No. _____

# In The
# Supreme Court of the United States

AUGUSTA THOMAS, JR.,
*Petitioner,*

v.

DELMARVA POWER & LIGHT COMPANY,
*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the *McDonnell Douglas* burden-shifting framework should be applied at the summary judgment stage of a mixed-motive Title VII race discrimination case.

2. Whether the Fourth Circuit erred when it required Thomas to either satisfy the *McDonnell Douglas* framework or meet a "demanding standard" under a mixed-motive framework to overcome summary judgment in favor of DPL.

## LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case.

Because the Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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The unpublished opinion of the United States District Court for the District of Maryland granting the defendant's Motion for Summary Judgment is reproduced in the Appendix at App. 6–21.

## STATEMENT OF JURISDICTION

The Fourth Circuit Court of Appeals issued its Opinion on March 19, 2018. The Fourth Circuit denied Petitioner's timely filed petition for rehearing and rehearing *en banc* on April 30, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The present Petition for Writ of Certiorari is filed within 90 days of the Denial of Petition for Rehearing by the Fourth Circuit and is timely pursuant to Rule 10(a) of the Rules for the U.S. Supreme Court.

## STATUTORY PROVISIONS INVOLVED

Section 703(m) of Title VII of the Civil Rights Act of 1964 provides:

> (m) Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or

> national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m).

## STATEMENT OF THE CASE

### 1. Factual background

Petitioner Augusta Thomas, Jr (Thomas) was employed by Delmarva Power & Light (DPL) beginning in 1983. He was terminated in 2013, ostensibly for a violation of DPL's harassment policy. Thomas alleged that he was terminated because of his race (African-American) and that the investigators and decision-makers in his case had discriminatory animus towards African-American persons, leading them to tamper with witnesses, taint his investigation with unsubstantiated rumors and knowingly include false accusations in the report used to justify his dismissal. He also alleged that Caucasian employees who committed equally, or more serious, offenses were treated more favorably and in accordance with policy and that DPL failed to enforce its alleged harassment policy against Caucasian employees.

Thomas filed an action against DPL, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. ("Title VII").

### 2. Proceedings in the district court

DPL moved for summary judgment and the district court granted the motion. (App. 7). The

district court found that Thomas' race was not a motivating factor in DPL's decision to investigate the harassment claims against him or in DPL's conduct during the investigation. (App. 14). The court held that a plaintiff faces a "demanding standard" under the mixed-motive framework. (App. 13). It failed to address any of the evidence raised by Thomas related to the racially discriminatory environment at DPL, including the fact that the investigation was tainted with discriminatory conduct and that one of the investigators and/or decision-makers in the investigation admittedly used the N-word.

The bulk of the district court's opinion focuses on Thomas' alleged failure to establish a prima facie case under the *McDonnell Douglas* framework. (App. 15). The court found that Thomas could not make out a prima facie case because given the alleged harassment, he could not show that he was meeting DPL's legitimate expectations. The court also found he could not show that DPL replaced him with a person outside his protected class. (App. 16). The court then found that Thomas could not show pretext, holding that Thomas' comparator evidence should be rejected because the comparators were disciplined by different decision-makers. (App. 20).

### 3. Proceedings in the Fourth Circuit Court of Appeals

In an unpublished opinion, the Fourth Circuit affirmed the district court. (App. 2). The court held that the district court had correctly rejected Thomas' claim under the mixed-motive framework, because he did not disprove that the investigation revealed that he had made inappropriate comments, and

because he failed to demonstrate that the decision-makers acted with racial animus. (App. 4). The court also focused on Thomas' alleged failure to point to a similarly situated comparator. (App. 5).

## REASONS FOR GRANTING THE PETITION

### I. The federal courts of appeals are in disagreement as to whether the *McDonnell Douglas* framework should be applied at the summary judgment stage of a mixed-motive Title VII race discrimination case.

The federal courts of appeal have articulated a number of different frameworks for determining whether summary judgment is appropriate in a mixed-motive federal employment discrimination case. The majority of the circuits incorporate the burden-shifting framework of *McDonnell Douglas* in some form, either as an option or on a mandatory basis but in a modified form.

However, the *McDonnell Douglas* framework is incompatible with a mixed-motive case, because of its requirement that an employee demonstrate pretext. In a mixed-motive case, it should not be necessary for an employee to demonstrate pretext, because the employee does not need to disprove the employer's stated reason for the adverse employment action but must merely demonstrate that a protected characteristic was a motivating factor.

In 2003, this Court considered the statutory text at 42 U.S.C. § 2000e–2(m) and held that a plaintiff is not required to present direct evidence of

discrimination in order to obtain a mixed-motive instruction under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

*Costa* did not address the question of what evidence is required for an employee to overcome summary judgment for the employer in a mixed-motive case. Nevertheless, the lower courts have interpreted 42 U.S.C. § 2000e–2(m) and *Costa* and found support for a variety of approaches when considering the summary judgment question. The majority of the circuits continue to incorporate the *McDonnell Douglas* burden-shifting framework in some fashion.

The Eighth Circuit requires an employee in a mixed-motive case to follow the traditional *McDonnell-Douglas* framework with no modifications, thus requiring an employee to demonstrate in the third step of the analysis that an employer's proffered reason for the adverse employment action is pretext. *Macklin v. FMC Transp., Inc.*, 815 F.3d 425 (8th Cir. 2016).

The Second, Third, Fifth, and Tenth Circuits have adopted frameworks for mixed-motive cases that incorporate a modified version of the *McDonnell Douglas* framework, although the particular modification varies by court. The Second Circuit has replaced the original third step of *McDonnell Douglas* (that the plaintiff demonstrate the employer's stated legitimate nondiscriminatory reason for the adverse employment action is merely a pretext and the true reason for the adverse employment action was illegal discrimination) with a requirement that the employee demonstrate that "the 'impermissible factor was a motivating factor,

without proving that the employer's proffered explanation was not some part of the employer's motivation.'" *Holcomb v. Iona Coll.*, 521 F.3d 130, 142 (2d Cir. 2008) (quoting *Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 120 (2d Cir. 1997))

The Fifth Circuit has also modified the third step of the *McDonnell Douglas* framework by incorporated a "motivating factor" analysis. After the plaintiff has met his prima facie case and the defendant has responded with a legitimate nondiscriminatory reason for the adverse employment action:

> [T]he plaintiff must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic. (mixed-motive[s] alternative).

*Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 341 (5th Cir. 2005) (quoting *Rachid v. Jack In The Box*, Inc., 376 F.3d 305, 312 (5th Cir. 2004)).

The Third Circuit has modified the first step of the *McDonnell Douglas* framework and requires a plaintiff to show:

> (1) she was a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) members of the opposite sex were treated more favorably. A plaintiff may also meet the last element by showing that the adverse

> employment action "occurred under circumstances that could give rise to an inference of intentional discrimination." *Makky v. Chertoff*, 541 F.3d 205, 214 (3d Cir. 2008).

*Burton v. Teleflex Inc.*, 707 F.3d 417, 426 (3d Cir. 2013) (some internal citations omitted).

In the Tenth Circuit, an employee may use the *McDonnell Douglas* burden-shifting approach or a "mixed-motive approach" in which the employee must demonstrate, using direct or circumstantial evidence, that the alleged impermissible motive actually relates to the question of discrimination in the particular employment decision. If the plaintiff presents only circumstantial evidence, it must be tied directly to the impermissible motive. *See Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217, 1226 (10th Cir. 2008).

The Fourth Circuit identified a framework in 2005, holding that an employee may use the *McDonnell Douglas* burden-shifting "pretext" framework to survive a motion for summary judgment or may present direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor motivated the employer's adverse employment decision. *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005).

The Seventh Circuit has also articulated a two-option standard under which a plaintiff may proceed under *McDonnell Douglas* or under a "direct method" in which the plaintiff demonstrates sufficient circumstantial evidence to allow a jury to infer intentional discrimination by the

decisionmaker. *Petts v. Rockledge Furniture LLC*, 534 F.3d 715, 720 (7th Cir. 2008).

In the Ninth Circuit, plaintiffs are not required to use *McDonnell Douglas* and may "simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer]" *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004)

The D.C. Circuit has held that in the mixed motive case, 42 U.S.C. § 2000e–2(m) applies and a plaintiff may show that a protected characteristic was a motivating factor for an adverse employment decision, but a plaintiff can also use *McDonnell Douglas* to prove a mixed-motive case. *Fogg v. Gonzales*, 492 F.3d 447, 453 (D.C. Cir. 2007); *Ponce v. Billington*, 679 F.3d 840, 844 (D.C. Cir. 2012).

Thus, in nine of the circuit courts, the *McDonnell Douglas* framework (in its original or modified form) is incorporated in some way, either as the only possible framework at the summary judgment stage or as one option at that stage.

But using the *McDonnell Douglas* framework is incompatible with the language in 42 U.S.C. § 2000e–2(m). Two circuits have recognized that *McDonnell Douglas* is not an appropriate framework at the summary judgment stage of a mixed-motive discrimination case and have developed alternative frameworks.

The Sixth Circuit considered the issue in 2008 and determined that compliance with the *McDonnell Douglas* burden-shifting framework is not required in mixed motive cases. The court held that:

> …to survive a defendant's motion for summary judgment, a Title VII plaintiff

> asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) "race, color, religion, sex, or national origin was a motivating factor" for the defendant's adverse employment action.

*White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008). The court went on to state that the "burden of producing some evidence in support of a mixed-motive claim is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim." *White*, 533 F.3d at 400 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The court explained its reasoning, using U.S.C. § 2000e-2(m) as the basis:

> …this elimination of possible legitimate reasons for the defendant's action is not needed when assessing whether trial is warranted in the mixed-motive context. In mixed-motive cases, a plaintiff can win simply by showing that the defendant's consideration of a protected characteristic "was *a* motivating factor for any employment practice, *even though other factors also motivated the practice*." 42 U.S.C. § 2000e-2(m) (emphasis added). In order to reach a jury, the plaintiff is not required to eliminate or rebut all the possible legitimate motivations of the defendant as long as the plaintiff can demonstrate that an illegitimate discriminatory animus factored into the defendant's decision to take the adverse employment action. As the shifting burdens of

> *McDonnell Douglas* and *Burdine* are unnecessary to assist a court in determining whether the plaintiff has produced sufficient evidence to convince a jury of the presence of at least one illegitimate motivation on the part of the defendant, we conclude that the *McDonnell Douglas/Burdine* framework does not apply to our summary judgment analysis of mixed-motive claims.

*White*, 533 F.3d at 401.

In 2016, the Eleventh Circuit adopted the Sixth Circuit's approach. Again, the focus was on the language in 42 U.S.C. § 2000e–2(m), and the court found that the proper framework:

> …requires a court to ask only whether a plaintiff has offered "evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) [a protected characteristic] was a motivating factor for the defendant's adverse employment action." See *White*, 533 F.3d at 400 (internal quotation marks omitted).

*Quigg v. Thomas County Sch. Dist.*, 814 F.3d 1227, 1239 (11th Cir. 2016).

The Sixth and Eleventh Circuits' focus on the statutory text led them to the correct conclusion that *McDonnell Douglas* should not be applied at the summary judgment stage of a mixed-motive discrimination claim. The conflict among the circuits on this issue is clear and is unlikely to be resolved without guidance from this Court.

This Court should clarify that *McDonnell Douglas* is a useful methodology for some discrimination cases where there is no direct

evidence of discrimination, but not the only framework for a plaintiff to avoid summary judgment, and not an appropriate framework in mixed-motive cases or where there is direct evidence of discrimination. Given the large number of employment discrimination-related cases handled in the federal courts, the question should be resolved as soon as possible.

## II. The Fourth Circuit's requirement that Thomas either satisfy the McDonnell Douglas framework or meet a "demanding standard" under a mixed-motive framework placed an inappropriate burden on him at the summary judgment stage.

The Fourth Circuit's framework required Thomas to either meet the *McDonnell Douglas* framework or to meet what the district court referred to as a "demanding standard" to survive analysis under a mixed-motive framework. As discussed above, *McDonnell Douglas* should not be applied in a mixed-motive case. In addition, the court's alternative framework placed an inappropriate burden on Thomas at the summary judgment stage.

As discussed above, whether a plaintiff can demonstrate pretext should be irrelevant at the summary judgment stage of a mixed-motive race discrimination case. The Eleventh Circuit recently hammered that point home in a race and national origin discrimination case:

> The district court granted summary judgment on Vinson's discriminatory termination claim

> for three reasons. First, the district court concluded that the record did not discredit the defendants' reasons for firing Vinson, ostensibly requiring Vinson to show pretext. But pretext has no place in a motivating factor analysis. Vinson did not need to discredit the defendant's reasons. She only needed to demonstrate a genuine issue of material fact as to whether race or national-origin was a motivating factor in the decision to terminate her.

*Vinson v. Koch Foods of Alabama*, LLC, No. 17-10075, 2018 WL 2329800 at *3 (11th Cir. May 23, 2018) (internal citations omitted). Here, Thomas should only have needed to demonstrate that race was a motivating factor in his investigation and termination, not that the investigation was utterly baseless. Showing that the investigation was baseless might have been one way for him to demonstrate that race was a motivating factor in his termination, but it was not the only way.

The Fourth Circuit also erred when it affirmed the district court's holdings on comparators. As part of its discussion on pretext, the district court held that Thomas needed to produce a comparator with the same supervisor. As discussed above, because this was a mixed-motive case, the district court should not have focused on pretext and Thomas should not have been required to identify a comparator. *See Czekalski v. Peters*, 475 F.3d 360, 365-66 (D.C. Cir. 2007) (reversing a grant of summary judgment to a Title VII gender discrimination defendant, holding that the plaintiff was not required to show that a comparator male employee was treated more favorably; evidence as to

comparators was only one way in which an inference of discrimination can arise).

A very similar issue came up in a Fifth Circuit case in 2014. In *Willis v. Cleco Corp.*, 749 F.3d 314 (5th Cir. 2014), an employee claimed racial discrimination and retaliation related to several adverse employment actions including a disciplinary warning and termination. As to the disciplinary warning, the Fifth Circuit found that the district court had erred when it granted summary judgment for the employer, because the decision-maker for the warning had referred to the employee using the N-word and indicated that he wanted to retaliate against him for the employee's prior complaints regarding the decision-maker's racially-charged statements in the workplace. *Willis*, 749 F.3d at 318. Relevant to this case is the discussion of comparators in the concurring and dissenting opinion by Justice Dennis:

> As for Willis's race discrimination claim, Cleco commits illegal discrimination if race is a "motivating factor" in the termination. 42 U.S.C. § 2000e–2(m). Here, it is clear that there is sufficient evidence to find that, when Willis's employment was terminated by Melancon, who allegedly referred to Willis as "that nigger," race was a "motivating factor" in the decision.
>
> The majority faults Willis for not identifying a "similarly situated comparator," that is, another Cleco employee "who was treated differently [than Willis] under nearly identical circumstances." Ante, at 320, 320 n. 6. The majority's argument is without merit. Where the evidence is that an employee's boss

> announces that he has decided to "terminate that nigger," neither the law nor common sense requires the employee to show "similarly situated comparators" in order to prove that race was a motivating factor in the termination. *See, e.g.*, *Brown v. E. Miss. Elec. Power Ass'n,* 989 F.2d 858, 861 (5th Cir.1993) (use of the term "nigger," a "universally recognized opprobrium [that] stigmatiz[es] African–Americans because of their race," is direct evidence of discrimination).

*Willis*, 749 F.3d at 326 (Dennis, Circuit Judge, concurring in part, dissenting in part). Given the investigator's admitted use of the N-word to refer to members of Thomas' class in this case, Thomas should not have been required to identify a comparator; he produced sufficient evidence that race was a motivating factor in his termination.

But even if Thomas was required to identify a comparator, the fact that his named comparator had a different supervisor should not have precluded the comparison. In *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012), the Seventh Circuit held that comparators were not required to have the same direct supervisor, where there was a common decision-maker, noting that the real question is whether the comparator employees were treated more favorably by the decision-maker. The reason for that, explained the court, is that it goes to the ultimate question of whether the decision-maker acted for a prohibited reason. *Id.* at 848. In this case, one of the decision-makers (the investigator) acted with racially-discriminatory motives, given his prior use of the N-word. And, investigations into alleged harassment by white employees were conducted

differently. Thomas therefore already demonstrated sufficient evidence on the ultimate issue, whether the decision-maker acted for a prohibited reason, and should not need to produce evidence of a comparator with the same supervisor. The district court and Fourth Circuit's focus on whether Thomas could demonstrate pretext strayed from the relevant question: whether Thomas presented evidence that race was a motivating factor in his termination.

Although the court provided Thomas with an alternate framework to escape summary judgment, the court's alternative "demanding standard" (in the words of the district court), under the mixed-motive framework this standard is incompatible with the appropriate burden on a plaintiff at the summary judgment stage. The rationale for the "demanding" nature of the standard is unclear, but the court potentially required Thomas to meet a higher standard because it believed that the evidence he presented was circumstantial.

The burden on the plaintiff at the summary judgment stage is intended to be a low one, so that the trier of fact may determine factual disputes:

> To complete his prima facie case, plaintiff must introduce evidence that he was terminated under circumstances which give rise to an inference of unlawful discrimination. Drawing all permissible factual inferences in plaintiff's favor, we find that the evidence adduced by Holcomb comfortably meets this low threshold, which the Supreme Court has described as "minimal."

*Holcomb,* 521 F.3d at 139 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993)). Therefore,

"the plaintiff will always survive summary judgment if [s]he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Quigg*, 814 F.3d at 1240 (citing *Smith v. Lockheed–Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011)).

As the Second Circuit has stated, courts should be cautious about granting summary judgment to an employer in a case where the dispute concerns the employer's intent. *Holcomb*, 521 F.3d at 137 (noting that direct evidence of discriminatory intent will only rarely be available, so that evidence must be carefully scrutinized for circumstantial proof).

In this case, due to the evidence of racial animus in the workplace, the court erred by finding that Thomas did not demonstrate that race was a motivating factor in his termination. Given the investigator's use of the N-word and evidence that African-American employees were disciplined more harshly than white employees, Thomas should have made it past the summary judgment stage. For example, in *Holcomb*, the fact that one decision-maker was in the habit of making racially questionable remarks and another appeared to have an incentive to minimize the African-American presence was cited by court as a basis that a reasonable jury could rely on to find that the termination was, in part, racially-motivated. *Holcomb*, 521 F.3d at 142-143.

Courts have found words much less offensive than the N-word to support a denial of summary judgment to the employer. In an Eighth Circuit case, the court found that a supervisor's use of the words

"white bitch" permitted an inference that racial animus motivated her conduct:

> The DSS argues, and the magistrate judge found, the evidence established nothing more than Lee had an extreme, intense dislike for Bowen unrelated to her race. We do not agree. Viewing, as we must, the evidence in the light most favorable to Bowen, we conclude she produced sufficient evidence from which reasonable jurors could infer that Lee's conduct toward Bowen was based on race. Lee's two "white bitch" epithets were explicitly racial and were directed specifically to Bowen, a white woman. Because the epithets carried clear racial overtones, they permit an inference that racial animus motivated not only her overtly discriminatory conduct but all of her offensive conduct towards Bowen.

*Bowen v. Missouri Dept. of Soc. Services*, 311 F.3d 878, 884 (8th Cir. 2002) (internal citations omitted).

As the Fifth Circuit explained more than two decades ago, the N-word is known to be offensive in a way that other words (although derogatory) are not:

> Pippen's routine use of racial slurs constitutes direct evidence that racial animus was a motivating factor in the contested disciplinary decisions. Pippen's use of the racial epithet was not, as EMEPA suggests, an innocent habit. Unlike certain age-related comments which we have found too vague to constitute evidence of discrimination, the term "nigger" is a universally recognized opprobrium, stigmatizing African–Americans because of their race.

*Brown v. E. Mississippi Elec. Power Ass'n*, 989 F.2d 858, 861–62 (5th Cir. 1993).

Even "a single discriminatory comment by a plaintiff's supervisor or decisionmaker is sufficient to preclude summary judgment for the employer." *Dominguez–Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1039 (9th Cir. 2005). Comments such as referring to employees as "Chinks" or referring to an employee as a "dumb Mexican" could be proof of discrimination. *Id.* Clearly the N-word far surpasses either of those terms as evidence of discrimination. And, more importantly, the word was uttered by one of the supervisors who investigated Thomas' alleged harassment. Because the individual with discriminatory animus influenced and participated in the decision-making, Thomas presented sufficient evidence to overcome summary judgment. See *id.* at 1039-1040 ("Where, as here, the person who exhibited discriminatory animus influenced or participated in the decisionmaking process, a reasonable factfinder could conclude that the animus affected the employment decision.").

In this case, racial animus was present in a variety of ways in the investigation beyond the supervisor's use of the N-word. For example, white employees accused of harassment were permitted to make statements in their defense; Thomas was not. DPL used progressive discipline with white employees, but not with Thomas. However, as explained by a federal district court in a national origin discrimination case, even a single discriminatory comment may prevent summary judgment for the employer. *Lalau v. City & County of Honolulu*, 938 F.Supp.2d 1000 (D. Haw. 2013). In

*Lalau*, a supervisor made a derogatory remark about the plaintiff's national origin). The court held that:

> First, Lalau's inability to identify more than a single comment relating to his being Samoan and a single comment relating to his age is not fatal to his claims of national origin discrimination and age discrimination. The Ninth Circuit has noted, "[I]n this circuit, we have repeatedly held that a single discriminatory comment by a plaintiff's supervisor or decisionmaker is sufficient to preclude summary judgment for the employer." *Dominguez–Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1039 (9th Cir. 2005). "Where, as here, the person who exhibited discriminatory animus influenced or participated in the decisionmaking process, a reasonable factfinder could conclude that the animus affected the employment decision." *Id.* 1039–40. Such evidence is "sufficient to overcome summary judgment." *Id.* at 1040 n. 5. Accord *Metoyer v. Chassman*, 504 F.3d 919, 937 (9th Cir. 2007).

*Lalau*, 938 F.Supp.2d at 1013. The court went on to point out that relying on a single discriminatory comment (when uttered by a supervisor) is consistent with the duty to zealously guard an employee's right to a full trial. *Id.* In this case, given the investigator's use of the N-word, summary judgment should not have been granted for DPL.

The district court and Fourth Circuit should not have placed such an emphasis on Thomas' ability to demonstrate pretext, given that the *McDonnell Douglas* framework is incompatible with a mixed-motive race discrimination claim. The court's

alternate framework was equally flawed, in that it is an overly demanding standard that fails to adhere to the statutory text of 42 U.S.C. § 2000e–2(m). The court should have focused on the statutory text, and given the evidence of race discrimination on the part of the investigator and investigatory practices as a whole, concluded that Thomas presented sufficient evidence that race was a motivating factor in his termination.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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