

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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ROBERT J. BALDING,

*Petitioner,*

v.

SUNBELT STEEL TEXAS, INC.,  
SUNBELT STEEL TEXAS, LLC, and  
RELIANCE STEEL & ALUMINUM CO.,

*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Tenth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

This Court and Congress have emphasized the national importance of adequate job security and work-life balance for employees who have serious health conditions that prevent them from working for temporary periods. But significant corruptions and splits have developed as to whether and when a private employer can interfere with, restrain, deny—and even retaliate against—an employee for exercising, or even attempting to exercise, his rights under the Family and Medical Leave Act (“FMLA”), 29 U.S.C. §§ 2601, *et seq.* and the Americans With Disabilities Act (“ADA”), 42 U.S.C. §§ 12101, *et seq.* In this case, the United States Court of Appeals for the Tenth Circuit and the District Court adopted admittedly, and applied, incorrect standards, even though genuine disputes of material fact exist. This case thus raises important and compelling issues never addressed by this Court, but which arise frequently, as to whether and if a private employer can violate, disregard, or ignore important standards and safeguards. Thus, the specific question presented is:

Whether an employer violates an employee’s FMLA or ADA rights by interfering with, retaliating against, denying accommodations, and taking adverse action—including termination of the employee who is out on protected and approved leave—without any meaningful or fair investigation by the decision makers, and by asserting a pretext that it acted

**QUESTION PRESENTED – Continued**

because it “sincerely believed” or “honestly believed,” even if mistakenly, that the employee had engaged in alleged misconduct while out on leave, even when genuine disputes of material fact exist, and the pretext is discredited, proved to be an excuse unworthy of credence, and indeed false.

## **PARTIES TO THE PROCEEDING**

All parties are listed in the caption.

Petitioner, Robert J. Balding, an individual, was the Plaintiff-Appellant below.

## **RULE 29.6 STATEMENT**

Respondents, Sunbelt Steel Texas, Inc. and Sunbelt Steel Texas, LLC are believed to be owned by Respondent Reliance Steel & Aluminum Co., a publicly traded company.

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Robert J. Balding respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

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### **OPINIONS BELOW**

The unpublished order and judgment of the Court of Appeals dated March 13, 2018 is found at Appendix, App. 1. The Court of Appeals' order denying Robert J. Balding's timely petition for rehearing was entered March 28, 2018 and is found at App. 101. The memorandum decision and order of the United States District Court for the Central Division of Utah granting the motions for summary judgment of Sunbelt Steel of Texas, Inc., Sunbelt Steel Texas, LLC, and Reliance Steel & Aluminum Co. is found at App. 38, based on a hearing transcript found at App. 26. The first memorandum decision and order of the District Court denying Robert J. Balding's motion to reconsider in part and granting in part on his FMLA interference and retaliation claims and on his ADA retaliation claim is found at App. 41. The second memorandum decision and order of the District Court, denying Balding's motions and granting Sunbelt's motion for reconsideration is found at App. 75.

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### **JURISDICTION**

Petitioner seeks review of the decision of the United States Court of Appeals for the Tenth Circuit entered on March 13, 2018. Timely petition for

rehearing was denied on March 28, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

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### **STATUTORY PROVISIONS INVOLVED**

Relevant statutory provisions are reproduced in the Appendix to this Petition and are found at App. 102.

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### **STATEMENT OF THE CASE**

In 2009, Petitioner, Robert J. Balding, was hired to sell steel in Sunbelt's largest geographical territory. Motivated, Balding called upon customers far and wide selling roughly a quarter of a million dollars in the first year, then doubling that the following year, and then doubling that again each successive year. He was patient with Sunbelt who made various excuses why he was receiving only his base salary component of his compensation package but not receiving his commissions as promised. In 2012, in part because of Balding's dedicated efforts, Sunbelt had become an attractive enterprise and it was bought by Reliance—the largest steel company in North America—who was enriched. While Balding did get *merit* raises to his base salary, he was never paid his promised, earned, and outstanding commissions totaling \$173,277.92.

Since his youth, Balding struggles in life with serious physical and mental impairments and disabilities, including major depression, generalized anxiety

disorder, abnormal testosterone levels, adrenal gland and other disorders. Balding voiced his disabilities, challenges, and concerns to his employer. However, try as he might, he suffered a rock-bottom mental breakdown in November 2013. While Balding was out on approved leave, under doctor's care, on medication, and seeking accommodations, including assistance through Sunbelt's and Reliance's Employee Assistance Program ("EAP"),<sup>1</sup> and was filling out FMLA papers with his doctor, he was terminated by Sunbelt and Reliance. Balding was denied these and other accommodations.<sup>2</sup>

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<sup>1</sup> Information provided to Balding by Sunbelt and Reliance, states: "Few things matter more than protecting your family and your family's health and welfare. The Reliance Rewards Plan is designed to support the physical, emotional and financial well-being of our diverse workforce, and to provide comprehensive, cost-effective benefits. We understand every employee is unique . . ."

**EMPLOYEE ASSISTANCE PROGRAM (EAP)** We understand there may be times when we all could use a little extra help dealing with the challenges in our lives. When this occurs, help is available through the Employee Assistance Program (EAP). The Employee Assistance Plan is free, confidential counseling assessment and referral service for all Reliance Rewards benefit-eligible employees and their family members. . . .

Family and marital discord, depression and stress management financial or legal problems . . ."

<sup>2</sup> On Monday, November 25, 2013, *after* Balding was on protected and approved leave pursuing FMLA and short-term disability leave, Balding received a telephone call from Sunbelt's Chairman and Chief Executive Officer, Michael Kowalski, Sr., and Executive Vice President, Kathleen Rutledge. They told Balding that they had heard and had knowledge of Balding's medical conditions, including such things as Balding's adrenal gland diagnosis, panic attacks, and "low testosterone." It was a negative interrogation. They were harassing, intrusive and expressed outright irritation and hostility towards Balding for his condition and his time off.

As a cover up for FMLA and ADA violations, interference, retaliation, and discrimination, Balding's supervisor betrayed Balding with false accusations that Balding—*while on protected and approved leave, was suffering from, and under doctor's care, and on medication for his serious medical conditions*—somehow lied about a customer named Weatherford. Within hours and without any investigation or accommodations by, or input from Balding to the decision makers, Balding was terminated on November 26, 2013 while on protected and approved leave.<sup>3</sup>

Up to this point, Sunbelt and Reliance had imposed financial, physical, and emotional hardships for Balding and his family, continuing to make excuses for their failures to pay Balding his hard-earned commissions, and now false excuses for their termination of—an American with disabilities who was on protected leave and pursuing FMLA rights, as well as help through the Employee Assistance Program.

In November 2014, and after timely exhausting administrative remedies, Balding brought this civil suit for breach of contract and quantum meruit for his earned but unpaid commissions; for FMLA interference and retaliation violations; and for ADA discrimination, retaliation, and failure to accommodate violations.

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<sup>3</sup> At termination, Balding was under doctor's care, and was literally on the phone in further contact with Reliance corporate human resources regarding his FMLA and other options as he had discussed with Sunbelt and been directed to do.

In discovery, Sunbelt and Reliance were asked to state in complete detail and with particularity any and all facts supporting any reason for the termination of Balding. Under oath, the *sole* reason given by Sunbelt and Reliance was “dishonesty after [Balding] lied to a customer [Weatherford], and when confronted about his dishonesty, also lied to his supervisor.” This “reason” is in total dispute by Balding; is unworthy of credence; is shown to be false; and has been completely rebutted and debunked by Balding. He was not dishonest, and he did not lie. Not only was Sunbelt mistaken, but in bad faith Sunbelt was deceitful and dishonest about it.

In viewing the facts in the light most favorable to Balding, and drawing all reasonable inferences in his favor, as due process requires, Balding’s claims have merit for a jury to determine. In error, the District Court granted Sunbelt’s and Reliance’s motions for summary judgment as to all claims. App. 26, 38, and 40. When Balding brought the first of two motions for reconsideration, the District Court reversed itself but only as to the FMLA interference and retaliation claims and the ADA retaliation claim. App. 41. The breach of contract claim, the quantum meruit claim, and the ADA discrimination and failure to accommodate claims remained dismissed.

Sunbelt then filed a motion for reconsideration as to the revived claims, and Balding filed a second motion for reconsideration as to the claims which remained dismissed together with supplemental evidence

from Balding’s designated treating medical expert confirming Balding’s serious health conditions and disabilities. In error, the District Court then reversed itself again by dismissing all claims.

On appeal, the Tenth Circuit Court of Appeals, reversed the District Court’s granting of summary judgment as to the breach of contract claim only, but affirmed dismissal as to all other claims. App. 1. The Court of Appeals admitted that the District Court’s analysis was incorrect, but adopted it anyway among other departures, erroneous standards, and flawed rationale. App. 1, 7-10.

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#### **REASONS FOR GRANTING THE WRIT**

**THIS COURT SHOULD GRANT REVIEW OF THE COURT OF APPEALS’ DECISION BECAUSE THE COURTS BELOW HAVE DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND APPLIED ERRONEOUS STANDARDS AND RATIONALE WHICH ARE IN CONFLICT AND INCONSISTENT WITH ESTABLISHED RIGHTS OF EMPLOYEES AND THE EXPRESS NATIONAL PURPOSES UNDER THE FMLA AND THE ADA, WHICH COMPEL AND CALL FOR AN EXERCISE OF THIS COURT’S SUPERVISORY POWERS**

Under the important U.S. Constitution Equal Protection Clause of the Fourteenth Amendment, Congress specifically found that there is inadequate job security for employees who have serious health conditions that

prevent them from working for temporary periods. The purpose of the FMLA is to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. 29 U.S.C. § 2601(a)(4), (b)(1), (4).

Likewise, the specific purpose by Congress in enacting the ADA under the Fourteenth Amendment, is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101(a), (b). Physical or mental disabilities are not to diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination. Discrimination against individuals with disabilities continues to be a serious and pervasive social problem, individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, and failure to make modifications to existing practices.

A citizen depends on the Circuit Courts to uphold the above Constitutional and legislative protections and purposes. Up to now, these protections and purposes have failed Balding and will fail other Americans if not corrected.

The FMLA creates two interrelated, substantive employee rights: First, the employee has a right to use a certain amount of leave for protected reasons without

interference, and second, the employee has a right not to be retaliated against and to return to his or her job or an equivalent job after using protected leave. 29 U.S.C. §§ 2612(a), 2614(a). Congress intended that these new entitlements and safeguards would set “a minimum labor standard for leave,” in the tradition of statutes such as “the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment.” S. Rep. No. 103-3 at 4.

Implementing the above objectives, Congress made it unlawful for an employer to “interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided” by the Act. 29 U.S.C. § 2615(a)(1).

Put simply, if an employee is denied a lawfully entitled right under the FMLA, the employer is deemed to have violated the FMLA regardless of the employer’s intent. FMLA interference claims are not about discrimination. Even unintentional behaviors are prohibited.

Here, the Courts below got it wrong. Instead of applying the “regardless of intent” standards, the Court of Appeals and the District Court applied erroneous standards and corrupted rationale. For example, the Court of Appeals acknowledged that a burden-shifting pretext analysis<sup>4</sup> is an incorrect standard for FMLA interference claims. Yet, it followed the District Court’s

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<sup>4</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

erroneous and flawed rationale anyway. In addition, the Court of Appeals went on to consider erroneously whether the employer “honestly believed” or “sincerely believed, even if mistakenly” that Balding had engaged in misconduct. These departures are at odds and conflict with the “regardless of intent” standards established by Congress.

It is crucial to keep uppermost in mind the following due process standards when reviewing summary judgment: The facts are to be viewed in the light most favorable to Balding as the non-moving party, and that the court is to draw all reasonable inferences in his favor.<sup>5</sup>

This Court has stated that “although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). And, when evaluating an employer’s motives or reasons, “motivation is itself a factual question.” *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999).

“Summary judgment is appropriate *only if* [Sunbelt and Reliance] show ‘there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law.’”<sup>6</sup> “A fact is material if, under the

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<sup>5</sup> *Smother v. Solvay Chemicals, Inc.*, 740 F.3d 530, 538 (10th Cir. 2014); *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1215 (10th Cir. 2013).

<sup>6</sup> *Tabor*, 703 F.3d at 1215 (quoting *Hernandez v. Valley View Hosp. Ass’n*, 684 F.3d 950, 957 (10th Cir. 2012)); *see also* Fed. R. Civ. P. 56(a).

governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented.”<sup>7</sup> A summary judgment as a matter of law is warranted “only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party’s position.”<sup>8</sup>

The court is not to weigh conflicting evidence since it is the province of the jury to assess the probative value of evidence and the believability and credibility of witnesses. The key is that the jury’s task is to determine whether plaintiff has proved that the defendant committed discrimination—irrespective of whether the reasons provided for the adverse act were true or false. As held by this Court, the jury may reject or disbelieve a defendant, *Reeves*, 530 U.S. at 150:

“The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice . . . Thus, rejection of the defendant’s proffered reasons will *permit* the trier of fact to infer the ultimate . . . [citation omitted.] . . . [t]he court must draw all reasonable inferences in favor of the non-moving party, and it may not make credibility

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<sup>7</sup> *Tabor*, 703 F.3d at 1215.

<sup>8</sup> *Herrera v. Lufkin Industries, Inc.*, 474 F.3d 675, 685 (10th Cir. 2007); *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955 (10th Cir. 2002).

determinations or weigh the evidence. [citations omitted.] Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions.”

When the above required standards are clearly in mind and applied, the triable issues of material fact which exist are evident when viewing the facts in the light most favorable to Balding. As to Balding’s FMLA interference claim, factual disputes exist which require neither burden-shifting nor pretext analysis as the Courts below did.<sup>9</sup> Importantly, Balding was on protected, promised, and approved leave, and was exercising his FMLA and ADA rights based on his serious health conditions and disabilities—which were well known to his employers Sunbelt and Reliance who interfered with those rights, discriminated, and

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<sup>9</sup> The analysis of the courts below is at odds with the letter and spirit of *Smothers v. Solvay Chemicals, Inc.*, 740 F.3d 530, 538 (10th Cir. 2014). As the basis for concluding summary judgment was warranted, both the Court of Appeals and the District Court conceded and pointed to four facts which actually support Balding: (1) Sunbelt knew about a number of Balding’s health issues before terminating him; (2) Sunbelt decided to fire Balding within hours on the day (very close proximity) it learned about the Weatherford issue and while Balding was on protected leave, all without a fair or meaningful investigation, which a jury may infer that Sunbelt management may have used the “problems” as a cover up; (3) Sunbelt’s senior management decision makers (Kowalski Sr. and Rutledge) had agreed on November 22 that Sunbelt might have to fire Balding after the first of the year; and (4) Sunbelt’s management was on notice that the customer, Weatherford, might have backdated to November 5 the purchase order it sent to Sunbelt on November 26, 2013.

retaliated. Balding's protected leave rights and accommodation were taken from him, aborted, as well as other accommodations which had been promised to him.<sup>10</sup>

Balding also prevails on his FMLA retaliation claims and ADA discrimination, retaliation, and failure to accommodate claims, even under a *McDonnell* burden-shifting. Pretext is present.

The analysis by the Court of Appeals and the District Court is a radical departure from the findings and purposes outlined above by this Court and Congress regarding FMLA and ADA, as well as from this Court's clear Constitutional Equal Protection and due process summary judgment protections and standards.<sup>11</sup>

Neither the Court of Appeals' analysis, nor that of the District Court, has yet to view the facts in the light most favorable to Balding. When viewed in the light most favorable to Balding, using correct standards,

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<sup>10</sup> Balding was promised an interactive process meeting after his return from leave. The pretextual behaviors by Sunbelt denied him that right and were contrary to what had been discussed with him, i.e., that a meeting would be held in February 2014 to address the issues interactively, and how his supervisor could be more supportive, and Balding more productive and a better employee. In light of this, one cannot conclude that Balding would have been terminated in any event.

<sup>11</sup> The Court of Appeals also failed to perform its own proper and required *de novo* analysis, but merely adopted and passed on the District Court's flawed and erroneous rationale. A failure to conduct a fair investigation of the violation that purportedly prompted adverse action may support an inference of pretext. *Smothers*, 740 F.3d at 539.

the facts support and favor Balding requiring denial of summary judgment. Sunbelt had a motive to terminate, and apparently had discussed secretly a plot among those who decided to terminate. On November 26, 2013, Sunbelt seized upon a bogus and false Weatherford purchase order situation to terminate Balding—not because it sincerely believed Weatherford because indeed it had information that Weatherford was back-dating an invoice.

Sunbelt's own policies, practices, and instructions to Balding were to adhere to the trade standards of the International Organization for Standardization (“ISO”) when it comes to securing written purchase orders, expected compliance, and practices. Balding was following those expectations for the benefit of sales for his employer. Sunbelt's pretextual “reasons” do violence to upholding the very ISO standards Sunbelt was insisting Balding and its other employees comply with. As such, Sunbelt engaged in discrimination, disturbing insincerity, and gross procedural irregularities as to Balding. The termination was done deceptively and in a discriminatory and illegal manner to take advantage of Balding to get him out—to interfere with and in retaliation against him in violation of his FMLA and ADA rights.

The Weatherford issues have been proven false, discredited, and debunked. The decision makers in terminating Balding were Sunbelt's Chairman and Chief Executive Officer, Michael Kowalski, Sr.; Executive Vice President, Kathleen Rutledge; and Reliance's Vice President of Human Resources, Don Prebola—none of

whom gave Balding an opportunity to defend himself or tell his side of the story to them in any fair or meaningful investigation.

Balding was on protected leave when he was subjected to invasive, hostile conversations, and interrogation about his medical condition and needs, then discriminated against and terminated. Whenever termination occurs while the employee is on leave, that timing has significant probative value. *DeFreitas v. Horizon Invest. Mgmt. Corp.*, 577 F.3d 1151, 1160 (10th Cir. 2009). The Weatherford issue was not the real reason for termination. It is for the jury to weigh credibility, the employer's words, sincerity, discrimination, and reasons.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000), this Court has emphasized that the key question is not about the procedure of proof, but rather whether the trier of fact determined that the act was motivated by discriminatory intent. In so doing, this Court has stated:

“In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is disseminating to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party’s dishonesty about a material fact as ‘affirmative evidence of guilt.’”

*Id.* at 147. (Citing *Wright v. West*, 505 U.S. 277 (1992)).

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## CONCLUSION

For all these compelling reasons, this Court should grant the petition, ultimately reverse as to Balding's FMLA interference and retaliation and ADA discrimination, retaliation, and failure to accommodate claims, and remand these claims to the courts below for a Constitutional jury trial where the factual disputes, sincerity, and the credibility of the witnesses may be determined with Constitutional safeguards and due process, uniformity under the law, and equal protection—weighed by a jury in fundamental fairness and in the interests of justice.

Respectfully submitted,

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