No. 23-10882

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DEBORAH ANN THOMAS,
Plaintiff-Appellant,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission ("EEOC") with administering and enforcing federal laws prohibiting workplace discrimination, including the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA"). This appeal raises important questions regarding the correct standards for pleading a claim of ADEA discrimination sufficiently to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Because the EEOC has a substantial interest in ensuring the proper application of the laws it enforces, EEOC offers its views. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUES[1]

1. Did the magistrate judge contravene this Court's holding in *Cicalese v. University of Texas Medical Branch*, 924 F.3d 762 (5th Cir. 2019), by effectively requiring Plaintiff to plead the prima facie elements of her ADEA failure-to-hire and failure-to-promote claims rather than the "ultimate elements" of those claims?

[1] The EEOC takes no position on any other issues in this appeal.

2. Did the district court err in granting Defendant's motion to dismiss where the magistrate judge rejected Plaintiff's allegations that she was qualified and received less favorable treatment than substantially younger candidates based on standards reserved for summary judgment?

STATEMENT OF THE CASE

A. Statement of the Facts[2]

Plaintiff Deborah Thomas alleges that Defendant Dallas Independent School District ("DISD") discriminated against her in violation of the ADEA when it rejected her for multiple positions in the spring of 2018 in favor of much younger applicants. ROA.9, 11-15. Thomas, who holds a master's degree in Public School Administration, was fifty-five at the time.

In 2018, Thomas had been an educator for over twenty-five years and worked for DISD for over ten years. She had spent the last three years as a Campus Instructional Coach at Oliver Wendell Holmes Middle School ("Holmes"). ROA.11. During her three years at Holmes, campus scores on

[2] We take these facts from Thomas's original complaint, drawing all reasonable inferences in her favor, as required at the pleading stage. *Hernandez v. W. Tex. Treasures Est. Sales, LLC*, 79 F.4th 464, 469 (5th Cir. 2023). We recount only those facts relevant to the issues on which we take a position here.

statewide testing rose from below 40% to over 60%. ROA.13. DISD promoted three teachers Thomas personally coached to Assistant Principal positions. ROA.12. All three promoted teachers were younger than Thomas. ROA.12.

That spring, Thomas learned that DISD would not renew her in the position at Holmes. ROA.13. She attended DISD job fairs, at which she applied for over eighty positions, consisting primarily of Assistant Principal positions but also Instructional Coach and other positions. ROA.14. DISD interviewed her for twenty of those positions. ROA.14. For at least seven of those positions, DISD rejected her in favor of a candidate under forty years of age. ROA.14.

Thomas filed this lawsuit pro se. She asserted, in relevant part, a claim for failure to hire or promote under the ADEA arising from DISD's rejection of her for the Assistant Principal and Instructional Coach positions to which she applied in the spring of 2018. ROA.5-18. According to Thomas's complaint, DISD selected substantially younger candidates for each of these positions: two thirty-year-old Assistant Principals, two thirty-six-year-old Assistant Principals, and Instructional Coaches aged twenty-six, thirty-four, and thirty-six. ROA.14. Thomas identified the schools for

which DISD selected each candidate, and for some, the candidate's previous classroom position. ROA.14. She further alleged that almost all these candidates had less than three years in the classroom before their promotion. ROA.14. One selected candidate's class had a 30% pass rate on statewide testing. ROA.14.

B. District Court's Decision

DISD moved to dismiss under Fed. R. Civ. P. 12(b)(6). ROA.43-71. The magistrate judge issued findings, conclusions, and a recommendation that DISD's motion be granted. ROA.103-119. The magistrate judge reasoned that Thomas had not alleged direct evidence of age discrimination, and therefore must proceed under a "burden-shifting analysis." ROA.112-13. The magistrate judge specified that the prima facie elements of a failure-to-hire or failure-to-promote claim consist of evidence that Thomas was within the protected class, was adversely affected, was qualified for the position, and the job remained open or was filled by someone younger. ROA.113. The magistrate judge acknowledged this Circuit's precedent that a plaintiff need not establish a prima facie case at the pleading stage, and must only plead sufficient facts on the "ultimate elements" of her claim to make her case plausible. ROA.114.

Nonetheless, the magistrate judge proceeded to evaluate whether Thomas alleged facts supporting each of the prima facie elements and concluded that she had failed to do so for two of the elements. ROA.115-117. Relying exclusively on a district court decision, the magistrate judge found that Thomas's allegations concerning her education and experience did not satisfy the "qualified" element because she failed to plead the "requisite qualifications" for the positions to which she applied. ROA.116 (citing *Jenkins v. City of Dall.*, No. 3:22-cv-0960, 2022 WL 6225559, at *8 (N.D. Tex. Oct. 6, 2022) (*Jenkins I*)). The magistrate judge concluded that even if Thomas were qualified, and even though she alleged that DISD rejected her in favor of younger applicants, her claim was doomed because she failed to allege that these younger applicants were similarly situated. ROA.117.

Thomas then filed "amended complaint" documents, ROA.136-49, 150-69, which the district court construed as objections to the magistrate judge's recommendation. ROA.170 n.1. The court stated it had reviewed the objected-to portions de novo and the other portions for plain error. ROA.170. In a brief order, it stated it found no error and accepted the findings, conclusions, and recommendations of the magistrate judge. ROA.170.

ARGUMENT

I. Supreme Court and this Court's precedent establish that plaintiffs need not plead the elements of the *McDonnell Douglas* prima facie case to survive a motion to dismiss.

The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual … because of such individual's age." 29 U.S.C. § 623(a)(1). At the pleading stage, courts apply the *Twombly/Iqbal* plausibility standard, under which "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Courts are "not authorized or required to determine whether the plaintiff's plausible inference … is equally or more plausible than other competing inferences," except for unique claims not at issue here. *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 267 (5th Cir. 2009). "Thus, particularly where the relevant information is beyond the access of the plaintiff, courts should generally permit discovery to proceed unless the complaint recites no more than sheer speculation about the plaintiff's entitlement to relief." *Motiva Pats., LLC v. Sony Corp.*, 408 F. Supp. 3d 819, 827 (E.D. Tex. 2019) (citing *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 498 (5th Cir. 2015)); *accord Swierkiewicz v. Sorema N.A.*, 534 U.S.

506, 512 (2002) ("Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case.").

To make a claim plausible, this Court's precedent requires a plaintiff to "plead sufficient facts on all of the *ultimate elements* of a disparate treatment claim." *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 766 (5th Cir. 2019) (emphasis added by the court) (quoting *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 470 (5th Cir. 2016)). There are just two ultimate elements a plaintiff must plead to support a disparate treatment claim under the ADEA: "(1) an 'adverse employment action,' (2) taken against a plaintiff 'because of her protected status.'" *Id.* at 767 (emphasis omitted); *see also Evans v. City of Houston*, 246 F.3d 344, 349 (5th Cir. 2001) (claims under Title VII and the ADEA are "evaluated within the same analytic framework").

Following Supreme Court precedent, this Court has drawn a clear distinction between the "ultimate elements" of a discrimination claim and the prima facie elements established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *Cicalese*, this Court held that "a court errs by requiring a plaintiff to plead something more than the 'ultimate elements'

of a claim," and specifically warned that "[a] court thus inappropriately heightens the pleading standard by subjecting a plaintiff's allegations to a rigorous factual or evidentiary analysis under the *McDonnell Douglas* framework in response to a motion to dismiss." 924 F.3d at 767; *accord Raj v. La. State Univ.*, 714 F.3d 322, 331 (5th Cir. 2013) (holding that it is improper to "require[] … a showing of each prong of the prima facie test for disparate treatment at the pleading stage"). *Cicalese* and other decisions of this Court have noted that "it can be helpful to *reference* that [*McDonnell Douglas*] framework when the court is determining whether a plaintiff has plausibly alleged the ultimate elements of the disparate treatment claim." *Cicalese,* 924 F.3d at 767 (emphasis added) (cleaned up). But *Cicalese* does not countenance dismissing claims for failing to plead facts necessary to meet summary-judgment scrutiny of the prima facie case. *Id.* at 768.

Despite *Cicalese*, some district courts within this circuit continue to invoke the elements of the *McDonnell Douglas* prima facie case as if they were the "ultimate elements" a plaintiff must plead. *See, e.g.*, *Boyd v. Monroe City Hall*, No. 3:20-cv-01473, 2021 WL 1305385, at *4 (W.D. La. Mar. 8, 2021), *report and recommendation adopted*, No. 3:20-cv-01473, 2021 WL 1299204 (W.D. La. Apr. 7, 2021); *Deljavan v. Goodwill Indus. of Fort Worth*, No. 4:20-

cv-01258, 2021 WL 2187245, at *7 (N.D. Tex. May 28, 2021); *Coleman v. Saul*, No. 3:19-cv-2198, 2021 WL 1117167, at *4 (N.D. Tex. Mar. 24, 2021). Some district courts have even explicitly stated that the *McDonnell Douglas* elements *are* the "ultimate elements." *See, e.g.*, *Berrios v. Miller*, No. EP-22-cv-00139, 2023 WL 5246351, at *5 (W.D. Tex. Aug. 15, 2023) ("The ultimate elements of a discrimination claim are those a plaintiff must show to establish a prima facie case of discrimination under *McDonnell Douglas*'s analytical burden-shifting framework." (footnote omitted)); *Noakes v. Dep't of Homeland Sec.*, No. 2:22-cv-00213, 2022 WL 11435959, at *10 (E.D. La. Oct. 18, 2022) (referring to the prima facie elements as "ultimate elements of a disparate treatment case").

When courts blur the line between the *Twombly/Iqbal* requirement to plead a "plausible" claim and the *McDonnell Douglas* "evidentiary standard," they risk improperly applying a heightened pleading standard. *See Cicalese*, 924 F.3d at 768. To be sure, in evaluating whether a plaintiff pled the ultimate causation element, courts may look to how causation might be inferred from the allegations under the prima facie case. *See, e.g., id.* at 767-68 (holding that allegation of non-Italian employees being treated more favorably was sufficient to render national-origin claim plausible);

Leal v. McHugh, 731 F.3d 405, 413 (5th Cir. 2013) (pleading facts for each element of the prima facie case defeats a motion to dismiss); *Haskett v. T.S. Dudley Land Co.*, 648 F. App'x 492, 495-96 (5th Cir. 2016) (same). But all that is required is that plaintiffs "allege[] sufficient facts to 'nudge[ ] their claims across the line from conceivable to plausible.'" *Cicalese*, 924 F.3d at 767 (quoting *Twombly*, 550 U.S. at 547). A court may "merely frame its inquiry with the [*McDonnell Douglas*] standard," but it crosses a line when it "engage[s] in a rigorous factual analysis better reserved for a later stage of the proceedings." *Scott v. U.S. Bank Nat'l Ass'n*, 16 F.4th 1204, 1211 (5th Cir. 2021), as revised (Nov. 26, 2021); *see also id.* at 1209, 1212 (applying *Cicalese* in case arising under 42 U.S.C. § 1981 and holding that the district court crossed this line).

A recent unpublished decision of this Court may have inadvertently contributed to this confusion. *See Coleman v. Kijakazi*, No. 21-10399, 2023 WL 2660167 (5th Cir. Mar. 28, 2023). In affirming dismissal of a Title VII claim under Rule 12(b)(6), *Coleman* states, "a plaintiff must *plead* that he '(1) is a member of a protected class, (2) was qualified for the position that he held, (3) was subject to an adverse employment action, and (4) was treated less favorably than others similarly situated outside of his protected class.'"

Id. at *2 (emphasis added) (quoting *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 426 (5th Cir. 2017)). These are the elements of a prima facie case of discrimination, not the ultimate elements of a discrimination claim per this Court's published precedent. *Compare Alkhawaldeh*, 851 F.3d at 425-26 (summary judgment), *with Cicalese*, 924 F.3d at 767 (motion to dismiss).

As explained in further detail below, the magistrate judge here did not merely reference *McDonnell Douglas* to "frame the inquiry." The magistrate judge prematurely applied scrutiny reserved for later stages of the proceedings and, in doing so, held Thomas to a heightened pleading standard. We ask this Court to assist district courts and future litigants by reemphasizing and clarifying the distinction it drew in *Cicalese* between the elements of the *McDonnell Douglas* prima facie case and the "ultimate elements" of a disparate treatment claim.

II. Under the correct pleading standard, Thomas's ADEA hiring and promotion allegations are more than adequate to survive dismissal and warrant discovery.

Here, the magistrate judge found that Thomas's pro se complaint did not state a claim for age discrimination because: (1) she had not pled the requisite qualifications for the positions; and (2) she had not pled that she was similarly situated to the younger individuals selected instead of her.

ROA.115-17. In rejecting Thomas's claim, the magistrate judge effectively applied summary judgment-like scrutiny to Thomas's complaint, using standards that are appropriate only after the parties have developed evidence through discovery. The magistrate judge's ruling, adopted by the district court, thus contravenes *Cicalese*.

A. The magistrate judge should have inferred from Thomas's factual allegations that the ultimate elements of her claim were plausible.

Under the correct standard, Thomas alleges ample facts to support inferences that she was qualified for the Assistant Principal and Instructional Coach positions to which she applied and that DISD rejected her because of her age. *See supra* at 2-4. Thomas alleges in detail her education and experience as an educator, including her recent experience as an Instructional Coach, her success in that role, and her master's degree in Public School Administration. ROA.11, 13. She also alleges that, of the positions to which she applied, DISD interviewed her for approximately twenty. ROA.12, 14. She alleges with adequate—even surprising—detail the exact ages of seven comparators, the positions for which DISD selected them instead of her, and their limited experience in the classroom, including that one comparator's students passed statewide testing at a low

rate. ROA.14. Thomas also describes other incidents when DISD promoted younger teachers after she coached them. ROA.12.

Thomas's detailed allegations, though not marshaled as a lawyer might have done, are far from the "[t]hreadbare recitals of a cause of action's elements" and "mere conclusory statements" that fall short of the *Twombly/Iqbal* plausibility standard. Rather, the complaint describes the facts known to Thomas from which she reasonably inferred that her age was the cause of DISD's failure to hire or promote her: her extensive experience and qualifications; her selection for multiple interviews; and DISD passing over her in favor of younger workers despite their allegedly inferior experience, qualifications, and track records. And this was allegedly in keeping with a pattern she had previously experienced.

At this stage of the proceedings, these allegations are more than sufficient to state a claim for age discrimination. There is no dispute that Thomas, at age fifty-five, is in the protected age group, or that she suffered the adverse action of not being hired or promoted. 29 U.S.C. §§ 623(a)(1), 631(a). The only necessary inference is whether it is plausible she was not hired or promoted because of her age—an inference the complaint readily supports. Thomas's description of her experience and how it compared to

the experience of those who were selected for the positions to which she applied raises the inference that she had the relevant background and possessed the objective qualifications for the positions. That DISD chose to interview her further bolsters this inference. Despite these qualifications, Thomas alleges, DISD rejected her in favor of younger, less qualified candidates, raising the inference that age was the reason these candidates were chosen despite their inferior qualifications.

Thomas's allegations provide at least as strong a foundation for the inference of age discrimination as other pleadings this Court has endorsed. For example, in *Haskett v. T.S. Dudley Land Co.*, an ADEA failure-to-hire case, the plaintiff alleged that he possessed a certification and had ten years' experience, that the defendant had hired younger workers instead of him, and that this was part of a pattern in the industry. 648 F. App'x at 493-94. In reviving his claim, this Court referred to his complaint as "*more* factually detailed" than others it had accepted, *id.* at 496 (emphasis added), but it is not nearly as detailed as Thomas's. Thomas identifies specific younger comparators by school and age, and she points to the undisputed fact that DISD selected her for interviews. *See Jenkins v. City of Dall.*, No. 3:22-cv-0960, 2023 WL 3514455, at *6 (N.D. Tex. May 17, 2023) (*Jenkins II*)

(placement on the "eligibility list" supports reasonable inference that the plaintiff was qualified).

Likewise, Thomas's allegations are more fulsome than those in *Leal v. McHugh*, where the Court held that the plaintiffs' "admittedly bare allegations" of having many years' experience and being passed over in favor of at least one substantially younger candidate, as to whom they claimed to be "clearly better qualified," were sufficient to sustain their failure-to-promote claim at the pleading stage. 731 F.3d at 413. In yet another ADEA case, *Wooten v. McDonald Transit Associates*, this Court found that the plaintiff's complaint of retaliation was plausible despite alleging only that he had worked for a company, that he filed an age discrimination charge against the company, and that the company constructively discharged him in response, causing him harm. 788 F.3d at 498-99.

Put another way, Thomas's complaint unquestionably "give[s] [DISD] fair notice of what the … claim is and the grounds upon which it rests.'" *Id.* at 498 (ellipsis in original) (quoting *Twombly*, 550 U.S. at 555); *see also Swierkiewicz*, 534 U.S. at 514 (holding that the pleading requirements were "easily satisfie[d]" by allegations of the events leading to the adverse

action, the relevant dates, and the ages "of at least some of the relevant persons involved" because they gave fair notice). This is particularly so in light of this Court's longstanding case law requiring liberal interpretation of pro se litigants' pleadings. *See, e.g.*, *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) ("It is well-established that 'pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers.'") (quoting *Miller v. Stanmore*, 636 F.2d 986, 988 (5th Cir. 1981)). The district court therefore should have denied DISD's motion to dismiss the complaint and allowed discovery to go forward.

B. The magistrate judge applied a heightened pleading standard in rejecting Thomas's complaint for failure to plead two elements of the prima facie case.

In rejecting Thomas's complaint, the magistrate judge made two errors. First, at the pleading stage, the magistrate judge should not have faulted Thomas for not alleging the "requisite qualifications" of the positions to which she applied. ROA.116. Second, the magistrate judge should not have required Thomas to plead facts demonstrating that the substantially younger candidates selected instead of her were "similarly situated." ROA.116-17. These are standards that should only control after Thomas has an opportunity to flesh out her factual allegations in discovery.

1. The magistrate judge erred in requiring Thomas to plead the "requisite qualifications," a summary-judgment inquiry.

The magistrate judge acknowledged that Thomas had pled a number of facts concerning her experience and education but did not draw the inference that she was qualified because she had not also pled the positions' "requisite qualifications." ROA.116. In rejecting Thomas's allegations, the magistrate judge applied a particular "precise formulation" of the prima facie case imported from the summary-judgment phase, ignoring other reasonable inferences that would have supported the plausibility of her claim. *See Swierkiewicz*, 534 U.S. at 512; *Scott*, 16 F.4th at 1212 (holding it erroneous to discount a discriminatory inference in favor of a more innocuous explanation at the motion-to-dismiss stage); *Lormand*, 565 F.3d at 267 (holding that the plaintiff's cause of action need only be *a* plausible inference, even if there are other, more plausible inferences).

The magistrate judge borrowed the "requisite qualification" requirement from *Jenkins I*, but *Jenkins I*—which was unpublished and nonbinding in any event—cited no authority for applying such scrutiny at

the pleading stage.[3] 2022 WL 6225559, at *8. To the best of our knowledge, this Court has only analyzed the "requisite qualifications" formulation of the prima facie case at the summary-judgment stage. *See Weber v. BNSF Ry. Co.*, 989 F.3d 320, 325 (5th Cir. 2021) ("[Weber] presents no evidence that he had the requisite qualifications for that position. Thus, Weber fails to bear his burden of showing that he was a qualified individual …."); *Ruth v. Owens-Illinois Glass Container, Inc.*, 260 F. App'x 703, 705 (5th Cir. 2007) (concluding at summary-judgment stage that employee did not have the "requisite qualifications"); *Marks v. St. Landry Par. Sch. Bd.*, 75 F. App'x 233, 234-35 (5th Cir. 2003) (same). In applying this level of summary-judgment-like scrutiny to Thomas's complaint, the magistrate judge held her to an overly strict pleading standard. *See Cicalese*, 924 F.3d at 768.

If allowed to stand, this analysis would impose an essentially insurmountable barrier for many plaintiffs. The "requisite qualifications"

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[3] Notably, in a subsequent decision in the *Jenkins* case, the court clarified that "stating the requisite qualifications for a role is *not* required for plausibility" at the pleading stage. *Jenkins II*, 2023 WL 3514455, at *6. (emphasis added) (citation omitted). After Jenkins amended his complaint to allege that the defendant had notified him that he was "eligible" for the position, the court "dr[ew] a reasonable inference that Jenkins was qualified for the role." *Id.* Thomas's allegation that DISD selected her for interviews raises the same inference.

for a position are not information the plaintiff necessarily has—or can possibly obtain—without discovery, because among other things, they depend on which qualifications the employer actually required of its successful candidates. *See Smith v. City of St. Martinville*, 575 F. App'x 435, 439 (5th Cir. 2014) ("This Court has held that, in determining whether a plaintiff is qualified for a position, the court must consider whether the requirements were equally applied to all employees." (cleaned up)); *Johnson*, 351 F.3d at 624 ("We find that the district court erred by applying objective requirements to the Grouped Plaintiffs without considering whether the requirements were equally applied to the employees actually hired.").

It is true that courts may inquire into whether the plaintiff has sufficiently pled that she was qualified for the position she did not receive. However, as long as the plaintiff alleges factual information concerning her qualifications that raises a plausible inference that she is qualified, for pleading purposes the inquiry should be at an end. *See Leal*, 731 F.3d at 408, 413 (allegations of experience); *Haskett*, 648 F. App'x at 493, 495 (allegations of certification and experience). That is what Thomas did here, and the

district court should have inferred that she was qualified for the positions to which she applied.

2. The magistrate judge erred in rejecting Thomas's comparator allegations.

The magistrate judge also found that, even assuming Thomas was qualified, she failed to plead that she was "similarly situated" to the younger candidates DISD selected instead of her. ROA.116-17.[4] The magistrate judge acknowledged that Thomas had "identifie[d] the ages of some of those who received positions that she applied for, all under 40," but nonetheless faulted her for not alleging that "these younger individuals were similarly situated to her." ROA.116-17. Had the court merely used *McDonnell Douglas* as a "reference," it would have found that Thomas's allegations are more than adequate.

In a failure-to-hire context, plaintiffs may be able to raise an inference of age discrimination by showing that the employer "hired substantially

[4] Because the magistrate judge appears to have raised this issue *sua sponte*, this Court may reverse this part of the decision on this ground alone. *See Washburn v. Harvey*, 504 F.3d 505, 510 (5th Cir. 2007) (refusing to consider whether the plaintiff established the elements of his prima facie case that the defendant had not raised) (citing *Baker v. Metropolitan Life Ins. Co.*, 364 F.3d 624, 632 (5th Cir. 2004) ("[A] district court may not grant summary judgment *sua sponte* on grounds not requested by the moving party.")).

younger applicants for each of the positions in question." *Stennett v. Tupelo Pub. Sch. Dist.*, 619 F. App'x 310, 315 (5th Cir. 2015) (citing *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 350 (5th Cir. 2005)); *accord Flanner v. Chase Inv. Servs. Corp.*, 600 F. App'x 914, 918-19 (5th Cir. 2015). Thomas pled that DISD hired applicants ranging from nineteen to twenty-nine years younger than her. ROA.14. This was sufficient under this Court's case law. *See Flanner*, 600 F. App'x at 919 (holding that a six-year age difference is "a close call," but sufficient to survive summary judgment).

In rejecting these allegations, the magistrate judge (and the district court) necessarily applied the *McDonnell Douglas* prima facie case as more than just a "framework." The magistrate judge did not provide a detailed explanation, but cited three district-court cases: *Magellan v. McAlleenan*, No. SA-19-cv-01410, 2020 WL 13561344, at *3 (W.D. Tex. Oct. 7, 2020); *Barnes v. Walters*, No. 3:21-cv-3099, 2022 WL 18776172, at *4 (N.D. Tex. Sept. 7, 2022); and *Culley v. McWilliams*, No. 3:20-cv-0739, 2021 WL 1799431, at *9 (N.D. Tex. Apr. 14, 2021). ROA.117. Although analyzing motions to dismiss, each of *these* decisions relied on summary-judgment cases in applying this standard: *Magellan* cites *Ogden v. Brennan*, 657 F. App'x 232, 235 (5th Cir. 2016), a summary-judgment case; *Culley* cites *Smith v. City of Jackson*, 351

F.3d 183, 196 (5th Cir. 2003), a summary-judgment case; and *Barnes* cites *Wheeler v. Bank of New York Mellon*, which itself imported a summary-judgment standard, *see* 256 F. Supp. 3d 205, 217-18 (N.D.N.Y. 2017) (citing *Martinez v. Davis Polk & Wardwell LLP*, 208 F. Supp. 3d 480, 486-87 (E.D.N.Y. 2016) (summary-judgment case applying an "all material respects" standard)).

In applying this scrutiny, the magistrate judge again contravened *Cicalese*, in which this Court held that a court errs in "scrutinizing whether [comparators] were really 'similarly situated'" at the pleading stage. 924 F.3d at 768. Indeed, only the rare plaintiff will be in possession of the facts required to demonstrate that comparators are "similarly situated" without the benefit of discovery. *See Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 260 (5th Cir. 2009) (holding that, in assessing whether a comparator is "similarly situated" at summary judgment, a court may consider whether "[t]he employment actions being compared [were] taken under nearly identical circumstances when the employees being compared held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially comparable violation histories" (footnotes omitted)). If a plaintiff plausibly

pleads that comparators exist, she should be permitted discovery to determine whether those comparators are really similarly situated. *See Cicalese*, 924 F.3d at 768; *cf. Motiva Pats.*, 408 F. Supp. 3d at 827 (citing *Wooten*, 788 F.3d at 498) (discovery should proceed when information is beyond plaintiff's access and allegations rise above "sheer speculation"); *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 830 (7th Cir. 2014) ("[T]he identity of the employer's decision-maker and the employer's stated reason for its decision are critical in figuring out who else might have been similarly situated. The employee often will not be able to answer those questions without discovery.").

As *Cicalese* teaches, courts should not fault plaintiffs for failing to plead facts of this type demonstrating that the comparators they identify are "similarly situated." 924 F.3d at 768. Of course, a plaintiff may not survive at the pleading stage with "[t]hreadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678. But where a plaintiff alleges specific facts that render the ultimate elements plausible, courts err in rejecting those allegations simply because they would not be sufficient to survive summary judgment under a particular formulation of the prima facie case. *Cicalese*, 924 F.3d at 768

("At this stage of the proceedings, a plaintiff need only plausibly allege facts going to the ultimate elements of the claim to survive a motion to dismiss."); *see also Swierkiewicz*, 534 U.S. at 512.

The magistrate judge's demand for more detailed allegations regarding Thomas's comparators is irreconcilable with *Cicalese*. Thomas alleges that she had far more experience than the substantially younger candidates that were selected instead of her. As explained *supra* at 14-15, *Leal*, *Wooten*, and *Haskett* demonstrate that nothing more is required at the pleading stage. The Court should therefore reverse the dismissal of Thomas's ADEA claim on this ground as well.

A final note: permitting discovery does not relieve the plaintiff of any burden of proof, but simply allows both parties to obtain and proffer evidence supporting or rebutting the inference of discrimination. *See, e.g.*, *Lee*, 574 F.3d at 261 (determining, after discovery, that one comparator was similarly situated and the other was not). And, of course, discovery may inure to the defendant's benefit. *See, e.g.*, *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 304–05 (5th Cir. 2000) (differences between the plaintiff's and comparator's circumstances accounted for the disparate treatment). But at the pleading stage, Thomas's allegations are more than adequate. This

Court should vacate the district court's decision on Thomas's ADEA claim for failure to hire or promote and remand to allow discovery to proceed.

CONCLUSION

For the foregoing reasons, this Court should reverse the dismissal of the claims addressed above and remand the case for further proceedings.

Respectfully submitted,

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November 21, 2023

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), and Fifth Circuit Rules 29.2, 29.3, and 32.2, because it contains 5,253 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

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I certify that on November 21, 2023, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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