No. 19-8520

IN THE

SUPREME COURT OF THE UNITED STATES

Justin Mohn — PETITIONER
(Your Name)

vs.

Progressive Insurance — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Tenth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Justin Mohn
(Your Name)

145 Upper Orchard Drive
(Address)

Levittown, PA, 19056
(City, State, Zip Code)

719-432-8416
(Phone Number)

QUESTION(S) PRESENTED

(1) Whether the District Court and Tenth Circuit erred in holding that a plaintiff establishing a prima facie case and or showing pretext plus proof of the employer's discriminatory animus to meet the burden of proof for a finding of employment discrimination under Title VII of the 1964 Civil Rights Act is not sufficient to compel discovery per a plaintiff's discovery requests and Motion to Compel.

(2) Whether the District Court and Tenth Circuit erred in holding that a plaintiff establishing a prima facie case and or showing pretext plus proof of the employer's discriminatory animus to meet the burden of proof for a finding of employment discrimination is not sufficient to grant a plaintiff's Motion for Summary Judgement or otherwise rule in favor of a plaintiff for a plaintiff's claims under Title VII of the 1964 Civil Rights Act.

(3) Whether the District Court and Tenth Circuit erred in granting Defendant's Motion for Summary Judgement without compelling discovery per Plaintiff's discovery requests and Motion to Compel or else erred in not granting Plaintiff's Motion for Summary Judgement or otherwise ruling in Plaintiff's favor based upon the pretext-plus rule and or Plaintiff establishing a prima facie case.

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 issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Petition Appendix A 1-9 and is unpublished to Plaintiff's best knowledge. The opinion of the United States district court appears at Petition Appendix B 1-20 and is unpublished to Plaintiff's best knowledge.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on February 10, 2020 and appears at Appendix A. The Court of Appeals denied a timely petition for rehearing on March 11, 2020 which appears at Appendix C to the petition and is unpublished. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a)(1) provides in pertinent part: "It shall be an unlawful employment practice for an employer... 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."

STATEMENT OF THE CASE

During 10/16 Plaintiff Justin Mohn ("Mohn or Plaintiff") started training as an employee at Defendant Progressive Casualty Insurance Company, ("Defendant" or "Progressive") in Colorado Springs, CO, and, after training, all new hires go through a phase called Academy in which a "coach" and manager oversee the new hire until either graduation from Academy or else termination from the company. Greg Lofthus was Plaintiff's coach and Beverly Auld-Feldman was Plaintiff's manager while in Academy, which started during 12/16. There was only one other male in Plaintiff's training class (Eric Foster), a class of about a dozen people. A couple weeks into Academy, another coach named Sheila told Plaintiff that he was on a seemingly unprecedented learning pace for a new hire who had never worked such a role, noticeable by Plaintiff's performance metrics and compliments from customers. Around week 8 of Academy, Plaintiff inquired about graduation from Academy, and Greg said Plaintiff would graduate when everyone else normally does, around weeks 10 to 12 of Academy.

All the young women (about Plaintiff's age, in their 20s) who did not have college degrees and who sat next to Plaintiff would frequently put their customers on hold while having personal conversations with each other instead of working, and they achieved lower performance metrics than Plaintiff yet graduated from Academy weeks earlier than Plaintiff – while Plaintiff's coach and manager would not graduate Plaintiff from Academy. Plaintiff's Academy manager, Beverly, eventually threatened to put Plaintiff on performance improvement plans for her and Greg not graduating Plaintiff in time,

while Greg continued to have harassing "coaching" sessions with Plaintiff, both of them trying to force Plaintiff into constructive discharge or else fire him.

About 13-14 weeks into Academy, during 3/17, Plaintiff was the only new hire who hadn't graduated, when Plaintiff likely should have graduated first, so Plaintiff emailed another supervisor, Rebecca Coffey, and made her aware of Plaintiff's stellar performance whilst still in Academy, and Plaintiff miraculously graduated from Academy that same day... as if Progressive feared they might cause a lawsuit at that time. Eric graduated second to last, a week or two before me, and other young men in training classes before and after Plaintiff who were top performers with much potential for promotions seemed to also be held back from graduating Academy, such as Christopher Lewis – if Plaintiff trusted and could afford a lawyer in Colorado, Plaintiff would likely have tried to turn this into a class-action lawsuit, as Plaintiff mentioned to the Equal Employment Opportunity Commission (EEOC).

Since Plaintiff graduated last from Academy for being perceived as an overeducated/overqualified male, Plaintiff had a lower pay scale, couldn't use Plaintiff's benefits such as Paid Time Off for weeks longer than other coworkers, and Plaintiff was given a lower priority choice for other job roles and schedules, which him and his coworkers frequently bid on, so Plaintiff's hours would not only change more often than others, but Plaintiff would be stuck with the schedules which most people didn't want, including those which Plaintiff didn't want. Plaintiff would have legally pursued Defendant sooner, but Plaintiff had to focus on other issues until 6/17 which Plaintiff cannot legally discuss. Thereafter, wanting to avoid a lawsuit against Progressive, Plaintiff tried to resolve this issue in-house, so Plaintiff took some unpaid time off to visit

Las Vegas, Nevada to see if Plaintiff would move there to pursue a career in the music industry, then to Sacramento, CA to see if Plaintiff wanted to transfer there in the near future to work at Progressive's office in that city.

In attempts to resolve this issue of discrimination, which started in Academy and ruined Plaintiff's career thereafter, in addition to there being evidence of the same people still above Plaintiff trying to get rid of Plaintiff discriminatorily, Plaintiff tried to have a meeting of minds with site director Charlie Baughman in 6/17 about a promotion as soon as possible. During 8/17, a few days after an hour-long phone call in which a supervisor and Plaintiff saved a customer from being made unethically/illegally homeless by two other Progressive supervisors via a recorded phone call the morning of 8/5/17, Plaintiff applied for a promotion as a technical writer (which got denied) and Plaintiff complained to Progressive's Human Resources, specifically Jim Lawson, in regards to harassment and discrimination which Plaintiff experienced, trying to resolve the issue in-house. Around this time, Plaintiff's work hours were also changed by management to hours Plaintiff previously said to his manager would be difficult for Plaintiff, so Plaintiff complained of retaliation for the changing of Plaintiff's schedule and denying of the promotion, as well as offered to transfer to the site in Sacramento, CA and applied for a second role, this time in CA to once again try to resolve the issue. Plaintiff was then put on administrative leave for 1 week before getting fired by phone call during 8/17, made effective on or about August 24th, 2017.

Because of the timing in which Progressive discharged Plaintiff (after several weeks of unpaid time off and spending money on the aforementioned trips), Plaintiff was forced into thousands of dollars of debt and had to find a lower paying job as soon

as possible to avoid homelessness, and timely filed a charge of discrimination with the EEOC on December 7th, 2017. Plaintiff received a Notice of Right to Sue on January 8th, 2018. On or about April 6th, 2018, Plaintiff filed U.S. District Court Case Name: *Mohn v Progressive Insurance*, Case Number: 1:18-cv-00812 for employment discrimination.

Plaintiff filed a Motion for Summary Judgement (and embedded Motion to Compel Discovery) on or about January 14th, 2019 which was opposed by Defendant. Defendant filed a Motion for Summary Judgement on April 10th, 2019. Plaintiff filed a Response in Opposition to Defendant's Motion for Summary Judgement on or about April 15th, 2019, reiterating he established a prima facie case and Defendant has concealed evidence, while adding the pretext-plus rule could also be applied to grant judgement in favor of Plaintiff or the District Court should compel Defendant to produce discovery pursuant to Plaintiff's discovery requests and motion to compel so the parties may proceed to trial. Despite the District Court not compelling Defendant to produce discovery pursuant to Plaintiff's requests for statistical evidence to compare comparable individuals, the District Court granted Defendant's motion (which appears at Appendix B) on June 3rd, 2019, stating "Mohn has not come forward with evidence that he was similarly-situated to any of the women in any relevant category of performance. Statistical evidence has little probative value unless it compares comparable individuals. *Turner v. Public Service Co.*, 563 F.3d 1136, 1147 (10th Cir. 2009)." Pet. App. B 11-12. On or about June 5th, 2019, Mohn filed the instant appeal in the Tenth Circuit, Appeal Case No. 19-1207.

The District Court did not compel Defendant to produce discovery to allow Plaintiff to compare comparable individuals. The District Court then did not adhere to

the pretext-plus rule or recognize Plaintiff established a prima facie case, and instead, the District Court stated the result of the District Court not compelling discovery as the District Court's reason to grant Defendant's Motion for Summary Judgement.

The Tenth Circuit panel also relied on a flawed and circular argument in their opinion that Plaintiff did not establish a prima facie case of discrimination by stating "Mohn does not advance a reasoned argument that the [district] court erred in reaching this conclusion. Nor does he cite any evidence that undermines it (Pet. App. A 5)," "Mohn argues that the district court erred by failing to consider how the circumstances surrounding his termination support an inference that Progressive's stated rationale was pretextual... But Mohn fails to cite record evidence that establishes any of these facts (Pet. App. A 6)," and "Mohn further appears to argue that the district court erred by failing to apply the "pretext plus" doctrine, which requires a plaintiff to provide "additional, direct evidence of a discriminatory motive (Pet. App. A 7)." Not only did Plaintiff establish a prima facie case of discrimination as outlined below (which was detailed in Plaintiff's Motion for Summary Judgement) as well as satisfy pretext-plus, but the Tenth Circuit panel has thrown back in Plaintiff's face the main reason for Plaintiff's appeal – the Defendant concealed evidence for which the District Court did not compel discovery and then the District Court granted Defendant's Motion for Summary Judgement by similarly stating "Mohn has not come forward with evidence that he was similarly-situated to any of the women in any relevant category of performance." Pet. App. B 11-12. Plaintiff cannot see how the District Court and Tenth Circuit can logically say Plaintiff has not provided enough evidence when the reasons for Plaintiff's Motion for Summary Judgement and embedded Motion to Compel, Plaintiff's appeal, Plaintiff's

petition for rehearing, and now Petition for Writ of Certiorari are all because Defendant concealed evidence for which the courts did not compel discovery yet granted judgement in favor of Defendant instead of Plaintiff. Plaintiff should not be penalized for Defendant concealing evidence and the district court refusing to compel discovery, especially when other courts have sided with Plaintiffs for this exact reason as followed: "The trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose" and "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decisions." *Reeves v Sanderson Plumbing*, 530 U.S. 133 (2000). The Courts have recognized that direct evidence of discrimination is rarely available because sophisticated employers generally will conceal their true motivations for taking the adverse employment action at issue. *See Kolstad v Am. Dental Assoc.*, 527 U.S. 526, 551, 119 Ct. 2118, 2132 (1999). "A pretext, in employment law, is a reason that the employer offers for the action claimed to be discriminatory and that the court disbelieves, allowing an inference that the employer is trying to conceal a discriminatory reason for his action." *Visser v Packer Eng'g Assocs.*, 924 F.2d 655, 657 (7th Cir. 1991). Because Plaintiff provides evidence of discrimination in Plaintiff's Motion for Summary Judgement in addition to establishing a prima facie case, Plaintiff demonstrates that the reason Defendant concealed further evidence is to hide the extent of their discriminatory and retaliatory actions, thus satisfying the "pretext-plus" rule, and so judgement should be granted on any and all of Plaintiff's claims in the above-captioned action. See *Valdez v. Church's Fried Chicken*, 683 F. Supp. 596, 631 (W.D. Tex. 1998).

The Plaintiff's claim of sex discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, requires the Plaintiff to establish, by a preponderance of evidence, a *prima facie* case that: (i) he is male; (ii) he was qualified for the position he held; (iii) he suffered an adverse employment action; and (iv) that adverse action occurred in circumstances giving rise to an inference of discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993).

Elements that can be proven by the Plaintiff

Elements 1 and 2: Plaintiff establishes he is a male, qualified for the position he held.

A. On the Scheduling Order created by the parties for the above captioned action, the first undisputed fact is that Plaintiff is a male who was hired by Defendant on or about October 24th, 2016. Plaintiff contends that Defendant must believe Plaintiff was qualified for the position he held if Defendant hired him for it, and furthermore, Plaintiff contends he was qualified for the role evident by his performance evaluation as an "outstanding" employee (Progressive 000009-32)[1], Plaintiff's performance metrics (Progressive 0000536 shows Plaintiff was a top performer as early as 2/21/17), and compliments from customers for his customer service (which was concealed by Defendant). Both the Defendant and State of Colorado evidently agree that Plaintiff was qualified for the position he held because Plaintiff graduated from Academy, Plaintiff was a top performer with much upward potential for promotions, and the State of Colorado granted Plaintiff unemployment benefits for his wrongful termination from Defendant (Plaintiff's Motion for Summary Judgement Exhibit B).

[1] Future references to Progressive discovery documents on record as files in a USB drive will refer to the relevant Bates number – e.g. Progressive 000032.

Element 3: Plaintiff contends that he demonstrates a triable issue of fact as to whether he suffered an adverse employment action.

A. The Plaintiff stated in his complaint filed on or about April 6th, 2018 for the above captioned action the following events to have been discriminatory: (i) Plaintiff was held back from graduating Progressive's Academy so Plaintiff was paid less than the coworkers in his training class (most of whom were female), could not use benefits such as paid time-off until a later date than his coworkers, and he had a lower priority choice for other job roles, promotions, and schedules – effectively hurting if not ruining Plaintiff's career, whilst the female coworkers in Plaintiff's training class were allowed to graduate Academy on time, weeks before Plaintiff and the only other male employee in Plaintiff's training class. The evidence for the difference in salaries over time between Plaintiff and his female coworkers is seen in the documents Progressive 0000165-70 produced by Defendant to answer Interrogatory No. 9, and the difference in graduate dates from Academy between males and females is seen in Progressive 0000549 and 0000551 produced by Defendant in response to Request for Production No. 17. (ii) Plaintiff's career was verbally threatened during Progressive's Academy process with performance improvement plans and or other written adverse employment actions for not graduating Academy on time (and graduating last) despite the fact that he was one of the top performers of his training class during Academy and thereafter. Although Plaintiff states Defendant has concealed documents to show the extent and duration to which Plaintiff was a top performer and how many compliments he received from customers, regardless, by producing Progressive 0000536 in response to Request for Production No. 8, Defendant has revealed Plaintiff was a top performer as early as

2/21/17. Plaintiff further states that any communications which would reveal Defendant's intentions to put Plaintiff on a performance improvement plan during Academy were not produced (iii) Plaintiff was denied promotions and transfers which would likely have avoided this lawsuit, and in fact, Defendant instead hired an ineligible candidate for one of the roles Plaintiff applied for as there is evidence of - Progressive states in Progressive 0000545 that this position was for internal candidates only and so the candidate Defendant hired was simply ineligible for the role since this candidate was external to Progressive according to her resume (Progressive 0000354) (iv) Plaintiff's work hours were changed to hours he stated would be difficult for him to manage, and although Defendant did not produce documents to show this, Plaintiff states there is sufficient evidence to prove factual Plaintiff's allegations for judgement to be passed in his favor (v) Plaintiff was terminated [even after he flew to Progressive's site in California and offered to transfer there], which Plaintiff alleges was wrongful termination and discriminatory retaliation by Defendant after Plaintiff complained to Defendant's Human Resources. In Defendant's response to Request for Production No. 1, by producing Progressive 0000552, Defendant showed that Plaintiff's initial complaint occurred on 7/28/2017, and in Defendant's response to Request for Production No. 2, in producing Progressive 0000578-579, 0000587, and 0000594-595, Defendant has revealed Plaintiff began trying to resolve this dispute as early as 6/2/2017 via communications Plaintiff initiated with Site Director Charles Baughman in order to avoid lawsuit, yet Plaintiff was terminated by Defendant in August of 2017 in retaliation. In Defendant's response to Request for Production No. 3, Defendant reveals Progressive did not follow their Disciplinary Action guidelines according to Progressive 0000109-110

in regards to any behavior allegations against Plaintiff, and so in addition to Tamara Marchese terminating Plaintiff for disagreeing with Progressive's Academy and alleged behavior, Plaintiff and the Courts can only infer that his termination was discriminatory and retaliation by Defendant for his complaint of discrimination, and that Defendant was wrongfully looking to terminate Plaintiff after he complained, especially knowing Plaintiff was a top performer.

B. The standard for "adverse action" in the 10th Circuit is to be "liberally construed." *Heno v. Sprint/United Mgmt. Co.* 208 F.3d 847, 857 (10th Cir. 2000). Actions which pose no immediate consequence but potentially harm future employment prospects may be adverse actions. *Burlington Industries Inc. v. Ellereth*, 524 U.S. 742, 761 (1998).

D. Defendant was discriminatorily holding back Plaintiff from graduating Progressive's Academy, despite Plaintiff being an early top performer, which constitutes an adverse action. Plaintiff evidently only graduated from Academy because Plaintiff emailed his supervisor to be, Rebecca Coffey, about Plaintiff's top performance whilst still in Academy - then Plaintiff miraculously graduated that same day, very last of his class, as seen by Defendant's response to Request for Production No. 8 by producing Progressive 0000541-542. However, even though Plaintiff graduated from Academy, he graduated late and last (besides a coworker who hurt her hip), and so as seen by Progressive 0000165-170, Plaintiff was paid less than the majority of the female coworkers in his training class, could not use benefits such as paid time-off until a later date than his female coworkers, and he had a lower priority choice for other job roles

and schedules – effectively hurting if not ruining Plaintiff's career in a discriminatory manner; only for Plaintiff to be wrongfully terminated about 5 months later.

E. In trying to resolve this dispute to avoid lawsuit after Plaintiff graduated from Academy, since Plaintiff's career was essentially ruined from there on out, Plaintiff applied for other job roles and was denied two promotions by Defendant, Plaintiff was not given the chance to transfer to a site in California even after taking time off and using his own money to visit there, and Plaintiff had his schedule changed to hours he previously said would be difficult for him to manage, all of which may constitute adverse actions.

Element 4: The Plaintiff can establish that adverse employment action arose in circumstances giving rise to an inference of discrimination.

A. "Circumstances giving rise to an inference of discrimination" may arise in many contexts. For example, the Plaintiff may show actions or remarks by decisionmakers reflecting discriminatory animus, preferential treatment given to employees outside the protected class, or questionable timing of an employment decision. *Plotke v. White*, 405 F.3d 1092, 1101 (10th Cir. 2005).

B. The Plaintiff states Defendant's Greg Lofthus and Beverly Auld-Feldman deterred Plaintiff's Academy graduation as occurs to the majority, if not all, of male employees in similar roles as seen by Defendant's response to Plaintiff's Request for Production No. 17 in producing Progressive 0000549 and Progressive 0000551 - and then Academy Manager Beverly Auld-Feldman threatened Plaintiff with performance improvement plans and or other written adverse employment actions. Even though

Plaintiff graduated from Academy, as seen by Progressive 0000165-170, Plaintiff had a lower pay for a longer time than his female coworkers, could not use benefits until a later date than his female coworkers, and had a lower priority choice for other job roles and schedules after Academy. As seen by Progressive 0000536 in Defendant's response to Request for Production No. 8, because Plaintiff was a top performer during Academy and thereafter in his training class of mostly women and only one other man (Eric Foster), Plaintiff and the courts can infer that Defendant attempted to hold Plaintiff back and or terminate him in Academy discriminatorily due to his male gender.

C. Because Plaintiff experienced discriminatory conduct during Progressive's Academy process which other men seemed to experience as well, and because Plaintiff was the only party trying to resolve the issue in the months thereafter, Plaintiff and the courts can infer that the denial of his promotions, the changing of his schedule to nonpreferred hours, and his termination were all for the same discriminatory reasons that he was held back from graduating Academy, almost terminated in Academy, and had his career perceivably ruined during Academy regardless of graduating – because of his male gender.

D. Plaintiff recalls Defendant's reasons for terminating him via phone call by Tamara Marchese to be Plaintiff disagreeing with Progressive's Academy process [for which the above captioned action was initiated] and alleged behavior. The reasons which Tamara stated over the phone are different than that which Defendant states in their answer to Plaintiff's Interrogatory Nos. 11, 14, 15, 16, and 17: "based on performance and behavior issues... Plaintiff was terminated from employment." The behavior which Defendant alleges Plaintiff engaged in evidently occurred *after*

Defendant had already engaged in discriminatory conduct against Plaintiff and effectively hurt if not ruined Plaintiff's career at Progressive. This behavior which Defendant alleges Plaintiff engaged in evidently occurred *before* Plaintiff complained to Progressive's Human Resources of discrimination, and then this alleged behavior was brought up by Defendant weeks later seemingly only to retaliate against Plaintiff for complaining of discrimination - as if Progressive was ignoring this alleged behavior Plaintiff was never warned about then decided to terminate Plaintiff after Plaintiff complained of discrimination, a termination which was in violation of Defendant's own Disciplinary Action guidelines as seen by Progressive 0000109-110.

According to Progressive's aforementioned Code of Conduct, there are 4 steps of disciplinary action involved in terminating an employee for behavior – Step 1 Verbal warning, Step 2 Written Warning, Step 3 Final Written Warning, and Step 4 Termination. Plaintiff never received a verbal warning, written warning, and or final written warning before Tamara Marchese terminated Plaintiff over the phone for disagreeing with Defendant's Academy process and alleged behavior, and so Plaintiff and the courts can infer that his termination was discriminatory and retaliation for his complaint of discrimination, and that Defendant was wrongfully looking to terminate Plaintiff, especially knowing Plaintiff was a top performer.

If the District Court and Tenth Circuit panel are stating Plaintiff did not establish a prima facie case because he was not qualified for the position he held due to Defendant's proffered reason for Plaintiff's discharge 9 months into his employment, then the District Court and Tenth Circuit have circularly contradicted the reasons why Plaintiff was hired in the first place by Defendant, why Plaintiff even graduated from

Academy, how Plaintiff was a top performer with much upward potential for promotions at Progressive, and why the State of Colorado granted Plaintiff unemployment benefits for his wrongful, retaliatory termination from Defendant. Rather than excepting Defendant's proffered reasons for Plaintiff's discharge while Defendant conceals evidence, the Courts may infer discriminatory reasons for Plaintiff's wrongful discharge as one or more of the below pretexts for discrimination:

1. Changing reasons: Although one of the three promotions Plaintiff applied for or else a transfer could have resolved this dispute and avoided a lawsuit, instead, Plaintiff was wrongfully terminated in a retaliatory manner after he complained of discrimination. Defendant's Tamara Marchese stated that Plaintiff was being terminated due to disagreeing with Progressive's Academy process, i.e., complaining of discrimination, as well as [alleged] behavior. However, now that much time has gone by since Plaintiff's wrongful termination and the initiation of this lawsuit, Defendant has changed their reason solely to [alleged] behavior. "The fact finder may properly take into account weaknesses, implausibility's, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions." *City of Salem v MCAD,* 44 Mass. App. Ct. 627 (1996). See also *Velez v. Thermo King,* U.S Court of Appeals, First Circuit (2009). See also *Haddad v. Wal-Mart,* 455 *Mass.* 1024 (2010).

2. Delay: After Plaintiff complained of discrimination to Progressive's Human Resources, Plaintiff's hours were changed, he was denied promotions, and he was wrongfully terminated for disagreeing with the Academy process and [alleged] behavior which supposedly occurred before Plaintiff's complaint but was only brought up after Plaintiff's complaint. Because there was a several week delay in which Defendant

coincidentally only brought up this alleged behavior issue after Plaintiff complained of discrimination – an alleged behavior issue which occurred before Plaintiff's complaint, it may be inferred as a pretext for discrimination. "Such reasons advanced by a defendant to explain its conduct, which are first advanced after a considerable delay, suggest that the reason was a pretextual afterthought to avoid the consequences of improper motive. Such delay is especially significant when the explanation is articulated for the first time in response to the plaintiff's charges [or complaints] of discrimination." *Hendricks v Mid-America Pipeline,* 985 F.Supp. 1024 D. Kansas (1997). See also *Peirick v. IUPUI Athletics Department,* No. 06-1538 (7th Cir. 2007).

3. Deviation from Policy: As described in Plaintiff's Motion for Summary Judgement, Defendant deviated from their disciplinary policy in wrongfully terminating Plaintiff without any warnings or discipline. "Pretext can be demonstrated through a showing that an employer has deviated inexplicably from one of its standard business practices." *Kouvchinov v. Parametric Technology,* U.S. Court of Appeals, First Cir. No. 07-2395 (2008). See also *Dartt v. Browning-Ferris,* 427 Mass. 1 (1997).

4. Disbelief or Mendacity: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

5. Lying in Wait: Even if Plaintiff's [alleged] behavior could be seen as grounds for discipline, Plaintiff had opened the specified entrance door with his foot many times over the span of his career with Progressive, yet Plaintiff was never disciplined and Defendant chose only one specific moment, which happened before Plaintiff

complained of discrimination, yet this alleged behavior was only brought up after Plaintiff complained of discrimination for the purpose of terminating Plaintiff in a retaliatory manner. "We [the Courts] have held that when an employer... waits for a legal, legitimate reason to fortuitously materialize, and then uses it to cover up his true, longstanding motivations for firing the employee, the employer's actions constitute the very definition of pretext." *Hamilton v. General Electric*, (W.D. Ky. 2011).

6. Severe Punishment: As Plaintiff described, Defendant violated their own disciplinary code when terminating Plaintiff for alleged behavior in a manner which can be seen as severe punishment to conceal their true discriminatory motives, especially knowing Defendant chose only one specific instance when Plaintiff often opened the entrance door with his foot – not for the purpose of performing a "soccer move" as Defendant slanted the truth, but for the purpose of opening the door to leave for lunch. "More compelling is the severity of the punishment in relation to the alleged offense... This strikes us as swatting a fly with a sledge hammer. That [Defendant] felt compelled to terminate [Plaintiff] for this offense does not pass the straight-face test..." *Shalter v. Wal-Mart*, 195 F.3d 285 (7th Cir. 1999).

7. Shoddy Investigation: Defendant's investigation of Plaintiff's complaint of discrimination was for the most part ignored, as no inhouse resolution occurred which culminated in retaliation against Plaintiff in denying Plaintiff promotions and transfer opportunities, changing Plaintiff's work hours, and wrongfully terminating Plaintiff for an alleged behavior violation and disagreeing with the Academy process, i.e. complaining of discrimination. Defendant's investigation of Plaintiff's alleged behavior violation was shoddy at best as well, in that Defendant placed Plaintiff on a one week paid-leave of

absence, then Human Resources Representative Jim Lawson placed at least one harassing phone call to Plaintiff trying to get Plaintiff to admit he "kicked" open the entrance door on his way out of lunch on one specific day before Plaintiff complained of discrimination, for Defendant evidently did not know if it was even Plaintiff who left for lunch that day, which, in combination with Defendant's failure to produce discovery, could also be seen as Defendant's failure to properly document their "investigations." "Record evidence suggests that [Defendant's] investigation, which was central to and culminated in [Plaintiff's] termination, was not just flawed but inexplicably unfair." *Mastro v. Potomac Electric Power Company*, 447 F.3d 843 (D.C. Cir. 2006).

Not only has Plaintiff established a prima facie case according to the McDonnell Douglas Test as just described, but if the court were to unnecessarily apply the "background circumstances test," Plaintiff has still established a prima facie case by showing Defendant is the unusual employer who discriminates against the majority. In producing documents for Plaintiff's Request for Production No. 17, Defendant has revealed Progressive's Academy shows a pattern which may be seen as systematic gender discrimination against men, including Plaintiff. According to Progressive 0000549, of the 16 individuals coached by Greg Lofthus since 2015, 5 were male and 11 were female. Of those 5 men, including Plaintiff, the number of weeks it took for Academy graduation were as followed: 14 weeks, 13 weeks, 14 weeks, 14 weeks, and 13 weeks – the average graduation time being 13.6 weeks for men. Of those 11 females coached by Greg, the number of weeks it took for graduation were as followed: 11, 11, 14, 9, 8, 13, 9, 11, 13, 11, 8 – the average graduation time being 10.73 weeks for women. So, in addition to Defendant evidently hiring a greater ratio of females to

men, the females spend about 3 weeks less in Academy than men. When we consider the additional fact that Academy managers such as Beverly Auld-Feldman then threaten men such as Plaintiff with performance improvement plans for coaches such as Greg not graduating male employees on time, Plaintiff and the courts can infer discrimination.

As shown by Progressive 0000551, this trend of men graduating from Academy noticeably later than females continued with Plaintiff's training class (not counting Daniel Rogers who was a previous employee and was put on a different track than the rest of Plaintiff's class), such that the two male employees including Plaintiff took 13 weeks to graduate and the 7 females took the following times to graduate: 10, 10, 10, 10, 12, 11, and 16 (knowing Angela hurt her hip which contributed to her taking 16 weeks) – the average graduation time being 11.28 weeks for women even including Angela's time.

Furthermore, the trend which continued from 2015 to 2017 with Plaintiff's training class shows that Greg Lofthus does not have a history of bullying so much as Progressive's Academy systematically discriminates against most, if not all men while favoring women. Lastly, it appears Defendant backdated the effective date of Plaintiff's graduation to 3/4/17 in some documents for the purpose of their defense, for Progressive 0000541 reveals Plaintiff sent an email on 3/7/17 during week 14 of Academy to both Beverly Auld-Feldman and his supervisor-to-be, Rebecca Coffey, to make Rebecca aware of Plaintiff's contributions to the company so as to not allow Beverly Auld-Feldman to use her discretion to put Plaintiff on a performance improvement plan then terminate Plaintiff discriminatorily. Progressive 0000542 shows Plaintiff did indeed graduate on 3/7/17 and so it seems Defendant tampered with evidence to backdate Plaintiff's graduation date to 3/4/17 on Progressive 0000551.

The District Court and Panel failed to recognize that Plaintiff's career was already perceivably ruined due to him being discriminatorily held back in Academy by Defendant many months before Defendant's proffered reason for Plaintiff's termination, as if Plaintiff's termination nullifies the discrimination he previously experienced and provided evidence of – although Plaintiff maintains his termination was also a pretext for unlawful discrimination, in contravention of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Plaintiff respects the Tenth Circuit's precedents regarding the pretext-plus rule as in *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) as cited by the panel, however, in this scenario, when dealing with concealed evidence, the pretext-plus rule may be applicable, especially knowing other courts have applied the pretext-plus rule even after the Tenth Circuit rejected it, see *Valdez v. Church's Fried Chicken*, 683 F. Supp. 596, 631 (W.D. Tex. 1998).

REASONS FOR GRANTING THE PETITION

In allowing the termination of men, not women, and the preferential promotion of women, not men, for whatever proffered reasons stated by a Defendant, such as the one named in this suit, without the courts even compelling discovery, the Tenth Circuit's result conflicts with:

- *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (Title VII covers mistreatment motivated in any respect by the employee's sex irrespective of whether Congress contemplated that particular coverage);

- *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240, 242 (1989) (Title VII mandates that "gender must be irrelevant to employment decisions;" the employer cannot rely "upon sex based considerations"); id. at 251 (*reaffirming holding in City of Los Angeles Dep't of Water & Power v. Manhart*,435 U.S. 702(1978)("Manhart"), that Title VII strikes at the "entire spectrum" of mistreatment based on gender stereotypes); 490 U.S.at 243 n.9 (the same tests for liability under Title VII apply across the statute's enumerated traits);

- *Manhart*, 435 U.S. at 707 n.13 (Title VII strikes "at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes"); id. at 711(articulating the "simple test" that Title VII is violated if there is "treatment of a person in a manner which but for that person's sex would be different");

- *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (Title VII does not "permit[] one hiring policy for women and another for men").

The Courts may infer discriminatory reasons for Defendant not selecting Plaintiff for the promotions and transfer he applied for and roles offered to his female coworkers as one or more of the below pretexts for discrimination:

1. Comparators: Plaintiff maintains female coworkers similarly situated as him were beginning training to transfer to roles near the time of Plaintiff's wrongful termination, roles which Plaintiff also expressed interest in by filling out an intranet form for which Plaintiff believes was called a "Skills and Interests" form and discussed with supervisor Rebecca Coffey, as was the avenue of obtaining said roles, such as Blended Sales. Plaintiff was a better performing employee than these similarly situated female coworkers, and, along with his education, thus more qualified. Although Plaintiff does not know who, if anyone was hired for the IT Help Desk and Legal Assistant roles to which Plaintiff also applied, Defendant hired an ineligible female candidate for the Senior Copywriting role to which Plaintiff applied, and may have even left that specific job posting unfilled. "The principle, i.e., that evidence that similarly situated employees were treated differently can establish that a proffered reason for an adverse job action was a pretext, is sound." *Dorman v. Norton,* 64 Mass. App. Ct. 1 (2004). See also *Smith College v. MCAD,* 376 Mass. 221 (1978).

2. Deviation from Policy: Defendant deviated from their own policies in hiring a female employee who did not meet the eligibility requirements for the Senior Copywriting role for which Plaintiff also applied. "Pretext can be demonstrated through a showing that an employer has deviated inexplicably from one of its standard business practices." *Kouvchinov v. Parametric Technology,* U.S. Court of Appeals, First Cir. No. 07-2395 (2008). See also *Dartt v. Browning-Ferris*, 427 Mass. 1 (1997).

3. Disbelief or Mendacity: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

4. Performance History: Plaintiff maintains he was a top-performer at Progressive in regards to performance metrics, performed better than his similarly situated female coworkers, and he received one of the highest amounts of compliments from customers for his customer service, if not the most compliments in his department, yet Plaintiff was held back from graduating Academy, Plaintiff was not given the same job role opportunities as his similarly situated female coworkers who did not perform at the level which Plaintiff did, and Plaintiff was denied three promotions and not given the opportunity to transfer to Sacramento. "Given the uncontroverted evidence of plaintiff's stellar performance reviews, ... substantial experience, ... and score relative to [others] on the objective qualifications evaluation – along with the different rationales offered by defendant for this action as compared with the closely related [adverse employment] action - ... plaintiff has come forward with enough evidence to create a genuine issue of material fact about whether defendant's proffered rationale was the real reason defendant declined to select plaintiff for the position." *Kalinoski v Gutierrez*, 435 F. Supp. 2d55 (D.D.C. 2006).

5. Replacement/Selected Candidate: Plaintiff expressed interest in being trained for Progressive's "Blended" program for the position of Sales in addition to customer service, yet Plaintiff was not offered this option whereas his similarly situated female coworkers such as Donna Dover, Natasha Franklin, and others were given such

options, none of whom performed at the same level as Plaintiff. Because of Plaintiff's performance and education, he was more qualified for such roles than these females. Once again, an ineligible female candidate was also hired for the Copywriting role to which Plaintiff also applied, or else this specific job posting was left unfilled. "In this Circuit, we have held that a finding 'that a Title VII Plaintiff's qualifications were clearly superior to the qualifications of the application selected is a proper basis for a finding of discrimination." *Raad v. Fairbanks North Star Borough School District*, 323 F.3d 1185 (9th Cir. 2003).

6. Subjective Criteria: Defendant essentially was caught fibbing in their deposition in stating that although there is no handbook the academy coaches follow for graduating employees in academy, there are guidelines the deponent is "sure" are written down somewhere for graduating employees from Academy. Then when asked if graduating from Progressive's Academy is purely objective instead of subjective, the deponent then goes on to state that an employee graduates from Academy after 3 to 4 weeks of consistency while taking other factors into consideration such as "accuracy and all that stuff." Not only is deciding if an employee graduates after either 3 or else 4 weeks of consistency a subjective definition of consistently especially while considering other factors such as "accuracy and all that stuff," but taking into consideration Defendant's lack of producing discovery, Defendant is concealing the ability for a statistical comparison between Plaintiff and his coworkers. Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgement, Exhibit 2 Lofthus Dep. 54:11 – 56:1.

Q. Okay. Is there a handbook or guidelines you as an academy coach follow for graduating employees in academy?

A. There are set goals that you have to achieve that you guys are aware of that you need to meet, but there is not a handbook. There are guidelines, though.

Q. Okay. Are the guidelines written down somewhere?

A. I'm sure they are.

Q. Would you say that the process is purely objective?

...

A. Yes, it is.

...

Q. Is consistency subjective?

...

A. From what I remember back then, it was three to four weeks of consistency with numbers, but that's not going into account of accuracy and all that stuff either because that's different.

Given the evidence that all of Plaintiff's female coworkers graduated Academy before him and the only other male employee in their training class despite the differences in performance (besides Angela who hurt her hip) which was a ubiquitous trend amongst other training classes, and seeing that there is obviously subjective criteria at hand for graduating employees from Academy, this can be seen as a pretext for discrimination. Along with the evidence that Defendant subsequently gave job roles such as Sales positions to comparatively less-qualified and lesser performing candidates who were females in Plaintiff's training class, and Defendant violated their

own company policy/job requirements to give an ineligible female a promotion which Plaintiff was also applying for, these actions can be seen as subjective criteria used by Defendant for Plaintiff's denial of promotions and transfers, thus, pretext for discrimination. "In sum, the lack of objective guidelines for hiring and promotion and the failure to post notices of job vacancies are badges of discrimination that serve to corroborate, not to rebut, the racial bias pictured by the statistical pattern of the company's work force." *Brown v. Gaston County Dyeing Machine Company*, 457 F.2d 1377 (1971). See also *Stewart v. General Motors*, 222 F. Supp. 2d 845 (W.D. Ky. 2002).

Put simply, since Plaintiff was the top performing employee of his training class at Progressive, if Plaintiff were a female, Plaintiff would not have been discriminatorily held back from graduating Academy by Defendant as evidently happened to other male employees as well, and Plaintiff would have been given a chance for promotions and transfers as other female coworkers were given instead of Plaintiff being wrongfully terminated, which would be more obvious if Defendant did not conceal evidence for which the District Court did not compel discovery. The Tenth Circuit's results further conflict with the following cases in dealing with concealed evidence as quoted in the above section:

- *Reeves v Sanderson Plumbing*, 530 U.S. 133 (2000);
- *Kolstad v Am. Dental Assoc.*, 527 U.S. 526, 551, 119 Ct. 2118, 2132 (1999);
- *Visser v Packer Eng'g Assocs.*, 924 F.2d 655, 657 (7th Cir. 1991);

Second, this case involves a question of exceptional importance – whether the courts charged with ruling upon Title VII lawsuits have concluded that the only way to

achieve equality in the workplace is to permit companies such as Defendant to enforce affirmative action plans which allow, if not encourage, harassment, discrimination, and even tortuous conduct against men – as if the District Court and Tenth Circuit believe this is required so women can compete against men in Colorado. Plaintiff was raised to believe that men and women are equal and should be treated equally in the workplace, however, the District Court and Tenth Circuit seem to be trying to set legal precedents which give women better chances, and men worse chances, of success; and so more men than women are to be wrongfully terminated to create unemployment thus homelessness and crime to fill up the prison systems or else force more men to join the military - despite the fact that America has a higher population of women than men (U.S. Census Bureau). It is now no surprise why America, with less than 5% of the world's total population, holds over 20% of the world's prison population (International Centre for Prison Studies), over 90% of whom are men (Federal Bureau of Prisons). If this is the Supreme Court's perspective, America will handicap itself as a nation by hurting or else destroying the chances of success for men, fall into a system of labor-prison rackets, create the circumstances for a necessary revolution, and lower the prestige of women's success and achievements in modern America.

If the Supreme Court does not overturn the decision by the Colorado Court of Appeals and District Court, then what will the Colorado courts do next? Will the Colorado courts use this case as a precedent to normalize discrimination against men and even retaliation against men from female judges as a form of reparations for America's historical favoring of men? Will the Colorado lawmakers use this case as a precedent to attempt to change state and even federal discrimination laws to eliminate

gender as a protected class due to their evident belief that the genders are not equal and so should not have equal rights? While the last sentence may depict an unlikely scenario, Plaintiff urges the Supreme Court to think about the trend the Colorado courts are setting and how it could affect America as a whole. Plaintiff realizes he demonstrates what may be considered a rare or unordinary gender discrimination case as a male, but does that mean the discrimination laws do not apply to men, and should men just get used to being discriminated against and wrongfully terminated even if they happen to be a top performing employee?

THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT TO DEFENDANT BEFORE RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT AND EMBEDDED MOTION TO COMPEL

The District Court and Tenth Circuit seem to be setting a high standard for a Pro Se Plaintiff or else simply unjustly invoking litigation machinery upon Plaintiff in stating Plaintiff did not invoke rule 56(D) *in addition* to his Motion for Summary Judgement or embedded Motion to Compel in order to obtain sufficient evidence to oppose Defendant's Motion for Summary Judgement, knowing Plaintiff filed his Motion for Summary Judgement or Motion to Compel about 3 months before Defendant filed their Motion for Summary Judgement. When Defendant filed a Motion to Compel Deposition on 12/14/18, it took the District Court only 4 days (2 of which were weekend days) to order deposition dates, yet the District Court did not even acknowledge Plaintiff's embedded Motion to Compel Discovery for months until ruling on Defendant's Motion for Summary Judgement. The panel failed to recognize that Rule 56(D) does not have a timeframe for which a Plaintiff must wait to see if a court will compel discovery per a

Motion to Compel, and so a Plaintiff, especially a Pro Se Plaintiff, should not be held to redundancy measures of invoking Rule 56(D) in addition to a previously submitted Motion to Compel. Pro se pleadings are to be liberally construed. See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). The District Court did not tell Plaintiff they were ignoring Plaintiff's Motion to Compel embedded in his Motion for Summary Judgement and so he would be required to also invoke Rule 56(D) or file a separate Motion to Compel in order to properly oppose Defendant's Motion for Summary Judgement in their point of view, although Plaintiff maintains he properly opposed Defendant's Motion for Summary Judgement despite the district court's lack of compelling discovery per his motion. The goal of the justice system should be to do what's right, not to find loopholes to mechanically close a case.

Plaintiffs should not have to do extra, redundant work when a Defendant conceals evidence, not just as a principle of morals, but especially in a state such as Colorado in which plaintiffs such as the one named in this suit experience a war of attrition against them during labor law cases from alleged labor-prison rackets which force dire financial situations threatening homelessness and starvation along with extremely limited resources upon plaintiffs, greatly exacerbated by District Court judges pushing Scheduling Order dates out by months from the dates the court originally had available.

In retrospect, after the Defendant even acknowledged Plaintiff's Motion for Summary Judgement and embedded Motion to Compel Discovery as a Motion for Summary Judgement and or Motion to Compel in an email, Defendant then produced a second set of discovery documents without being ordered to do so by the District Court, which was hundreds of documents, almost all of which were useless and not what Plaintiff

requested, and so Plaintiff suspects if the District Court did compel discovery, then the Defendant likely would not have complied properly for a third time - resulting in the Colorado District Court still siding with the Colorado lawyers, knowing the magistrate judge admitted she was friends with counsel for Defendant during the Scheduling Conference for the above-captioned action.

CONCLUSION

Since other courts have acted differently than the District Court and Tenth Circuit when it comes to concealed evidence, arguably treating the sexes equally, and when applying the pretext-plus rule, the petition for writ of certiorari should be granted. Furthermore, regardless of the Tenth Circuit's opinion of pretext-plus, because Plaintiff has established a prima facie case, and because Defendant has concealed evidence, Plaintiff is entitled to judgement in his favor.

Date: May 12, 2020

Respectfully submitted:

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