

No. _____

In the
Supreme Court of the United States

HAROLD A. FLORES,
Petitioner,
v.

ENTERGY NUCLEAR OPERATIONS, INC.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Michael Confusione
Counsel of Record
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550; (888) 963-8864 (fax)
mc@heggelaw.com

*Counsel for Petitioner,
Harold A. Flores*

Question Presented

What quantum of evidence is sufficient to survive summary judgment on a Title VII retaliation claim – here, that defendant Entergy retaliated against its employee, plaintiff Flores, for supporting a colleague’s racial discrimination claim?

Parties to the Proceedings

Petitioner Harold A. Flores was the plaintiff in the United States District Court and the appellant in the United States Court of Appeals. Respondent Entergy was the defendant in the District Court and the appellee in the Court of Appeals. Wayne Griffin and Daniel Gagnon were defendants in the District Court.

Statement of Related Proceedings

- *Flores v. Entergy Nuclear Operations, Inc.*, No. 18-1936 (2d Cir.) (Summary Order issued May 28, 2019; mandate issued June 18, 2019)
- *Flores v. Entergy Nuclear Operations, Inc.*, No. 16-CV-7207 (CS) (S.D. N.Y.) (Opinion and Order issued May 31, 2018; final judgment entered May 31, 2018)

There are no additional proceedings in any court that are directly related to this case.

Table of Contents

Question Presented	i
Parties to the Proceedings.....	ii
Statement of Related Proceedings.....	ii
Table of Authorities	iv
Petition for a Writ of Certiorari.....	1
Opinions Below.....	1
Jurisdiction.....	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Petition.....	8
Conclusion	15
Appendix	
Appendix A Summary Order in the United States Court of Appeals for the Second Circuit (May 28, 2019)	App. 1
Appendix B Opinion and Order in the United States District Court, Southern District of New York (May 31, 2018)	App. 8

Table of Authorities

CASES

<u>Adickes v. S. H. Kress & Co.,</u> 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) 9
<u>Anderson v. Liberty Lobby, Inc.,</u> 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 9, 14, 15
<u>Burlington N. & Santa Fe Ry. Co. v. White,</u> 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) 8, 13
<u>Cosgrove v. Sears, Roebuck & Co.,</u> 9 F.3d 1033 (2d Cir. 1993) 7
<u>Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn.,</u> 555 U.S. 271, 129 S. Ct. 846, 172 L. Ed. 2d 650 (2009) 8
<u>Gorman-Bakos v. Cornell Co-op Extension of Schenectady Cty.,</u> 252 F.3d 545 (2d Cir. 2001) 11
<u>Graziadio v. Culinary Inst. of Am.,</u> 817 F.3d 415 (2d Cir. 2016) 12
<u>Kennedy v. Silas Mason Co.,</u> 334 U.S. 249, 68 S. Ct. 1031, 92 L. Ed. 1347 (1948) 9
<u>Mitchell v. Robert DeMario Jewelry, Inc.,</u> 361 U.S. 288, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960) 8

<u>Nat'l R.R. Passenger Corp. v. Morgan,</u> 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002).....	9, 10
<u>Redd v. New York Div. of Parole,</u> 678 F.3d 166 (2d Cir. 2012)	10
<u>Reeves v. Sanderson Plumbing Prod., Inc.,</u> 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).....	12
<u>Univ. of Texas Sw. Med. Ctr. v. Nassar,</u> 570 U.S. 338, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013).....	8
<u>Vale v. Great Neck Water Pollution Control Dist.,</u> 80 F. Supp. 3d (E.D.N.Y. 2015)	13

STATUTES

42 U.S.C. § 2000e, et seq	2
28 U.S.C.A. § 1254 (West)	1
42 U.S.C. § 2000e-3 (West)	2
42 U.S.C. § 2000e-5(e)(1)	10
42 U.S.C. § 2201a.....	12

Petition for a Writ of Certiorari

Harold A. Flores petitions this Court for a writ of certiorari to review the Orders and Decisions of the Court of Appeals and District Court.

Opinions Below

The May 28, 2019 Summary Order of the United States Court of Appeals for the Second Circuit is unpublished and appears at Appendix A. The May 31, 2018 Decision of the United States District Court for the Southern District of New York is unpublished and appears at Appendix B.

Jurisdiction

The Summary Order of the United States Court of Appeals was entered on May 28, 2019. (Appendix A). This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254 (West).

**Constitutional and
Statutory Provisions Involved**

“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.” 42 U.S.C.A. § 2000e-3 (West).

Statement of the Case

Since 2005, plaintiff has been employed (except for a short break in employment from May 2013 to October 2014) as an armed Nuclear Security Officer (“NSO”) at Indian Point Energy Center (“IPEC”), operated by defendant Entergy.

Plaintiff’s employment with defendant was satisfactory until May 2013, when plaintiff, who is African-American and Hispanic, submitted an affidavit in support of a fellow African-American employee’s then-pending racial discrimination lawsuit against their common employer. Plaintiff submitted the Affidavit on or about May 13, 2013. Entergy fired him three days later (claiming that plaintiff’s termination was already in process beforehand).

This resulted in a Union-filed grievance on plaintiff’s behalf and subsequent settlement agreement reinstating plaintiff’s employment. In his verified Charge of Discrimination then in his Complaint filed in the District court, plaintiff charged that Entergy fired him and took other retaliatory actions in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e, et seq. “Entergy induced Plaintiff to waive his right to seek recovery of back wages as a result of his unlawful termination by falsely representing that a New York State Pistol License was required to perform the duties and responsibilities of the position of Nuclear Safety Officer. Entergy falsely

and misleadingly induced Plaintiff to waive his right to reimbursement for back wages. Plaintiff entered into the Agreement based on Entergy’s false and misleading representations that he was required to obtain a New York State Pistol License in order to be employed as a Nuclear Security Officer at IPEC. At the time that Entergy entered into the Agreement, Nuclear Security Officers were not required to possess a New York State Pistol License in order to lawfully possess and/or use firearms in the course of their duties – a fact known to Entergy.” Certainly by August 2014 when Entergy started issuing preemption cards, “a pistol license was not required for Indian Point Nuclear Security Officers to possess or use firearms in the course of their duties.”

Ultimately, plaintiff was forced to incur the expense of retaining an attorney to apply to a judge to facilitate his reinstatement of employment at Entergy. Yet, upon plaintiff’s return to employment in October 2014, defendant’s retaliatory practices against plaintiff continued. Plaintiff had been arrested in April 2013 for misdemeanor possession of a controlled dangerous substance. The charge was ultimately dismissed in its entirety. Yet Entergy required plaintiff to submit to continuous drug tests despite the dismissal of the charge and despite plaintiff’s consistently negative drug test results. Entergy also required Plaintiff to “engage in a psycho-educational program,” “show documented compliance weekly, and “[attend] the intensified random follow-up testing program over the next three years...” Entergy “continued to require Plaintiff to submit to drug testing ... for a charge that was dismissed in its entirety,” plaintiff affirmed, in continued retaliation and discrimination. “Since

October 2014, Plaintiff has submitted to numerous drug tests as required by Entergy and carried out at the direction of Defendants Griffin and Gagnon. Each of Plaintiff's drug tests has been negative for the presence of drugs. Entergy, through Defendant Griffin, has never rescinded the requirement that Plaintiff regularly submit to drug testing."

This resulted in plaintiff being perceived, falsely, as a drug addict, and continued adverse actions against plaintiff by his supervisors and co-workers: "Because of Entergy's treatment, through Defendants Griffin and Gagnon, as Plaintiff's co-workers call him names and make comments characterizing him as being a drug addict and/or alcoholic." This happened "more than a hundred times," plaintiff affirmed. Being called a drug addict by co-workers "bothered" plaintiff. This happened in the "locker room" and "gun room" (among other places). As plaintiff affirmed, "I was reinstated to my position in the Security Department in October 2014. On October 9, 2014, Entergy continued its retaliation against me and required that I 'engage in psycho-educational program...show documented compliance weekly...[attend] the intensified random follow up testing program over the next three years' ... for an arrest involving a charge that was *dismissed in its entirety*. I had been drug tested by Entergy within 1 week of the arrest, which results were negative. I have been harassed and retaliated against by being subjected to numerous urinalysis tests, the results of which have all been negative for the presence of alcohol or drugs. The unwarranted urinalysis tests are requested in front of my peers, I have been teased and harassed by my peers who call me names and make

comments characterizing me as being a drug addict and/or alcoholic, causing harm to my reputation,” plaintiff affirmed in his submissions.

Plaintiff charged that defendant’s continued requirement that he submit to routine drug testing was in retaliation for his protected activity of having submitted the affidavit in support of his co-worker’s race discrimination claim. “Entergy’s repeated Fact Findings against Plaintiff are in retaliation for his having engaged in protected activity.” Other retaliatory actions against plaintiff included “rescheduling the date for his mandatory physical examination for a time when they knew that Plaintiff was away on vacation”; unreasonably delaying “Plaintiff’s mandatory requalification test alleging that ‘management was not available’ to administer the test; “punitively reassigning” Plaintiff to the day shift from his permanently scheduled night shift; refusing to provide documentation to Plaintiff that was provided to every other Security Officer in and around August 2014 that allegedly eliminated the purported requirement that Nuclear Security Officers possess a New York State Pistol License; imposing a three day without pay suspension “in retaliation for his protected activities”; and refusing to allow Plaintiff to use accrued time off in continued retaliation for his protected activities, while simultaneously permitting 8 other Security Force employees such call out. A448-449. As plaintiff affirmed, “Entergy is aware of the harassing atmosphere - and the fact that there was no basis for requiring the tests in the first instance. All of the test results have been negative. Entergy continues to require the urinalysis testing with the intention to

facilitate harassment in the workplace by my peers and retaliate against me because of my protected activity.”

The Rulings Below

The District court ruled (Appendix B) that “allegedly retaliatory events occurring before June 17, 2015” were not timely and would be disregarded in assessing the claim. Thus, though plaintiff identified in his summary judgment opposition several retaliatory acts taken against him, the court considered only four of them, then ruled that “Plaintiff cannot sustain a retaliation claim based on” these four actions. “First, Plaintiff cannot demonstrate a causal connection between his protected activity and any adverse employment action.” “Second, ... Defendant has articulated legitimate non-retaliatory reasons for Plaintiff’s fact findings and suspension: Plaintiff’s unscheduled absences and failure to follow Defendant’s policy... Plaintiff, in response, makes no attempt to show that the reasons offered for the fact findings and suspension were a pretext for retaliation. A jury could not reasonably find on this record that retaliation was a motivating factor in Defendant’s employment decisions. Thus, Plaintiff’s retaliation claim is dismissed.”

The Court of Appeals affirmed (Appendix 1), ruling that the District court properly excluded consideration of prior discriminatory acts: “Flores argues that the statutory limitations do not apply because the pre-June 17, 2015 acts are ‘part of the overall retaliation and discrimination charge.’ We disagree. As we have previously explained, the ‘continuing violation exception’ applies only where a plaintiff alleges an ‘ongoing policy’ of related discrimination, rather than

cases of ‘*discrete* acts of discrimination or retaliation that occur outside the statutory time period, even if other acts of discrimination occurred within the statutory time period.’ ... Here, Flores has provided no evidence that the allegedly retaliatory acts were part of such an ongoing policy.” The Court ruled that a reasonable jury could not find in plaintiff’s favor on his retaliation (or ADA discrimination) claim:

... as we have already explained, claims based on adverse employment actions that occurred before June 17, 2015 (including Flores’s temporary 2013 termination) are barred by the relevant limitations period. Moreover, any inference of retaliation based on the proximity of Flores’s submission and his termination is undermined by undisputed evidence that the termination decision *preceded* Flores’s protected activity, App’x 394-97, and was based on a substantial disciplinary record, App’x 80-90, 347-391. Moreover, this 2013 termination is the only adverse employment action for which Flores advances any argument (rather than a conclusory statement) of a “causal connection” to a protected activity. Accordingly, Flores has failed to establish a *prima facie* case of retaliation under Title VII. *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 (2d Cir. 1993). [Appendix A]

Reasons for Granting the Petition

The Court should clarify for lower federal courts the quantum of evidence sufficient to survive summary judgment in a Title VII retaliation case. As this Court has stressed, antiretaliation provisions seek to “prevent[] an employer from interfering ... with an employee’s efforts to secure or advance enforcement of [antidiscrimination] guarantees.” Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 367–68, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013). “Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses.” Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006); Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960); Crawford v. Metro. Gov’t of Nashville & Davidson Cty., Tenn., 555 U.S. 271, 279, 129 S. Ct. 846, 172 L. Ed. 2d 650 (2009).

Here, the summary judgment record permits a reasonable jury to find that defendant took adverse employment actions against its employee, Mr. Flores, in retaliation for supporting his co-employee’s racial discrimination lawsuit against their employer, and that defendant continued taking adverse actions against plaintiff under the guise of labeling plaintiff a drug addict or alcoholic. A jury viewing the record can reject the employer’s proffered non-discriminatory reasons for its actions and find, at trial, that Entergy took the actions in retaliation for plaintiff’s activity protected by Title VII.

The lower courts’ decisions in this case illustrate the growing problem with the overuse of summary

judgment dismissals in federal discrimination cases. Lower courts are not adhering to the limited role of the judge on a summary judgment motion. As this Court has said, summary judgment “by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158–159, 90 S. Ct. 1598, 1608–1609, 26 L. Ed. 2d 142 (1970). Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. Kennedy v. Silas Mason Co., 334 U.S. 249, 68 S. Ct. 1031, 92 L. Ed. 1347 (1948).” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

In Mr. Flores’ case, the lower courts, as lower courts have done increasingly in the thirty years since Anderson, ignored this Court’s directive to proceed “with caution in granting summary judgment.” The lower courts, first, limited the acts they would even consider in assessing the sufficiency of Mr. Flores’ retaliation claim. As this Court has said, hostile work environment claims are “composed of a series of separate acts that collectively constitute one ‘unlawful employment practice.’” Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117, 122 S. Ct. 2061, 153 L. Ed.

2d 106 (2002) (*quoting* 42 U.S.C. § 2000e-5(e)(1)). A court may consider all of the acts that allegedly constitute the “unlawful employment practice” as long as at least one such act occurred within the 300-day time period. Id. National R.R. Passenger Corp., 536 U.S. 101. Mr. Flores’ EEOC complaint detailed allegations of pre-July 1, 2015 retaliatory acts that occurred as early as May 2013, beginning with the termination of his employment and continuing with Entergy’s refusal to reemploy him in July 2014 despite the absence of a requirement for a pistol license to perform the duties of the position. The 2013-2014 retaliatory acts that plaintiff detailed in his filings are reasonably related to and part of the overall retaliation and discrimination charge that plaintiff lodged against his employer. Though the events in 2013 and 2014 occurred outside of the 300-day time period preceding the filing of the EEOC complaint, the acts of retaliation that plaintiff detailed were of the same nature as those within the 300-day time period; the conduct complained of in both the EEOC complaint and the federal complaint alleges an ongoing retaliatory course of conduct by the employer such that any investigation conducted by the EEOC would necessarily have included acts prior to July 1, 2015 because they were reasonably related to plaintiff’s overall charge of retaliation and, relatedly, discrimination. These retaliatory acts should thus have been considered in assessing the summary judgment motion. This Court should clarify that the lower courts erred in disregarding this evidence in Mr. Flores’ case. See, e.g., Redd v. New York Div. of Parole, 678 F.3d 166, 176 (2d Cir. 2012) (stressing that in employment discrimination cases courts should evaluate facts

holistically rather than “view individual incidents in isolation” or in “piecemeal fashion”).

The lower courts disregarded what a reasonable jury viewing the evidence in Mr. Flores’ case can find. The District court said that plaintiff’s claim failed because “Plaintiff cannot demonstrate a causal connection between his protected activity and any adverse employment action” and a reasonable jury cannot find that defendant’s proffered reasons for its actions “were a pretext for retaliation.” But plaintiff was terminated three days after submitting the affidavit in support of the fellow African-American employee’s then-pending racial discrimination lawsuit against defendant Entergy. A reasonable jury can reject defendant’s proffered explanation that this was already in process and find a causal connection because of the close timing, this Court should clarify. See, e.g., Gorman-Bakos v. Cornell Co-op Extension of Schenectady Cty., 252 F.3d 545, 554 (2d Cir. 2001) (plaintiff can indirectly establish a causal connection to support a discrimination or retaliation claim by showing that the protected activity was closely followed in time by the adverse employment action.”)

The District court said, “Defendant has articulated legitimate non-retaliatory reasons for Plaintiff’s fact findings and suspension: Plaintiff’s unscheduled absences and failure to follow Defendant’s policy... A jury could not reasonably find on this record that retaliation was a motivating factor in Defendant’s employment decisions.” This Court should clarify that a plaintiff “may prove ... retaliation ... by demonstrating weaknesses, implausibilities,

inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action. From such discrepancies, a reasonable juror could conclude that the explanations were a pretext for a prohibited reason." Graziadio v. Culinary Inst. of Am., 817 F.3d 415, 430 (2d Cir. 2016); see Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) ("Proof that the defendant's explanation is unworthy of credence is ... one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.") As Mr. Flores' affirmed, Entergy knew that the pistol license was not a job requirement in light of the fact that NRC regulations for nuclear security personnel preempted New York State firearms licensing laws. Entergy did not require its Nuclear Security Officers to obtain pistol permits to perform their job duties. Indian Point Energy Center "obtained [NRC] authorization to use Section 161A preemption authority under 42 U.S.C. 2201a to expressly authorize Security Officers to carry weapons pursuant to their official duties at the Indian Point Energy Center. The authorization preempts local and state law pertaining to possession of these weapons." Entergy's requirement, for purposes of reemployment, that plaintiff obtain a New York State pistol license was illusory.

A jury can find that plaintiff was retaliated against by way of the January 2014 settlement as well, whereby Entergy falsely induced plaintiff to waive all legal claims to back pay in exchange for reinstatement of his employment under the condition that he obtain his New York State pistol license on or before July 1,

2014. Adverse employment action is broader for retaliation claims, this Court should clarify. See, e.g., Vale v. Great Neck Water Pollution Control Dist., 80 F. Supp. 3d 426, 439 (E.D.N.Y. 2015) (“Unlike claims of discrimination, which limit what qualifies as an ‘adverse employment action’ to changes in the terms and conditions of employment, adverse employment actions in the context of a claim of retaliation are much broader”); Burlington Northern and Santa Fe Ry. Co., 548 U.S. at 68–69.

The drug tests and psychological “education” that Entergy continually forced plaintiff to undergo were part of the retaliation, too, a jury can find. The summary judgment record shows that upon plaintiff’s return to employment in October 2014 (following the settlement of the grievance), defendant’s discriminatory practices continued. Plaintiff had been arrested in April 2013 for misdemeanor possession of a controlled dangerous substance. The charge was ultimately dismissed in its entirety. Yet Entergy required plaintiff to submit to continuous drug tests despite the dismissal of the charge and despite consistently negative results. Entergy also required Plaintiff to “engage in a psycho-educational program,” “show documented compliance weekly, and attend “intensified random follow-up testing program over the next three years...” A jury can find that defendant’s continued insistence that Plaintiff submit to drug testing and “education” was in retaliation for his protected activity of having submitted the affidavit in support of his co-worker’s race discrimination claim. As plaintiff affirmed in his filings below, Entergy’s continued insistence that plaintiff submit to drug-

testing, counseling and other onerous requirements of his employment “caused harm to Plaintiff’s personal and professional reputation” at his employment.

Though Entergy affirmed and the District court said that any adverse actions against plaintiff were because of his “unscheduled absences and failure to follow Defendant’s policy,” the jury could reject this proffered rationale viewing the evidence. This Court should clarify that per *Anderson*’s cautionary standard for grant of summary judgment and the importance of Title VII protections, the lower courts erred in removing Mr. Flores’ case from the jury. The jury would consider the evidence showing the timing between plaintiff’s signing of the Affidavit in support his co-employee’s racial discrimination lawsuit and defendant’s termination of plaintiff three days later. The jury would consider that plaintiff’s employment with defendant was satisfactory until he signed the Affidavit in support of his co-employee’s race discrimination suit. The jury would consider the subsequent actions that Entergy took against plaintiff in inducing “Plaintiff to waive his right to seek recovery of back wages as a result of his unlawful termination by falsely representing that a New York State Pistol License was required to perform the duties and responsibilities of the position of Nuclear Safety Officer.” The jury would consider whether defendant used plaintiff’s arrest in April 2013 for misdemeanor possession of a controlled dangerous substance (a charge that was dismissed) as a vehicle to continue to discriminate against plaintiff in retaliation for his protected Title VII actions. The Court should grant this Petition and clarify that the lower courts

misapplied this Court's Title VII precedent, violated Mr. Flores' federal statutory rights, and misapplied the cautionary summary judgment standard prescribed in Anderson, by dismissing what a reasonable jury can find were actions by his employer that violated Mr. Flores' protected federal rights.

Conclusion

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

Michael Confusione
Counsel of Record
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550; (888) 963-8864 (fax)
mc@heggelaw.com

Counsel for Petitioner, Harold A. Flores

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