No.

IN THE
Supreme Court of the United States

TATE CLARK,

Petitioner,

v.

SOUTHWEST AIRLINES COMPANY

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

TONY R. BERTOLINO
BERTOLINO, LLP
823 Congress Ave, Suite 704
Austin, Texas 78701-2405
Tel: 512.476.5757
Fax: 512.476.5758
tbertolino@bertolinolaw.com

Attorneys for Petitioner

QUESTION PRESENTED

It is well settled law that the evidence in support or opposition of a summary judgment motion and the factual inferences drawn therefrom are to be viewed by a court in the light most favorable to the party opposing the motion. *Matsushita Electric Industrial Co., Ltd, et al. v. Zenith Radio Corp. et al.*, 475 U.S. 574, 587 (1986). *Anderson* v. *Liberty Lobby, Inc*., 477 U. S. 242, 255 (1986). At the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Id*. at 249.

Therefore the question presented is whether the District Court and Court of Appeals failed to view the evidence presented in conjunction with Respondent's motion for summary judgment in the light most favorable to Petitioner and weighed the evidence.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

CASES **Page**

STATUTES

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was unpublished and is included in Appendix A. The order granting summary judgment by the United States District Court for the Western District of Texas is included in Appendix B.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on April 18, 2018. App. A. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and 29 U.S.C § 2601, et seq.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C § 2615 provides:

(a)Interference with rights

(1)Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2)Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below

This cases arises out of plaintiff Clark filing a lawsuit alleging retaliatory discharge by Southwest for Clark's utilization of FMLA.

Clark began working for Southwest ("SWA") in 2001 in Houston, Texas as a customer service agent. In 2010, Clark transferred to Austin, Texas and continued his work as a customer service agent. In 2011, Clark applied for and was approved for intermittent leave under the FMLA for his severe migraine headaches. Clark's intermittent leave continued until his discharge in March, 2015.

Clark filed suit on June 27, 2016. On July 12, 2017 Defendant filed a Motion for Summary Judgment in this matter. In its motion, Defendant alleged that Plaintiff could not establish a prima facie case for FMLA retaliation, that Defendant had articulated a legitimate, non-retaliatory reason for Plaintiff's discharge, and that Plaintiff could not establish that Defendant's stated reason for discharge was pretext for retaliation. Defendant also asserted that Plaintiff's claim was subject to a "but for" causation standard and that Plaintiff could not meet the "but for" causation standard. Plaintiff responded by asserting that he could establish a prima facie retaliation claim and that Defendant's stated reason for discharge was pretext for retaliation. Plaintiff also argued that the proper causation standard for an FMLA retaliation claim in the 5th Circuit is not the "but for" standard but rather the "mixed motive" standard.

On October 26, 2017, Judge Robert Pittman of

the United States District Court for the Western District of Texas issued an order granting Defendant's motion for summary judgment. In his ruling Judge Pittman found that the "mixed motivation" causation standard applied to Plaintiff's claim, rather than the "but for" standard, that Plaintiff had established a prima facie FMLA retaliation case, that Defendant had articulated a legitimate, non-retaliatory reason for Plaintiff's discharge and that Plaintiff had failed to establish pretext. After Plaintiff timely appealed, on April 18, 2018 the Fifth Circuit Court of Appeals affirmed the judgment essentially adopting the findings included in Judge Pittman's order.

B. Factual Background

The impetus for Tate Clark's termination began when two of his co-workers, Kate Rutz and Diane Largent, who were frequently complaining about Tate Clark taking medically approved FMLA leave and had expressed a desire to get him fired, reported to management that Clark had allegedly made a threatening statement about bringing a shotgun to the airport in a trenchcoat, an allegation which Clark adamantly denied. Shortly after Clark called in to work due to a severe migraine, Kate Rutz claimed she heard Clark make the comment two days prior. Largent admits that she did not personally hear the comment as she learned about the purported statement from Rutz.

These reports led to a criminal investigation of Clark by the Austin Police Department, which resulted in no arrest nor charge of Clark as the police after investigating found that there was no credible threat made. SWA fired Clark anyway based solely on the statements of Kate Rutz and Diane Largent and

without ever speaking directly to Kate Rutz about the matter to question her about it, even though Rutz was the only one who allegedly heard this threatening statement. SWA instead relied on an email Rutz had sent.

Tate Clark denied that he ever made a threatening comment about bringing a gun to the airport. When SWA asked Clark if he had done so, he adamantly denied it. One of Clark's supervisors, Roger Molina, who was involved in the termination, even told the police investigating the matter that Clark had not said that.

C. Evidence of Pretext

Both the District Court and the Court of Appeals conceded that Clark established a prima facie case of FMLA retaliation. And because SWA offered a legitimate, non-discriminatory reason for Clark's termination, the crucial question to be answered in deciding SWA's motion for summary judgment was whether Clark had presented evidence to raise the material fact issue of whether or not SWA's stated reason for termination was pretext for a retaliatory intent.

Clark pointed out in his response to SWA's summary judgment motion and on appeal that there are multiple ways in which circumstantial evidence can establish pretext. First, unfair or irregular investigations of misconduct can be evidence of pretext. *Trujillo v. PacifiCorp*, 524 F.3d 1149, 1159 (10th Cir. 2008); *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 407 (7th Cir. 2007) and; *Tisdale v. Federal Exp. Corp.*, 415 F.3d 516, 529-30 (6th Cir. 2005) (defendant's failure to speak to important witnesses and collect

relevant evidence in investigation of misconduct was evidence of pretext). In *Trujillo*, the court held that the defendant's "irregular" investigation of the plaintiff's alleged misconduct was evidence of pretext. The defendant alleged that the plaintiff had engaged in "time theft" when she reported more time on her timesheet than she actually worked. During its investigation, the defendant did not even interview the supervisor that signed the plaintiff's timesheets. The court held that the defendant's failure to interview the supervisor was evidence of pretext. *See Trujillo*, 524 F.3d at 1159.

Clark provided numerous evidence that showed SWA's investigation was inadequate. This included SWA's failure to interview Kate Rutz, the only person who allegedly heard Clark's statement, and instead relied solely on an email written by Kate Rutz two days after the alleged statement was made and in which Ms. Rutz wrote that she told Clark not to joke about that and that she was not afraid of him for saying it.

Clark also presented deposition testimony that one of Clark's supervisors, Roger Molina, who was involved in the termination, told the police investigating the matter that Clark had not made such a statement. In addition, evidence was present that after the police investigated the matter, they closed their file stating "case was closed due to the lack of creditable threat of work place violence."

Furthermore, Clark presented affidavit testimony that another co-worker, Debbie Aven, told another supervisor, Tim McGee, that Kate Rutz had made similar claims against other Southwest employees that were later found to be false, that she

had been suspected of stealing prescription drugs out of suitcases, and that she was not a credible witness. In addition Ms. Aven testified by affidavit that Diane Largent had spoken to her about possibly trying to get Clark fired a couple weeks before the threat allegation was made.

Clark also presented affidavit testimony from Clark's union representative, Terry Autrand, that at the meeting between Roger Molina, Tim McGee and Tate Clark (which Autrand attended) to discuss the shotgun related threat Kate Rutz had alleged, that Clark had denied making the statement, but that Autrand had the impression that Roger and Tim did not care and had already made up their minds. Mr. Autrand described the entire process as "bogus" and a "sham."

Clark also noted to the courts that additional circumstantial evidence may be used to establish a causal link between an employee's legally protected activity and an employer's retaliation against the employee for engaging in that legally protected activity including: (1) knowledge of the protected activity of the decision maker, (2) expression of a negative attitude toward the employee's protected activity, (3) failure to follow company policies, (4) different treatment in comparison to similarly situated employees, and (5) evidence that the stated reason for discharge was false. *See Pittman v. Collin County, Texas,* 2010 WL 1330752 at *5 (E.D.Tex. Mar. 30, 2010 (Schell, J.).

Clark provided evidence of two of these elements: Testimony that the termination decision makers, Tim McGee and Roger Molina, were aware that Tate Clark had been taking FMLA leave, and that they had expressed a negative attitude toward Clark's

protected activity. McGee expressed a negative attitude toward Clark's protected activity by writing an email which stated that Clark "wasn't the best with attendance" when Clark's only attendance issues were based on FMLA leave. Furthermore, Debbie Aven testified she had a conversation with SWA management, including Tim McGee and Roger Molina, in which they stated that they wanted Tate Clark gone because he would miss work due to using FMLA. Clark also received a poor evaluation from one of his SWA managers due to his attendance, and Clark testified that his managers appeared upset to him about his FMLA usage.

Clark also pointed out to the lower courts that co-worker retaliation and expression of a negative attitude towards the employee's protected activity can form the basis of an FMLA retaliation claim under a "cat's paw" theory if the employee can demonstrate that others had influence or leverage over the official decision maker, and thus were not ordinary coworkers, making it proper to impute their discriminatory attitudes to the formal decision maker. *Haas v. ADVO Systems, Inc.*, 168 F.3d 732, 734 n. 1 (5th Cir.1999) (rejecting defendant's argument that subordinate exerted no influence over ultimate decision maker and thus determining that sufficient evidence existed to demonstrate a causal nexus between the discriminatory remarks and the employment decision (citing *Long*, 88 F.3d at 307)). Therefore, the Defendant can be liable even if the decision makers did not have a discriminatory animus. An employee's retaliatory animus can be imputed to the alleged official decision maker regarding the termination if there is evidence that he influenced the official decision maker on the termination. *See Russell v. McKinney Hospital Venture*, 235 F.3d 219, 226 (5th Cir. 2000); *Gee*

v. Principi, 289 F.3d 342, 346 (5th Cir.2002). Discriminatory comments made by persons in a position to influence the decision maker can be used to establish pretext even if the decision maker lacked discriminatory intent. *See id.*

Clark presented evidence that both Diane Largent and Kate Rutz, who were the complainants in this matter (even though Diane Largent did not even witness the statement) were very upset that Tate Clark was taking FMLA leave. Largent testified by deposition that she did not want to work with Clark and had complained to McGee regarding Clark's attendance. Debbie Aven testified by affidavit that Diane Largent called Debbie Aven a couple of weeks prior to the Lutz complaint to complain about Clark's FMLA usage and to ask if there was anything she could do about Clark who in her opinion was abusing FMLA and that Clark shouldn't have the job if he couldn't show up for work. Kate Rutz testified by deposition that she had a problem with Tate Clark missing work due to FMLA, that she suspected that he was abusing FMLA, that Diane Largent had complained to her about Clark missing work, and that pretty much everyone complained about Clark taking FMLA leave. Tim McGee testified by deposition that a lot of the employee were not happy when people took FMLA leave and that Largent and Rutz may have been some of the employees who complained about that; and that someone had left a note in Clark's employee mailbox, an area only fellow employees had access to, that said "Leave".

Finally, Clark noted to the lower Courts that close timing between protected activity and an adverse employment action against him may provide the 'causal connection" needed to make a case for

retaliation. *See Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir.1997). A time lapse of up to four months has been found sufficient to satisfy the causal connection for summary judgment purposes. *See Evans v. City of Houston*, 246 F.3d 344, 355 (5th Cir.2001). A showing of causal connection is not necessarily defeated by evidence that the employee engaged in protected activity for a period of time without adverse action, as long as some adverse action occurred close in time to protected activity. *See, e.g., Fabela v. Socorro Independent School Dist.*, 329 F.3d 409, 417 n.9 (5th Cir. 2003); *Gee v. Principi*, 289 F.3d 342, 346-347 n.3 (5th Cir. 2002).

Clark presented evidence that he took FMLA leave the morning before Kate Rutz reported the alleged statement she claims that she had heard two days prior. In addition, Clark took FMLA leave only a few days before he was suspended and ultimately terminated.

REASONS FOR GRANTING THE PETITION

The evidence in support or opposition of a summary judgment motion and the factual inferences drawn therefrom are to be viewed by a court in the light most favorable to the party opposing the motion and that at the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. In this case, both lower courts failed not only to view the evidence presented by Clark in the light most favorable to Clark, they wholly failed to consider or even acknowledge much of the evidence presented by Clark that is discussed above.

In analyzing Clark's claim of pretext, the

District Court stated that Clark had provided only three pieces of evidence to show pretext: (1) his poor performance evaluation that was based on his use of FMLA leave; (2) a note left in his employee box that said "Leave"; and (3) Clark's frequent intra company complaints. As shown above, the vast majority of the evidence described above was not addressed.

Though the Court later acknowledged that Clark presented evidence for his cat's paw theory, the Court did not discuss most of the evidence described above. In analyzing Clark's cat's paw theory, the Court did not discuss evidence that Rutz and Largent, the complainants in this matter, were very upset that Tate Clark was taking FMLA leave; that Largent testified that she did not want to work with Clark and had complained to McGee regarding Clark's attendance; that Diane Largent called Debbie Aven a couple of weeks prior to the Lutz complaint to complain about Clark's FMLA usage and to ask if there was anything she could due to protect the employees from Clark abusing FMLA and that Clark shouldn't have the job if he couldn't show up for work; that Kate Rutz testified that she had a problem with Tate Clark missing work due to FMLA, that she suspected that he was abusing FMLA, that Diane Largent had complained to her about Clark missing work, and that pretty much everyone complained about Clark taking FMLA leave; that Tim McGee testified that a lot of the employee were not happy when people took FMLA leave and that Largent and Rutz may have been some of the employees who complained about that; and that someone had left a note in his employee mailbox, an area only fellow employees had access to, that said "Leave".

Therefore, the Courts not only did not view such evidence in the light most favorable to Clark, it failed to acknowledge or discuss most of the evidence at all. The Court also did not discuss Clark's arguments regarding inadequate investigation, knowledge of the protected activity by the decision maker, expression of a negative attitude by the decision maker toward the employee's protected activity, or (except in acknowledging the existence of a prima facie case) temporal proximity of the projected action to Clark's termination. Again, not only was most of this evidence not viewed in the light most favorable to Clark, it was not discussed.

This Court has opined on this issue in regard to the Fifth Circuit before. In *Tolan v. Cotton*, 134 S.Ct. 1861 (2014), this Court vacated the judgment of the Fifth Circuit affirming a District Court's grant of summary judgment and remanded the case. This Court ruled that the non-moving party (Tolan) had provided evidence that, if viewed in the light most favorable to Tolan would have raised a material fact issue regarding Tolan's claims.

In Clark's case, the District Court and the Fifth Circuit have not only failed to view Clark's evidence in the light most favorable to him, they have failed to consider the bulk of it in any light at all. For these reasons Petitioner respectfully requests that the Court grant its petition.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

Bertolino, LLP
823 Congress Avenue, Suite 704
Austin, Texas 78701-2405
Tel: 512.476.5757
Fax: 512.476.5758

/s/ Tony R. Bertolino
Tony R. Bertolino

Attorneys for Petitioner