RKB

No. 19-8520

ORIGINAL

IN THE SUPREME COURT OF THE UNITED

STATES

JUSTIN MOHN

Petitioner,

v.

PROGRESSIVE INSURANCE

Respondent.

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

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PETITION FOR REHEARING

Justin Mohn

Pro Se Plaintiff/Petitioner

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719-432-8416

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PETITION FOR REHEARING

In accordance with Supreme Court Rule 44, Plaintiff Justin Mohn ("Plaintiff" or "Mohn") respectfully requests an order (1) granting a rehearing or reconsideration and (2) vacating the Supreme Court's order on June 29, 2020 denying Plaintiff's timely filed petition for a writ of certiorari.

Plaintiff submits that although he recognizes his case is rare due to his claim of gender discrimination as a male, and without initiating a class-action lawsuit despite evidence of the employer discriminating against the majority, this case raises an important question about gender discrimination and the precedent of concealed evidence: Have the courts charged with ruling upon Title VII cases concluded that the only way to establish gender equality in the workplace is to allow employers such as Defendant to enforce affirmative action plans which call for the harassment, discrimination, wrongful termination, and even tortuous conduct against men without employers even having to worry about the courts compelling discovery or following precedents regarding concealed evidence in cases of claims of male gender discrimination?

As grounds for this petition for rehearing, petitioner states the following:

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 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).

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).

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.

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

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

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 accepting 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: "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: "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: "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: "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: "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: "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.

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. 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);

• *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 707(1978) 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 District Court and Tenth Circuit failed to recognize that Plaintiff's career was already 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).

CONCLUSION

For the foregoing reasons, pro se petitioner Justin Mohn prays that this Court (1) grant a rehearing or reconsideration and (2) vacate the Supreme Court's order on June 29, 2020 denying Plaintiff's timely filed petition for a writ of certiorari.

Date: July 13, 2020

Respectfully submitted:

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