No. 07-645

In the Supreme Court of the United States

FRANTZ Y. RICHARD, PETITIONER

v.

MICHAEL O. LEAVITT, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY D. BUCHOLTZ
Acting Assistant Attorney General
MARLEIGH DOVER
PETER R. MAIER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in holding that the district court did not abuse its discretion in denying petitioner's motion for discovery under Rule 56(f) of the Federal Rules of Civil Procedure and entering summary judgment for respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes, regulations and rules:

Statues, regulations and rules—Continued: Page

In the Supreme Court of the United States

No. 07-645

FRANTZ Y. RICHARD, PETITIONER

v.

MICHAEL O. LEAVITT, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted in 235 Fed. Appx. 167.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2007. The petition for a writ of certiorari was filed on November 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1992, petitioner, a black male of Haitian national origin born in 1954, began employment in procurement for the United States Department of Health and Human Services (HHS). Pet. App. 5a; C.A. App. 6-

7. In 1999, petitioner transferred to a Senior Contracts Specialist position, classified at grade-status (GS) 12, in the Contracts Operations Branch (COB) of the Division of Procurement Management (Division), Office of Management and Program Support, Health Resources and Services Administration (HRSA), HHS. *Id.* at 7. The Division comprises two branches: the General Acquisitions Branch (GAB), which handles smaller, simplified contracts, and the COB, which handles larger, negotiated contracts. Pet. App. 5a; C.A. App. 11-12, 18. In January 2000, petitioner was promoted to GS-13 in the same position within the COB. Pet. App. 5a; C.A. App. 7-8.

In July 2003, Alexandria Garcia (Garcia), a younger Hispanic female, who was serving as the Acting Team Leader of the GAB, classified at GS-13, was non-competitively promoted to GS-14, and her supervisory position over the GAB was made permanent. Pet. App. 6a-7a; C.A. App. 14, 52. In August 2003, after learning that Garcia had been promoted to GS-14, petitioner contacted an HHS Equal Employment Opportunity (EEO) counselor and later filed a complaint, alleging discrimination based on race, national origin, sex, and age. *Id.* at 57-59, 64. Petitioner claimed that HHS discriminated against him by promoting Garcia to a GS-14 supervisory position even though he had superior qualifications for such a promotion. *Id.* at 59, 65-70.

a. As a result of petitioner's complaint, an administrative investigation commenced pursuant to 29 C.F.R. 1614.108, which authorizes an agency-appointed EEO investigator to compel the production of documents, propound interrogatories, take sworn testimony, and conduct "any other fact-finding methods that efficiently and thoroughly address the matters at issue." 29 C.F.R.

1614.108(b). The investigator obtained, *inter alia,* affidavits of petitioner, three Division management officials, and a witness; petitioner's rebuttal to the affidavits; agency documentation of the relevant employment actions; and a history of the Division's promotions from 2001 forward. C.A. App. 116-117

On May 14, 2004, the EEO investigator issued a final report summarizing the evidence but making no findings of fact as to the ultimate claim of discrimination. C.A. App. 73-85. According to the report and its supporting exhibits, prior to 2001, James Quinn (Quinn) was the head of the COB, and Steven Zangwill (Zangwill) was the head of the GAB. *Id.* at 11-12. In early 2001, Quinn vacated his position, and, due to hiring and promotion restrictions imposed by the new Administration, HHS could not fill the position. *Id.* at 11, 18-19; see Pet. App. 5a. Zangwill assumed supervisory responsibility for both the COB and the GAB and determined that he needed managerial assistance. *Id.* at 5a-6a; C.A. App. 11, 18-19. Around that time, Zangwill and petitioner had several discussions regarding the possibility of petitioner working in the GAB. *Id.* at 13. According to Zangwill, petitioner indicated that he was not interested in working in the GAB because he felt that the simplified contracting process was less challenging and less prestigious. *Ibid.*

To meet his managerial needs, Zangwill appointed the most senior person in the COB and GAB to act as "Acting Team Leader" of the respective branches. C.A. App. 19; see Pet. App. 6a. No promotion in grade-status accompanied the appointments. Zangwill chose Frank Murphy (Murphy), GS-13, to serve as the Acting Team Leader of the COB because he was "the senior specialist in the branch" and "had a vast knowledge and experi-

ence processing negotiated contracts." C.A. App. 13; see *id.* at 19, 124. Petitioner does not allege discrimination in Murphy's appointment to that position.[1] Pet. App. 6a.

Similarly, Zangwill chose Garcia to serve as Acting Team Leader of the GAB. Pet. App. 6a; C.A. App. 12-13, 111-112. Before that appointment, Garcia had gained substantial experience and demonstrated expertise in the GAB simplified contracting process. *Id.* at 12-13; see Pet. App. 10a. She began work in the GAB in 1996 and, for several months, was the only Division employee handling the simplified contracts. C.A. App. 12-13. She had trained other GAB employees, created standardized templates for simplified contract solicitations and awards, and prepared special reports for the department's budget office. *Id.* at 12. At the time of her appointment, Garcia was handling the greatest number of contracts in the GAB. *Ibid.*

In late 2001, with the hiring and promotion restrictions still in place, Zangwill received authorization to fill just one GS-14 position through the competitive promotion process, see 5 C.F.R. 335.102-103. C.A. App. 13-14. He chose to advertise for the Lead Contract Specialist position in the COB. *Ibid.* Petitioner communicated his desire to be promoted to GS-14 to Zangwill, and he applied for the position. Murphy was selected for the posi-

[1] In a rebuttal affidavit submitted to the EEO investigator, petitioner claimed that Murphy was not selected as Acting Team Leader because of his seniority in the COB but that Murphy had been transferred from the GAB to assume the Acting Team Leader position. C.A. App. 93. Before the district court, HHS submitted the affidavit by the Director of the Division corroborating Zangwill's assertion that Murphy was not moved from the GAB to the COB in 2001 and that "Murphy has never been assigned to the [GAB]." 05-cv-2387-PJM Docket entry No. 8, Exh. 11 (D. Md. Nov. 15, 2005). Petitioner did not dispute that fact before the district court.

tion, however, due to his greater experience and relevant education. *Ibid.*; see Pet. App. 6a. Petitioner does not allege discrimination in Murphy's promotion to that position. *Ibid.*

In early 2002, Division supervisors informed petitioner that he could be promoted to a different GS-14 position that was to become available soon. C.A. App. 20, 30. That position depended on the Division reaching an agreement with a division of the United States Department of Justice to provide procurement services. *Ibid.* The agreement was never reached, however, and petitioner did not receive the promotion. *Ibid.*

Meanwhile, Garcia continued to perform "expertly" as Acting Team Leader of the GAB, even as her compensation remained fixed at the GS-13 level. C.A. App. 14, 79. In early 2003, Zangwill requested a non-competitive promotion for Garcia based on her assumption of additional duties, see 5 C.F.R. 335.103(c)(3)(ii). C.A. App. 14, 19, 79. HRSA supervisors directed a human resource specialist to assess Garcia's position in a "desk audit," a review of an employee's job description, actual work performed, and grade-status classification. *Id.* at 14, 46-50; see Pet. App. 6a. The audit supported the promotion, and with the HRSA Administrator's authorization, Garcia was promoted to Lead Contract Specialist in the GAB in July 2003. C.A. App. 14, 82. Thereafter, petitioner contacted an HHS equal employment counselor. *Id.* at 57-58.

b. Petitioner requested a hearing before an Equal Employment Opportunity Commission (EEOC) administrative law judge, and the parties engaged in additional discovery during the fall of 2004, pursuant to 29 C.F.R. 1614.109(a), (d). C.A. App. 118-190. HHS submitted responses to petitioner's discovery requests and pro-

duced relevant documents. *Id.* at 118-140. HHS produced additional documents in connection with its motion for summary judgment before the ALJ. *Id.* at 170-190.

2. In August 2005, before a final administrative decision was made, petitioner filed this civil action in the district court against respondent Michael O. Leavitt, Secretary of HHS, pursuant to the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, and the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* Pet. App. 4a; C.A. App. 5-10. The complaint alleged that despite his "excellent service at HRSA and his superior qualifications for promotion to a [GS] 14 supervisor position, based upon his race, national origin, sex, and age, [petitioner] has been denied promotion to such a position, while a lesser qualified, younger, white female was promoted in his stead without competition." *Id.* at 8.

On November 15, 2005, before the parties conducted discovery in the district court, HHS filed a motion to dismiss, or in the alternative, for summary judgment on the grounds that, *inter alia,* petitioner could not establish a prima facie case of non-promotion or show that HHS's legitimate non-discriminatory reason for promoting Garcia was pretextual. Pet. App. 4a-5a; C.A. App. 2. In support of that motion, HHS submitted the evidence discovered in the administrative proceedings, including the EEO investigative report, accompanying affidavits by both parties, and agency records. 05-cv-2387-PJM Docket entry No. 8 (D. Md. Nov. 15, 2005). Petitioner opposed the motion, contending that he could establish a prima facie case of discriminatory failure to promote and that he should be allowed discovery to develop evi-

dence of pretext. *Id.* No. 14 (Jan. 13, 2006); C.A. App. 98-104. In support of his motion for discovery, petitioner filed an affidavit under Rule 56(f) of the Federal Rules of Civil Procedure. The Rule 56(f) affidavit outlined areas in which petitioner sought discovery, including (1) discussions between petitioner and his supervisors concerning his stated desire to be promoted to a GS-14; (2) the manner in which management approached petitioner concerning a potential transfer to the GAB in 2001; (3) the reasons for management's decision to request the desk audit for Garcia which resulted in her promotion to GS-14; and (4) the circumstances surrounding the restrictions on GS-13/14 promotions within HHS during 2001-2003. C.A. App. 98-103.

In an oral ruling following a hearing on March 27, 2006, the district court granted respondent's motion for summary judgment. Pet. App. 4a-12a; C.A. App. 3. The court acknowledged that no discovery had been conducted in its forum but noted that "there's been ample document exchange at the administrative level in this case." *Id.* at 9a. The district court found no direct evidence of discrimination and expressed doubt that petitioner could make a prima facie case under the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). Pet. App. 8a. In particular, the court observed that there was "a certain amount of appeal" to HHS's contention that petitioner could not show he was denied a promotion because the promotion that Garcia received through the desk audit was one for which only she, and not petitioner—having never worked in the GAB—was eligible. *Id.* at 9a. Because the court found it "arguable," however, that discrimination could be accomplished by a non-competitive promotion through a desk audit, the court assumed for the

sake of argument that petitioner could show a prima facie case. *Id.* at 9a-10a.

Continuing the *MacDonnell Douglas* analysis, the court found that HHS had established a legitimate non-discriminatory reason for elevating Garcia to GS-14. Pet. App. 10a-11a. Garcia was "well-qualified" for the position, and certainly not less qualified than petitioner, because she had served well in the GAB for a number of years, including 24 months as the GAB Acting Team Leader. *Id.* at 10a.

In the court's view, the crucial question was "whether there is any basis for going forward now on the issue of pretext." Pet. App. 11a. The court rejected petitioner's argument that he need not make any showing of pretext to obtain discovery on that issue, despite HHS's showing of a non-discriminatory explanation for the promotion. *Id.* at 12a. Instead, the court explained, petitioner bore the burden of showing "some indication of potential illegal discrimination" before discovery would be permitted. *Ibid.* The court found, however, that there was "absolutely no evidence" that illegal discrimination motivated HHS's promotion decision. *Id.* at 11a. Finding not "the least suggestion of any illegal discrimination," the court granted HHS's motion for summary judgment. *Id.* at 11a-12a.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-3a. The court observed that "summary judgment [must] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Id.* at 2a (brackets in original) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). Additionally, the court explained that a Rule 56(f) motion should be granted "if the motion identifies relevant information

and there is some basis for believing the information actually exists." *Ibid.* The court concluded, however, that "Richard failed to identify relevant information or demonstrate that information relevant to his claim actually existed." *Id.* at 3a. Accordingly, the court held that the district court did not abuse its discretion in denying petitioner's motion for discovery and that entry of summary judgment was appropriate. *Ibid.*

ARGUMENT

The court of appeals correctly affirmed the denial of petitioner's Rule 56(f) motion and the grant of summary judgment for respondent. The court of appeals' fact-bound ruling raises no issue of law warranting this Court's review. Nor does the court of appeals' fact-specific application of Rule 56(f) conflict with any decision of other courts of appeals. Further review is therefore unwarranted.

1. The court of appeals' application of Rule 56 is correct and does not warrant this Court's review.[2] A defending party may move for summary judgment "at any time." Fed. R. Civ. P. 56(b); see *First Nat'l Bank* v. *Cities Serv. Co.,* 391 U.S. 253, 280 n.17 (1968) (approving entry of summary judgment even though defendant never filed an answer to complaint). A court should grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the

[2] References to Rule 56 are made to the version of the Rule in effect in March 2006, when the district court issued its order. The current version, effective December 1, 2007, differs in no substantive manner. See Fed. R. Civ. P. 56 (2007).

moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Regardless of when a motion for summary judgment is filed, a party opposing a properly "made and supported" motion for summary judgment bears the same burden. Fed. R. Civ. P. 56(e). The opposing party "may not rest upon the mere allegations or denials of the adverse party's pleading" but "must set forth specific facts showing that there is a genuine issue for trial." *Ibid.*; see *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Alternatively, the opposing party may seek relief under Rule 56(f), which suspends an opposing party's obligation to produce evidence of a triable issue if the party shows by affidavit that, for "reasons stated," it cannot present "facts essential to justify its opposition." Fed. R. Civ. P. 56(f).

While Rule 56(f) permits a party that has not had an adequate opportunity for discovery to avoid summary judgment, *Anderson*, 477 U.S. at 250 n.5, it "is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious." *Willmar Poultry Co.* v. *Morton-Norwich Prods., Inc.*, 520 F.2d 289, 297 (8th Cir. 1975), cert. denied, 424 U.S. 915 (1976). Instead, the courts of appeals construe Rule 56(f) as requiring the opposing party to "articulate some plausible basis to support a belief that discoverable material exists which, if available, would suffice to raise a trialworthy issue." *Filiatrault* v. *Comverves Tech., Inc.*, 275 F.3d 131, 138 (1st Cir. 2001); see, *e.g.*, *Messina* v. *Krakower*, 439 F.3d 755, 762 (D.C. Cir. 2006) (opposing party cannot "offer[] only a 'conclusory assertion without any supporting facts' to justify the proposition that the discovery sought will produce the evidence re-

quired") (quoting *Byrd* v. *EPA*, 174 F.3d 239, 248 n.8 (D.C. Cir. 1999)); *Willmar Poultry Co.,* 520 F.2d at 297 (opposing party must "affirmatively demonstrat[e] * * * how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact").

The court of appeals' decision is consistent with Rule 56(f). The court construed Rule 56(f) as directing the court to withhold summary judgment and permit discovery where the opposing party "identifies relevant information [to be discovered] and there is some basis for believing the information actually exists." Pet. App. 2a. That principle follows from Rule 56(f)'s requirement that the opposing party specify reasons that justify discovery; and it parallels other courts of appeals' requirement that the opposing party "articulate some plausible basis for the party's belief that specified 'discoverable' material facts likely exist which have not yet come in from the cold." *Paterson-Leitch Co.* v. *Massachusetts Mun. Wholesale Elec. Co.,* 840 F.2d 985, 988 (1st Cir. 1988); see *Messina*, 439 F.3d at 762; *Filiatrault,* 275 F.3d at 138; *Willmar Poultry Co.,* 520 F.2d at 297.

Petitioner misreads the court of appeals' decision in claiming (Pet. 22) that it adopted "a rule that requires the plaintiff in a discrimination case to produce evidence that the employer's stated reasons for its actions are pretextual before being allowed any discovery at all." The court announced no such per se rule conditioning discovery on a plaintiff's production of evidence, much less a rule specific to discrimination cases. See Pet. App. 2a. Rather, the court simply required the plaintiff to provide a plausible explanation of how discovery would lead to particular, material evidence and con-

cluded based on the facts and circumstances of this case that the district court properly concluded that petitioner failed to meet that burden. Nothing in the court's four-paragraph-long, unpublished per curiam decision misstates the general principles governing Rule 56(f).

At bottom, the crux of petitioner's claim is that the court of appeals erred in concluding the district court acted within its discretion in applying Rule 56(f)'s standard to the specific facts of this case. That fact-bound conclusion warrants no further review. See Sup. Ct. R. 10; *United States* v. *Johnston,* 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

In any event, the district court acted within its discretion in denying petitioner's Rule 56(f) motion. The district court denied the motion for discovery and entered summary judgment because petitioner did not carry his burden on the issue of whether HHS's nondiscriminatory explanation for promoting Garcia, and not petitioner, was pretextual. Pet. App. 8a-9a. In reaching that conclusion, the district court took into account "the fact that there's been ample document exchange at the administrative level in this case." *Id.* at 9a. Indeed, through the EEO investigator and before the EEOC, the parties engaged in substantial discovery, see pp. 2-6, *supra*, for which petitioner had the same counsel who represents him in this action, see C.A. App. 163.

Nevertheless, petitioner was unable to aver "some plausible basis to support a belief that discoverable material exists" on the issue of pretext. *Filiatrault,* 275 F.3d at 138. Rather than demonstrate how discovery would lead to particular evidence of pretext, petitioner's Rule 56(f) affidavit sought discovery in general terms of all persons and documents related to the personnel deci-

sions. Much of the documentary evidence that petitioner sought, however, had already been disclosed at the administrative level. For example, the record already included the documents associated with Garcia's promotion, as well as affidavits by the supervisors involved explaining how the decision was made. See *id.* at 46-50, 107-140, 170-190. Other information petitioner sought, such as the discussions between him and his supervisors regarding his desire for promotion, see C.A. App. 99-100, was in his possession because he participated in those discussions. Thus, although discovery had not occurred in the district court, this was not a case in which essential facts surrounding petitioner's claim remained undisclosed. See Pet. 11-16; cf. *Miller* v. *Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 303 (2d Cir.), cert. denied, 540 U.S. 823 (2003) (finding Rule 56(f) affidavit sufficient because it identified particular information that "was the critical issue in plaintiff's claim" and was clearly in defendant's possession). Ample information had been disclosed to petitioner through the administrative review process.

Petitioner argues (Pet. 34-37) that he needs the opportunity to depose decision makers who averred nondiscriminatory reasons for promoting Garcia in order to test his theories of pretext. Petitioner's theories, however, are based upon pure speculation. Cf. *VISA Int'l Serv. Ass'n* v. *Bankcard Holders of Am.*, 784 F.2d 1472, 1475-1476 (9th Cir. 1986). Because petitioner averred no "reason to question the veracity of affiants," his theories did not as a matter of law require the district court to permit discovery under Rule 56(f). *Strang* v. *United States Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989) (R.B. Ginsburg, J.) (affirming denial of Rule 56(f) motion where affidavit sought depo-

sitions to "test and elaborate the affidavit testimony already entered"); see *Davis* v. *G.N. Mortgage Corp.*, 396 F.3d 869, 885 (7th Cir. 2005) (affirming denial of Rule 56(f) motion where the "only reason to believe that additional, relevant evidence would materialize from deposing the defendants' employees is [plaintiffs'] apparent hope of finding a proverbial 'smoking gun'"). Accordingly, further review is unwarranted.

2. Contrary to petitioner's assertion (Pet. 23-27), the court of appeals' unpublished decision in this case does not conflict with decisions of other courts of appeals. Petitioner mistakenly contends (Pet. 27) that the Fourth Circuit has now held, in contrast to other courts of appeals, that "it is necessary to 'balance' the costs of discovery against the plaintiff's need for discovery" in ruling on a Rule 56(f) motion. The court of appeals' decision makes no mention of any need to balance discovery costs against the plaintiff's discovery needs and therefore adopts no such rule. See Pet. App. 1a-3a. Instead, the "balancing" language that petitioner cites is found in the district court's oral ruling. *Id.* at 12a. And even then, the district court's denial of petitioner's Rule 56(f) motion ultimately rested upon petitioner's failure to show how discovery would create an issue for trial, not upon a balancing of discovery's potential costs and benefits. See *id.* at 11a. ("Had there been the least suggestion of illegal discrimination, * * * the Court might have said, let's go forward with discovery.").

As noted above, the court of appeals stated simply that the party opposing summary judgment must identify relevant information to be discovered and provide a basis for believing the information actually exists. Pet. App. 2a; see, *e.g.*, *Ingle ex rel. Estate of Ingel* v. *Yelton*, 439 F.3d 191, 196 (4th Cir. 2006) (same standard). Al-

though petitioner canvasses decisions of other court of appeals (Pet. 23-27), he does not explain how any particular decision endorses a standard that conflicts with the standard used in this case. In fact, while the courts of appeals describe the Rule 56(f) standard in varying formulations, their formulations are remarkably consistent in substance.[3] Accordingly, there is no reason to believe that the linguistic variations that do exist would lead to different results in individual cases, much less on the record of this case.

3. In any event, this petition for a writ of certiorari is an ill-suited vehicle for any broad pronouncement on

---

[3] See, *e.g.*, *Filiatrault*, 275 F.3d 138 (opposing party must "articulate some plausible basis to support a belief that discoverable material exists which, if available, would suffice to raise a trialworthy issue"); *Miller*, 321 F.3d at 303 (opposing party must identify facts sought that will create a triable issue and the party's previous efforts to obtain those facts); *Doe* v. *Abington Friends Sch.*, 480 F.3d 252, 255 n.3 (3d Cir. 2007) (opposing party must identify "what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.") (quoting *Dowling* v. *City of Phila.*, 855 F.2d 136, 140 (3d Cir. 1988)); *Culwell* v. *City of Fort Worth*, 468 F.3d 868, 873 (5th Cir. 2006) (opposing parties must "adequately specif[y] how the discovery they want[] could give rise to a genuine issue of material fact"); *Cacevic* v. *City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000) (opposing party must "indicate * * * its need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information."). Petitioner describes (Pet. 23) the Eleventh Circuit's decision in *Harbert Int'l, Inc.* v. *James*, 157 F.3d 1271 (1998), as balancing the costs and benefits of discovery under Rule 56(f), and therefore as conflicting with decisions of other circuits. That balancing approach is not presented here, however, nor does it appear that the Eleventh Circuit has followed it in subsequent cases. See, *e.g.*, *Hall* v. *United Ins. Co.*, 367 F.3d 1255, 1259 n.2 (2004); *Burks* v. *American Cast Iron Pipe Co.*, 212 F.3d 1333, 1336 (2000). Accordingly, this case does not present a conflict with other courts warranting this Court's intervention.

Rule 56(f) because petitioner is likely unable to state a prima facie claim of discrimination. The district court only assumed and did not decide that petitioner could state a prima facie case. Pet. App. 9a. A basic element of petitioner's prima facie case is that he was denied a promotion to a position for which he was eligible. See, *e.g.*, *Nichols* v. *Southern Ill. Univ.*, 510 F.3d 772, 783 (7th Cir. 2007). Petitioner cannot state his case because, although he was eligible for *some* GS-14 supervisory positions, he was not eligible for the specific promotion Garcia that received. That promotion was a reclassification of the GAB Acting Team Leader position that Garcia (and only Garcia) already held. Pet. App. 10a; C.A. App. 14, 19, 79. Petitioner worked in a different branch and held a different position that was not eligible for reclassification to Lead Contract Specialist of the GAB. Pet. App. 10a. Simply put, not all GS-14 supervisory positions are fungible.[4] Therefore, even if this Court remanded the case to the district court for further proceedings, petitioner's claim would still likely fail. Accordingly, petitioner's claim does not warrant further review.

---

[4] To the extent that petitioner claims in this Court that HHS discriminated against him by not promoting him to the GAB Acting Team Leader position in July 2001 (Pet. 35), he contradicts his theory in the district court that the discrimination occurred in promoting Garcia to a GS-14 in July 2003. See C.A. App. 197-198 (District court: "[Y]ou're complaining that she got the desk audit and the 14." Petitioner's counsel: "Yes, and they filled it as a 14, that's correct.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JEFFREY D. BUCHOLTZ
Acting Assistant Attorney General
MARLEIGH DOVER
PETER R. MAIER
Attorneys

MARCH 2008