No.

IN THE

Supreme Court of the United States

AED EL-SABA, PETITIONER

v.

UNIVERSITY OF SOUTH ALABAMA

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Introduction

Petitioner filed a complaint for wrongful termination based on national origin discrimination and retaliation. He identified defendant's stated reason as an email of August 20, 2013, "deeming him to have resigned" when he did not appear for work on August 15. The "deemed resignation" (not termination) was based on a Handbook provision. Plaintiff alleged it was pretext. The trial court identified the reason as failing to appear despite a second medical letter that he was fit for duty. The court, assuming plaintiff had made out a prima facie case, found he "offered no evidence the proffered reason was false" (App.39a-40a; 45a) and granted summary judgment. Petitioner appealed. On June 13, 2018 the 11th Circuit agreed. The panel cited not a single case defining pretext. Panel and en banc reconsideration were denied. Petitioner abandons his national origin claim for these proceedings only.

1. Under Rule 10(a) when the trial court changes the language of the stated discharge reason; substitutes another document as the focus of pretext analysis; and finds no pretext; the appellate court sanctions this and cites no pretext law has the appellate court "so far departed" or sanctioned such a departure by the district court so as to require the exercise of this Court's supervisory power?

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CASES

MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

Aed El-Saba (El-Saba) respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit and the Order on Summary Judgment of the U.S. District Court for the Southern Division of the Southern District of Alabama.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated June 12, 2018, is reported at 738 Fed. Appx. 640 (11th Cir 2018) and is reproduced at App A, 1a-16a.

The Order on Summary Judgment of the U.S. District Court for the Southern Division of the Southern District of Alabama is unofficially reported at 2016 WL 6542719 and is reproduced at App. B, 17a-47a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on June 13, 2018. Panel and en banc review were denied August 10, 2018. This petition is timely under28 U.S.C. sec. 2101(c) and Supreme Court Rule 13.1 because it is filed within 90 days of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. sec, 1254(1).

RELEVANT PROVISIONS INVOLVED

(see appendix)

STATEMENT[1]

Petitioner, born in Lebanon, became a naturalized citizen in 1991; earned a PhD in 1996; was hired at the University of South Alabama (Mobile) in 1999 as an assistant professor in the Electrical and Computer Engineering (ECE) Department of the College of Engineering (COE); earned tenure in 2005; and was fired by COE Dean Steadman (Steadman) on August 20, 2013. El-Saba's ECE Chair was Dr. Alam. App. 28. Dr Johnson was Sr Vice-President for Academic Affairs. App. 34a.

Steadman became COE Dean in 2003. App. 28a. In 2007 he announced he wanted to "change the demographics" of the ECE Department and that he preferred "native-born, natural English speakers." App. 29a. At that time 13 of the 14 ECE professors were foreign born. App. 47a, n. 6. In May 2007 plaintiff publically accused Steadman of salary discrimination in favor of native-born citizens against Middle Easterners. App. 2a. He called Steadman a "racist." App. 30a. After another allegation against Steadman by El-Saba (retaliatory cancellation of an award)[2] in April 2010, Seadman stated he "would make it so tough" on El-Saba that he would resign. DE 66-1 pp180-83/21; App. 31a. Over the course of five years on four occasions (2008-2013), El-Saba alleges Steadman did exactly that.

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1 Citation is to both the ROA (DE) and Appendix.

2 DE 66-1, pp. 96/14-101/13.

App. 30a, (Fall 2008 leave request, 2008-09 evaluation); 32a, (Fall 2011 leave request) 33a, (Fall 2013 leave request).

In the midst of this abuse - early 2012- El-Saba complained of discrimination (again) and retaliation to Tucker, the University attorney. App. 32a. She invited him to file an EEOC charge and advised she would contact the Dean. DE 66-1, pp. 151/4-6; 112/3-15. In July 2012 El-Saba applied for a year's unpaid leave (2012-2013). App. A33a. Alam recommended approval; COE approval was signed off on by an Associate Dean. DE 79-11, p. 22. His signature does not match Steadman's. DE 66-9,p.9. When Steadman returned he rebuked Alam for recommending approval without his input. DE 66-1, pp.136/17-139//23.

Before returning from this leave to the COE, plaintiff had another heart attack in July 2013 while in the UAE. App. 33a. His next interaction with the University - that is, with Steadman - since his request for the 2012-13 leave was his application in July/August 2013 for another one-year unpaid leave. His initial request was predicated on his having open heart surgery, but he had six stents instead and advised Steadman of this on August 2 and also that he only needed one semester of leave. DE 79-11,pp. 5, 7-8. On August 5 he re-iterated his request of one semester. App. 34a. On August 6 Dr Johnson (Steadman was on vacation) indicated leave for the first semester might be acceptable if El-Saba could return for the second. DE 66-1, pp. 268-69. El-Saba responded he would return January 2014. DE 66-1, p. 268 He would send medical documentation. DE 79-11, p. 4.

On August 13 El-Saba sent a first medical note that he would be ready for work January 2, 2014. DE 66-1, p.283. On August 15 he sent a second letter which stated he "fit to resume his routine work" ((DE 66-1, p. 292.) Alam alerted Steadman (and plaintiff) to the confusion and Steadman replied to Alam that he would take it up with the attorneys. DE 79-4, pp. 7/21-8/23.

While El-Saba waited for a decision if his leave request were approved or if he should return immediately, Steadman, without replying to the leave request and utilizing a Handbook provision, "deemed" plaintiff to have resigned as of August 15, and accepted his "resignation" on August 20, 2013. Record Supp. Order, 4/10/17, p. 7/14-23; 8/9-10/1.

Writing on ***August 20***, 2013, Steadman's stated rationale was:

> I am in receipt of your e-mail of **August 15, 2013.** Included with your email was a medical report prepared by your doctor, dated August 14, 2013...In that report your doctor states...you are "fit to resume [your] routine work."...[G]iven that you are currently fit to resume work...a leave of an entire semester...appears unnecessary and would not be considered reasonable.
>
> In your email of August 5...you stated you would not be at work on **August 15, 2013, the required start date**.... **Because that date has now passed**, and **your request for leave *is* not granted**, it is understood that you will not be performing your faculty duties, and therefore

> **you are deemed to have resigned**... DE 66-1, p. 293 (emph. added).

The Handbook provision (**4.3.6 Absence without notice**) was:

> A faculty member who **fails to perform** the duties of his/her faculty position **and who fails to communicate** with his/her department chair for a period of **two weeks** is considered to have voluntarily resigned his/her position without proper notice. DE 91-2 as p. 2(emph. added).

As above, plaintiff filed a federal complaint for wrongful termination based on national origin discrimination and retaliation. Summary judgment was granted as to both. The Eleventh Circuit affirmed and denied panel and en banc reconsideration.

The rulings of the trial court

On the discrimination claim, the district court found "Plaintiff has offered no evidence ...the proffered reason is false..." The court identified plaintiff's pretext argument as one "based on his personal conclusion" the two medical letters were "confusing" and that Steadman should have resolved the ambiguity between the medical letters. The court found the second letter stated he was "fit to return...as of August 14, 2013. It was not unreasonable for Johnson to rely on the letter as written." The court granted summary judgment on the discrimination claim. App. 40a.

When the court addressed the retaliation claim (App. 40a) it set out the law of causation related to

temporal proximity. (App. 43a) Where, as here, there is a substantial time gap between the protected conduct and the adverse action, unless there is "other evidence tending to show causation, the complaint...fails as a matter of law." It also set out the requirement that the decisionmaker was "'aware of the protected conduct, and that the protected activity and the adverse actions were not wholly unrelated.'" App. 43a.

It found Johnson testified he was the ultimate decision-maker and there was no evidence he knew of the 2012 complaint (App. 43a; cf. 39 - "Johnson, the ultimate decision-maker"); plaintiff's presumption Steadman knew was "not sufficient to prove knowledge" by Steadman; and protected activity in 2007 and 2008 was too remote from termination in 2013 to establish causation. It did not there address the argument Steadman rebuked Alam for a missed opportunity to handle El-Saba's July 2012 leave request and that this constituted evidence tending to show retaliation. App. 44a. (It earlier found he had approved El-Saba's July 2012 leave request. App. 33a, citing Doc. 66-1 at 138, 252-53.)

However, bypassing these issues, the court concluded "even if Plaintiff had set forth prima facie proof of...retaliation, his claim would fail." App. 44a. *Citing* the law of pretext ("weaknesses, implausibilities, inconsistencies, incoherencies or contradictions" in defendant's stated reason), but *applying* it *only* to defendant's reliance on the second medical letter (App. 40a), the trial court found "Plaintiff fails to offer sufficient evidence" for pretext. App. 44a-45a.

Rulings of the appellate court

The appellate court found the trial court "correctly determined...El-Saba failed to show...pretext" and that this conclusion defeated the retaliation claim as a matter of law. Therefore, it did not have to address who was the ultimate decisionmaker. App. 11a. The appellate court found defendant "offered ample evidence El-Saba was *terminated* "because he failed to return to *work* ***after*** *his medical leave request*, which was unsupported by evidence of medical need, *was denied*.... El-Saba failed to show...this...reason was pretextual...." It went further than the trial court and held that even if Steadman and Johnson were mistaken about the second report, without other evidence of retaliation, their mistake was not pretext. App. 16a, n. 10. (emph. added.)

The appellate court did not cite any law defining pretext. The only analysis it made was of El-Saba's purported pretext argument that his numerous complaints were the real reason. It then found El-Saba's last complaint was in "early 2012, approximately a year and a half before termination." App. 12a -13a (emph. added). It held: "Even assuming Steadman (and/or Johnson) knew of this complaint - an assumption that lacks evidentiary support - this complaint... [was] simply too remote to bear any temporal relationship to El-Saba's termination."[3] App. 13a.

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[3] Plaintiff did not argue for knowledge as either a "presumption" (trial court) or and "assumption." (appellate court) He argued for it as a justifiable inference.

The appellate court cited the same language as the trial court that in the case of a "substantial delay between the protected expression and adverse action in the absence of other evidence tending to show causation" the complaint failed as matter of law. It addressed El-Saba's argument that his August 2013 leave request, not that of July 2012, was Steadman's first opportunity to "terminate him." Like the trial court, it found "[t]he record does not support El-Saba's position." "Steadman recommended approving El-Saba's [2012-13] leave request..." App. 16a, n. 11.

REASONS FOR GRANTING THE PETITION

I. **In a wrongful termination case, decided on pretext, the trial court misquoted the discharge letter and substituted another document as the discharge reason. The appellate court sanctioned this. Additionally, it did not cite any "pretext" law. Therefore, the appellate court twice - once factually and once procedurally - "so far departed from the"accepted and usual course of judicial proceedings" and sanctioned the trial court's factual departure as to call for the exercise of this Court's supervisory power.**

The "accepted and usual course of proceedings" on a motion for summary judgment in a wrongful discharge case is for the appellate and trial courts to accurately state the discharge reason; conduct a *de novo* review; and view the facts in the light most

favorable to the nonmovant. *Miccosukee Tribe of Indians of Fla. v.* U.S., 566 F3d 1257, 1264 (11th Cir 2009); *Anderson v Liberty Lobby, Inc.*, 447 U.S. 242, 255, 106 S. Ct. 2505 (1986). App. 9a.

That course of proceedings also includes citing and applying the relevant law.

Without belaboring the point, several citations are useful to stress the "usual" course of appellate opinions and both the necessity for citing the law and for the exercise of this court's supervisory power.

At an ABA Panel Discussion for appellate judges[4], the syllabus on writing appellate opinions cited a variety of authorities, two of whom stated at a minimum the opinion should identify the applicable law:

> **III. CONTENT AND STRUCTURE OF THE OPINION**
>
> A. **In General**
>
> .....
>
> 1 *Wigmore* 253:
>
> "Of course, there can be no one and exclusive style, appropriate for judicial opinion....But there

[4] *Appellate Court Opinions, A Syllabus for Panel Discussion at The Appellate Judges' Conference of the Section of Judicial Administration American Bar Association,* Montreal, August 7, 1966, prepared by B.E. Witkin, reprinted for distribution at The Federal Judicial Center Seminars for United States Circuit Judges, Washington, D.C., November 1972, March 1973, 63 F.R.D. 515, 550.

> is one thing it must do, viz., it *must state plainly the rule upon which the decision proceeds*....

Four sitting Justices have expressed the same opinion.

Justice Ginsburg, while with the District of Columbia Circuit, discussed the "core values" of American trial and appellate courts.[5] The first is to "get it right..."[6] Continuing, she wrote:

> ...When declaration and superintendence of the law are at stake, the court is obliged conscientiously to reason why...
>
> I turn now to endeavors of courts of appeals to live up to *the expectation that they will strive hard to state and apply the law* right.[7] (Emph. added.)

Chief Justice Roberts wrote:

> I will be vigilant to protect the independence and integrity of the Supreme Court, and I will work to ensure that it upholds the rule of law and

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[5] Ruth Bader Ginsburg, U.S. Circuit Judge, U.S. Court of Appeals, District of Columbia Circuit, *The Obligation to Reason Why*, 37 Univ. of Fla. L. Rev., 205 (1985). The Justice might also be in accord with Emperor Altoum (*Turandot*): "The law is sacred." Akin to this operatic expression is that of Justice Alito: "The judge's only obligation - and it's a solemn obligation - is to the rule of law." Opening Statement, Confirmation Hearing, Jan. 9, 2006,

[6] Ginsburg, p. 206.

[7] Ginsburg, p. 207.

> safeguards those liberties that make this land one of endless possibilities for all Americans. Opening Statement, Confirmation Hearing.

Justice Sotomayor wrote:

> I firmly believe in the rule of law as the foundation for all of our basic rights. Sonia Sotomayor, Remarks on Nomination, May 26, 2009.

One of those rights is free speech. This case, although not a First Amendment case, is essentially one of free speech exercised by a minority. It is important to note another writing by the Chief Justice. The Court held that speech on public issues is entitled to special protection under the First Amendment because it serves the "the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 562 U.S. 443, 452, 131 S. Ct. 1207, 1215 (2011)

Finally, two pivotal historical figures, well acquainted with the ultimate consequences of the rule of men, have unequivocally identified the importance of the rule of law. According to former President Eisenhower, "The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law."[8]

Henry Kissinger, former Secretary of State, put it succinctly:

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[8] Dwight D. Eisenhower, proclaiming a national Law Day, 1958.

Law makes life possible.[9]

The appellate court did not conduct a *de novo* review of Steaman's email stating the reason for El-Saba's discharge. That reason was not the second medical report, but the "deemed resignation" procedure Steadman borrowed from the University Handbook and set out in his email of August 20. Both courts changed the email language adversely to plaintiff; neither viewed favorably it to him. The appellate court compounded its departure from conducting a *de novo* fact review of the stated discharge reason with respect to pretext by not citing any pretext law. App. 11a-14a

Had both courts accurately and favorably viewed Steadman's email and the pretext evidence, intrinsic in it and in the Handbook, then both courts would have concluded Steadman's email was rife with "weaknesses, implausibilities, inconsistencies, incoherencies or contradictions." Both courts would have also concluded retaliation was the "but for" cause of El-Saba's "deemed resignation."

On its face, the email of August 20 does not make sense. Steadman's letter bizarrely states because El-Saba's "request for leave *is* not granted...." and because he had not returned for August 15 he was deemed to have resigned - five days ago.

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[9]Henry Kissinger, Remarks at funeral of Sen. John McCain, September 1, 2018. This truth is beautifully echoed in "America the Beautiful" where we are exhorted to "Confirm thy soul in self-control/Thy liberty in law."

The statement that El-Saba's leave request "is not granted" means one of two things - (1) the request is then and there - in the email itself - being denied, or (2) it was already denied at some unspecified time in the past. If the first interpretation is correct then the termination on August 20 is being made retroactive to August 15 - without notice to El Saba. If the second interpretation is correct then there is nothing in the record to show the request had already been denied. In fact, the record shows that El-Saba was still negotiating with Dr Johnson and, in view of the urgency of all the University's previous letters (App. 5a), expecting a prompt reply either granting his one semester leave request or denying it (but not "deeming" him to have resigned). See El-Saba letters August 2 (DE 79-10, p.. 13); August 5 (DE 79-11, p. 5); August 7 (DE 79-11, p. 4).

Most critically, both courts misstated the verb tense of the language about El-Saba's leave request not being granted. Both state the email reads "leave *had not been* granted." The trial court found:

> The email further stated that because leave *had not been* granted and Plaintiff did not return to work on August 15...Plaintiff...was...deemed to have resigned his position... App. 36a.

The appellate court noted a "leave of absence was unnecessary and therefore unreasonable" and "Steadman...stated that because leave had not been granted and El-Saba did not return...he was deemed to have resigned...." App. 6a. The strong implication of the phrase "unnecessary and therefore unreasonable" is that Steadman is then and there denying El-Saba's

leave request. This is borne out by Steadman's **actual** language: "Because that date [August 15] has now passed, and your request for leave ***is not granted***...." DE 66-1, p. 293 (emph. added).

This change of record document language permitted the appellate court to find the "decision to terminate El-Saba was made because he failed to return to work ***after his medical leave request...was denied***." App. 12a (emph. added). The decision to terminate El-Saba was made *at the same time* his request was being denied. Correctly noted, Steadman's letter makes that clear.

It is a severe departure to change the tense of the verb in a record document from the present tense "is" to the past perfect "had not been granted" with result that it seems Steadman is confirming a leave denial that had already happened, not something that he was doing in the email simultaneously with "deeming" El-Saba to have "resigned." And, further, that El-Saba was at fault for not returning to work after his leave had been denied.

Because both courts changed the verb tense (without expressly quoting the email) it suggests that both recognized, but refused to address, the "weaknesses, implausibilities, inconsistencies, incoherencies or contradictions"(particularly the incoherency) of Steadman's letter. It simultaneously gave El-Saba notice of his leave denial and his "deemed resignation" - five days ago. The letter was "cleaned up" in order for it to make sense. Moreover, both substituted the second medical letter as the discharge reason and found it not unreasonable to rely on it.

The factual failure of the trial court to state the correct verb tense and the double failure of the appellate court to both accurately state the verb tense and to state the applicable law of pretext are severe departures that warrant this court's supervision. This is the antithesis of "getting it right."

The next pretext evidence is the inconsistency of the "deemed resignation" procedure laid out by Steadman in his email as compared to the rule of the Handbook. He invoked the Handbook "deemed"-to-have-resigned provision which is triggered only under two conditions:

> 1. Two week failure to perform faculty duties for **two weeks** and
> 2. During which the absent faculty member has not communicated an excuse to his chair. DE 91-2, p. 2, at 4.3.6.

Assuming, as did the appellate court (App. 15a, n. 10), that Steadman made an honest mistake interpreting the second letter and it controls, it is irrelevant. By its terms, the Handbook rule does not "kick in" until **two weeks** after the start date. Assuming the start date was August 15[10], the faculty member would not be deemed to have resigned until **two weeks** had passed. That is, in this case, not until August 29 - El Saba still had nine (9) days to communicate with his chair (and straighten out confusion between the two letters).

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[10] There is evidence it could be as late as August 20)(DE 79-6, pp. 8/8-9/8; 79-5,pp 4/5-5/6; 79-5, p. 6/3-15).

Steadman's accelerated application of the "deemed" provision is inconsistent with defendant's own rules. Had the trial court not improperly changed the email wording adversely to El-Saba and limited its pretext analysis to the second letter, but instead have analyzed Steadman's email, and had the appellate court not sanctioned this course and cited and applied the law of pretext to the email, it would have found pretext and have remanded, if not reversed and rendered judgment for plaintiff.

El-Saba also shows retaliation was the "but for" cause of El-Saba's "deemed resignation." He showed Steadman had been solicitous toward Dr Ko when his responded he would not return from leave and Steadman invoked the Handbook provision to deem him to have resigned. Nevertheless, he sought permission to send a letter alerting Dr Ko that he was affirmatively resigning, not merely being a "no show." DE 79-13, p. 1; DE 91-2, p. 6. This comparison not only shows an "inconsistency" in Steadman's application of the Handbook, it also shows that "but for" El-Saba's 2012 complaint Steadman would not have invoked the Handbook provision. Dr Ko had not made any complaints against Steadman.

Finally, El-Saba's matter should not be derailed by purportedly uncontroverted findings Johnson was the sole decisionmaker or that there was a substantial gap between El-Saba's 2012 complaint to Tucker about Steadman (or his lack of knowledge) without interim evidence tending to show retaliation. Controverting evidence has been adduced above.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted
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