No. 19-178

IN THE

Supreme Court of the United States

JAGDISH C. LAUL,

Petitioner,

v.

LOS ALAMOS NATIONAL LABORATORIES,

Respondent.

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

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Summary judgment in this typical employment discrimination case requires the trial court to weigh and choose between competing inferences of what was and was not a part of a motivation for an employment decision. Choosing among competing inferences is uniquely a jury competency. Determining motive is uniquely a jury competency. The Seventh Amendment recognizes that judges, institutionally, are not good at weighing competing inferences and deciphering motive.

Still, that is what the Circuit Court's application of the McDonnell Douglas burden-shifting test required of the trial court at summary judgment, to the exclusion of Dr. Laul's constitutional right to a jury determination of these classic jury questions.

QUESTION PRESENTED

Does requiring the trial judge to weigh inferences (and in some cases inferences from inferences) and determine motive from competing testimony deprive a plaintiff of his Seventh Amendment right to make his case to a jury?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY

Dr. Laul filed suit against his former employer for failing to rehire him—indeed, for failing to even grant him an interview—for a number of positions for which he applied, alleging age and national origin discrimination and alleging retaliation based on his previous complaints of discrimination. Employer's hiring decisions were all made during Dr. Laul protracted litigation of whether his original termination was discriminatory.

His suit, like his original discrimination case before it, was dismissed by the trial court at the summary judgment phase. Applying what has become known as the McDonnell Douglas test, the trial court judge, sitting without a jury, considered competing inferences (and, in some cases, inferences based on inferences) from both sides and chose among them to make its own decision concerning motive of employer.

In every similar employment discrimination case the *McDonnell Douglas* framework turns entirely on inferences of employer motive. Juries are very good at drawing inferences to determine motive. Judges are not. But at summary judgment stage of a case, a federal judge, unmindful of a jury, grinds through a *McDonnell Douglas* analysis by choosing from among the competing inferences. By getting lost in the thicket required by *McDonnell Douglas* inferences, a judge is prone to lose sight of the polestar of the Seventh Amendment.

This should give us Seventh Amendment misgivings. Discrimination cases come with a ready-made fact dispute about Employer's motivation. Choosing which of competing rational inferences to draw from the observable facts is the quintessential question for a jury.

This case is an example of how the byzantine edifice of employment discrimination law has wrought a serious wrong: It has handed over to judges the power and traditional role of the jury to choose among disputed inferences to find motive.

The Seventh Amendment cautions we should not invite the trial judge, instead of jury, to weigh the facts supporting an inference of the "proffered reason" against the facts supporting the inference of "the proffered reason is pretext" or to weigh the competing inferences against each other. *McDonnell Douglas* leads us astray of the task at hand.

As then-Judge Gorsuch hinted in *Paup v. Gear* in 2009:

> [S]ome have criticized McDonnell Douglas as improperly diverting attention away from the real question posed by the ADEA —whether age discrimination actually took place—and substituting in its stead a proxy that only imperfectly tracks that inquiry. But *McDonnell Douglas* of course remains binding on us.

Paup v. Gear Prods., Inc., 327 F. App'x 100, 113 (10th Cir. 2009) (Gorsuch, J.) (citations omitted)); *see also Hinds v. Sprint/United Mgmt. Co.,* 523 F.3d 1187, 1202 n. 12 (10th Cir. 2008) (noting the Court will apply the test "so long as *McDonnell Douglas* remains the law governing our summary judgment analysis"). The Tenth Circuit in particular has nudged for clarity in this area. *See, e.g., Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1224-28 (10th Cir.2003) (Hartz, J., writing separately (from his own Opinion)); Timothy M. Tymkovich, *The Problem with Pretext,* 85 DENV. U.L.REV. 503, 528-29 (2008).

The "problem with pretext" (to use Judge Tymkovich) in a case like Dr. Laul's is that, as an issue

of institutional competency, juries are best for this. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). There is no blanket exemption for employment discrimination cases. *Cf. Reeves v. Sanderson Plumbing Prods.,* 530 U.S. 133, 150 (2000) ("[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence."). When a trial judge performs this kind of analysis, she usurps the function of the jury.

I. How This Decision Was Made And Continues to Be Argued Illustrates The Misleading Nature Of The Idea Of "Undisputed Material Facts" Under McDonnell Douglas Test.

In its *Brief in Opposition*, LANS sets out twenty-four (24) pages slogging through each job listing mechanically under point heading "Undisputed Material Facts." But in reality Dr. Laul's entire case was entirely a dispute about the employer's motivations. Employer's motivations can only be shown indirectly through inferences, and his dispute at its heart was about what inferences could be drawn from the fact that while he was in protracted litigation against employer for age and race discrimination, and he happened to be denied interview opportunity for each and every job in his field.

The entire case was about whether the employer's given reasons for not considering him were pretextual. This Court has made clear that (1) an employee is "not limited to presenting evidence of a certain type," and (2) pretext evidence may take a variety of forms. *Patterson v. McLean Credit Union*,

491 U.S. 164, 187 (1989*)* (superseded by statute in part on other grounds, 42 U.S.C. § 1981(b)). Here jurors as fact-finders would be asked to determine if it is mere coincidence that a highly-qualified experienced scientist who had a pending discrimination lawsuit was denied dozens of interviews for highly-technicals jobs due to whistleblowing, or for a valid reason?

The question of inferring motive vexes judges, but is perfect for juries. *Cf. Kozlowski v. Hampton School Board,* 77 Fed. Appx. 133, 143-44 (4th Cir. 2003) ("Given the amount of disagreement among judges of the federal courts of appeals over whether a jury may infer discrimination simply from their disbelief of the employer's stated justifications."); *Townsend v. Lumbermens Mut. Cas. Co.,* 294 F.3d 1232 (10th Cir. 2002).

In almost every employment discrimination cases, both parties present facts, put them in context, and ask the fact-finder to draw competing inferences from them. Juries are good at this work. *E.g., Desert Palace, Inc. v. Costa,* 539 U.S. 90, 100 (2003) ("[J]uries are routinely instructed that '[t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence.'" (second alteration in original) (quoting 1A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS, CRIMINAL § 12.04 (5th ed. 2000))).

This is a jury's sacred role. *See Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944) (explaining that it is the jury's role to weigh evidence, draw inferences, and reach conclusions); *Standard Oil Co. v. Brown*, 218 U.S. 78, 86 (1910) ("But what the facts were...and what conclusions were to be drawn from them were for the jury and cannot be reviewed here.").

Juries come on to the job much better equipped by unique and diverse life-experience to do this work.

See Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 U. COLO. L. REV. 233, 293 (2013) (proposing that jurors be instructed on the value of jury service, including an admonition to remain tolerant toward fellow jurors' diverse opinions because each juror has a unique life experience).

To really determine a party's reasons for its actions requires the fact-finder to choose among competing inferences from the facts. This–except in the most one-sided of cases—involves observing the witness' demeanor, evaluating a party's behavior, and particularly assessing how the party conducts itself when confronted by cross-examination. In *California v. Green,* 399 U.S. 149, 158 (1970), this Court described juror's work drawing inferences and evaluating credibility as the "greatest legal engine ever invented for the discovery of truth" (*quoting* 5 J. WIGMORE, EVIDENCE § 1367, at 32 (Chadbourn rev. 1970)) (cleaned up)).

This is the core institutional competency of juries, which is not shared with judges or courts. *Compare Cedillo v. Int'l Ass'n of Bridge & Structural Iron Workers, Local Union No. 1*, 603 F.2d 7, 11 (7th Cir. 1979) ("[A]s a general principle, questions of motive and intent are particularly inappropriate for summary adjudication.") *with Colby v. Klune,* 178 F.2d 872, 874 (2d Cir. 1949) (reasoning that "demeanor may be the most effective impeachment").

II. Dr. Laul Has Consistently Resisted Summary Judgment Precisely In Order To Present His Case To Jury. There Is No Preservation Problem.

Dr. Laul's argument is that to the extent the courts below got caught up in the byzantine machinery of the *McDonnell Douglas* test and drew their own inferences from the competing inferences supported by

the facts, they usurped the constitutional function of the jury. At the end of the day, a federal judge, without a jury, laid out dozens of pages of facts for the purposes of drawing inferences about motive, then that judge weighed those motive inferences and chose from among them, in favor of the movant on summary judgment.

LANS mischaracterizes Dr. Laul's argument as invited error, or making an unpreserved challenge to, the *McDonnell Douglas* test. The fact is that both the parties and the Court below were and constrained by this existing precedent and so conformed their cases and arguments to the governing law of the day. This Court is the body uniquely positioned to actually address the bigger picture: Is the *McDonnell-Douglas* framework a framework *for the jury?* And, to the extent the courts below got caught up in the byzantine machinery of the *McDonnell Douglas* and forgot the Seventh Amendment, has the test as Thus the test, as applied gone beyond the boundaries of the field of summary judgment.

Summary judgment is called a judgment "as a matter of law" and on "undisputed facts." To the extent that the courts are choosing from competing inferences of motive, they are making judgments of *fact*, on *disputed* facts.

CONCLUSION

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

Respectfully submitted,

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