No. 18-9410

IN THE SUPREME COURT OF THE UNITED STATES

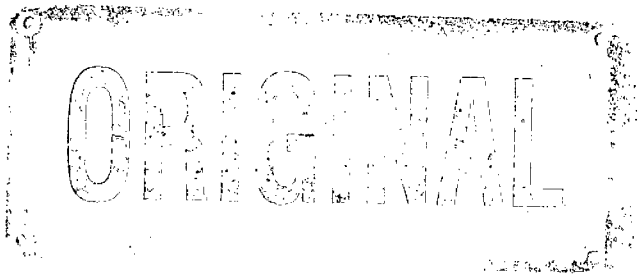
MORRIS SANDERS,

PETITIONER,

vs.

WAL-MART STORES EAST, LP,

RESPONDENT.



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

PETITION FOR WRIT OF CERTIORARI

MORRIS SANDERS, Petitioner
1607 Tremont Street
Selma, Alabama 36701
334-407-0984

QUESTIONS PRESENTED

1. Where the federal courts below decided for themselves every triable fact issue crucial to petitioner's workplace discrimination and retaliation claims, refusing to give his proof the probative force it deserves on summary judgment, has he been denied the right to have a jury instead of judges decide whether her claims are compensable?

2. Should this Court provide renewed and much needed guidance to inferior federal courts so that summary judgment is no longer misused to weigh evidence, make credibility determinations, find facts and impose on this Title VII plaintiff a more onerous burden of proof than the process demands in order to deny his discrimination claims without a trial?

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issues to review the judgment below.

OPINIONS BELOW

The unpublished per curiam opinion of the United States Court of Appeals for the Eleventh Circuit in Sanders v. Wal-Mart Stores East, LP. (C.A. No. 18-11524), decided and filed on January 2, 2019, affirming the District Court's order granting summary judgment to respondent and dismissing petitioner's case, is set forth in the Appendix A hereto.

The Magistrate for the Middle District of Alabama in Sanders v. Wal-Mart Stores East, LP (Civil Action No. 2:16-CV-637-WKW, CASE NO. 2:17-CV-31-WKW, filed on January 19, 2018 a Report and Recommendation. The District Judge filed an unpublished Order adopting the Magistrate's Report and Recommendation on May 15, 2018, granting summary judgment to respondent and dismissing petitioner's case, as set forth in Appendices B and C.

On January 2, 2019, the United States Eleventh Circuit Court of Appeals in Sanders v. Wal-Mart Stores East, LP (No. 18-11524) filed an unpublished opinion affirming the decision of the District Court. The United States Eleventh Circuit

Court of Appeals of filed an order dated February 22, 2019, denying petitioner's timely filed petition for rehearing en banc, as set forth in Appendix D.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V:

"No person shall ... be deprived of life, liberty, or property, without due process of law...."

United States Constitution, Amendment VII:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than ccording to the rules of the common law."

28 U.S.C. § 1331:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

42 U.S.C. § 1981:

"(a) Statement of equal rights All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed

by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"(b) Make and enforce contracts" defined For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"(c) Protection against impairment The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

42 U.S.C. §§ 2000e-2(a) and (b) and 3:

"2. UNLAWFUL EMPLOYMENT PRACTICES

"(a) It shall be an unlawful employment practice for an employer -

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of

employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

"(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

"3. OTHER UNLAWFUL EMPLOYMENT PRACTICES.

"(a) It shall be an unlawful practice for an employer to discriminate against of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

Fed. R. Civ. P. 56 (SUMMARY JUDGMENT):

"(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense - or the part of each claim or defense - on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of

law. The court should state on the record the reasons for granting or denying the motion.

"....

" (c) Procedures.

"(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

"(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

"(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

"(2) Objection That a Fact Is Not Supported by Admissible Evidence.

"A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

"(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

"(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would

be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

" ...

"(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c) the court may:

"(1) give an opportunity to properly support or address the fact;

"(2) consider the fact undisputed for purposes of the motion;

"(3) grant summary judgment if the motion and supporting materials

"- including the facts considered undisputed - show that the movant is entitled to it; or

"(4) issue any other appropriate order."

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's order granting summary judgment to respondent and dismissing petitioner's case was entered on January 2, 2019; and its order denying petitioner's timely filed petition for rehearing en banc was filed on February 22, 2019 (Appendices A and D). This petition for writ of certiorari is filed within ninety (90) days of February 22, 2019. 28 U.S.C. § 2101(c). Supreme Court Rule

13.3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The undisputed facts in this case is the petitioner an African-American male was an employee at the Wal-Mart Supercenter in Selma, Alabama. The petitioner was injured on the job, and prior to the injury he had a good work record. The petitioner continued to report to work after the injury because he could not financial afford to remain off work; however, the petitioner on some days could not report to work because of the pain and on some days he had to leave work early because of the pain. At all times the petitioner informed his supervisors the reason for his absence.

Another undisputed fact is that an African-American who was a supervisor assigned Petitioner to perform work related tasks that would lessen the stress on his body. A White supervisor however assigned petitioner to work tasks that increased the stress on his body. The management at the Wal-Mart allowed White employees who had injuries or sickness to job-related tasks that was less stressful on their bodies.

REASONS FOR GRANTING THE PETITION

1. Where Both Federal Courts Below Decided for Themselves Every Triable Fact Issue Crucial To Petitioner's Workplace Discrimination and Retaliation Claims, Refusing To Give His Evidence The Probative Force It Deserves On Summary

Judgment, He Was Denied The Right To Have A Jury Instead Of Judges Decide Whether His Claims Were Compensable.

McDonnell Douglas Corp. v. Green, 411 U.S. 792(1973) "establishe[s] an allocation of the burden of production and an order for the presentation of proof in ... discriminatory treatment cases" in the absence of direct proof of discrimination. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 142(2000) quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). First, the petitioner must establish a prima facie case of discrimination. *Id. Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252-253 (1981). The term "prima facie case" means the establishment of a legally mandatory, rebuttable presumption, one which "raises an inference of discrimination only because we presume [that] these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577 (1978).

If petitioner proves unlawful by a preponderance of the evidence, he has established his prima facie case which creates the presumption that the employer has unlawfully discriminated, proof which, if believed by a trier of fact and if the employer is silent in the face of this presumption, would warrant a judgment for petitioner because no issue of fact remains in the case. *Burdine*, 450 U.S. at 254. Under *McDonnell Douglas*, the employer is then given the opportunity to rebut

petitioner's prima facie case by adducing evidence that the adverse employment action was accomplished for a legitimate, nondiscriminatory purpose. *Reeves*, supra. *McDonnell Douglas,* 411 U.S. at 802.

If the employer successfully carries its burden, the presumption of discrimination - but not petitioner's evidence in support of this presumption - disappears; the sole remaining issue becomes discrimination vel non and petitioner must prove by a preponderance of the evidence that the reasons offered by the employer were not its true reasons but were a pretext for discrimination. *Reeves*, 530 U.S. at 143 citing Hicks, 509 U.S. at 507-508. Helped by the same proof which established his prima facie case, petitioner may establish that he was the victim of intentional discrimination by showing that a discriminatory reason more likely motivated the employer, or that its presumptively valid reasons for disparate treatment "were in fact a coverup for a ... discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805. See *Hicks*, 509 U.S. at 510.

Under the *McDonnell Douglas* framework, petitioner's initial burden of establishing a prima facie case of disparate treatment or retaliation for protected activity is "not onerous." *Patterson v. McLean Credit Union*, 491 U.S. 164, 186(1989). It focuses on (1) whether petitioner engaged in protected activity; (2) whether the employer subjected him to an adverse employment action; and (3) whether there is a causal link between the protected activity and the adverse

employment action. *Patterson*, 491 U.S. at 186-187. *McDonnell Douglas*, supra. See *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000).

When these respective burdens of proof are imposed within the context of respondent's summary judgment motion, two core principles obtain: (1) in construing the materials adduced by the parties, the district court was bound to draw all reasonable inferences from these materials against respondent as the moving party and in favor of petitioner as the nonmoving party; and (2) it was also required to resolve all credibility questions in favor of petitioner, the nonmoving party, because the role of the district court is only to determine whether there is a genuine issue of material fact for trial. *Beard v. Banks*, 548 U.S. 521, 529-530;534 (2006). *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 150-151 (2000). *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255 (1986). As *Reeves* holds, it cannot make credibility determinations because this is a function of a jury, not a judge. 530 U.S. at 150-151 citing *Anderson*, 477 U.S. at 255.

Informing these principles is the further proviso that a motion judge should be cautious about granting summary judgment to an employer in a discrimination case, especially when intent and credibility are in issue. "[A]dded rigor" is called for because direct evidence of discriminatory intent will rarely be available; "affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Gorzynski v. Jetblue Airways*

Corp., 596 F.3d 93, 101 (2nd Cir. 2010). *Gallo v. Prudential Residential Services, Ltd. Partnership,* 22 F.3d 1219, 1224 (2d Cir. 1994).

Yet contrary to these bedrock principles of summary judgment adjudication, both federal courts acted as a jury instead of judges, believed and then adopted every one of respondent's asserted reasons for discharging petitioner, concluding that no violation of Title VII had been made out and denying him the jury trial to which he was entitled. This abuse of summary judgment protocol failed to give the materials adduced by petitioner, the non-moving party, the deference they deserved; failed to read all of the materials against respondent as the moving party; and made crucial credibility determinations in respondent's favor and to petitioner's detriment which a jury - not judges - should have been allowed to make at trial. These failures to comply with Rule 56 has led to egregious factfinding on the most crucial fact issues in this case and render the disposition by the district court and the court of appeals not only unfair as a matter of due process, i.e., the denial of petitioner's right to a jury trial on disputed fact issues, but also a misuse of the summary judgment procedure.

Petitioner met the first two parts of his prima facie case under *McDonnell Douglas* because he established a causal connection between his complaint of discrimination against respondent and his ensuing discharge. The record undisputed facts showed that an African-American employee of respondent

worked with petitioner to accommodate the distress caused to him by his injury but a White supervisor in effect over ruled her and caused petitioner's employment to be terminate. The undisputed facts showed that White employee who suffered injuries was allowed to remain at work.

Petitioner's proof further showed that he was a good employee who received promotions at the work place before the injury, and he had no history of being a laggard at work.

The evidence by respondent that petitioner had too many unexcused absences was juxtaposed against petitioner's excellence work record itself proof of pretext on respondent's part and both courts below abused summary judgment protocol by refusing to give petitioner's proof the force it deserved and to apprehend that this was a fundamental genuine issue of material fact for trial.

Petitioner's proof made a prima facie case for discrimination, respondent's explanations notwithstanding, and created a genuine issue of material fact for trial whether he had suffered an adverse employment action as a result of his protected activity. But both the district court and the court of appeals once again read the summary judgment materials not in petitioner's favor but instead against him to mean that he had failed to perform his job properly and therefore no reasonable jury could find respondent's decision to discharge him was illegal retaliation. This was error and an abuse of the summary judgment procedure.

Compounding this misuse of summary judgment process, both lower courts completely discounted petitioner's other evidence of pretext. The district court did not consider:

1. That petitioner was assigned to a less strenuous positon as a people greeter.

2. The use of a motorized cart the Wal-Mart store by petitioner was only when the store was closed to the public.

3. Respondent did not present any evidence that petitioner had taken excessive leave prior to his injury.

4. The adverse job action against petitioner commenced under the tenure of store manager Matthew Joiner who is a Caucasian.

The federal courts of appeals uniformly follow *Reeves* and hold that an employer's shifting, incompatible reasons for treating an employee adversely is itself justification for denying summary judgment to the employer in a workplace discrimination case and permitting the issue of pretext to go to the jury. As the court of appeals for the First Circuit explained, "[a] company may have several legitimate reasons to dismiss an employee. But when a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual [for purposes of the *McDonnell Douglas* framework]." *Dominguez-Cruz v. Suttle Caribe, Inc.,* 202 F.3d 424, 432 (1st Cir.

2000). Accord, *E.E.O.C. v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2nd Cir. 1994); *E.E.O.C. v. Sears, Roebuck and Co.* 243 F.3d 846, 853 (4th Cir. 1993); *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996); *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1422 (7th Cir. 1992); *Kobrin v. University of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994); *Washington v. Garrett,* 10 F. 3d 1421, 1434 (9th Cir. 1993); *Tyler v. Re/Max Mountain States, Inc.,* 232 F.3d 808, 813 (10th Cir. 2000).

Indeed, the *Hicks* Court teaches that the fact issue of discrimination should be treated no differently than any other ultimate question of fact, that whether an employer's "obviously contrived" reason for an employee's discharge or reassignment adds up to discrimination "remains a question for the factfinder to answer" and that [t]he factfinders' disbelief of the reasons put forward by the [employer for discharging/reassigning the employee] (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the [employer's] proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination.509 U.S. at 510-51 l;524(emphasis in original). Reeves, 530 U.S. at 147.

Because none of the analysis of the district court comports with summary judgment protocol or with the law of employment discrimination, especially with

regard to weighing whether respondent's asserted reason(s) for petitioner's termination were a pretext for discrimination, this Court should grant this petition for writ of certiorari to the Eleventh Circuit court of appeals and provide petitioner with a jury trial to which he is entitled.

2. The Court Should Provide Renewed Guidance To Inferior Federal Courts So That Summary Judgment Is No Longer Misused To Weigh Evidence, Make Credibility Determinations, Find Facts And Impose On This Title VII Plaintiff A More Onerous Burden Of Proof Than The Process Demands In Order To Deny His Discrimination Claims Without A Trial.

Federal jurists and legal commentators have noted that federal trial judges regularly overuse summary judgment in order to take triable cases away from juries. *Hon. W.G. Young, Vanishing Trials - Vanishing Juries - Vanishing Constitution,* 40 Suffolk U. Law Rev. 67, 78 (2006). *Arthur R. Miller, The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. Law Rev. 982, 1064; 1066; 1071-1072; 1133-1134 (2003). Professor Miller writes that Rule 56's "paper trials" of triable issues of disputed fact would be an unfortunate break with the past. Our civil dispute resolution system has always preferred adjudication based on oral testimony in open court subject to cross examination....[T]hey are considered aspects of what often is referred to as a "day in court," with due process embracing notions of a fair trial before an

impartial tribunal. Id. at 1072 & n. 476, citing *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 209 (1958) ("There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case."). See also *Thomas, Suja A., Why Summary Judgment Is Unconstitutional,* 93 Va. L. Rev. 139, 143-144; 158-160; 177-178 (2007).

In his dissenting opinion in *Anderson v. Liberty Lobby*, Justice Brennan predicted that the majority's analysis there which encourages trial judges to assess and weigh evidence and to ask themselves whether a fair-minded juror could return a verdict for the plaintiff on the evidence presented would impose a dramatically new burden of proof on the plaintiff as the opposing party, so conflating the role of judge and jury that this "summary" procedure will become "a full-blown paper trial on the merits." 477 U.S. at 265-267. Rejecting this outcome, he wrote that whether the plaintiff's evidence is "clear or convincing," or proves a point by a mere preponderance, is for the factfinder to determine. As I read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain. Id. at 268. See *Scott v. Harris*, 550 U.S. 372, 389-390 (2007) (Stevens, J., dissenting)

(criticizing the majority for acting as "jurors" or factfinders rather than reviewing court).

This misuse of summary judgment in Title VII discrimination cases has been documented. *Schneider, Elizabeth M., The Impact of Pretrial Practice on Discrimination Claims*, 158 U. Penn. Law Rev. 517, 548-551 (2010) (Schneider I). *Schneider, Elizabeth M., The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 Rutgers L. Rev. 705, 737-753 (2007) (Schneider II). *McGinley, Ann C., Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases,* 34 B.C. L. Rev. 203, 229(1993). Recent data suggests that 70% of summary judgment motions in civil rights cases and 73% of such motions in employment discrimination cases are granted, the highest of any type of federal civil case. *Schneider I at 549 & n. 150.*

Courts in these kind of cases routinely weigh evidence, minimize the harm claimed by the plaintiff, make credibility determinations which accord him less credibility, draw inferences against him instead of in his favor, divide and categorize his evidence in piecemeal fashion which divorce it from its context in order to dilute its probative force, demand more proof than summary judgment requires and then resort to a "reasonable juror's" view of this now diluted and distended evidence to deny his claims. *Schneider I* at 535-536; 540-546 ("Summary judgment decisionmaking … involves a tremendous amount of

discretion, and discretion can be a locus of hidden discrimination."). *Schneider II* at 708-712; 714-715; 718-720; 728; 737-745. See McGinley at 233-236.

Title VII plaintiffs like petitioner thus face a double discrimination: i.e., first, the unfair workplace events causing him to seek redress in the federal courts; and second, the manner in which the federal courts employ summary judgment in order to clear their calendars and avoid jury trials. Instead of denying respondent's motion for summary judgment because of the conflicting - indeed, irreconcilable - evidence about core material facts upon which the viability of his claims hinge, both courts below improperly drew every inference from the parties' proof against Safari, the non-moving party, accepting respondent's explanation for its conduct as true and legally dispositive of his claims.

Adopting wholesale the credibility of the respondent while discounting petitioner facts at every turn, both courts diluted the collective impact of the chronology of events leading up to petitioner's discharge and thereby whitewashed the conduct of its employees the petitioner as he together carried out his plan to sabotage petitioner's employment. Both courts chose not to credit petitioner's evidence showing a clear and unmistakable reason why he was absence from work, i.e. the pain he experiences from his injury, and his retaliatory discharge.

This Court should accordingly take this opportunity to provide renewed guidance to inferior federal courts on the vitally important question of whether

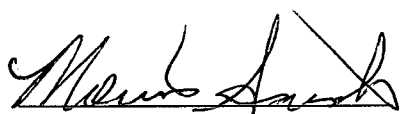
summary judgment is being misused to weigh evidence, make credibility determinations, find facts and impose on Title VII plaintiffs like the petitioner is a more onerous burden of proof than the process demands in order to deny his discrimination claims without a trial.

CONCLUSION

For all of these reasons identified herein, petitioner Morris Sanders respectfully requests that this Court grant his petition for a writ of certiorari and review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit, remand the matter to the federal district court for the Middle District of Alabama for trial or provide him with such other relief as is fair and just in the circumstances.

Respectfully submitted this the 19th day of May, 2019,

Respectfully submitted,



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