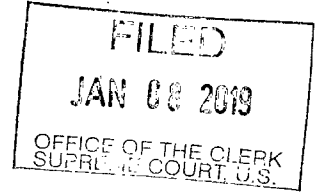


18-7601

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



IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
JOSEPH CHHIM, PETITIONER

vs.

GOLDEN NUGGET LAKE CHARLES, L.L.C., improperly  
referred as Golden Nugget Casino Lake Charles, RESPONDENT

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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## **QUESTIONS PRESENTED**

- 1. Did Defendant Golden Nugget discriminate against Plaintiff when it hired 300 employees with different eligibility requirements based on a discriminatory computer assessment, and no interview? Can it be believed, or is it pretextual, when Defendant then claims it did not hire a facility supervisor to supervise the 300 employees that it claims it hired?**
- 2. Did Defendant Golden Nugget discriminate against Plaintiff when it did not consider his qualifications to be hired for the position of facility supervisor to supervise the 300 employees it claims it hired. Not only did Defendant not consider Plaintiff's application for facility supervisor, but also, Defendant discriminated against Plaintiff when it told him, "The results of the Assessment indicate that you would not be considered for other positions, so no further Assessment is required."**
- 3. Did Defendant Golden Nugget discriminate against Plaintiff when it failed and refused to consider him for other positions for which he applied and was qualified based on the same computer Assessment and no interview for the positions?**
- 4. Should this case be returned to the U. S. District Court for the Southern District of Texas, Houston Division, for the Age discrimination claim which was not considered in the Magistrate Judge's Recommendation?**

## LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

**JOSEPH CHHIM, - Appellant**

And

**GOLDEN NUGGET LAKE CHARLES, L.L.C., improperly referred to as Golden Nugget Casino Lake Charles, - Appellee**

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## **OPINIONS BELOW**

**The Court of Appeals for the Fifth Circuit found in favor of Appellee Golden Nugget on Chhim/s claim that Golden Nugget Lake Charles, L.L.C. failed to hire him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. for the following reasons:**

**'In June, 2014, Golden Nugget was in the midst of a mass recruiting effort to attract employment candidates in advance of the December, 2014 opening of its casino resort in Lake Charles, Louisiana. Chhim, a now seventy-three year old U.S. citizen of Cambodian descent applied for a position as facilities supervisor through Golden Nugget's online application system. His application was automatically rejected. In a subsequent email exchange. Golden Nugget's Director of Human Resources, Laura Jasso, informed Chhim that the rejection was due to his failure to complete an online assessment, required of all employment applicants, that is designed to gauge an applicants strength in customer service and engagement. Chhim completed the assessment scoring a twelve percent ..... well below the recommended minimum of thirty percent. Based on this low score, Golden Nugget generated and sent an automated rejection to Chhim on July 12, 2014." Then Golden Nugget claimed that it never filled the position for which Chhim applied.**

**The Court of Appeals for the Fifth Circuit ignored all of the contradictions in the evidence submitted by Golden Nugget and granted its Motion for Summary Judgment and applied the same standards as the district court. Ezell v. Kan. City S, Ry. Co., 866 F3d 294, 297, (5<sup>th</sup> Cir. 2017).**

## STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on July 11, 2018. The Court of Appeals denied the Petition for Rehearing on October 11, 2018, (Pet, App A), The Petition for Writ of Certiorari was filed on January 9, 2019, The Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1),

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Court of Appeals for the Fifth Circuit found in favor of Appellee Golden Nugget on Chhim/s claim that Golden Nugget Lake Charles, L.L.C. failed to hire him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. Chhim brought his case under Title VII and the Age Discrimination in Employment Act of 1967.

### Summary Judgment Legal Standard

The party moving for Summary Judgment is initially responsible for the reasons justifying the Motion for Summary Judgment by identifying portions of the pleadings and discovery that show the lack of a genuine issue of a material fact for trial. *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5<sup>th</sup> Cir. 1995). The Court must deny the moving party's Motion for Summary Judgment if the movant fails to meet this burden. Once the movant makes this showing, the burden then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.* 106 S. Ct. 2505, 2510. (1989). The burden requires more than mere allegation or denials of the adverse parties's pleadings. The non-moving party must demonstrate by way of affidavit or other admissible evidence that there are genuine issues of fact or law. *Celotex*, 106 S. Ct. At 2553.

There is no genuine issue of material fact if, viewing the evidence in the light most favorable to the non-moving party, no reasonable trier of fact could find for the non-moving party. *Tolan v. Cotton*, 134 S. Ct. 1831, 1866. (2014) .A court may not make credibility determinations or weigh the evidence in ruling on a Motion for Summary Judgment. *Reeves v. Sanderson Plumbing Prods., Inc.* 120 S. Ct. 2097, 2110, (2000). However, the non-movant must submit "significant probative evidence" in support of his claim. *State Farm Life Ins. Co. v. Gutterman*, 896 F.2<sup>nd</sup> 116, 116, 5<sup>th</sup> Cir. (19990). If the evidence is merely colorable, or is not significantly probative, Summary Judgment may be granted. *Anderson*, 106 S. Ct. at 2511.



## TITLE VII AND ADEA

Chhim alleges that by failing to hire him, Golden Nugget violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. In relevant part, Title VII provides that it is unlawful for an employer "to fail or refuse to hire ... any individual ... because of such individual's race, color, religion, sex or national origin." 42 U.S.C. 2000e (a)(1). The ADEA outlaws employment discrimination, including refusal to hire, on the basis of an individual's age. 29 U.S.C. 623 (a)(1), Chhim claims disparate treatment based on his race, national origin and age. A disparate treatment claim requires proof of intentional discrimination. Munoz v. Orr, 200 F.3d 291, 299. (5<sup>th</sup> Cir. 2000). Because direct evidence of an employer's discriminatory intent is rare, plaintiffs must ordinarily prove their claims through circumstantial evidence. *Scales v. Slater*, 181 F.3d 703, 709 (5<sup>th</sup> Cir. 1999). In both ADEA and Title VII cases, this circumstantial evidence is analyzed through the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973). *Moss v. BMC Software, Inc.*, 610 F.3d 017, 922 (5<sup>th</sup> Cir. 2010)..

In order to set out a prima facie case of employment discrimination based on failure to hire, the plaintiff must demonstrate that: (1) he is a member of a protected class; (2) he applied for a position for which the employer was seeking applicants; (3) he was qualified for the position; (4) he was not selected for the position; and (5) the employer continued to seek applicants for the position with someone outside of the protected class. *Goswani v. Unocal*, 2013 WI 5520107. #5 (S.D. Tex. Oct. 3, 2013)(Citations omitted).

## **STATEMENT OF THE CASE**

Petitioner Joseph Chhim is a United States citizen of Cambodian descent. On July 25, 2016, Chhim filed a pro se discrimination suit against Golden Nugget Resort in Lake Charles, Louisiana. Doc 1. Chhim had applied for a position as facilities supervisor (position code 48BR) at Golden Nugget through its online application system in June 2014. Chhim was 73 years old at the time of his application. [ROA 58, 64-67, 70-71 and ROA 94-95.].

Golden Nugget rejected Chhim's online application. Chhim then sent Golden Nugget an email about the employment application process. [ROA 64-67].

Chhim's online application was rejected by Golden Nugget. Chhim then sent an email to Golden Nugget about the employment application process. [ROA 105-108]. Golden Nugget Human Resources Director responded on July 27, 2014, saying that Golden Nugget had a policy of non-discrimination, and that employment decisions were "based on merit, qualifications and abilities." She stated that Chhim's application was rejected due to his failure to complete a behavioral assessment required of all candidates and that he must complete this assessment if he wished to be considered for any future employment opportunities. On July 10, 2014, Sherry Grodner, Golden Nugget Vice-President of Human Resources, then emailed Chhim offering to let him complete the assessment and finalize his application for facilities supervisor.

Chhim completed the assessment the same day that Grodner's email was sent, and scored in the twelfth percentile. An automated rejection was sent to Chhim via email on July 12, 2014.

Before filing a charge of employment discrimination against Golden Nugget on September 22, 2014, Chhim called the Human Resources team to inquire whether they had received his June 16, 2014 email and to discuss the response that he had received from Golden Nugget. Golden Nugget Human Resource team had written to him advising him that "We have decided to pursue other candidates that more closely match our position criteria. The results of the assessments indicate that you would not be considered for other positions, so no further assessment is required."

During the EEOC Investigation, Golden Nugget never raised the defense that it never hired anyone for the position of facilities supervisor. There are other inconsistencies and contradictions that are discussed in the "Reasons for Granting the Petition" section.

Chhim argues that the Golden Nugget online application process is a pretext for discrimination, and that he was discriminated against on the basis of age, race and nationality in the application process. He never was told what his alleged deficiencies were on the online application, and there is no way to know whether

someone at home, or other test cite, was actually helping other applicants to respond to the questions on the online application.

THE PETITION

## **REASONS FOR GRANTING THE PETITION**

**Chhim asserts that he was discriminated against under Title VII and under the ADEA by Golden Nugget when his application for the job of Facilities Supervisor was immediately rejected after he filled out an online Job application and assessment and received an immediate message back from Golden Nugget telling him, "The result of the assessment indicates that you would not be considered for other positions, so no other assessment is required." He asserts that since the online assessment was taken at home that anyone could have taken the test for the individual applying and that since his first language is Cambodian, there were no safeguards in place in the assessment to rule out a discriminatory language barrier based on his Cambodian nationality. Further, the assessment dealt with customer service and engagement, and not with facility technology. Chhim is an American citizen of Cambodian descent. Golden Nugget made the pre-textual statement that they have a non-discriminatory policy, because Golden Nugget checks the qualifications of the Applicant, however in this case, circumstantial evidence would indicate that the job application of Chhim was summarily rejected when Golden Nugget discovered that he was 73 years old at the time of his application. They did not check his qualifications, nor did they have an interview with him to discover that he had worked for the City of Houston for**

more than ten years, with three years of courses at San Jacinto College (80 credit hours) in maintenance technology, plus another two years of college hours in executive housekeeping and supervisory management with Houston Community College, a related field, and held the position of custodial leader with the City of Houston. He was a qualified candidate for the position for which he applied with Golden Nugget, and he was not considered for the job, and further, was told that he need not apply for any other positions, because he would not be considered. Chhim maintains that Golden Nugget discriminated against him in his job application on the basis of race, nationality and age.

Petitioner requests that his case be returned to the lower Court for further proceedings based on a circumstantial evidence perception that he was discriminated against on the basis of race, nationality and age, when his job application with Golden Nugget was summarily rejected without an interview. Chhim was discriminated against on the basis of race, nationality and age in the processing of his job application with Golden Nugget.

All five prongs to show discrimination in employment practices and age discrimination have been satisfied in this case.

## **CONCLUSION**

**Chhim believes that he has set out a prima facie case of employment discrimination in hiring and age discrimination in hiring practices. 1. He is a member of a protected class. He is of Cambodian descent. 2. He applied for a position for which the employer was seeking applicants. Golden Nugget was seeking applicants for the position of Facility Supervisor. 3. He was qualified for the position. He had strong education and supervisory work experience as a lead supervisor in building maintenance with the City of Houston. 4. He was not selected for the position. 5. The employer continued to seek applicants for the position or filled the position with someone outside of the protected class. Golden Nugget said it did not hire anyone for the position of Facility Supervisor, which is not believable. At the investigation stage, Golden Nugget did not tell the EEOC that its did not hire a Facility Supervisor, or this case would have never gone forward to be a case. It creates a genuine material fact issue for a trier of fact.**