ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LAURA INGRAM, et al.,)
)
Individually and as)
Representatives of)
a Class,) CIVIL ACTION
v.) FILE NO. 1:98-CV-3679-RWS
)
COCA-COLA COMPANY,)
)
Defendant.)

IN RE: Election of Larry Jones to Pursue Promotional Claims Procedure

O R D E R

I. Introduction

The instant action was initially filed on December 23, 1998, as an individual action and then amended on April 22, 1999, to add class action allegations. The lawsuit charged Defendant, The Coca-Cola Company ("Coca-Cola"), with race discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., and 42 U.S.C. § 1981. On June 7, 2001, District Judge Richard W. Story entered an order granting the motion for approval of a class action settlement agreement in the case. See [Doc. No. 316]. The settlement agreement provided, among other things, that any settlement class member could elect to pursue individual promotional

365

discrimination claims before a United States Magistrate Judge, rather than accept his or her share of a back-pay fund established under the settlement agreement. (Exh. A to [Doc. No. 302-1] at III.C. pp. 33-34).

Claimant Larry Jones, a member of the class, elected to file a claim under the Promotional Claims Procedure provisions of the settlement agreement. See [Doc. No. 323]. Pursuant to Jones' election, his claims were referred to the undersigned. See [Doc. No. 324].[1] Discovery has now been completed, and, on August 28, 2002, Defendant filed its motion for summary judgment as to all of Plaintiff's claims. [Doc. No. 345]. This matter has been fully briefed and is presently before the Court for decision. For the reasons stated herein, this Court **GRANTS** the motion in part and **DENIES** it in part.

II.
Factual Background

When evaluating the merits of a motion for summary judgment, the Court must view the evidence and factual inferences therefrom in a light most favorable to the non-moving party. Frederick v.

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[1] Under these provisions, Jones' promotional claims are to be heard "solely by a United States Magistrate Judge in this Court. There will be no appeals from his or her decision." (Exh. A to [Doc. No. 302] at III.C. p. 33). The Promotional Claims Procedure also provides that the Federal Rules of Civil Procedure and Local Rules of the Court will apply unless otherwise stated and sets forth certain limitations on discovery. All Title VII relief except compensation and punitive damages is available on a "make whole" basis. Id. at 33-34.

Sprint/United Mgt. Co., 246 F.3d 1305, 1309 (11th Cir. 2001); Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 920 (11th Cir. 1993). Applying the above legal standard, the Court derives the following facts from the parties' statements of facts and from the record as a whole:[2]

A. Plaintiff's Employment Background, Experience, and Job Responsibilities

Plaintiff began his employment with Coca-Cola on April 1, 1985, as a Benefits Planning and Development Manager in the Worldwide Corporate Employee Benefits Department. [Doc. No. 351] (Pl. response ("Pl. resp.") to Def. SMF ¶ 1). As a Benefits Planning and Development Manager, Plaintiff was responsible for the planning and development of Coca-Cola's domestic and international welfare plans and programs. [Doc. No. 351] (Pl. resp. to Def. SMF ¶ 5). Plaintiff asserts that he was also performed additional tasks, including:

- Researching and performing cost assessments and analyses on welfare plans and programs;
- Issuing communications to employees;

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[2] Unless otherwise noted, this overview is derived from those facts in Defendant's statement of material facts ("Def. SMF."). It is noted that both Plaintiff and Defendant have included legal conclusions and arguments in the statement of material facts and response to the statement of material facts. See (Def. SMF ¶ 26), (Pl. resp. to Def. SMF ¶ 29). Because this Court's local rules prohibit the inclusion of such material in the statement of material facts, conclusory and argumentative material will not be considered by the Court. See L.R. 7.1(D) (limiting brief in support of motion and response to 25 pages); L.R. 56.1 ("Statements in the form of issues or legal conclusions (rather than material facts) will not be considered by the court.").

- Reviewing and assessing Coca-Cola's benefit offerings in comparison to other companies;
- Developing the first formal benefit statement used by the company;
- Developing and publishing the executive benefit statement.[3]

Plaintiff's 1989-1990 performance review reflects the following achievements: he was instrumental in the development of a combined benefits statement enrollment workbook; he enhanced and expanded the Executive Compensation and Benefits Statement; and he completed, re-wrote and redesigned the company's Summary Plan Descriptions. [Doc. NO. 351] (Pl. resp. to Def. SMF ¶ 5), (Pl. Dep.) (Ex. 8 - December 31, 1990 performance review). Plaintiff's performance appraisals also state that he was "instrumental" in the development and management of a new managed care program called SelectCare in 1992. [Doc. No. 351] (Pl. resp. to Def. SMF ¶ 5).

In addition to working on welfare plans, Plaintiff also developed and managed retirement plans. He testified that as Manager, Benefits Planning and Development, he created a retirement program called the Compensation Development and Deferral Plan ("CDIP"). This project required Plaintiff to negotiate the contractual relationship with the bank that managed the plan, design statements for employees, and ensure that

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[3] Plaintiff testified that a benefit statement is a document that outlines the various plans in which an employee may participate. (Pl. Dep. at 65).

executives received annual statements on investments. [Doc. No. 351] (Pl. resp. to Def. SMF ¶ 5). Plaintiff also reviewed benefit plans and helped transition benefits and personnel after Coca-Cola acquired several bottling companies. [Doc. No. 351] (Pl. resp. to Def. SMF ¶ 5).

In addition to the above, Plaintiff also worked on other retirement benefits projects, including the "Thrift Enhancement Task Force," "ESOP Task Force" and "Post-retirement Funding Task Force," as a project manager or task force member.[4] [Doc. No. 351] (Pl. resp. to Def. SMF ¶¶ 5, 6). Plaintiff testified that he "conducted the search for and chose the benefits and retirement vendor for Coca-Cola's Puerto Rico employees." [Doc. No. 351] (Pl. resp. to Def. SMF ¶ 9).

In February of 1993, Plaintiff was promoted to Manager, Group Benefits. In this position, he was responsible for managing Coca-Cola's health, dental and long-term disability

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[4] Relying on Plaintiff's deposition testimony, Defendant states that Plaintiff did not have responsibility for "management, administration or design of Coca-Cola's retirement plans:" [Doc. No. 345] (Def. SMF ¶ 9).

> Q: . . . Did you ever, while you were employed by The Coca-Cola Company . . . have responsibility for management, administration or design of Coca-Cola retirement or pension plans?
> A: I did not.

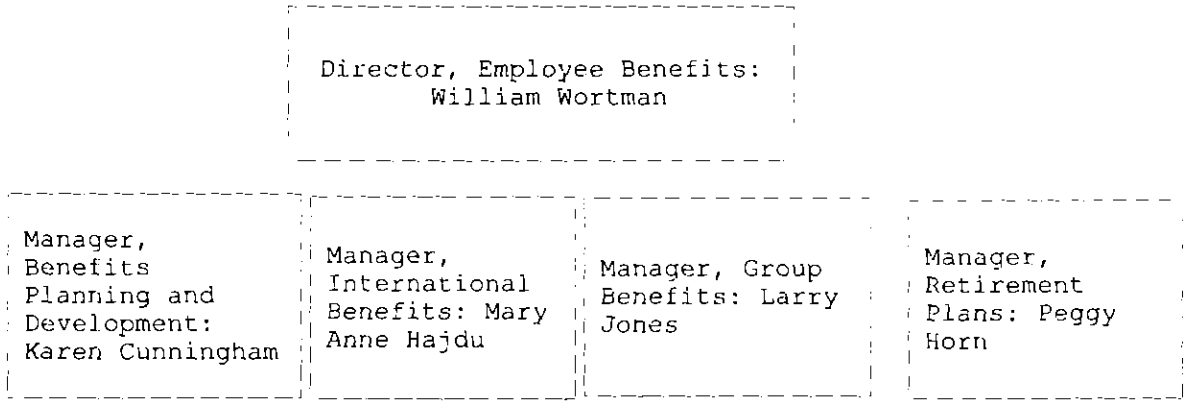
(Pl. Dep. at 79). In his response to Defendant's statement of material facts, Plaintiff explains that while he was not "directly responsible" for Coca-Cola's retirement plans, he had some responsibility for retirement benefits. [Doc. No. 351] (Pl. resp. to Def. SMF ¶ 9).

insurance. He also worked on new welfare benefits programs, including developing a vision care plan and an onsite pharmacy and implementing a benefits plan for employees in Puerto Rico. In addition, Plaintiff worked with Mary Ann Hajdu ("Hajdu"), Manager, International Benefits, to design and modify the international benefits program. [Doc. No. 351] (Pl. resp. to Def. SMF ¶ 8).

Plaintiff further testified that he reviewed the benefits programs for overseas plants purchased by Coca-Cola. This review included conducting cost-analyses on benefit programs from both the company's and the employees' perspectives; reviewing HR standards and procedures; and researching welfare benefit and retirement plans. Plaintiff received an award in 1994 for his efforts on Coca-Cola's project in Tanzania. [Doc. No. 351] (Pl. resp. to Def. SMF ¶ 8).

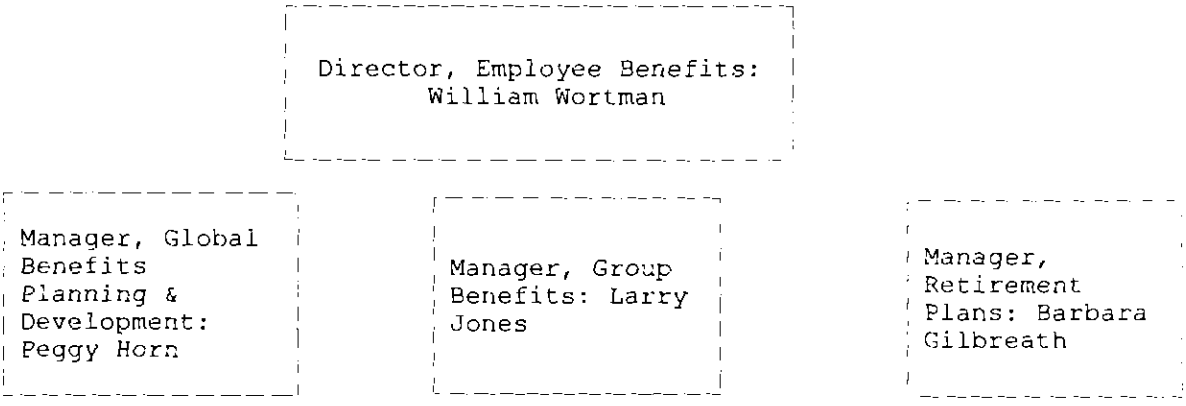
B. Coca-Cola's Benefits Department

Before August 19, 1997, the relevant areas of the Coca-Cola Benefits Department were organized as follows:



[Doc. No. 345] (Def. SMF ¶ 10), [Doc. No. 351] (Pl. resp. to Def. SMF ¶ 10).

In August 1997, both Hajdu and Karen Cunningham left the company. Afterward, the positions of Manager, Benefits Planning and Development and Manager, International Benefits were combined to form the position of Manager, Global Benefits Planning and Development. Horn transferred from Manager, Retirement Plans to the newly formed position and Barbara Gilbreath ("Gilbreath") assumed the Manager, Retirement Plans position:



[Doc. No. 345] (Def. SMF ¶¶ 12-14).

1. Evolution of the Director, Employee Benefits Position, and the Selection of Horn

In August of 1998, William Wortman ("Wortman"), the Director of Employee Benefits, retired and Coca-Cola began to search for his replacement. The Director was responsible for the overall management and administration of Coca-Cola's retirement benefit and welfare benefit plans, including its foreign plans. Michael Walters ("Walters"), Vice President Human Resources, testified that, in addition to a college degree, the successful applicant for the Directorship should possess the following qualifications:

> The person in that role . . . would have had to have leadership capabilities, . . . the ability to conceptualize a direction for his or her organization to strive for. Be able to communicate clearly that direction, be able to help people understand their roles in achieving that direction. . . . a good understanding of, and skill set in how to plan, organize, administer and deliver an employee benefit program. . . . a solid financial understanding . . . somebody who had the strategic ability to connect the work of employee benefits with the work of compensation. . . . [someone] technically proficient in the major areas of employee benefits . . . with a base level of understanding of the principals and the issues related to the various components . . . an average of the skills of just about everybody else in the company because [the person must be able to] communicate . . . legislate . . . [and] keep records."

(Second Deposition of Michael Walters taken May 8, 2002 ("Walters Dep. II"), at 31-33). Walters further testified that [i]t was a very difficult job to fill because it required so many different skill bases." (Walters Dep. II at 33).

Both Plaintiff and Horn were considered for the Directorship. Horn was a graduate of Roanoke College with a double major in economics and business. (Deposition of Peggy Horn ("Horn Dep.") at 4). Horn testified that she is an enrolled actuary.[5] (Horn Dep. at 5). Like Plaintiff, Horn had significant experience in the area of employee benefits. Horn testified that before her employment with Coca-Cola, she spent approximately four years at Ernst and Young as a manager in the actuarial benefits and comp practice where she "worked with healthcare actuaries on valuing medical liabilities." (Horn Dep. at 27.) She began working for Coca-Cola in 1993 as Manager, Retirement Plans. (Horn Dep. at 8). She remained in this position until 1997 when she became Manager, Global Benefits and Planning. (Horn Dep. at 12-13). In this position, Horn supervised the annual open enrollment for the group benefits plans, called the flex implementation project, as well as worked on world-wide benefit programs. (Horn Dep. at 28).

Defendant selected Horn to fill Wortman's position. Walters testified that he could not recall who made the decision to promote Horn. (Walters Dep. II at 12). Upon further questioning, however, Walters stated that "I would have either made the decision, if it was mine unilaterally to make. . . Or if

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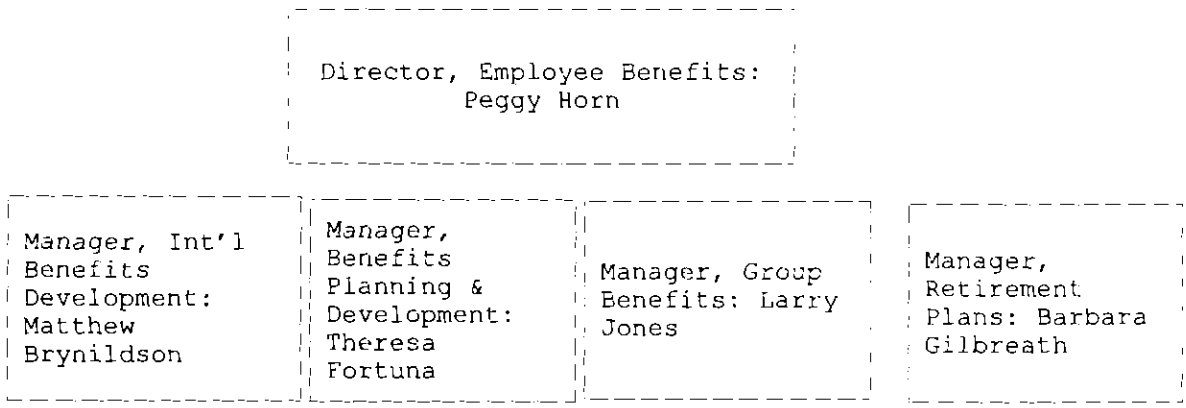
[5] According to Horn, an "enrolled actuary" is entitled to practice before the Internal Revenue Service on pension-related matters. (Horn Dep. at 5).

[Cheeley] had made the decision I would have approved it . . . ." (Walters Dep. II at 122). He admitted that there was no perfect candidate from within the company but stated that Horn "had the level of skills that at least met the minimum acceptable." Walters testified that Horn was the best candidate because she had demonstrated "the ability to plan, organize and execute at a high level." He further testified that he "had concerns about Larry's [skills] particularly [his] organizing and executing skills." Walters added that he believed that "given [Horn's] background in the retirement and thrift area and her strong financial capabilities that she could move fairly quickly and deepen her understanding in the group benefits area. Conversely, [Plaintiff] had . . . some experience with retirement and thrift . . . but he didn't have long experience there and I felt that it would be a much, much bigger hill with a somewhat lower ability to predict success of climbing the hill." (Walters Dep. II at 121-22).

2. Evolution of the Manager, Benefits Development Position and the Selection of Gilbreath

After Horn's promotion to Director in August of 1998, the Manager, Global Benefits Planning and Development position, previously occupied by Horn, was divided into two positions: Manager International Benefits Development, which was filled by

Matthew Brynildson and Manager Benefits Planning & Development, which was filled by Theresa Fortuna:



Brynildson remained in the position of Manager, International Benefits Development only until September of 1998.[6] After Brynildson's departure, the Manager International Benefits Development position remained vacant until August of 1999, during which time Horn performed these responsibilities. (Deposition of Peggy Horn ("Horn Dep.") at 121-22).

Around August of 1999, Horn decided to combine the Manager, International Benefits Development and Manager, Retirement Plans positions. Barbara Gilbreath ("Gilbreath"), who held the position of Manager, Retirement Plans, assumed responsibility for

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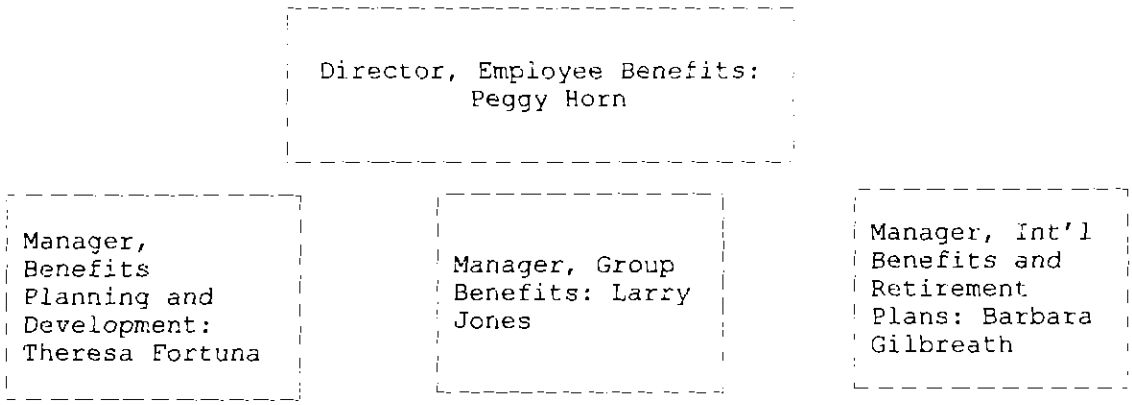
[6] Plaintiff asserts that because Brynildson left the company such a short time after his appointment to the position of Manager, International Benefits Development, it is not clear whether he actually ever assumed the position or performed any duties. [Doc. No. 351] (Pl. resp. to Def. SMF ¶ 19). Brynildson's promotion to this position or his performance of the accompanying duties is not, however, material to this case.

these duties under the Manager, Benefits Planning and Development position. (Horn Dep. at 122). The new position was called "Manager, International Benefits and Retirement Plans." After this reorganization, the Benefits Department appeared as follows:



Gilbreath testified that she requested that Horn give her these additional responsibilities. Gilbreath considered these new duties to constitute a promotion; she received a pay and grade increase with their addition. (Deposition of Barbara Gilbreath ("Gilbreath Dep.") at 6-9).

C. The Internal Audit

In 1996, the Coca-Cola Corporate Audit Department audited the entire Human Resources Division. The audit identified deficiencies of various degrees in the respective departments. At the time of the audit, Plaintiff headed up Group Benefits while Horn managed Retirement Plans. [Doc. No. 351] (Pl. resp. to Def. SMF ¶ 10). Three of the four "high risk" deficiencies

identified occurred in Group Benefits, Plaintiff's department.[Doc. No. 345] (Def. SMF ¶ 33), (Pl. Dep. Ex. 25 p. 5). The audit also identified Group Benefits as having a "high potential for improvement" in one area and a "definite potential for improvement" in another. [Doc. No. 351] (Pl. resp. to Def. SMF § 34), (Def. SMF ¶ 34), (Pl. Dep.)(Ex. 25 - Audit, p. 5). No high-risk deficiencies were identified in Retirement Plans, Horn's area of responsibility, but two areas were marked as a "potential risk" and one was marked as having "definite potential for improvement." (Pl. Dep.)(Ex. 25 - Audit, pp. 5-6).[7]

One of Plaintiff's identified high risk areas involved execution of contracts with health care providers. Walters testified that Ron Cheeley ("Cheeley"), Plaintiff's supervisor, informed him that the difficulties arose from a disagreement between Plaintiff and the Legal Department. [Doc. No. 351] (Pl. Br. at 4), (Walters Dep. II at 74). In Plaintiff's 1997 performance appraisal, Cheeley noted that by February 24, 1997, the audit findings "had been rectified." (Cheeley Dep. Ex. 49).

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[7] The parties have quoted lengthy passages from the audit. They have also provided their analyses of the severity and importance of the identified risks and areas of improvement. These are not facts, however, but are legal arguments used to support each parties' position. As noted previously legal arguments have no place in the statement of material facts. See L.R. 56.1(B)("Statements in the form of issues or legal conclusions (rather than material facts) will not be considered by the court.").

D. The OFCCP Audit

In 1997, the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") performed an audit on Coca-Cola's employment practices. The audit report noted that "[t]he Company has a plan to develop internal talent at Grades 12 and above through the implementation of talent development committees. There is also an initiative . . . to get minorities and women into general management where their representation is not as good as in functional areas." [Doc. No. 351] (First Deposition of Michael Walters ("Walters Dep. I"), Ex. 10 p. 1090).

The audit reports that African Americans received only between 2.5 to 5.6% of promotions into management.[8] (Walters Dep. I, Ex. 10 p. 1093). The report concluded that although Coca-Cola "appears to have developed a culture of fairness and awareness of diversity and has made several high level appointments of minorities and women . . . there are inconsistent

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[8] Plaintiff quotes numerous findings from the OFCCP audit, only a sample of which will be included here. An example of these findings include: "the representation of minorities in the workforce generally decreases after Grade 11," (Walters Dep. I, Ex. 10 p. 1092); "during the period from January 1, 1996 through July 15, 1997, there were 53 hires into mid and senior level management positions from Grade Levels 10 through 17. Of these, only 3, (5.6%) were African Americans"; and "[o]f the 40 hires into mid and upper level management positions at grade levels 13 through 17, only 1 (2.5%) was African American." (Walters Dep. I, Ex. 10 p. 1093).

personnel practices which make monitoring affirmative action and holding people accountable for ensuring diverse pools of candidates difficult." [Doc. No. 351] (Walters Dep. I, Ex. 10 p. 1094). Recommendations included the suggestion that the company institute standard procedures for recruitment, hiring, promotions and performance appraisals so that the processes for each can be monitored and that parameters for conducting a job search be established and that the company "comply[] with the mandatory job listing requirements." [Doc. No. 351] (Walters Dep. I, Ex. 10 p. 1095).

Following the audit, on June 1, 1998, Coca-Cola entered into an agreement with the OFCCP promising to correct the identified areas of concern. The agreement provides, in part:

> Except in cases of noncompetitive promotions or under certain unusual and infrequent circumstances, the Company will, when a job vacancy occurs:
>
> 1. List with the SES all jobs required to be listed by OFCCP regulations, and add to the [Global Talent Data Base ("GTDB")[9]] all consequent referrals from the SES;
>
> 2. Query the GTDB using job relevant skills and competencies and related education and experience as appropriate;
>
> 3. Use in the query only inclusive criteria (not exclusive criteria such as elimination of candidates with certain characteristics, educational institutions, etc.);

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[9] The GTDB is composed of current employees as well as outside candidates. [Doc. No. 351] (Walters Dep. I, Ex. 10 p. 1090).

4. Keep records by race and sex of all candidates from the first query which yields ten or fewer candidates; and

5. Consider for selection all candidates from the first query which yields ten or fewer candidates.

[Doc. No. 351](Walters Dep. I, Ex. 13 p. 0985).

E. The Strategic Organizational Alignment

In January of 2000, Defendant instituted the Strategic Organizational Alignment ("SOA"), a corporate-wide reorganization and reduction in force, which included both voluntary retirements pursuant to a "Special Retirement Plan" and involuntary terminations. Plaintiff remained employed by Coca-Cola until May 31, 2000, when he "retired" under the "Special Retirement Plan" offered as part of the SOA. [Doc. No. 351] (Pl. resp. to Def. SMF ¶ 2).

III.
The Standard of Review on Summary Judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir. 1998). A factual dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc) (quoting Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 248 (1986)). The substantive law applicable to the case determines which facts are material. Anderson, 477 U.S. at 248.

The moving party bears the initial burden of showing the court "the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548 2552-54 (1986); Four Parcels, 941 F.2d at 1437-38. When the non-moving party has the burden of proof at trial, the moving party may discharge its initial burden by "showing . . . the district court . . . that there is an absence of evidence to support the non-moving party's case." Id. at 325 (internal quotes omitted); accord Four Parcels, 941 F.2d at 1437-38. If the moving party fails to discharge this initial burden, then the motion must be denied. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1116 (11th Cir. 1993) (citing Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991)). Once this burden is met, the non-moving party must then "go beyond the pleadings and . . . designate specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324, 106 S.Ct. at 2553 (citing Fed. R. Civ. P. 56(e)).

IV.
Discussion

A. The Applicable Law

Title VII makes it unlawful for an employer "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). In a Title VII disparate treatment action, the plaintiff has the burden of persuading the factfinder that the defendant intentionally discriminated against him. Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). The allocation of burdens and order of presentation and proof are as follows: (1) the plaintiff has the burden of establishing a prima facie case of discrimination; (2) once the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the action taken against the employee; and (3) the burden then shifts back to the plaintiff to raise a genuine factual question as to whether defendant's stated reason is mere pretext. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973); Richardson v. Leeds Police Dep't., 71 F.3d 801, 805-06 (11th Cir. 1995).

When direct evidence of discriminatory intent is not available, a plaintiff may present circumstantial evidence from

which an inference of intentional discrimination may be drawn.[10] Armstrong v. Flowers Hosp. Inc., 33 F.3d 1308, 1313 (11th Cir. 1994). The basic framework for establishing a prima facie case relying on circumstantial evidence is set out in McDonnell Douglas; however, the framework is a flexible guide and is "not necessarily applicable in every respect in differing factual situations." McDonnell Douglas, 411 U.S. at 802 n.13; Burdine, 450 U.S. at 253-54 n.6; accord Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). The burden of establishing a prima facie case of disparate treatment is not onerous. Burdine, 450 U.S. at 253; Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). It simply requires evidence adequate to permit an inference that an employment decision was based on an illegal discriminatory criterion. See O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996) (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977)).

B. Was Plaintiff Denied the Director, Employee Benefits Position Based on His Race?

1. The Prima Facie Case

Plaintiff contends that Defendant did not select him for the Director, Employee Benefits position because of his race. Defendant contends that a plaintiff may establish a prima facie

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[10] Plaintiff does not contend that he has presented direct evidence in this case.

case of race discrimination by showing: (1) that he is a member of a protected class; (2) that he was qualified for and applied for the position; (3) that he was rejected; (4) that other equally or less qualified employees who were not members of the protected class were promoted. Defendant cites Denny v. City of Albany, 247 F.3d 1172, 1183 (11th Cir. 2001) (quoting Combs v. Plantation Patterns, 106 F.3d 1519, 1539 n. 11 (11th Cir. 1997), and Lee v. GTE Florida, Inc., 226 F.3d 1249, 1253 (11th Cir. 2000). Defendant contends that Plaintiff cannot establish a prima facie case because he cannot show that he was equally or more qualified than Horn for the Director, Employee Benefits position.

Plaintiff espouses a different version of the prima facie framework. Plaintiff contends that he must show that: (1) he belonged to a protected group; (2) he was qualified and applied for the position; (3) that despite his qualifications he was rejected; and (4) after the rejection the employer filled the position with someone outside of plaintiff's protected class, or the position remained open and the employer continued to seek applications from persons with plaintiff's qualifications. Plaintiff cites McDonnell Douglas, 411 U.S. at 802; Schoenfeld v. Babbitt, 168 F.3d 1257, 1267 (11th Cir. 1999).

In Walker v. Mortham, 158 F.3d 1177, 1188-1194 (11th Cir. 1998), the court recognized two conflicting lines of precedent in

the Eleventh Circuit regarding whether a plaintiff must engage in a comparison of relative qualifications at the prima facie stage. The Walker court analyzed the origin of both lines of precedent and concluded that the "lesser or equal qualifications" requirement was derived from the 1983 Eleventh Circuit case, Perryman v. Johnson Products, 698 F.2d 1138 (11th Cir. 1983). Courts which allowed a plaintiff to establish a prima facie case without addressing relative qualifications, however, relied upon an earlier case, Crawford v. Western Electric Co., 614 F.2d 1300, 1315 (5th Cir. 1980), a Fifth Circuit case decided in 1980. Id. at 1188.

Noting that in the case of an intra-circuit split, courts should "look to the line of authority containing the earliest case," the Walker court concluded that "the Crawford standard (established in 1980) predates the Perryman standard (established in 1983), and is therefore the standard to be applied in the Eleventh Circuit."[11] Id. at 1189. The Walker court also observed that "the Supreme Court implied [in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)] that it is the *employer* who initially presents evidence of relative qualifications, not the employee." Walker, 158 F.3d at 1189

[11] In regard to the "earliest case" rule, the court noted "[t]he prior precedent rule, which binds later panels to the decisions of former panels, is essential to maintaining stability in the law. The rule is 'emphatic' and 'firmly established' in the Eleventh Circuit." Walker, 158 F.3d at 1188-89.

(emphasis in original). Thus, the Walker court found that Crawford was in accord with the Supreme Court cases Burdine and Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363 (1989).

Acknowledging that the split in authority has nonetheless survived Walker, this Court nonetheless finds the Walker court's analysis to be persuasive. Therefore, applying the prima facie framework advanced by Plaintiff, Plaintiff has shown that he is black, applied for the position of Director, and was rejected for the position in favor of Horn, a white female. Defendant does not contend that Plaintiff was not qualified for the position of Director, but that Horn was more qualified. See [Doc. No. 345] (Def. Br. at 19-20). Therefore, the Court finds that Plaintiff can establish a prima facie case of discrimination as to the Director, Employee Benefits position that was awarded to Horn.

2. Defendant's Legitimate Nondiscriminatory Reason

Once plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the defendant to provide evidence of a legitimate nondiscriminatory reason for the adverse employment action taken against the plaintiff. McDonnell Douglas 411 U.S. at 802. Defendant contends that Horn's training and experience made her better qualified than Plaintiff for the Director, Employee Benefits position. Plaintiff argues that because Walters testified that he could not

remember the reasons he promoted Horn over Plaintiff, Walters' *ex post facto* speculation cannot be considered the "actual reason" for Horn's selection and, thus, Defendant has not carried its burden of establishing a legitimate nondiscriminatory reason.

Citing Fowler v. Blue Bell, Inc., 737 F.2d 1007, 1011 (11th Cir. 1984), Defendant responds that the burden of articulating a legitimate nondiscriminatory reason is satisfied even if the decision maker cannot remember the decision but is able to review the plaintiff's application and provide a logical reason for the decision. In Fowler, the plaintiff applied for a position with the defendant company. Eldon Pierce, who had temporarily worked in the defendant's personnel department at the time plaintiff applied for employment, processed the plaintiff's application. Id. at 1010. The court elaborated further on the facts as follows:

> Pierce testified that he did not remember actually interviewing Fowler, but that because of a notation on Fowler's application . . . Pierce knew that he had handled the application. After reviewing Fowler's application in light of what he knew the 1970 hiring criteria to have been, Pierce testified that the applicant would not have been hired because his erratic work history, as well as his request for a wage of at least $1.80 per hour when the company was able to guarantee only the minimum wage of $1.60 per hour, indicated that 'he wouldn't stay with us for long.'

Fowler, 737 F.2d at 1010. The court concluded that although the defendant failed to offer any direct evidence of a non-discriminatory reason for its failure to hire the plaintiff, the

circumstantial evidence presented was sufficient. Id. at 1012. "A fact finder would be entitled to infer from Pierce's testimony that the reason for Fowler's rejection in 1970 was not a discriminatory motive on the part of [the defendant] Bell but rather was Fowler's unstable work record. . . ." Id. The court, thus, concluded that Pierce's explanation was sufficient to satisfy the defendant's burden of production.

In this case, although Walters initially stated that he was unable to recall the specifics of how the decision was made to select Horn (Walters Dep. II at 23), he clarified that, based on "firsthand observations" and reports from other employees of the relative qualifications of Plaintiff and Horn at that time, his "opinion was and remains, that Peggy Horn was the best qualified for the job." (Walters Dep. II at 119-120). Walters testified that he chose Horn based on her superior ability to plan and organize, her background in the area of retirement and thrift, as well as her strong financial capabilities. Id. at 120-121. Unlike the decisionmaker in Fowler, who did not know the plaintiff and based his decision only on an application, Walters was well acquainted with both Plaintiff and Horn's performance and qualifications at the time he made the decision. Plaintiff does not contend that Walters did not have personal knowledge of their relative qualifications. In other words, this is a stronger case than Fowler, and the Court concludes that Defendant has

presented a sufficient legitimate nondiscriminatory reason for the selection of Horn.[12]

3. Pretext

After the employer presents nondiscriminatory reasons for its action, in order to avoid summary judgment, the plaintiff must present evidence that the reasons offered by the defendant were mere pretext or unworthy of credence. McDonnell Douglas, 411 U.S. at 804; Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143, 120 S.Ct. 2097, 2106 (2000); Combs, 106 F.3d at 1528. Notably, Plaintiff does not argue that he was more qualified than Horn for the position of Director, Employee Benefits.[13] Instead, he contends that Defendant's reason for promoting Horn are pretextual because: (1) Defendant did not follow the promotional procedures outlined in the agreement with the OFCCP; and (2) Defendant has not provided sufficient specific factual basis for selecting Horn.

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[12] On the issue of who made the decision, Walters testified that "I would have either made the decision, if it was mine unilaterally to make, ... Or if Ron [Cheeley] had made the decision I would have approved it for the same reasons that I basically just reiterated." (Walter II at 122.).

[13] Indeed, the argument that Plaintiff was more qualified that Horn would fail. In order to demonstrate pretext on the basis of qualifications, the "disparities in . . . qualifications" must be "so apparent as virtually to jump off the page and slap you in the face." Lee, 226 F.3d at 1253 (citing Deines v. Texas Dept. of Protective & Regulatory Svcs., 164 F.3d 277, 280 (5th Cir. 1999)). In this case, the record indicates that Horn was at least equally as qualified as Plaintiff.

a. Defendant's alleged failure to follow the OFCCP's promotional procedures

Plaintiff contends that Defendant departed from the procedures outlined in the agreement with the Department of Labor's OFCCP. He argues that Walters violated the consent agreement by "unilaterally" promoting Horn, and, thus, "an inference of . . . an improper motive should be assumed." [Doc. No. 351] (Pl. Br. at 22). Defendant responds that Plaintiff has not introduced any evidence that the agreement, which it characterizes as an affirmative action policy, applied to the Director, Employee Benefits position.[14]

"Departures from normal procedures may be suggestive of discrimination." Morrison v. Booth, 763 F.2d 1366, 1374 (11th Cir.1985). See also Walker, 286 F.3d at 1279 ("The bending of established rules may . . . be suggestive of discrimination."). The OFCCP agreement states Coca-Cola will follow certain posting and interviewing procedures "[except in cases of noncompetitive promotions or under certain unusual and infrequent circumstances." [Doc. No. 351] (Pl. Ex. 14 - OFCCP agreement).

Plaintiff relies on the testimony of Cheeley and Wortman to establish that the Director, Employee Benefit position was

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[14] Plaintiff also argues that Defendant failed to follow its own promotional policies and procedures. As Defendant correctly points out, Plaintiff cites only the OFCCP agreement and has not set forth any arguments outlining how Defendant violated its internal promotional procedures. See [Doc. No. 351] (Pl. Br. at 21-22).

subject to the agreement. See [Doc. No. 351] (Pl. Br. at 9). Cheeley testified:

> Q: To your knowledge was there a list of candidates that were put together to be a pool of applicants to be considered for Bill Wortman's replacement?
>
> A: No, not to my knowledge.
>
> Q: Are you familiar with that process by which Coca-Cola would put together a list of diverse candidates for promotional opportunity?
>
> A: . . . The answer is no.
>
> Q: In your times that you hired or participated in promoting employees were you ever asked, told or suggested that you should come up with a list of diverse candidates to be considered as part of the decision making process?
>
> A: We would always do that.
>
> Q: So you were aware of that concept?
>
> A: Yes, absolutely. That was just part of managing.
>
> Q: But to your knowledge that wasn't done with the replacement for Bill Wortman?
>
> A: . . . I don't know.

(Cheeley Dep. at 47-48). Wortman testified that the company used a "targeted selection process" to fill available positions. Individuals who heard about a job opening and felt that they were qualified could apply for the position. These individuals would then be interviewed by five or six people chosen to sit on "the targeted selection committee." In addition, Wortman testified that this process was used in pay grades above Level 10 but he did not know whether or not the "targeted selection process"

ceased to be used after a certain pay grade level. (Wortman Dep. at 60-61, 70-71).

Drawing all inferences in Plaintiff's favor, the cited deposition testimony still does not support his contention that the OFCCP agreement applied to the Director, Employee Benefits position. Neither Cheeley nor Wortman's testimony mentions the OFCCP agreement. Nor has Plaintiff offered any evidence that the OFCCP agreement was equivalent to "targeted selection process."[15] Moreover, Plaintiff has not offered any evidence that the Director position did not fall into the "certain unusual and infrequent circumstances" exception mentioned in the agreement.

Plaintiff has the burden of establishing that Defendant's legitimate nondiscriminatory reason is pretextual. Conclusory allegations that the OFCCP agreement applied to the Director, Employee Benefits position are insufficient to carry this burden. See Ratliff v. DeKalb County, 62 F.3d 338, 341 (11th Cir. 1995) ("plaintiffs seeking to avoid summary judgment . . . must present specific nonconclusory facts that would support a jury verdict against the particular defendant on discriminatory intent"); Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990); Mayfield v. Patterson Pump Co.. 101 F.3d 1371, 1376 (11th

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[15] Plaintiff has also not offered any evidence that the Director position was at pay grade 10 or above, which might suggest that Defendant did not follow its own promotional policies.

Cir. 1996); Carter v. City of Miami, 870 F.2d 578, 585 (11th Cir. 1989). Therefore, the fact that Defendant did not follow the OFCCP guidelines on promotions does not satisfy Plaintiff's burden of showing that Defendant's legitimate nondiscriminatory reasons are pretextual.[16]

b. Did Defendant sufficiently articulate the reasons for selecting Horn over Plaintiff?

Plaintiff concedes that the use of subjective criteria does not, in and of itself, establish pretext. See Chapman, 229 F.3d at 1033-37. Plaintiff argues, however, that Walter's reasons for selecting Horn are conclusory and vague, and, thus, are suspect. Plaintiff further contends that such vague testimony and the lack of records to document the reasons for Horn's selection robs him of "a full and fair opportunity to demonstrate pretext," [Doc. No. 351] (Pl. Br. at 20). Plaintiff also argues that Defendant's contention that Horn was more qualified because she is an actuary

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[16] Furthermore, Defendant correctly argues that the agreement between Coca-Cola and the OFCCP could be analogized to an affirmative action policy. "Courts have been extremely wary of citing lawful affirmative action plans as evidence of an employer's pretext." Denney v. City of Albany, 247 F.3d 1172, 1188 (11th cir. 2001). More recently, the court has said "the failure to give a preference under [an affirmative action] plan cannot be used to support an allegation of discrimination in employment decisions." Walker v. Prudential Property and Cas. Ins. Co., 286 F.3d 1270, 1279 (11th Cir. 2002) (quoting Liao v. TVA, 867 F.2d 1366 (11th Cir. 1989)). In addition, it is noteworthy that the OFCCP found an under-representation of women as well as minorities. [Doc. NO. 351] (Pl. Ex. 10 p. 1092). Because Defendant chose a woman for the Director position, Defendant arguably was still in compliance with OFCCP policies.

demonstrates pretext because Walters did not identify this as one of the qualifications for the Director position and Wortman, Horn's predecessor, was not an actuary.

As the Eleventh Circuit noted, "subjective evaluations of a job candidate are often critical to the decision-making process, and if anything, are becoming more so in our increasingly service-oriented economy." Chapman v. AI Transport, 229 F.3d 1012, 1033 (11th Cir. 2000). "Personal qualities also factor heavily into employment decisions concerning supervisory or professional positions." Id. If an employer offers subjective reasons for taking adverse action against an employee, those reasons "must be clear and reasonably specific" so that the employee is given a "full and fair opportunity to demonstrate pretext." Burdine, 450 U.S. at 258 (citations omitted); Chapman, 229 F.3d at 1034. Chapman illustrated these principles as follows:

> [I]t might not be sufficient for a defendant employer to say it did not hire the plaintiff applicant simply because "I did not like his appearance" with no further explanation. However, if the defendant employer said, "I did not like his appearance because his hair was uncombed and he had dandruff all over his shoulders," or "because he had his nose pierced," or "because his fingernails were dirty," or "because he came to the interview wearing short pants and a T-shirt," the defendant would have articulated a "clear and reasonably specific" basis for its subjective opinion-the applicant's bad (in the employer's view) appearance. That subjective reason would therefore be a legally sufficient, legitimate, nondiscriminatory reason for not hiring the plaintiff applicant.

Chapman, 229 F.3d at 1034.

Walters' failure to provide any specific examples as to why he considered Horn's planning and organizing skills to be superior to Plaintiff's undermines the weight to be given these subjective judgments under Chapman. Furthermore, Plaintiff is correct that Walters did not mention Horn's status as an actuary in support of her selection. The inquiry does not end here, however. While Walters acknowledged that Plaintiff had some experience with retirement benefits, he testified that he chose Horn, who had served as Manager, Retirement Plans for four years, because of her background in retirement benefits and her strong financial background. He testified that, in his opinion:

> if you can learn retirement and thrift you can pick up group benefits fairly quickly. And I felt that given [Horn's] background in the retirement and thrift area and her strong financial capabilities that she could move fairly quickly and deepen her understanding in the group benefits area. Conversely, [Plaintiff] had had some experience with retirement and thrift. . . but he didn't have the long experience there and I felt that it was a . . . much, much bigger hill with a somewhat lower ability to predict success of climbing the hill."

(Walters Dep. II at 121). The Court finds these reasons "clear and reasonably specific" and sufficient.

Moreover, Plaintiff has not presented any evidence that Horn did not have strong financial capabilities or that the Director position did not require a strong understanding of financial matters, as Walters contends. In fact, Horn testified that before her promotion to Director she assisted Plaintiff in

preparing his budgets for programs under Group Benefits. See (Horn Dep. at 124-25). In conclusion, therefore, Defendant has presented a legally sufficient legitimate nondiscriminatory reason in response to the prima facie case and Plaintiff has failed to come forth with any evidence to raise an issue of fact as to pretext or from which an inference of discrimination could be drawn. Accordingly, summary judgment is appropriate on this claim.

C. Was Plaintiff Denied the Manager of International Benefits Position Based on His Race?

After Horn's promotion to Director in August of 1998, her previous position -- Manager, Global Benefits and Planning -- was split into two positions: Manager, Benefits Planning and Development and Manager, International Benefits Development. Matt Brynildson assumed the position of Manager, International Benefits Development, but left the company in September of 1998. After Brynildson's departure, Horn performed these duties until August of 1999. At that time, the position of International Benefits was combined with Retirement Benefits and Barbara Gilbreath assumed the job responsibilities for International Benefits. [Doc. No. 351] (Def. SMF ¶¶ 16-22), [Doc. No. 351] (Pl. resp. to Def. SMF ¶¶ 16-22). Plaintiff argues that Defendant discriminated against him based on his race when Horn decided to award the Manager, International Benefits Development

job to Barbara Gilbreath by combining it with the Retirement Benefits position already held by her.

Defendant responds that the promotional claims procedure specifically states that any class member who wishes to pursue an individual promotional decision must "identify the specific available position which the claimant asserts he or she did not receive due to racial discrimination." Defendant argues that Plaintiff has not identified a specific available position but, instead, challenges Defendant's business decision to combine the Manager, Retirement Plans and Manager, International Benefits positions. Thus, Defendant concludes that Plaintiff's claim of discrimination with respect to the combination of International Benefits with Retirement Benefits is outside the scope of this claims procedure and not properly before the Court.

Defendant's argument, however, elevates form over substance. Defendant is technically correct that there was no open or "available position" with the title "Manager, International Benefits," because that position was merged into Gilbreath's new position. When Gilbreath assumed the duties of International Benefits, however, her title changed from Manager, Retirement Plans to Manager, International Benefits *and* Retirement Plans. She also received an increase in pay. [Doc. No. 351] (Pl. resp. to Def. SMF at 11), (Pl. Ex. I). The substance of the event was that the position of Manager, International Benefits, was awarded

to Gilbreath and not to Plaintiff. Defendant's argument that Plaintiff has not identified an available position under the claims procedure is, therefore, rejected.

In order to establish a prima facie case, Plaintiff must show that: (1) he belonged to a protected group; (2) he was qualified and applied for the position; (3) that despite his qualifications he was rejected; and (4) after the rejection the employer filled the position with someone outside of plaintiff's protected class, or the position remained open and the employer continued to seek applications from persons with plaintiff's qualifications. McDonnell Douglas, 411 U.S. at 802; Schoenfeld, 168 F.3d at 1267. Plaintiff is black. Defendant has not argued that Plaintiff was not at least minimally qualified to assume these duties[17] and Plaintiff testified in his affidavit that he requested that Horn assign the duties of the Manager, International Benefits, position to him. See [Doc. No. 351] (Affidavit of Larry Jones ("Pl. Aff.") at ¶¶ 16 - 19). Finally, Horn assigned the duties to Gilbreath, who is white. Thus, Plaintiff has satisfied all the elements necessary to make out a prima facie case.

Once plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the defendant

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[17] Once again, Defendant does not appear to suggest that Plaintiff was unqualified, merely that Gilbreath was more qualified than Plaintiff. See [Doc. No. 345] (Def. Br. at 20).

to provide evidence of a legitimate nondiscriminatory reason for the adverse employment action taken against the plaintiff. Plaintiff correctly argues that Defendant has not provided a legitimate nondiscriminatory reason for selecting Gilbreath over Plaintiff. In its motion and reply brief, Defendant argues extensively that Plaintiff's claim involving the Manager, International Benefits position is outside the scope of the promotional claims procedure. Defendant's argument on the substantive merits of this claim, however, consists only of the rubric "Barbara Gilbreath was More Qualified for the Position She Filled in August 1999." [Doc. No. 345] (Def. Br. at 20). Defendant has not provided any explanation as to why Horn considered Gilbreath more qualified than Plaintiff.

Defendant argues that Plaintiff admitted in his deposition that he was less qualified than Gilbreath. Plaintiff responds that he testified that he was less qualified for the combined position of Manager, International Benefits and Retirement Planning because Gilbreath had more experience in the retirement benefits arena, see [Doc. No. 351] (Pl. Br. at 28), but that he considers himself qualified to perform the International Benefits job duties. A review of Plaintiff's deposition supports his interpretation of the testimony. Defendant repeatedly asked Plaintiff whether he claimed he was more qualified for the "International Benefits and Retirement Planning position," to

which Plaintiff responded that he was not. See (Pl. Dep. at 198, 200-01). Defendant did not inquire as to Plaintiff's perceived ability to perform the job responsibilities associated only with International Benefits. The Court, therefore, concludes that Plaintiff did not concede that he was not as qualified as Gilbreath for the job duties at issue.

In order to shift the burden to Plaintiff to demonstrate pretext, Defendant must first point to admissible evidence explaining the reason for Plaintiff's rejection. See Burdine, 450 U.S. at 254-56. Conclusory assertions, such as are presented by Defendant, are insufficient to meet its burden. See Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993); Ratliff, 62 F.3d at 341. Moreover, this Court will not cull through the materials submitted by the Defendant searching for evidence which negates the existence of a disputed issue. See United States v. Adkinson, 135 F.3d 1363, 1378-1380 (11th Cir. 1998); Johnson v. City of Ft. Lauderdale, 126 F.3d 1372, 1373 (11th Cir. 1997); Dickson v. Amoco Performance Prods., Inc., 845 F.Supp. 1565, 1570 (N.D. Ga. 1994) ("It should be the party's responsibility to direct the court's attention separately to each portion of the record which supports each of the party's distinct arguments."). Because Defendant has not provided any explanation for why Horn selected Gilbreath over Plaintiff to perform the duties associated with the International Benefits position,

Defendant has not rebutted Plaintiff's prima facie case and summary judgment is inappropriate on this claim.

V.
Conclusion

In summary, Defendant's motion for summary judgment [Doc. No. 345] is **GRANTED** as to Plaintiff's promotional discrimination claim relating to the Director, Employee Benefits position. Defendant's motion for summary judgment is **DENIED** as to Plaintiff's promotional discrimination claim relating to the Manager, International Benefits position.

SO ORDERED, this 18th day of March, 2003.

E. CLAYTON SCOFIELD III
UNITED STATES MAGISTRATE JUDGE