No. _____

In the
Supreme Court of the United States

RAO S. MANDALAPU,
Petitioner,
v.

TEMPLE UNIVERSITY HOSPITAL; DOCTOR JACK H. MYDLO; DOCTOR ROBERT GUY UZZO; DOCTOR RICHARD E. GREENBURG; DOCTOR DAVID Y.T. CHEN; DOCTOR ALEXANDER KUTIKOV; DOCTOR ROBERT S. CHARLES; DOCTOR STEVEN J. HIRSHBERG; DOCTOR YAN F. SHIBUTANI
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-2-3) and the Civil Rights Act of 1866 (42 U.S.C. § 1981) prevent discrimination and retaliation in the workplace. Twenty years ago, this Court clarified, in *Reeves v. Sanderson Plumbing*, that a plaintiff can prevail by presenting a prima facie case along with pretext of the employer's articulated reason. Such a showing would prevent a defendant employer from obtaining summary judgment. Since, then appellate courts have interpreted this standard differently, sometimes requiring "animus" or additional evidence beyond that as articulated in *Reeves*.

The question presented is: At the summary judgment stage, is it necessary for a plaintiff to show discriminatory or retaliatory "animus" against a protected category in order to prevent dismissal?

PARTIES

The parties to this proceeding are set forth in the caption. However, the only claim at issue in this appeal is the retaliation claim under 42 U.S.C. § 1981, which is limited to Temple University Hospital.

LIST OF DIRECTLY RELATED PROCEEDINGS

There are no related cases or proceedings.

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Petitioner Rao Mandalapu respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on December 3, 2019.

OPINIONS BELOW

The December 3, 2019, opinion of the court of appeals, which is unofficially reported at 786 Fed. Appx. 348, is set out at pp. 1-4 of the Appendix. The January 2, 2020 order of the court of appeals denying rehearing, which is not reported, is set out at pp. 52-53 of the Appendix. The July 5, 2018 district court Order granting summary judgment, which is unofficially reported at 2018 U.S. Dist. LEXIS 112693 (E.D. Pa. July 5, 2018), is set out at pp. 5-49 of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on December 3, 2019. A timely petition for rehearing was denied by the court of appeals on January 2, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is timely, as it is being filed within 150 days[1] from the denial of the petition for rehearing.

STATUTES INVOLVED

42 U.S.C. § 1981 states, in relevant part:

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and

[1] Extended via the order issued on March 19, 2020.

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.

42 U.S.C. § 2000e-2 states, in relevant part:

(a) **Employer practices**. 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.

42 U.S.C. § 2000e-3 states, in relevant part:

> (a) **Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings**. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, 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.

INTRODUCTION

This case presents conflicts and inconsistencies with respect to application of the burden-shifting mechanism originally articulated in *McDonnell Douglas v. Green*, and subsequently in *St. Mary's Honor Ctr. v. Hicks* and then *Reeves v. Sanderson Plumbing*. Specifically, lower courts differ as to whether or to what extent "animus" may be a requirement to prove unlawful employment discrimination or retaliation. Mandalapu contends that there is no requirement for a plaintiff to show "animus" against a protected trait in order to survive summary judgment.

STATEMENT OF THE CASE

Rao Mandalapu had been raised in India, where he graduated from medical school and became a board-certified surgeon. He moved to the United States in 2002. App. 6.

Because the United States does not recognize foreign medical training, he passed an intensive examination to validate his medical degree. Having become a medical doctor in the United States, he began his residency in surgery, but shifted his focus after a year to pursue his growing interest in urology instead. So he spent the next two years gaining experience in urology as a fellow at Brown University. *Id.* He then resumed his residency training, now in urology at Ohio State, successfully completing his second and third residency years there from July 2007 to June 2009. App. 6-7.

In July of 2011, Mandalapu began his fourth-year urology residency at Temple University. The director of the program was Jack Mydlo. Other faculty included Robert Charles, David Chen, Richard Greenberg, Steven Hirschberg, Alexander Kutikov, Yan Shibutani, and Robert Guy Uzzo. App. 9.

Not long after he began at Temple in July 2011, Mandalapu began having problems with some of the faculty relating to racially-sensitive matters concerning his ethnicity and accent. In December 2011, Mandalapu complained to Mydlo, the director, about the racial discrimination. The racially-charged acts continued to occur, and Mandalapu frequently reported such matters to Mydlo between March and May 2012. App. 31-32.

Mydlo decided either sometime in April or May 2012 to terminate Mandalapu, as indicated in a May 2012 performance review which essentially criticized Mandalapu's performance. App. 38. The timing of the evaluation is noteworthy because it was submitted several months after the evaluation period (July through October 2011) ended. App. 10. Furthermore, the substance of the evaluation contradicted the fact that Mandalapu was ultimately assigned to perform 638 surgical procedures (100 more than the other fourth-year resident) and, regardless, Mandalapu was offered a contract to proceed to his fifth-year of residency (covering the July 2012 to July 2013 time period).[2] App. 23-24.

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[2] The trial court improperly infringed on the summary judgment standard and dismissed these points, finding that the relatively

Mydlo officially terminated Mandalapu in a June 6, 2012 letter (just a few weeks after Mandalpu's last complaint of discrimination). App. 16. About a year later, in July 2013, Mydlo filled out a credentials-verification form that was submitted to the Federation of State Medical Boards. In this form, Mydlo falsely indicated that Mandalapu had only completed the first-year training level for urology residency and that Mandalapu had been on probation at Temple. App. 17.

Mandalapu filed a lawsuit in district court, asserting several claims against the defendants, and summary judgment was granted on July 5, 2018. App. 5-49. An appeal to the Third Circuit was timely filed, only focusing on the retaliation claim against Temple under 42 U.S.C. § 1981. The Third Circuit summarily affirmed the District Court's decision. App. 2-4.

Of note, the Third Circuit stated that to establish pretext, "a plaintiff must show '(1) that retaliatory animus played a role in the employer's decisionmaking process and (2) that it had a determinative effect on the outcome of that process.'" App. 2. In doing so, it cited to *Krouse v. Am. Sterlizer Co.*, 126 F.3d 494, 501 (3d Cir. 1997), which is a pre-*Reeves* decision.

The focus of this writ concerns the first prong referenced by the lower court, specifically whether

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large number of surgeries he performed does not mean he "performed those surgeries well" or that the contract, signed by Mydlo, does not mean that Mydlo read it or means that he believed Mandalapu should have been promoted. App. 26.

discriminatory or retaliatory "animus" is required at the summary judgment stage.

REASONS FOR GRANTING THE WRIT

The Third Circuit decision in the instant case directly contradicts the Supreme Court's holding in *Reeves* and also deepens a conflict regarding whether "animus" is required in order to avoid summary judgment.

The Third Circuit in this case held that animus is required at the summary judgment stage in order to establish pretext. This is an incorrect application of *Reeves* and highlights the discrepancies among the circuits as to how to apply *Reeves* and whether "animus" is required to avoid summary judgment.

I. "Animus" is not necessary to prove discrimination or retaliation

McDonnell Douglas, the formative decision that developed the burden-shifting analysis in employment cases, had no mention of the need for "animus" to allow a jury to find discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Although *Reeves*, in supporting a jury verdict in favor of the employee, did note that the plaintiff had produced evidence of discriminatory animus based on age, this Court made it clear that a jury may infer unlawful discrimination based on falsity of the employer's articulated reason for the adverse action. *Reeves v. Sanderson Plumbing*,

530 U.S. 133, 147 (2000).[3] Previously, in *Hicks*, this Court similarly made no requirement for a plaintiff to show or prove animus in order to prevail:

> The factfinder's disbelief of the reasons put forward by the defendant (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 defendant's proffered reasons will *permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "no additional proof of discrimination is required."*

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

As referenced below, appellate courts throughout the country have periodically referenced the possible need for "animus" to prove discrimination or retaliation in an employment case. "Animus" is generally defined as a "strong dislike or enmity; hostile attitude; animosity,"[4] "a usually prejudiced and often spiteful or malevolent ill will,"[5] or "a strong feeling of disliking

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[3] The *Reeves* court did note that there may be circumstances where the record conclusively reveals that real reason could be "some other, nondiscriminatory reason" than the reason articulated by the employer.

[4] *See www.dictionary.com/browse/animus.*

[5] *See www.merriam-webster.com/dictionary/animus.*

someone or something."[6] But nothing about the applicable statutes or this Court's guidance in prior rulings require "animus" for a plaintiff to prevail. For example, it is quite possible – if not likely – for a decision-maker to have the *intent* to discriminate or retaliate without disliking or having hostility towards a protected category. The decision-maker could simply be uncomfortable or unfamiliar with a certain protected category; could be ignorant of anti-discrimination or anti-retaliation laws due to poor employer training; or simply be willing to commit a tort-like offense against such an individual.

Indeed, this Court recently confirmed, in the context of a 42 U.S.C. § 1981 lawsuit, that discrimination claims are to be analyzed under tort principles. *Comcast Corp v. Nat'l Ass'n of African American-Owned Media*, 2020 U.S. LEXIS 1908 (Mar. 23, 2020). Requiring "animus" to prove causation creates an unnecessary additional hurdle for plaintiffs, and several lower courts are utilizing such a requirement to inappropriately grant summary judgments or take away plaintiff-favorable jury verdicts.

II. The Third Circuit did not apply the correct standard

The Third Circuit held in this matter that to establish pretext, a plaintiff must show "'(1) **that retaliatory animus played a role in the employer's decisionmaking process** and (2) that it had a determinative effect on the outcome of that

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[6] *See https://www.macmillandictionary.com/us/dictionary/american/animus.*

process.'" *Mandalapu v. Temple Univ. Hosp.*, 786 Fed. Appx. 348, 349 (Dec. 3, 2019) (citing *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 501 (3d Cir. 1997)) (emphasis added). App. 2. *Krouse*, a pre-*Reeves* decision, relied on two prior cases to articulate the standard: *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989) and *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287 (11th Cir. 1997). But neither of those cases referenced the need for "animus." Instead, they referenced the need to provide some evidence of causation, which *Reeves* later confirmed could be inferred by establishing pretext. It is unclear why the Third Circuit referenced the need for showing "animus" even though *Reeves* and *Hicks* makes no such requirement to prove unlawful discrimination. The district court, in granting summary judgment, similarly referenced the need for "retaliatory animus." App. 31.

III. The Circuit courts are not consistently evaluating pretext at the summary judgment stage and differing with respect to applying *Reeves*

Generally, the First, Second, Fourth, Fifth, Ninth, and Tenth circuits apply *Reeves* in a manner that allows a plaintiff to survive summary judgment by establishing pretext, and not requiring a separate showing of "animus." The Third, Sixth, Seventh, Eighth, and Eleventh circuits have standards that apparently require more evidence, including the possible need for "animus," and arguably make it easier

for courts to grant summary judgments in favor of employers compared to the other circuits.

The First Circuit upheld a jury verdict in favor of a plaintiff where it relied on *Reeves* to confirm that discrimination may be inferred by a jury where there is sufficient evidence that an employer's alleged justified reason is false. *Rinsky v. Cushman & Wakefield, Inc.*, 918 F.3d 8, 28-29 (1st Cir. 2019); *see also Ahmed v. Johnson*, 752 F.3d 490, 503 (1st Cir. 2014) ("sufficient evidence to support a finding of pretext, in combination with the plaintiff's prima facie showing, can suffice at times to raise an inference of discrimination that will defeat summary judgment").

The Second Circuit has similarly applied *Reeves*. *Sands v. Rice*, 619 Fed. Appx. 31, 32 (2d Cir. 2015). However, the Second Circuit has also deviated from *Reeves* to require more than pretext. *Martinez v. Davis Polk & Wardell LLP*, 713 Fed. Appx. 53, 56 (2d Cir. 2017) (citing a pre-*Reeves* decision of *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 561 (2d Cir. 1997)).

The Third Circuit has generally been consistent with respect to following *Reeves* and allowing for an inference of discrimination without the need for animus. *See Scanlon v. Jeanes Hosp.*, 319 Fed. Appx. 151, 154 (3d Cir. 2009); *Burton v. Teleflex Inc.*, 707 F.3d 417, 430-31 (3d Cir. 2013). However, the Third Circuit decision that led to this writ inexplicably disregards the standard and reverts back to requiring "animus."

The Fourth and Fifth Circuits generally track the *Reeves* standard. *See Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 253-254 (4th Cir. 2015);

Norman v. Call-A-Nurse, LLC, 783 Fed. Appx. 307, 308 (4th Cir. 2019); *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 350-51 (5th Cir. 2005); *Inmon v. Mueller Copper Tube Co.*, 757 Fed. Appx. 376, 380-81 (5th Cir. 2019); *Stennett v. Tupelo Pub. Sch. Dist.*, 619 Fed. Appx. 310, 317 (5th Cir. 2015).

The Sixth Circuit has previously followed *Reeves*, not requiring animus. *See Moffat v. Wal-Mart Stores, Inc.*, 620 Fed. Appx. 453, 461 (6th Cir. 2015) (reversing summary judgment); *Fuller v. Mich. DOT*, 580 Fed. Appx. 416, 426-27 (6th Cir. 2014); *Back v. Nestle USA, Inc.*, 694 F.3d 571, 579 (6th Cir. 2012) (not requiring any separate "animus" and focusing on whether the employer fired the employee for its stated reason or not). However, recently the Sixth Circuit has deviated from this standard, arguably requiring more than just pretext. *See Alberty v. Columbus Twp.*, 730 Fed. Appx. 352, 359-360 (6th Cir. 2018) (suggesting more than just pretext is needed). *Alberty* had a dissenting opinion indicating concerns about not following *Reeves* or the summary judgment standard by resolving factual disputes. *Id.* at 365-367.

The Seventh Circuit requires more than just establishing pretext. Specifically, the Seventh Circuit has interpreted *Reeves* to require "circumstances demonstrating the presence of intentional discrimination" at the summary judgment stage. *See Rayford v. Wexford Health Sources, Inc.*, 400 Fed. Appx. 100, 104 (7th Cir. 2010); *McGowan v. Deere & Co.*, 581 F.3d 575, 581 (7th Cir. 2009).

The Eighth Circuit similarly appears to require more than just establishing pretext. *See Lucke v.*

Solsvig, 912 F.3d 1084, 1088 (8th Cir. 2019) (citing a pre-*Reeves* Eighth Circuit decision, stating "the plaintiff must present evidence "that the reason was false, and that discrimination was the real reason."); *Johnson v. Securitas Sec. Servs. USA, Inc.*, 769 F.3d 605, 611 (8th Cir. 2014) (requiring "more substantial evidence of discrimination" to prove pretext); *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 976-77 (8th Cir. 2012) (finding that even though a reasonably jury could find that the employer's asserted nondiscriminatory reason "has no basis in fact," affirming summary judgment anyway because there theoretically could have been other non-discriminatory reasons for the termination); *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1002 (8th Cir. 2012) (allowing an employer to rely on its alleged "good faith" belief at the summary judgment stage). In *Pulczinski*, the Eight Circuit acknowledged *Reeves*, but allowed an employer to invoke an "honest belief" defense, essentially allowing courts to avoid actually applying *Reeves*. Under such a standard, applied occasionally in other circuits as well, a decision-maker only needs to testify along the lines of "Even though the employee did not [insert bad act], I believed the plaintiff did in fact [insert bad act]," and summary judgment will be granted.

The Ninth and Tenth Circuits have consistently followed the guidance in *Reeves*, confirming that establishing falsity of the employer's articulated reason for the adverse action can allow for a jury to infer discrimination. *Viana v. FedEx Corp. Servs.*, 728 Fed. Appx. 642, 644-45 (9th Cir. 2018); *Beck v. UFCW, Local 99*, 506 F.3d 874, 883 (9th Cir. 2007); *Salguero v.*

City of Clovis, 366 F.3d 1168, 1176 (10th Cir. 2005); *Sotunde v. Safeway, Inc.*, 716 Fed. Appx. 758, 762 (10th Cir. 2017); *Drury v. BNSF Ry. Co.*, 657 Fed. Appx. 785, 789-90 (10th Cir. 2016).

The Eleventh Circuit has apparently created a modified standard, requiring "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker" in order to avoid summary judgment. *Dukes v. Shelby Cty. Bd. of Educ.*, 762 Fed. Appx. 1007, 1013 (11th Cir. 2019) (citing *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011)); *see also Dishman v. Fla. Dep't of Juvenile Justice*, 659 Fed. Appx. 552, 555-57 (11th Cir. 2016) (weighing the evidence to grant summary judgment).

This is not to say that establishing pretext is the only way to prove unlawful discrimination or retaliation. It also does not mean that establishing pretext would automatically result in a finding of liability. The issue is whether or not summary judgment is appropriate in favor of an employer when there is sufficient evidence of pretext. Nothing is to prevent an employer from making relevant arguments at trial for a jury to evaluate. Courts have strayed from *Reeves* over the years and are not consistently applying this Court's precedent. This Court should clarify and confirm that a plaintiff can avoid summary judgment simply by establishing pretext, and that there is no need to show discriminatory or retaliatory "animus."

Ultimately, there are inconsistencies between, and even within, various circuits that this Court should address.

CONCLUSION

Several courts are disregarding or inappropriately applying the *Reeves* standard in order to create ways to dismiss employment cases and infringe on a party's right to a jury trial. This problem must be addressed. For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully Submitted,

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