No. 18-634

IN THE

Supreme Court of the United States

AED EL-SABA, PETITIONER

v.

UNIVERSITY OF SOUTH ALABAMA

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

REPLY

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QUESTION(S) PRESENTED

Respondent inaccurately states the Question Presented. As a threshold question, it is appellate procedural law, not Title VII substantive law, that is at issue. That is, in a pretext case, when the appellate court affirms the trial court finding of "no pretext", but fails to define and apply the law of pretext, has there been a such a departure from the "accepted and usual course of judicial proceedings" as to call for this Court's supervision?

On motion for summary judgment, when the trial court changes the verb tense in the discharge email, reversing the rule of construing the facts in the light most favorable to the nonmovant, and the appellate court sanctions that rule violation, has the appellate court sanctioned a procedural departure calling for this Court's supervision?

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REPLY INTRODUCTION

This Petition sounds first in arguing the appellate court utterly failed to state and apply the applicable rule of (pretext) law; that is, to follow the rule of law at all. This is a severe departure which alone compels this Court's supervision. Secondly, it argues the trial court reversed the required construction of evidence in the light most favorable to the nonmovant (El-Saba) by changing a verb tense in Steadman's discharge email of August 20. The appellate court sanctioned this departure. That departure alone or in combination with the appellate court's failure also compels supervision.

The Petition does not request re-examination of record evidence except as incidental to laying out the course of analysis enabled by the trial court's editing a verb tense in Steadman's email and to showing substantive error underlying the procedural errors.

REPLY STATEMENT OF THE CASE

Respondent's fact-intensive statement is helpful, but largely unnecessary to deciding this Petition. It is primarily based on procedural error by the court of appeal sanctioned by the appellate court. Both the trial and appellate courts ultimately by-passed most facts. The trial court assumed even if El-Saba had set forth a prima facie case of retaliation, he failed to show pretext with respect to the second medical report. (Petition, p. 6; 44a-45a.) It changed the verb tense in Steadman's email from "leave is not granted [on August 20]" to "leave had not been granted." (Petition, p. 13; 36a) See email at DE 66-1, p. 293; SOF E.

The appellate court held the trial court "correctly determined...El-Saba failed to show...pretext" with

respect to the second medical opinion. (Petition, p. 7; 16a, n.10.) It, too, changed the verb tense from "leave is not granted" to leave "had not been granted." (Petition, pp. 13-14; 12a).

In both courts, lack of pretext was dispositive. Accordingly, related facts are implicated, e.g., the Handbook, Steadman's treatment of Prof. Ko. To the extent respondent argues lack of a causal connection between El-Saba's last complaint and his discharge (Opp., pp. 13-14) the limited facts and law related to his complaint and Steadman's next opportunity to retaliate are also implicated.

Petitioner has not abandoned his national origin claim except for purposes of this Petition. (National origin facts are not necessary to the pretext argument.) He intends to go forward with it if able if certiorari is granted.

SUMMARY OF THE REPLY ARGUMENT

The Petition is not fact-intensive as shown by both the trial and appellate courts' focus (after changing the verb tense of Steadman's email) on the second medical report, and their finding El-Saba failed to show sufficient evidence reliance on it was pretext. After review of the email on its face, incidental record review is necessary to again show error as to pretext (without and even with editing) and as to causal connection. Although the Court has apparently granted certiorari in one wholly procedural case, the available practice literature suggests buttressing a procedural Petition with some showing of error. That practical consideration should not, and does not, convert this Petition to one for a review of factual or legal error. It remains one based on a severe procedural

departure by the court of appeals and the sanctioning of another at the trial court level.

No issues are raised which were not properly before the appellate court.

The argument the appellate court correctly found El-Saba failed to rebut the University's discharge reason (show pretext) itself misses the point. To make sense of the chronology of Steadman's discharge email, the trial court "cleaned it up" adversely to El-Saba in violation of a rule of construction; ignored it as the discharge rationale; erroneously focused on the second medical opinion; and found Steadman's reliance on it reasonable. The appellate court sanctioned the trial court's adverse construction; followed its course of analysis to the second report; and without definition or application of the rule of (pretext) law found no pretext.

The appellate court's failure to follow the rule of law - to define and apply the law of pretext - is a severe departure from the "accepted and usual course of judicial proceedings." Definition and application of the governing rule of law is fundamental to the administration of justice; failure to do so is a compelling reason to grant the writ. Its sanctioning the trial court's editing Steadman's email adversely to El-Saba by reversing a rule of construction is also a severe departure which compels supervision. Maintenance of this rule of construction is fundamental to the administration of justice.

Briefly, as to the merits, had the courts analyzed on its face the actual discharge rationale - Steadman's email without editing the verb tense - and then as inconsistent with the Handbook and past faculty practice as to Prof. Ko, it can be simply shown the court should have denied summary judgment. Even with editing and reliance on the second medical report the result - pretext - is the same for the same reasons.

As to causal connection, El-Saba shows termination was Steadman's first opportunity to retaliate. The trial court's finding he had an earlier opportunity (application in July 2012 for one-year leave) was error.

REASONS FOR GRANTING THE WRIT

A. El-Saba presents compelling reasons for granting the writ.

Both the issue raised at the appellate level - the complete lack of the rule of (pretext) law, and at the trial level - the reversal of a rule of construction by changing a verb tense in Steadman's email (and its sanction by the appellate court) are compelling. Both are fundamental to the rule of law and the administration of justice and therefore compelling. Notwithstanding respondent's attempt to read out departures, Rule 10(a) lists "departure" as an example of a compelling reason.[1]

Respondent argues the appellate court did cite Title VII pretext law. While the cases it cites do involve pretext, the cited pages do not set out the law of pretext. *Joe's Stone Crabs, Inc.*, 296 F3d 1265, 1272-73 (11th Cir 2002) mentions the term "pretext", but does not define the law of pretext. *Flowers v Troup Cty., Ga. Sch. Dist.*, 803

[1] Petitioner has located one "procedure" case taken up on that issue alone. *Nguyen v US*, 539 U.S. 69, 80 (2003)(finding participation on appellate panel by non-Art. III judge compel supervision and declining to address merits of petitioner's conviction). However, available literature suggests the Court is unlikely to take up a mere procedural error without substantive error. (The "basketball rule" of "no harm, no foul" also suggests showing error.) Respondent's citation to *Braxton v US*, 500 U.S. 344, 348 (1991)does not support its contention the principal purpose of certiorari jurisdiction is to resolve conflicts among the courts about the meaning of federal law.

F3d 1327, 1338 (11th Cir 2015) is to the same effect. Thus, El-Saba's first argument that the rule of law has failed because the appellate court did not set out and apply the law of pretext remains good. He seeks, at most, incidental *de novo* review.

El-Saba's second compelling reason is the appellate court's sanctioning the trial court's adversely editing Steadman's discharge email of August 20 by changing it from "your request for leave is not granted" to "leave had not been granted." This change was adverse to El-Saba because it made it seem as though Steadman had already denied his request for leave before his email of the 20th, not at the same time and in the same document, and that El-Saba, with knowledge of this denial based on an insufficient medical request, had simply not shown up for work August 15. Whatever *de novo* review follows arises from the trial court's rule violation enabling it to shift pretext analysis from the email to the medical report and in order to address causal connection.

Respondent does not argue the failure to define the relevant rule of law is not a compelling reason to grant the writ. Nor does it address whether a reversal of a rule of construction (and its sanction) is a departure also compelling review.

B. The District Court and the Eleventh Circuit erred in granting summary judgment

1. El-Saba argued Steadman's email made no sense to the appellate court.

Respondent correctly notes El-Saba did not raise the argument to the trial court the email did not make sense. Respondent fails to mention it did not object to this

reply argument at the appellate level and, most significantly, the court of appeals did not.

Glover is not applicable. There, the Court would not consider an issue raised for the first time in a brief on the merits. Here, the issue was raised at the appellate level in El-Saba's reply brief. Further, the appellate court implicitly "resolved" the "nonsense email" argument because it sanctioned the change in verb tense by the trial court and the "disappearance" of the "nonsense" argument so that it did not need to consider it.

If, however, the Court is disinclined to review the "nonsense"/"changed- verb- tense" argument, the reversal of the rule of construction is such an "unusual circumstance" that the "interests of judicial administration will be served by addressing the issue on its merits." *See, Carlson v Green*, 446 US 14, n.2 (1980).

Accordingly this Court may consider it.

2. Steadman's email was a pretext for retaliation.

a. The courts' changing the tense recognizes the email was pretext on its face.

Respondent argues the appellate court "accurately characterized Steadman's email of August 20 when it stated:

> ....Steadman further stated that because leave **had not been granted** and El-Saba did not return to work as required on August 15, he was deemed to have resigned ..." (Opp., p. 12, emph. added).

Likewise, respondent argues the trial court characterized the letter in a "similar manner." (Reply, p. 12.) 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.... (36a, emph. added).

Respondent is incorrect as to both courts' characterizations - they are "hocus pocus." The August 20 email clearly reads El-Saba's "request for leave is not granted" and because he was not at work on August 15 he was deemed to have resigned - five days ago. (Pet. p. 5.) By themselves, the courts' changing the verb tense is recognition the chronology of the email on its face was incomprehensible. It needed to be changed. How could Steadman logically deny a leave request and fire someone at the same time and in the same document - five days before?

b. Steadman's email is inconsistent with the Handbook and past practice with Prof. Ko. This analysis also shows pretext.

First as to the Handbook. At the time of Steadman's email El-Saba's revised leave request for the first semester only was pending. On August 1 Steadman denied El-Saba's leave request for one year, but the next day El-Saba replied he could modify his request to the first semester and advised stents had been substituted for surgery. DE 79-11, pp. 7-9. On August 6 Vice-Provost Johnson (Steadman was on vacation) conditionally granted first-semester leave if plaintiff provided his

physician's statement he could return for the second. DE 66-1, pp. 268-69. On August 7, El-Saba assured him he could and on August 13 and 15 sent the conflicting medical reports. DE 66-1, p. 268, 276, 283, 292. There was no reply until he was fired August 20. Accordingly, his one (first)-semester request had not been denied, but was still pending on August 20; Steadman's use of the present tense "is denied" recognized it was still pending. It is inconsistent with the Handbook to fire an absent professor - even one who has been incommunicado(and El-Saba was not) - without a two-week grace period. (See Pet. p. 5.)

The "deemed to have resigned" provision was triggered under two conditions:

> 1. Failure to perform faculty duties for two weeks and
> 2. During which the absent faculty member has not communicated an excuse to his chair.
> (Pet. p. 15, stated correctly.)

Respondent is correct the Handbook provision was not cited in Steadman's email. However, it does apply. When Steadman was asked how he came up with "deemed resignation" he stated; "...I am aware that in the faculty handbook, there's a statement...if a faculty member is not present at the time...the semester begins... they will have been deemed to have resigned their appointment...." Record Supp. Order (RSO), 4/10/17, p. 7/14-23.

El-Saba does not miss the point about timing. Respondent itself can make sense of the timing only by also changing the verb tense of Steadman's letter from "is denied" to "was denied." (Opp. p. 12.) His first-semester request, pending from August 6, was never denied until Steadman advised him August 20 it "is denied." In fact,

on August 6 it had been conditionally granted pending sufficient medical evidence. As of August 15, his first semester request had never been acted on (denied). And even if it were proper to deny the request on the basis of the second letter, El-Saba still had the balance of the two-week grace period - nine days - left until August 29 to straighten out the reports or return . Steadman ignored it. In fact, he accelerated it. This was inconsistent with the Handbook.

Second, in the case of Prof. Ko, Steadman had delayed implementing a "deemed resignation." (Pet. p. 16.) His termination of El-Saba was inconsistent with past practice.

c. Assuming the reasonableness of the second report, termination is pretext for the same reasons as above.

Accepting the trial court's finding, the discharge letter should have been analyzed for pretext. Had it been, the discharge rationale - a "deemed resignation"- was still pretext.

Finally, *Flowers* permits discharge for any reason provided it is not a pretext, but the appellate court did not "look at" (Opp., p.13) the law of pretext - it did not set it out or apply it.

3. There is a causal link between El-Saba's complaint and termination.

Respondent argues there is no causal connection between El-Saba's last complaint in early (March) 2012 to the University attorney (Pet. p. 3) and his termination in August 2013 because there is no evidence Steadman knew of the complaint. Respondent is correct there is no hard

evidence Steadman knew. However, on MSJ he is entitled to the inference she fulfilled her duty to advise Steadman. *Summers v City of Dothan, AL*, 444 Fed. Appx. 345, 351 (11th Cir 2011)(inference available where Steadman has not denied knowledge.) Respondent does not argue this inference does not apply.

El-Saba argues both that his July/August 2013 first-semester leave request was Steadman's first opportunity to retaliate and, if not, then on the occasion of Steadman's purported earlier opportunity (July 2012), Steadman was absent, did not sign the leave request, and expressed retaliatory animus to Chairman Alam for recommending approval in his absence. *Ward v UPS*, 580 Fed. Appx. 735, 739 (11th Cir. 2014)(causation shown by interim antagonistic act or that adverse action was first opportunity).

First, El-Saba's Chair, Alam, testified Steadman berated him for approving El-Saba's request in his absence. Ex A, Pltf Dep 230/16-23. This is evidence of retaliatory animus.

Second, respondent argues and the trial court found August 2013 was not Steadman's first retaliatory opportunity; he purportedly had one when El-Saba applied in March 2012 for one-year leave for 2012-13 and Steadman approved it. 16a n. 11 and 33a, appellate opinion, citing Doc. 66-1 at 136-37 (El-Saba's deposition testimony referring to Dep. Ex. 20, the purported leave request signed by Steadman). However, the appellate court did not cite Ex. 20 itself. It cited only El-Saba's testimony appearing to confirm Steadman had approved the leave request. The trial court cited no evidence whatsoever. Its finding is clear error because it overlooks two items of evidence, one of which is the actual leave request form signed by Steadman's associate.

Ex 20 does not appear to be in the record. It is not merely the Leave of Absence Request Form, but also a USA Healthcare Management Form which was the document actually signed by Steadman. El-Saba's above cited testimony about Steadman's purported approval of his leave was "artfully" induced on examination:

> Q. Let me show you Exhibit 20. Do you recognize Exhibit 20 as the official university **forms** for your leave of absence for the 2012/2013 academic year?
>
> A. Yes.
>
> Q. And you'll see that, **at least on the last two pages**, you see Dr Steadman signed his approval on the request?
>
> A. Uh-huh... (Emph. added.)

The questions show Ex. 20 consisted of two forms. Steadman did not sign off on the Leave of Absence Request Form. It was approved by Steadman's Associate Dean. DE 79-11, p. 22 (sealed exhibit). Although the signature is illegible, it plainly does not match Steadman's. *Cf.* Steadman's signature on Declaration. DE 66-9, p. 9. Finally, his Declaration at no. 12 states he approved El-Saba's request but, like the trial court's finding, cites no evidence, particularly not the expected Exhibit 20 from El-Saba's deposition. Finally, respondent has never disputed the signature on the Leave of Absence is not Steadman's.

Accordingly, Steadman did not have an opportunity to retaliate until August 2013 - in July 2012 he was gone and did not approve the leave. August 2013 was his first opportunity and there is no gap. *Ward, supra*.

Finally, respondent raises El-Saba's lack of candor regarding his surgery in his letter of July 22. That observation is irrelevant on a motion for summary judgment; was corrected on August 2 when he proposed only a first semester leave; and was never raised by respondent.

CONCLUSION

Because both courts have so far procedurally departed from the "accepted and usual course"and there is egregious error this Court should find compelling reasons to exercise its supervision.

Respectfully submitted,

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