641, 650 (3d Cir. 2007) (finding temporal proximity insufficient to raise inference of causal link when plaintiff had not proffered any evidence that the supervisors responsible for the alleged adverse actions were aware of plaintiff's complaint to EEO Office five months prior).

Rather than concede the lack of causal connection, Plaintiff asks this Court to speculate by positing that a jury could discredit the decision of the interview panel because the selected candidate for the subject position, Haines, had "never filed an internal or external complaint of discrimination . . . [and] was selected for the Position after Plaintiff filed a Charge of Discrimination with the EEOC on December 10, 2018." (Pl. Br. at 47). However, "[s]peculation does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment." *Lexington Ins. Co. v. W. Pennsylvania Hosp.*, 423 F.3d 318, 333 (3d Cir. 2005) (quoting *Hedberg v. Indiana Bell Tel. Co., Inc.*, 47 F.3d 928, 932 (7th Cir. 1995)). And here, there is no evidence in the record that Haines' lack of discrimination complaints against Defendants benefited her or had any role whatsoever in her being selected for the subject position. (A14).

Based on the foregoing, the lower court was correct in finding that "Plaintiff fails to identify any evidence that credibly supports any but-for causation underlying the decision not to select her as PPT Coordinator." (A13-A14).

Even if Plaintiff could establish causation to meet her *prima facie* burden, the undisputed facts establish that the non-selection of Plaintiff was the result of the interview panel's finding that Haines was the better qualified candidate for the position, which was determined by the candidates' responses to ten retaliation-

neutral questions—four of general competency and six of technical competency—as well as their communication skills. (A585-A595).

Accordingly, the trial court was correct in finding that "Defendants offer[ed] a legitimate discriminatory reason for hiring Haines over Plaintiff." (A14).

To be clear, the subject claim fails because there is no competent evidence that supports the necessary causal connection for Plaintiff's *prima facie* claim for retaliation. Nonetheless, Plaintiff's remaining arguments sounding in pretext are addressed here for completeness. Plaintiff contends that Defendants' proffered legitimate, non-discriminatory reason for its decision—namely, that Haines was selected by the interview panel as the more qualified candidate for the position—was pretextual. At the pretext stage, "the factual inquiry into the alleged discriminatory motives of the employer [rises] to a new level of specificity." *Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 646 (3d Cir. 1998). The plaintiff must not only establish that the employer's reason was wrong, but that it was so plainly wrong that it could not have been the real reason. *Keller v. Orix Credit All., Inc.*, 130 F.3d 1101, 1109 (3d Cir. 1997). "[F]ederal courts are not arbitral boards … [t]he question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [discrimination]." *Id.* (quoting *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996)).

Here, Plaintiff attempts to establish pretext by attacking Haines' qualifications and eligibility for the subject position by arguing that: (1) Haines did not meet the minimum qualifications for the PPT Coordinator position because she did not have three years' experience in FRA, OSHA, EPA, and NFPA regulations (Pl. Br. at 47); and, (2) Plaintiff was better qualified for the position because she possessed various certifications in project management and enhanced incident management, which Haines did not. (Pl. Br. at 48).

Plaintiff's first argument is without merit because the job bulletin required that the candidate have experience with "FRA/OSHA/EPA/NFPA". (A577). It is well settled that a slash is generally used instead of the word "or". *E.g.*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/slash (last visited May 14, 2024); Wikipedia, https://en.wikipedia.org/wiki/Slash_(punctuation) (last visited May 14, 2024); *How to Use Slashes in Writing*, Grammarly, https://www.grammarly.com/blog/slash/ (last visited May 14, 2024). In fact, Lau testified that "the slash indicates or." (A514 at 168:23-24). And, nowhere in Plaintiff's deposition transcripts or resume is there any mention that she has experience in NFPA or EPA regulations. (A1320-A1322).

Plaintiff's second argument likewise fails because PPT Coordinator job listing did not require candidates to possess certifications in project management and enhanced incident management. (A577-A578). As testified to by Lau, having or

exceeding the qualifications for a position does not automatically entitle you to that position; "the résumé and the experience is essentially the ticket to getting the interview because it would outline the overall experience required of the position. The interview itself is the main determining factor of selecting a finalist for the position." (A481 at 35:22-36:4).

In sum, Plaintiff's failed attempt to point out what she perceives to be deficiencies in Haines' qualifications and eligibility for the position serves only to highlight that she has failed to adduce any evidence that the selection of Haines was retaliatory for her internal or external discrimination complaints.

B. Plaintiff cannot not show that Defendants retaliated against her by not promoting Plaintiff to the Superintendent of Transportation position because the undisputed evidence shows that Plaintiff interviewed poorly

In her brief, Plaintiff claims temporal proximity between her protected activity in 2018 and 2019 and when she learned that she was not selected for the Superintendent of Transportation position in 2022 because the litigation was ongoing and her counsel had "deposed many high-ranking officials at PATH/Port Authority . . .". (Pl. Br. at 49-50). This argument lacks merit because there is no "evidence of any pattern of antagonism or any credible evidence sufficient for a reasonable juror to infer causality between any protected activity and the failure to promote Plaintiff to Superintendent of Transportation years later, particularly in view

of her promotion to Superintendent of Night Operations in November 2020 after she had filed her discrimination claims and the instant action." (A15).

Plaintiff cites to the unpublished decision of *Johnson v. Nicholson*, No. 05 CV 2740, 2007 WL 1395546 (E.D.N.Y. May 11, 2007), *aff'd on other grounds*, 349 F. App'x 604 (2d Cir. 2009) for the proposition that a plaintiff's participation in a federal lawsuit is an ongoing protected activity for purposes of a temporal proximity analysis. This argument fails because (a) the facts in *Johnson* are markedly different from the case at bar; and, (b) it predates guidance provided by the United States Supreme Court as to the causation standard necessary for a Title VII retaliation claim.

In *Johnson*, plaintiff filed a formal EEO complaint in 1998, a separate federal discrimination lawsuit on a different matter in 1999, and two formal and three informal EEO complaints in 2000. *Id*. at *1. The court found that plaintiff's protected activity was continuous and ongoing because "defendant's adverse employment actions could have taken place simultaneously to any one of plaintiff's protected EEO complaints or the ongoing activity in her federal lawsuit." *Id*. at *7.

Here, Plaintiff filed her EEO complaint in 2018 and the present lawsuit in 2019. After the lawsuit was initiated, no further EEO complaints were filed. As correctly stated by the lower court, there is a years-long gap between Plaintiff's discrimination charges in 2018, her lawsuit in 2019, and the 2022 employment

decision; during this time there is no "evidence of any pattern of antagonism or any credible evidence for a reasonable juror to infer causality between any protected activity and the failure to promote Plaintiff to the Superintendent of Transportation years later . . . ." (A15). Moreover, nowhere in the *Johnson* decision, which granted summary judgment to the defendant-employer, did the court find that plaintiff's participation in the ongoing litigation in the case before it constituted protected activity.

Further, the *Johnson* decision was issued on May 11, 2007, over five years prior to the *Nassar* decision, where the Supreme Court held that the "text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000e–3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Nassar*, 570 U.S. at 362. Given the foregoing, Plaintiff's reliance on the *Johnson* decision is inapposite.

Therefore, Plaintiff is unable to demonstrate a causal link between protected activity and an employer's adverse action. *See Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997) ("Even if timing alone could ever be sufficient to establish a causal link, we believe that the timing of the alleged retaliatory action must be 'unusually suggestive' of retaliatory motive before a causal link will be inferred.").

Plaintiff also posits that with respect to question No. 3, "the lower court made impermissible credibility determinations" in noting that Haines broke down the

process of onboarding to 30, 60, and 90 days. (Pl. Br. at 51). The court did not err because the uncontroverted evidence in the form of testimony by Perez and Vartolone established that Haines broke down the process in 30, 60, and 90 day increments even if it was not captured in their respective notes. (A717 at 69:1-6, A717 at 69:23-70:21, A834 at 81:22-25). Whereas Plaintiff did not break the process down in increments as the question called for. (A1260).

Next, Plaintiff points to question No. 1 and claims she should have received a higher score than Haines because Bacon's interview notes indicate she discussed various leadership styles and several other management styles, but do not show this for Haines' response. (Pl. Br. at 52). Plaintiff's argument is without merit because question No. 1 did not ask the interviewee to simply list the different management styles, but to list the management styles required to succeed in the position. (A1196). Bacon rated Haines's response as "Outstanding" because Haines discussed the various required management styles. (A695 at 50:14-51:14, A1163). In contrast, Bacon rated Plaintiff's response as "Needs Development" because Plaintiff's response was to list "job progression" instead of discussing "style or accomplishments" as the question called for. (A688 at 23:4-12, A688 at 24:21-25). More notably, in answering this question, Plaintiff was "rambling"; she displayed a "very challenged communications style and there was not a cohesive response to the

question." (A688 at 24:17-25). Bacon's testimony is corroborated by Perez's interview notes. (A965).

Plaintiff's claim that there are inconsistencies between the interviewers' notes, deposition testimony, and scoring of Plaintiff and Haines is likewise without merit. The notes each interviewer took do not reflect the full answer each candidate gave. (A687 at 19:10-14, 689 at 26:7-8, A726 at 106:22-107:11, A834 at 81:22-25). Therefore, the lower court was correct in finding that "the interview notes on these and other questions may not completely document the details of each candidate's every response do not amount to inconsistencies that substantiate a causal link or show that Defendant's proffered reasons for not promoting Plaintiff to Superintendent of Transportation are weak, implausible, or so inconsistent to be unworthy of credence." (A16).

In sum, each member of the interview panel testified that Plaintiff did not interview well; her answers lacked cohesion and organization (A661, A723 at 95:17-18) and consisted of "just a lot of thoughts being thrown out or a lot of ideas or commentary." (A723 at 19-20).

Accordingly, the lower court's decision should be affirmed because poor performance in an interview is a well-recognized legitimate nondiscriminatory reason for failure to hire or promote. *E.g.*, *Alcantara v. Aerotek, Inc.*, 765 F. App'x

692, 697 (3d Cir. 2019); *Green v. Postmaster General of U.S.*, 437 F. App'x 174, 176-77 (3d Cir. 2011).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order granting summary judgment to Defendants.

PORT AUTHORITY LAW DEPARTMENT
Attorneys for Port Authority of New York and New Jersey and Port Authority Trans-Hudson Corp.

By: /s/ Juan M. Barragan
Juan M. Barragan
Matthew Malysa

Dated: May 31, 2024

CERTIFICATION OF BAR ADMISSION

I, Juan M. Barragan, certify as follows:

1. Pursuant to Third Circuit Local Rule of Appellate Procedure 28.3(d), I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

PORT AUTHORITY LAW DEPARTMENT

By: /s/ Juan M. Barragan
Juan M. Barragan

Dated: May 31, 2024

CERTIFICATION OF BAR ADMISSION

I, Matthew Malysa, certify as follows:

1. Pursuant to Third Circuit Local Rule of Appellate Procedure 28.3(d), I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

PORT AUTHORITY LAW DEPARTMENT

By: /s/ Matthew Malysa
Matthew Malysa

Dated: May 31, 2024

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND THIRD CIRCUIT LOCAL RULE OF APPELLATE PROCEDURE 31.1(c)

I, Juan M. Barragan, certify as follows:

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 12,996 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

3. This brief complies with the electronic filing requirements of Rule 31.1(c) of the Third Circuit Local Rules of Appellate Procedure because the text of this electronic brief is identical to the text of the paper copies, and Microsoft Defender has been run on the file containing the electronic version of this brief and no viruses have been detected.

PORT AUTHORITY LAW DEPARTMENT

By: /s/ Juan M. Barragan
Juan M. Barragan

Dated: May 31, 2024

CERTIFICATE OF FILING AND SERVICE

I hereby certify that a copy of the foregoing brief for Defendants-Appellees was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

PORT AUTHORITY LAW DEPARTMENT

By: /s/ Juan M. Barragan
Juan M. Barragan

Dated: May 31, 2024