

1 DEBRA ANN LIVINGSTON, *Circuit Judge*, dissenting:

2 I cannot join in the majority's determination that a reasonable jury might
3 conclude that the decision not to hire the plaintiff, Rita Walsh, as a bricklayer
4 was attributable even in part to sex discrimination. By her own admission
5 during the job interview, Walsh, an experienced tile setter, was not a bricklayer.
6 As she candidly stated during the interview when asked about her bricklaying
7 experience, Walsh had "done a glass block shower at the Home Depot Expo," but
8 "[t]hat was pretty much it. . . . I've done little things on my own but nothing, you
9 know." J.A. 267. Given her admission that she lacked any experience in the
10 skilled trade in which she sought a position, it is highly doubtful that Walsh
11 established even a prima facie case. Assuming she did, it is abundantly clear that
12 the New York City Housing Authority ("NYCHA") mustered at step two as
13 persuasive a "legitimate, nondiscriminatory reason" for this failure-to-hire as one
14 could imagine — namely, that Walsh herself admitted to having virtually no
15 bricklaying experience during her interview for the position.¹

¹ This Court evaluates Title VII sex-discrimination claims under the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this three-step test, "the plaintiff bears the initial burden of establishing a prima facie case of discrimination," which requires showing membership in a protected class, qualification for the relevant position, an adverse employment action, and circumstances giving rise to an inference of discriminatory intent. *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir.

1 With respect, moreover, the triable case that the majority perceives at step
2 three (supposedly from looking at the record as a whole) is an illusion. The
3 majority's fanciful approach to the summary judgment standard requires the
4 majority, against all evidence in the record, either to equate tile setting and
5 bricklaying, two distinct trades, or utterly to deny the skills associated with
6 bricklaying — skills that Walsh could undoubtedly acquire, but that she does not
7 now have, by her own admission. I cannot agree with the majority's assessment
8 that the record here could support a reasonable jury verdict in favor of the
9 plaintiff. Accordingly, I would affirm for substantially the reasons stated in the
10 opinion of the United States District Court for the Southern District of New York
11 (Buchwald, J.).

12 I.²

13 A.

2008) (citing *McDonnell Douglas*, 411 U.S. at 802). "If the plaintiff does so, the burden shifts to the defendant to articulate 'some legitimate, non-discriminatory reason for its action.'" *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 802). Once the defendant provides such a reason, the burden shifts back to the plaintiff to show that the defendant's explanation was not the only reason for the employment decision "and that [discrimination] was at least one of the motivating factors." *Id.* (quoting *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995)). To be sure, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

² The following facts are undisputed, except where otherwise noted.

1 In the New York City civil-service system, the stated qualifications — as
2 established by the New York City Department of Citywide and Administrative
3 Services (“DCAS”) — for the position of Bricklayer include either (1) at least five
4 years of “full-time satisfactory experience as a bricklayer,” or, alternatively, (2) at
5 least three years of such experience, plus “sufficient training of a relevant
6 nature . . . to make up the equivalent of three years of acceptable experience.”³
7 J.A. 279. Applicants undergo a multi-step application process. At the first stage,
8 applicants must pass a written, civil-service examination administered by DCAS.
9 After the examination, DCAS places applicants with a passing score on an
10 “eligible list,” providing them with a “list number” based on their examination
11 score. J.A. 276. As openings arise, DCAS refers candidates for interviews based
12 on their list number.⁴ The record suggests that interviewers — at least those in
13 this case — expect candidates at the interview stage to have satisfied the bare

³ The Notice of Examination for the bricklayer examination informs applicants that “[b]y the last day of the Application Period, [they] *must* have” the stated qualifications for the bricklayer position. J.A. 275 (emphasis added). However, applicants may take the examination before the City checks their qualifications for the position; the applicants themselves “are responsible for determining whether or not [they] meet the qualification[s].” *Id.*

⁴ It is unclear whether, aside from the civil-service examination, candidates are vetted regarding their qualifications prior to being interviewed. Indeed, to the extent the record speaks to this question, it suggests that such review occurs only *after* candidates have received an offer of employment.

1 DCAS requirements. Interviewers seek to confirm during the interview that
2 applicants possess the basic ability to do bricklaying work, to assess whether
3 they can show up for work on time, and to determine their borough preferences.

4 DCAS defines the duties and responsibilities of bricklayers.⁵ As a general
5 matter, bricklayers “lay[] bricks and masonry to line and grade in or on a given
6 structure or form of work.” J.A. 278. “Typical tasks” include “[l]ay[ing] brick or
7 masonry units . . . for walls and partitions,” “[w]ork[ing] with refractory and
8 insulating units for boiler settings and combustion chambers,” “[d]o[ing]
9 fireproofing, block arching, terra cotta cutting and setting,” “[c]onstruct[ing]
10 brick masonry sewers and manholes,” and various administrative tasks. J.A. 278.
11 According to James Lollo, a bricklayer supervisor for the Technical Services
12 Department, bricklaying work for the City can include wall construction, brick
13 replacement, reconstructing door frames, glass-block installation, incinerator and
14 boiler repair, fireproofing and fire-brick installation inside the trash compactor,
15 fire chamber and flues, and concrete laying. The record is undisputed, moreover,
16 that all bricklayers are expected to perform all duties within the job title.

⁵ New York City employs bricklayers in the Technical Services Department and the Borough Management Departments. This case involves an application for the latter position. The record indicates that, while the mix of bricklaying work differs between these positions, all bricklayers are subject to the same hiring standards.

1 Bricklayers in the New York City civil-service system also perform tasks
2 ordinarily done by tile setters, a related but distinct trade.⁶ Although the parties
3 disagree as to how much tile-setting a New York City bricklayer performs, there
4 does not appear to be a dispute as to the technical differences between
5 bricklaying and tile-setting.⁷ As James Lollo, a bricklaying supervisor for the
6 Technical Services Department, testified during his deposition, “[l]aying brick is
7 significantly more difficult than laying tile. . . . [T]o lay brick, plumb, level and
8 square, is extremely difficult” J.A. 162. Whereas tile-setting involves

⁶ Brick masonry and tile-setting are generally understood to constitute separate occupations, with different skill sets. The Bureau of Labor Statistics, for example, defines these trades separately, and observes that brickmasons, “often called bricklayers,” have higher median pay levels and entry level education requirements than tile setters. Bricklayers generally complete a three to four year apprenticeship in order to “learn the trade,” unlike tile setters, who “typically learn by working with experienced installers.” And whereas bricklayers “build and repair walls, partitions, fireplaces, chimneys, and other structures,” tile setters “cut and place tile.” Compare UNITED STATES DEPARTMENT OF LABOR: BUREAU OF LABOR STATISTICS, *Occupational Outlook Handbook: Brickmasons, Blockmasons, and Stonemasons*, <http://www.bls.gov/ooh/construction-and-extraction/brickmasons-blockmasons-and-stonemasons.htm#tab-2>, with UNITED STATES DEPARTMENT OF LABOR: BUREAU OF LABOR STATISTICS, *Occupational Outlook Handbook: Tile and Marble Setters*, <http://www.bls.gov/ooh/construction-and-extraction/tile-and-marble-setters.htm>.

⁷ Indeed, Walsh herself recognized the distinction between bricklaying and tile-setting during her interview, stating that, despite extensive experience setting tile, she had virtually no experience in bricklaying. In particular, Walsh stated that she had done only a “glass block shower at the Home Depot Expo,” but “that was pretty much it. . . . I’ve done little things on my own but nothing, you know.” J.A. 267.

1 applying masonry units to a standing structure, bricklaying entails creating a
2 freestanding structure from scratch. In Lollo's words, "[b]uilding a wall is
3 significantly more difficult than putting tile on a wall or on a floor."⁸ *Id.*

4 **B.**

5 Walsh began the application process in 2005, taking the civil-service
6 written examination on October 15 of that year. She received a passing score,
7 and DCAS placed her 55th on the eligibility list. More than four years later, in
8 January 2010, NYCHA had openings to hire five new bricklayers for Borough
9 Management Departments — three in Brooklyn and two in Manhattan. DCAS
10 sent NYCHA's Human Resources Department a list of eight individuals from the
11 eligibility list, including Walsh. NYCHA then sent letters to each of the eight
12 applicants and, on February 24, 2010, six of them appeared at the agency's
13 Human Resources Department to interview for the five positions. The six
14 candidates who appeared were — in order of their positions on the eligibility list

⁸ In addition to bricklayers, New York City employs "mason's helpers," who "assist[] bricklayers and cement masons in the preparation and finishing of cement, concrete, brick, tile, and other masonry work." J.A. 280. Technically, the mason's helper position is a stepping stone to becoming a cement mason, not a bricklayer. But the cement mason position no longer exists in New York City, and such work has been performed by bricklayers. City employees testified that mason's helpers often learn many of the skills that bricklayers use, including where to set the block, what kind of mix and mortar to use, how to build a scaffold, and how properly to retemper mortar.

1 — Ferdinand Arlia, Joseph Giannotti, Michael Zambino, Emmanuel Sylvester,
2 Rita Walsh, and Giuseppe Grippi. At the time of the interview, Giannotti and
3 Grippi worked for NYCHA in non-bricklayer capacities. All interviewees
4 brought resumes, except for Grippi.

5 Four City employees conducted the interviews: Fred Singer, Wanda
6 Gilliam, James Lollo, and Charles Pawson. Singer and Gilliam were Borough
7 Administrators for Skilled Trades in Manhattan and Brooklyn, respectively.
8 Lollo was a Technical Adviser in the Technical Services Department, and had
9 spent his career as a bricklayer or bricklaying supervisor for the City. Pawson
10 was a Deputy Director for the Technical Services Department.

11 Overall, “[t]he purpose of [the] questions and the interviews in general,”
12 as the district court noted, “was to ascertain whether the candidates had
13 adequate knowledge of bricklaying and could perform the job well, not to
14 determine whether the candidates met the qualification requirements established
15 by DCAS.” *Walsh v. N.Y.C. Hous. Auth.*, No. 11 Civ. 6342 NRB, 2013 WL 6669381,
16 at *2 (S.D.N.Y. Dec. 16, 2013). Each interviewer had a different understanding of
17 his or her role. Gilliam had the final say on hiring for the Brooklyn positions, but
18 had no special knowledge about bricklaying. From her experience in similar

1 interviews, Gilliam left it to the representatives from the Technical Services
2 Department — in this case, James Lollo — to ask technical questions; she would
3 ask about borough preferences and the ability to attend work. As she put it,
4 Gilliam was looking for “[s]omeone who could fit into the position of bricklayer,
5 someone who can easily adapt to our, our agency’s requirements to do X number
6 of jobs a day, somebody just[, in] general, just a person who can fit into that
7 capacity . . . [with] [s]ome overall knowledge of the job.” Singer, as the
8 Manhattan representative, also had the final say over the Manhattan positions,
9 but described the interview process as involving a joint hiring decision made
10 with the technical advisers. He, like Gilliam, had no bricklaying experience.
11 Lollo was the technical expert of the group. He had spent his career as a
12 bricklayer, and felt that his responsibility in the interview was to determine
13 whether applicants “had knowledge of the bricklaying and masonry trades.”
14 J.A. 127. Finally, Pawson said little in the interviews. He explained that Lollo
15 asked technical questions, and that his job was simply to sit in on the process.⁹

⁹ A fifth city employee, Osagie Akugbe, organized and observed the interviews, but was not an official interviewer. Akugbe worked in NYCHA’s Human Resources Department and sent the interview letters to applicants. When the applicants arrived, he told them the number of vacancies and described the interview process. Akugbe also spoke to the four interviewers about the interview process, the applicant order, and questions to be avoided. It was also his job to inform applicants about the interviewers’

1 Walsh's interviewers received her resume, which states, in relevant part,
2 that she spent four months at the Tile Mechanic Training Center and worked
3 from 1995 to 2010 as a Tile Mechanic for the Tile, Marble and Terrazo Division of
4 the Bricklayers and Allied Craftsman Union. The portion of the resume about
5 Walsh's tile-setting work adds that her responsibilities include installing tile or
6 marble "on walls and floors," leveling and plumbing tile on walls and floors,
7 "[w]ater proofing" walls, and "cutting and install[ing] saddles [and] soap
8 dishes." J.A. 651.

9 At her deposition, Walsh stated that she could not recall whether the
10 interviewers gave her any description of the job. They asked some non-technical
11 questions, including whether she had a fear of heights, whether she was able to
12 work in cramped spaces, and whether she was available for overtime. Walsh
13 also recalled that she was asked a technical question about mixing cement.

14 With regard to her work experience, Walsh testified that "[t]hey asked if I
15 had experience laying brick." J.A. 267. She recounted that she had "done a glass
16 block shower at the Home Depot Expo," but "that was pretty much it. . . . I've

final decisions, and to give employment paperwork to applicants who received offers.

1 done little things on my own but nothing, you know.”¹⁰ *Id.* Walsh thus provided
2 the interviewers with a candid (and accurate) assessment of her experience. In
3 response to questioning at her deposition, Walsh elaborated that she has never
4 held the title of bricklayer, and that in her experience working for various
5 companies between 1995 and 2011 as a tile setter, she has never constructed a
6 wall with brick or cement block, never constructed a parapet or block arch, never
7 constructed masonry sewer or manholes, never done fireproofing with brick or
8 worked with refractory or insulating materials — indeed, that she is unaware of
9 what such materials are. Walsh, who had never before applied for a position as a
10 bricklayer, also made clear at her deposition that she has never served an
11 apprenticeship as a bricklayer and that the apprenticeship for tile setter is not the
12 same thing.

13 Walsh’s recollection of her interview as it relates to the discussion of her
14 work experience is generally consistent with that of each of the interviewers.

¹⁰ Bricklayers work with both “brick” and “block” (i.e., concrete block). See UNITED STATES DEPARTMENT OF LABOR: BUREAU OF LABOR STATISTICS, *Occupational Outlook Handbook: Brickmasons, Blockmasons, and Stonemasons*, <http://www.bls.gov/ooh/construction-and-extraction/brickmasons-blockmasons-and-stonemasons.htm#tab-1> (emphasis omitted) (“Brickmasons and blockmasons — often called bricklayers — build and repair walls, floors, partitions, fireplaces, chimneys, and other structures with brick, precast masonry panels, concrete block, and other masonry materials.”).

1 Gilliam recalled Walsh saying that “she did not have any knowledge of
2 brickwork . . . her experiences were mostly with the ceramic tiles, but that she
3 was a hard worker and a quick learner and that she was willing to do what she
4 needed to do.”¹¹ J.A. 108. Similarly, Pawson and Singer both remembered that
5 Walsh said that she had not worked with brick or block. Finally, Lollo
6 recounted:

7 Obviously, [Walsh] has tile experience, you know, being a Local 7
8 member. And then usually in an interview, we ask people to tell us
9 a little about themselves first. And then when I asked her what
10 specific experience do you have with brick and block, to the best of
11 my recollection, her answer was, to be honest, I don’t have any. . . . I
12 was kind of shocked that somebody would actually come, because
13 the title is bricklayer, and come right out and tell everybody you
14 have no experience with brick or block.

15
16 J.A. 156-57.

17 The interviewers unanimously agreed not to offer Walsh a position, citing
18 as the reason her lack of experience with brick and block. At least one person
19 noted that Walsh would have been a good candidate for a mason’s helper
20 position, where she would presumably have learned requisite bricklaying skills.
21 Indeed, Akugbe made a notion to that effect — “*consider Mason Help[er]” — on

¹¹ Gilliam also stated that Walsh answered one question regarding boiler overhaul by stating that she was “not aware of” the necessary tools and asking if a mason’s helper (at NYCHA, the bricklayer’s assistant) could “help with some of those tasks.” J.A. 106. Walsh, however, denies being asked questions about this subject.

1 Walsh's resume during the interview process. J.A. 298. After the interviewers
2 made their decision, Akugbe informed Walsh that NYCHA would not be
3 offering her a position. The interviewers extended offers to all five male
4 candidates interviewed that day, although one of these offers was later retracted
5 when investigation established that the candidate lacked the requisite
6 experience.

7 C.

8 On September 12, 2011, Walsh filed suit, claiming that NYCHA
9 discriminated against her on the basis of sex in violation of Title VII of the Civil
10 Rights Act of 1964, the New York State Human Rights Law, and the New York
11 City Human Rights Law. Following discovery, NYCHA moved for summary
12 judgment. NYCHA argued that Walsh failed to establish a prima facie case of
13 discrimination or, in the alternative, that no reasonable jury could conclude that
14 NYCHA's rationale for not hiring her was a pretext for discrimination on the
15 basis of sex. The district court issued a memorandum and order granting
16 summary judgment to NYCHA on December 16, 2013. *See Walsh*, 2013 WL
17 6669381, at *11.

18 The district court noted that "[i]t is far from clear that plaintiff possessed

1 the necessary qualifications to become a bricklayer,” but elected to assume
2 without deciding, given the minimal burden of establishing a prima facie case,
3 that Walsh’s time as a tile setter qualified her for the bricklayer position and that
4 the circumstances surrounding the interview raised an inference of
5 discrimination. *Id.* at *8. Judge Buchwald went on to note, however, that
6 NYCHA had a legitimate, nondiscriminatory reason for choosing the five male
7 candidates over Walsh: namely, that she “admittedly [had] extremely limited
8 experience with brick and block.” *Id.* at *9.

9 With this explanation in mind, the court turned to whether Walsh had
10 “produced evidence from which a rational jury could find that gender was more
11 likely than not a motivating factor in NYCHA’s refusal to hire her.” *Id.* As
12 relevant here, the court assessed evidence put forward by Walsh that: (1)
13 NYCHA has never had a female bricklayer so far as the interviewers recalled; (2)
14 plaintiff supposedly had superior qualifications to other candidates who were
15 hired; and (3) Akugbe allegedly informed Walsh at the time of her rejection that
16 the interviewers rejected her because “they wanted somebody stronger.” *Id.* The
17 district court concluded that this evidence “falls short of raising a triable issue of
18 fact that NYCHA’s refusal to hire [Walsh] was based on her gender.” *Id.* The

1 district court therefore granted summary judgment for NYCHA on Walsh's Title
2 VII and New York State Human Rights Law claims. *Id.* at *10-11. However,
3 because a more liberal standard applies to discrimination claims under the New
4 York City Human Rights Law, the court declined to exercise supplemental
5 jurisdiction over that remaining claim and dismissed it without prejudice. *Id.* at
6 *11. This appeal followed.

7 II.

8 We "review a district court's decision to grant summary judgment *de novo*,
9 resolving all ambiguities and drawing all permissible factual inferences in favor
10 of the party against whom summary judgment is sought." *Burg v. Gosselin*, 591
11 F.3d 95, 97 (2d Cir. 2010) (quoting *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir.
12 2009)). Title VII makes it unlawful for an employer to "refuse to hire . . . any
13 individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).
14 "An employment decision, then, violates Title VII when it is 'based in whole or *in*
15 *part* on discrimination.'"¹² *Holcomb*, 521 F.3d at 137 (quoting *Feingold v. N.Y.*, 366
16 F.3d 138, 152 (2d Cir. 2004)). "In assessing the record to determine whether there

¹² The substantive standards for liability under the New York State Human Rights Law are "analytically identical" to those "under Title VII." *Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 107 n.10 (2d Cir. 2011) (quoting *Torres v. Pisano*, 116 F.3d 625, 629 n.1 (2d Cir. 1997)).

1 is a genuine issue to be tried” in Title VII cases, courts must “carefully
2 distinguish between evidence that allows for a reasonable inference of
3 discrimination and evidence that gives rise to mere speculation and conjecture.”
4 *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 448 (2d Cir. 1999). “The ultimate burden of
5 persuading the trier of fact that the defendant intentionally discriminated against
6 the plaintiff remains at all times with the plaintiff.” *Burdine*, 450 U.S. at 253
7 (1981).

8 Walsh has not adduced sufficient evidence to raise a triable issue of fact on
9 this ultimate question. In arguing to the contrary, the majority contends that the
10 district court “failed to view Walsh’s evidence as a whole.” Maj. Op. at 9.
11 Examining each piece of evidence on which the majority relies, however, it is
12 clear that whether viewed item-by-item or all together, the evidence here is
13 simply inadequate to support a reasonable conclusion, at step three, that
14 NYCHA’s “proffered, non-discriminatory reason” for not hiring the plaintiff —
15 namely, that she lacked bricklaying experience — was “a mere pretext for actual
16 discrimination.”¹³ *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000); *see*

¹³ As already noted, I have my doubts that Walsh raised even a prima facie case. Because the majority proceeds to step three, however, and because it does not matter whether the plaintiff made out a prima facie case where, as here, “the defendant has done everything that would be required [at step two],” I also proceed to step three of

1 also *Cross v. N.Y.C. Transit Auth.*, 417 F.3d 241, 248 (2d Cir. 2005) (“[P]laintiff must
2 prove that a defendant’s proffered reasons were not the true reasons for its
3 actions but a pretext for discrimination.”). To be sure, “bits and pieces” of
4 evidence, when viewed together, may form a “mosaic” of discrimination. *Vega v.*
5 *Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 86 (2d Cir. 2015) (quoting *Gallagher v.*
6 *Delaney*, 139 F.3d 338, 342 (2d Cir. 1998)). But the obligation to look at the record
7 as a whole does not afford reviewing courts a license to “[t]roll[] for an issue of
8 fact,” *Weinstock*, 224 F.3d at 41, contrary to this court’s recognition that the
9 “salutary purposes of summary judgment — avoiding protracted, expensive and
10 harassing trials — apply no less to discrimination cases than to . . . other areas of
11 litigation.” *Id.* at 46 (alteration in original) (quoting *Meiri v. Dacon*, 759 F.2d 989,
12 998 (2d Cir. 1985)); see also *Aikens*, 460 U.S. at 716 (noting that neither trial courts
13 nor reviewing courts “should treat discrimination differently from other ultimate
14 questions of fact”).

15 The majority first points to evidence that at the time of Walsh’s interview,
16 no women were employed by NYCHA as bricklayers and, so far as the

the *McDonnell Douglas* framework. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711,715 (1983).

1 interviewers knew, no woman had held this civil service position.¹⁴ But on the
2 record here, this evidence is of no appreciable weight — maybe not even a
3 scintilla — in establishing that there was intentional discrimination in the
4 decision not to hire *Walsh*. In individual disparate treatment cases, contrary to
5 the majority’s claim, “statistical evidence is less significant than in disparate
6 impact or pattern and practice cases, because the ultimate issue is whether a
7 particular plaintiff was the victim of an illegitimately motivated employment
8 decision.” 21A Federal Procedure, Lawyers Edition § 50:1021 (2016); *see also*
9 *United States v. City of N.Y.*, 717 F.3d 72, 83 (2d Cir. 2013). This general
10 proposition is particularly apt here, moreover, where the statistical evidence at
11 issue — the absence of women among NYCHA’s bricklayers — is presented
12 devoid of *any* necessary contextual information as to how many women have
13 applied for positions as bricklayers at NYCHA, the nature of their qualifications,
14 or even the time period at issue and the number of bricklayers that NYCHA
15 employed during that time.¹⁵ *Cf. Pollis v. New Sch. for Soc. Research*, 132 F.3d 115,

¹⁴ Interviewers testified that they were familiar with women in other skilled trades at NYCHA such as plumbing, plastering, painting, and carpentry.

¹⁵ This is in stark contrast to *United States v. City of N.Y.*, 713 F. Supp. 2d 300 (S.D.N.Y. 2010), on which the majority relies. In that pattern or practice case, as the district court’s opinion reflects, the New York City Department of Transportation

1 123 (2d Cir. 1997) (concluding that because the relevant statistical group was “so
2 tiny, was spread over such a long period, and was composed so largely of
3 individuals who were not fairly comparable to her,” plaintiff’s statistics “[did]
4 not support an inference about the School’s motivations” and evidence lacked
5 “logical tendency to show that discrimination was present”). The majority notes
6 that an “inexorable zero” may sometimes support a “weak inference” of
7 discrimination in the pattern-or-practice context, citing *United States v. City of*
8 *N.Y.*, 713 F. Supp. 2d at 318. But on the record here, that unadorned number says
9 nothing about whether this particular group of interviewers declined to hire
10 Walsh because of her sex, at least absent “[m]ore particularized evidence relating
11 to the individual plaintiff[].” *Zahorik v. Cornell Univ.*, 729 F.2d 85, 95 (2d Cir.
12 1984); *see also Weinstock*, 224 F.3d at 46 (noting that raw data “purportedly

(“DOT”) employed about 40 in-house bridge painters from 1996 to 2001. *Id.* at 306. No women were included among this number, and no women were hired as a result of three successful job postings during this period. Significantly, the district court opinion reflects *both the number of men and women in each applicant pool and the qualifications of applicants*. *Id.* at 311-14. Noting that the case had been litigated “without resort to statistical evidence other than . . . the incontrovertible fact that DOT [had] never hired a provisional female Bridge Painter,” the district court suggested that in the circumstances, the absence of women was relevant, albeit perhaps only weakly so. *Id.* at 317-18. At any rate (and unlike here) “[r]egardless of the weight given to the total absence of female hires, the remaining anecdotal evidence,” the court concluded “was more than sufficient to show that DOT lacked consistent hiring standards . . . , that less qualified men were given preferences over more qualified women, and that the disparate treatment was intentional appeasement of DOT’s existing all-male workforce.” *Id.* at 318.

1 describing a pattern of under-representation and unequal opportunity for
2 women faculty at Columbia . . . provid[ed] no foundation for the assertion that
3 there was discrimination” in a *particular* woman’s tenure process).

4 There is no such particularized evidence in this record. The majority
5 endeavors to find some discrepancy in qualifications, opining that “a rational
6 finder of fact could reasonably conclude” that Walsh’s *tile-setting* experience was
7 superior to that of Zambino, one of the five men offered employment on the day
8 that Walsh interviewed.¹⁶ Maj. Op. at 13. Even assuming that Walsh is a
9 qualified tile setter, however, she told the interviewers that she had no
10 experience with brick or block — a proposition that includes wall construction,
11 block arching, fireproofing, boiler repair, constructing brick masonry sewers and
12 manholes, and the many other bricklaying tasks that NYCHA bricklayers
13 routinely perform. While the record does not discuss Zambino’s interview,
14 Zambino’s resume, in contrast, states that he performed “[p]ointing, cleaning
15 and caulking brick work” for Blade Contracting, as well as “[m]asonry
16 restoration . . . , [w]aterproofing . . . , [lintel] replacement, [masonry] work.” J.A.
17 680. It also shows that he completed four courses at the International Masonry

¹⁶ The majority does not even attempt to suggest that Walsh’s qualifications were equal to (much less superior than) any of the other four candidates.

1 Institute, receiving a “Pointer, Cleaner, Caulker Certificate.” J.A. 681. Zambino’s
2 job offer, moreover, was later retracted when it was determined that, in fact, he
3 *lacked* the requisite five years of bricklaying experience. But at the time of the
4 interview, Zambino, like the other four successful applicants, presented himself
5 as having bricklaying experience. Walsh did not.

6 The majority endeavors to sidestep this basic problem — that Walsh
7 lacked bricklaying experience, and admitted as much in her job interview — by
8 pointing to evidence that some bricklayers at NYCHA do a substantial amount of
9 tile work. The record is undisputed, however, that bricklayers at NYCHA must
10 be proficient in *all* duties under the job title, including brick and block
11 construction, masonry repair, and boiler overhauling. As Wanda Gilliam,
12 Borough Administrator for the Skilled Trades in Brooklyn put it, “bricklayers are
13 supposed to perform all kinds of tasks,” and “[w]e don’t know what’s on the
14 work orders until they get the job.” J.A. 86. It is thus irrelevant, even if true, that
15 Walsh has more tile-setting experience than Zambino, given her professed *lack* of
16 experience in bricklaying. As we recently stated, Title VII prohibits
17 *discrimination*: It “is not an invitation for courts to ‘sit as a super-personnel
18 department that reexamines’ employers’ judgments,” whether related to the

1 proper standards for tenure or for proficiency in bricklaying. *Chen v. City Univ.*
2 *of N.Y.*, 805 F.3d 59, 73 (2d Cir. Oct. 28, 2015) (quoting *Delaney v. Bank of Am.*
3 *Corp.*, 766 F.3d 163, 169 (2d Cir. 2014) (per curiam)); *see also Weinstock*, 224 F.3d at
4 43 (noting that court's "role is narrowly limited to determining whether an
5 illegitimate discriminatory reason played a motivating role in the employment
6 decision" (quoting *Bickerstaff*, 196 F.3d at 456)); *Bickerstaff*, 196 F.3d at 455
7 (observing that "Vassar alone has the right to set its own criteria for promotion
8 and then to evaluate a candidate's fitness for promotion under them").

9 Recognizing the weakness in its position, the majority hurries on to note
10 that "[p]erhaps more significant" than the supposed discrepancy of skills
11 between Walsh and Zambino is the evidence that, according to Walsh, she was
12 asked only one technical question during her interview. Maj. Op. at 12-13. But it
13 is the majority that now fails to assess the record as a whole. Perhaps such a fact
14 could be probative in another case, but it is wholly inadequate to raise an
15 inference of discrimination here, and for one simple reason: namely, that given
16 Walsh's admitted lack of bricklaying experience, it is hardly surprising that the
17 interviewers declined to press her on the intricacies of the field. In any event,
18 even drawing all inferences in Walsh's favor, it is in fact unclear whether the

1 interviewers asked Walsh fewer technical questions than they did the others.
2 Walsh testified that an interviewer asked her about mixing cement and about her
3 bricklaying experience, but did not ask any questions about bricklaying
4 techniques. Giannotti recalled receiving a similar pair of questions, while
5 Sylvester remembers being asked only about the tools used for bricklaying and
6 tile cutting. The record lacks information about the other candidates' interviews.

7 That brings us to the single piece of evidence on which the majority really
8 relies: namely, that Akugbe supposedly told Walsh, after her interview, that the
9 interviewers "wanted somebody stronger."¹⁷ J.A. 638. The record is undisputed
10 that physical strength was not discussed during Walsh's interview. According to
11 both the interviewers and Akugbe (who was not a decisionmaker, but there to
12 assist in the interview process) there was also no discussion among the
13 decisionmakers about any need for physical strength, as opposed to experience.

14 Setting this aside, however, and properly assuming, at the summary
15 judgment stage, that Akugbe did, in fact, make the statement attributed to him
16 by Walsh, there is a more fundamental problem: namely, that Akugbe's alleged

¹⁷ Walsh testified that Akugbe made this comment after informing her that NYCHA would not be offering her a position and saying that he was "sorry" and had been "rooting for [her]." J.A. 637. Akugbe denies telling Walsh either that he hoped she would be selected or that the interviewers were looking for someone stronger. J.A. 64.

1 statement very plausibly could refer not to Walsh's physical strength (and to
2 gender stereotypes about physical strength) but to Walsh's near total lack of
3 experience and to the fact that she was not a *strong* candidate, in light of her
4 inexperience as a bricklayer. In such circumstances, where a remark is
5 susceptible of two or more meanings, only one of which may be relevant to
6 discriminatory intent, it is "perfectly appropriate" for a court at the summary
7 judgment stage (as we have said in the past) to ask whether a reasonable finder
8 of fact, considering such a remark, "could conclude from both [the] remark and
9 other evidence in the record that [the plaintiff] met her burden of proving
10 pretext."¹⁸ *Govori v. Goat Fifty, L.L.C.*, 519 F. App'x 732, 735 (2d Cir. 2013); *see also*
11 *Weinstock*, 224 F.3d at 43-44 (rejecting argument that referring to female professor

¹⁸ This conclusion is consistent with the approach of our sister circuits. *See, e.g., Spokojny v. Hampton*, 589 F. App'x 774, 781 (6th Cir. 2014) ("[Plaintiff] cannot show that discrimination was a motivating factor by using a combination of remote, conclusory, isolated, unrelated, and ambiguous statements."); *Yue Yu v. McGrath*, 597 F. App'x 62, 67 (3d Cir. 2014) ("[E]mployee's subjective belief in invidious nature of isolated and ambiguous comment does not support inference of discrimination.") (citing *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1151 (10th Cir. 2008)); *Hobgood v. Illinois Gaming Bd.*, 731 F.3d 635, 644 (7th Cir. 2013) (stating that "ambiguous or isolated comments that stand alone are insufficient" to survive summary judgment); *Wagoner v. Pfizer, Inc.*, 391 F. App'x 701, 708 (10th Cir. 2010) ("First, even at the summary judgment stage, 'stray remarks,' and 'isolated or ambiguous comments are too abstract . . . to support a finding of age discrimination.'" (quoting *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994))); *Hein v. All Am. Plywood Co.*, 232 F.3d 482, 488 (6th Cir. 2000) (explaining that a plaintiff cannot establish a prima facie case based on "vague, ambiguous, or isolated remarks").

1 as “nice” and “nurturing” in regard to teaching could, without more, establish
2 discriminatory intent in evaluation of scholarship for tenure); *cf. Anderson v.*
3 *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (“The mere existence of a scintilla of
4 evidence in support of the plaintiff's position will be insufficient . . .”). Here, the
5 record is undisputed that the plaintiff admitted during a job interview to lacking
6 the requisite experience in a skilled trade. Setting aside the alleged remark, there
7 is no meaningful evidence of discriminatory intent. In such circumstances, and
8 even considering Akugbe’s alleged remark, Walsh simply has not put forward a
9 case to support a reasonable jury verdict.

10 * * *

11 With this decision, the majority comes close to eviscerating the plaintiff’s
12 burden at step three of the *McDonnell Douglas* test. NYCHA proffers a powerful
13 reason (perforce a “legitimate, nondiscriminatory reason”) for declining to hire
14 Walsh: namely, that she admitted during her job interview to lacking the
15 required experience in a skilled trade. Walsh herself concurs in this account of
16 what she said. The majority nevertheless concludes that Walsh has assembled
17 just enough evidence, considered as a whole, to permit a reasonable trier of fact
18 to draw the inference that this reason was pretextual, and that NYCHA

1 discriminated against her on the basis of sex. With respect (and knowing the
2 evidence on which the majority relies), one is left wondering what the majority
3 means by “reasonable” and “inference.”

4 The majority’s approach to the summary judgment standard as applied to
5 hiring decisions may perversely disserve those who seek work in fields in which
6 they have been historically underrepresented by creating incentives on the part
7 of employers to interview only those with impeccable paper credentials — those
8 with formal training and evident work experience, and not those who may have
9 the requisite knowledge and experience notwithstanding a lack of formal
10 credentials.¹⁹ Regardless, the law is clear that the plaintiff at step three must
11 produce “not simply ‘some’ evidence, but ‘sufficient evidence to support a
12 rational finding that the legitimate, non-discriminatory reasons proffered by the
13 [defendant] were false, and that more likely than not [discrimination] was the
14 real reason for the [employment action].” *Weinstock*, 224 F.3d at 42 (quoting *Van*

¹⁹ The majority invokes the film *My Cousin Vinny* in its discussion of the role of circumstantial evidence in Title VII cases. See Maj. Op. at 9 & n.6. The film might more aptly be cited for the proposition that some individuals, such as Mona Lisa Vito, Vinny Gambino’s fiancée who gained expertise in automotives and auto mechanics working in her father’s garage, are well qualified despite a lack of formal credentials. To avoid the possibility of creating disincentives to interview such people, courts might simply follow the Supreme Court’s admonition that they should not “treat discrimination differently from other ultimate questions of fact,” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (quoting *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993)).

- 1 *Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 714 (2d Cir. 1996)). That standard
- 2 has not been satisfied. I respectfully dissent.