No. _____

In the

Supreme Court of the United States

ERIC A. LONGMIRE,

Petitioner,

v.

WARSHAW BURSTEIN COHEN SCHLESINGER & KUH, LLP,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the State Appellate Division wrongfully denied Petitioner's Motion for Leave to Appeal when sua sponte and without notice to Petitioner, and without providing him an opportunity to respond, it determined that Petitioner failed to establish a prima facie case of employment discrimination against his former employer.

Whether the State Appellate Division erred in affirming sua sponte and without notice to Petitioner, and without providing him an opportunity to respond, the decision and order of the motion court in dismissing Petitioner's counterclaim for legal malpractice against the Respondent.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this Court are as follows:

Eric A. Longmire, Petitioner and Appellant below.

Warshaw Burstein Cohen Schlesinger & Kuh, LLP, Respondent here and below.

LIST OF PROCEEDINGS

COURT OF APPEALS OF THE STATE OF NEW YORK
Index No.: 116683/09
WARSHAW BURSTEIN COHEN SCHLESINGER & KUH, LLP v. ERIC A. LONGMIRE.
Judgment dated 09/12/19 Longmire's motion to appeal DENIED without opinion.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, OF THE STATE OF NEW YORK
Index No.: 116683/09
WARSHAW BURSTEIN COHEN SCHLESINGER & KUH, LLP v. ERIC A. LONGMIRE.
Judgment dated 5/16/2013 Warshaw Burstein Cohen Schlesinger & Kuh, LLP motion to dismiss Longmire's counterclaim for legal malpractice GRANTED and AFFIRMED.

Warshaw Burstein Cohen Schlesinger & Kuh, LLP v. Longmire, 106 A.D.3d 536, 965 N.Y.S.2d 458, 2013 N.Y. App. Div. LEXIS 3487, 2013 NY Slip Op 3566, 118 Fair Empl. Prac. Cas. (BNA) 852, 2013 WL 2096485.

SUPREME COURT OF THE STATE OF NEW YORK
Index No.: 116683/09
WARSHAW BURSTEIN COHEN SCHLESINGER & KUH, LLP v. ERIC A. LONGMIRE.
Judgment dated 4/19/2012 Warshaw Burstein Cohen Schlesinger & Kuh, LLP motion to dismiss Longmire's counterclaim for legal malpractice GRANTED.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK
05 Civ. 6725 (SHS)
ERIC A. LONGMIRE v. GUY P. WYSER PRATTE &WYSER-PRATTE MANAGEMENT CO.
Judgment Dated September 6, 2007 Motion for Summary Judgment in favor of Defendants GRANTED; Plaintiff's claim of employment discrimination DISMISSED WITH PREJUDICE.

Longmire v. Wyser-Pratte, 2007 U.S. Dist. LEXIS 65844, 101 Fair Empl. Prac. Cas. (BNA) 1311, 90 Empl. Prac. Dec. (CCH) P42,958.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that a Writ of Certiorari be issued to review the Denial of his appeal to the Court of Appeals of the State of New York on September 12, 2019.

OPINIONS BELOW

The September 12, 2019 decision without published opinion from the Court of Appeals of New York denial of motion to appeal can be found at *Warshaw Burstein Cohen Schlesinger & Kuh, LLP v. Longmire*, 2019 N.Y. LEXIS 2617, 33 N.Y.3d 914, 132 N.E.3d 649, 108 N.Y.S.3d 456, 2019 NY Slip Op 79329, 2019 WL 4383898.

The May 16, 2013 Appellate Division decision which is contended can be found at *Warshaw Burstein Cohen Schlesinger & Kuh, LLP v. Longmire*, 106 A.D.3d 536, 965 N.Y.S.2d 458, 2013 N.Y. App. Div. LEXIS 3487, 2013 NY Slip Op 3566, 118 Fair Empl. Prac. Cas. (BNA) 852, 2013 WL 2096485.

BASIS FOR JURISDICTION IN THIS COURT

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1257 and U.S.C. § 1331. This matter rises from the highest court in New York and presents questions of federal and U.S. constitutional law.

In *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), articulated a standard for "arising under" jurisdiction over state law

claims with embedded federal issues that are careful, narrowly drawn. The federal issue must be "actually disputed and substantial," and it must be one that the federal courts can entertain without disturbing the balance between federal and state judicial responsibility. *Id.* at 314.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof,

is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of

insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1981

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

A. Petitioner's Background

Petitioner's father is African-American, and his mother is Caucasian. R. 183. Petitioner has a B.A. in Economics and an M.B.A. from Stanford University. R. 1805. In his application for admission to the Stanford Graduate School of Business, Petitioner identified himself as black. *Id.* Moreover, in his Complaint filed with the New York State Division of Human Rights (the "SDHR"), Petitioner described himself as black. *Complaint dated Feb. 3, 1995*; R. 184. In fear of judgment on Wall Street, Petitioner self-identified as "white" at his place of employment. R. 1805. Petitioner kept his racial background closely guarded in his professional life and did not disclose his race to any "white" person on Wall Street. R. 1805.

B. Petitioner's Employment at WPMC

In 1991, Petitioner accepted a job with Wyser-Pratte Management Co., Inc. ("WPMC"), a Wall Street hedge fund. R. 185. Petitioner began as a Research Analyst with a starting salary of $85,000, plus incentive compensation of 7.5%. R. 186. His initial supervisor, Phoebe Yen – Director of Research, received a base salary of $95,000, plus incentive compensation of 10%. R. 2900. Shortly after beginning his employment at WPMC, Petitioner informed Guy Wyser-Pratte ("GWP"),

the owner and manager of WPMC, of his racial identity to curb GWP's and others distasteful and offensive racial epithets. R. 1807.

During his employment at WPMC, Petitioner was an exemplary employee. In fact, Petitioner became the only person at WPMC, outside of the owner, who possessed investment decision-making responsibilities. *Id.* Additionally, Petitioner became WPMC's most senior employee. *Id.* During his time at WPMC, Petitioner had earned an average of more than $420,000 per year and $5.5 million in total. R. 1814.

However, despite his seemingly excellent work-performance, Petitioner was the victim of racial discrimination. For instance, WPMC employees would play guessing games and attempt to categorize and stereotype Petitioner and his family during company gatherings. R. 2902. This sort of conduct rose to a level that forced Petitioner to boycott all company social events with his family. R. 2903.

Petitioner made several attempts to get his Series 7 Registration with the NASD. R. 2906. However, Petitioner never could obtain Series 7 Registration because GWP refrained from sponsoring him for the Series 7 examination. *Id.* Unfortunately, GWP never articulated a reason for refusing to sponsor Petitioner. *Id.*

Additionally, Petitioner was underpaid. *Id.* GWP's wife, and a WPMC employee, told Petitioner that he was paid less than he otherwise would have because GWP could get away with paying Petitioner less. *Id.* The basis for this notion was grounded in racism given

that Petitioner's race serves as an impediment to his likelihood of finding employment elsewhere on Wall Street, GWP could pay him less than his white counterparts. *Id.* GWP admitted to making these remarks this in his deposition. *Id.*

During his employment, WPMC did not employ any black professionals in permanent positions other than Petitioner. R. 2905. Interestingly in WPMC's EEOC Statement, WPMC did not claim white consultants as employees, but attempted to do so with their black consultants. In fact, GWP informed Petitioner that blacks did not project the appropriate Wall Street image. *Id.*

Moreover, GWP demanded that Petitioner commit perjury in a divorce proceeding between GWP and his then-wife, Vivian. R. 1809-1810. Vivian was prepared to expose GWP's guilt pertaining to an SEC insider trading investigation relating to put-options in Telxon Corp. *Id.* Despite admitting to Petitioner that he traded on inside information to avoid over $20 million in losses, GWP demanded that Petitioner testify falsely to protect GWP's reputation and wealth. R. 1810-1811. GWP did not request this from any white employees. R. 1811. Once Petitioner refused to commit perjury, GWP doubled down and told Petitioner he would "go down" unless he complied. R. 1811. On January 9, 2004, GWP threatened Petitioner by stating: "If you don't testify the way I want you to, I'm going to 'out' you. If you don't lie for me, you're dead. Think of your family." R. 1812. Petitioner perceived this to mean that GWP would reveal his true race to all of his co-workers and subject

his family to further ridicule. R. 1812. Notably, this was the last time GWP and Petitioner spoke. R. 1812.

GWP refused to communicate with Petitioner about business and investments. R. 1812. Petitioner decided it was appropriate to complain to WPMC's Chief Legal Officer, Kurt Schacht. *Id.* Schacht refused to get involved and suggested that Petitioner hire independent counsel. R. 1812-13. Schacht further directed Petitioner to work remotely while still receiving his salary. R. 1813. Given that GWP refused to speak with Petitioner and Schacht was Chief Legal Counsel, Petitioner believed Schacht was authorized to give Petitioner such orders. *Id.* GWP, in his deposition, admitted that Schacht had the authority to do so. R. 2456-57. Subsequently, Petitioner began working from home. R. 18113-14.

WPMC kept paying Petitioner's salary through the end of January 2004. R. 1814. However, that came to a halt in February. *Id.* Soon thereafter, Petitioner learned that he was terminated and was removed from WPMC's medical plan because he was a "former employee." R. 1814; 1857.

Longmire's attorney complained to WPMC about the termination on January 31, 2004, and in March 2004, WPMC reinstated Longmire on the payroll. R.1815, 2481-82. Although Longmire was not permitted to return to the office, Longmire was advised by his attorney that WPMC had "rehired"[1] him. R. 1815. At

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[1] However, the evidence that Warshaw missed shows that in March 2004 Longmire was not an employee of WPMC, that Longmire was not reinstated to his former positions and that his

month end, however, and again without explanation or warning, WPMC terminated Longmire's from its payroll effective March 30, 2004. R. 1815. WPMC's attorney later wrote to the Department of Labor a letter stating that she had been assigned to deal with the matter of his "employment termination." R. 3412.

C. Petitioner's Employment Discrimination Suit Against His Former Employer

On July 26, 2005, Petitioner brought an action against GWP and WPMC in the United States District Court for the Southern District of New York alleging employment discrimination. R. 1870-1897. Respondent through Mr. Lew and Mr. Lee represented Petitioner in the matter. *Id.*

Petitioner's *Second Amended Complaint* (SAC) in the discrimination suit included allegations that were the basis of his lawsuit. R. 1949-76.

1. Discriminatory work assignment and racial profiling: Because of his race, GWP required Petitioner to commit perjury at GWP's divorce proceedings regarding SEC insider trading investigations. R. 1963-66, 1970-72.

2. Discriminatory discharge on January 31, 2004. R. 1963, 1967-72.

3. Discriminatory termination on March 30, 2004. R. 1963, 1967-72.

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replacement, Adam Treanor, still worked at WPMC in Longmire's former position as Director of Research. (See WPMC's EEOC Statement, employee roster).

Importantly, Petitioner detailed the racial remarks by GWP and established that he was terminated and replaced by Adam Treanor, a white male. R. 1949-1976; 1952, 1969-70. In GWP's and WPMC's answer, they admitted to all of the allegations in the SAC, except for one. R. 1979, 1986-87. Petitioner's former employer insisted that Petitioner abandoned his job in January 2004. R. 1814.

On October 6, 2006, GWP and WPMC filed a motion for summary judgment. R. 2552-2897. In their motion, which was supposed to address the entire action, WPMC and GWP neglected to address the discriminatory termination claim. R. 2869-2897. Respondent improperly informed Petitioner that the aforementioned motion for summary judgment was limited to the claims addressed and discussed by WPMC. R. 1822. In Respondent's reply to WPMC's and GWP's motion for summary judgment, Respondent argued that Petitioner was terminated twice. R. 2913-2921. However, Respondent did not cite any evidence or cite any supporting case law pertaining to discriminatory termination. R. 575-602.

Perhaps most alarming, Respondent did not include the fact that WPMC and GWP admitted Petitioner was qualified for the position and was terminated and replaced by a white person. R. 3329-3333; R. 1824. Notably, Respondent did not mention the landmark case *McDonnell Douglas* and its framework at all in the summary judgment stage. R. 575-602. In September 2007, the District Court ruled in favor of WPMC and GWP. R. 3351-86. Significantly, the District Court noted

that Petitioner was terminated twice from his employment. R. 3363-3364.

Subsequently, an appeal was filed. Although Respondent did not cite *McDonnell Douglas* nor assert any contentions against discriminatory discharge at the summary judgment stage, Respondent raised the issue on appeal. R. 3400. After admitting their mishandling of the case and abandonment of the discriminatory termination claim, the firm relieved themselves as Petitioner's counsel in September 2008. R. 1827-28; R. 3404-10.

Since the central issues of his discrimination case, particularly that his termination on January 31, 2004 was discriminatory, were abandoned by Respondent and not ripe for appeal, Petitioner was forced to engage in settlement negotiations with his former employer. R. 1828. Petitioner retained new counsel in the continued negotiations. *Id.* On December 8, 2008, Petitioner entered into a settlement agreement with GWP and WPMC. R. 236-249. Petitioner also took the settlement because he believed that he had very little chance of succeeding in the appeal because of Respondent's failure to oppose summary judgment properly. In other words, Respondent failed to preserve his claims for discriminatory termination for appellate review.

Tragically, Petitioner has not been able to secure employment in his field since being terminated by WPMC, and his only income stems from his settlement agreement. R. 1829.

D. Respondent's suit for legal fees and Petitioner's legal malpractice counterclaim

Warshaw Burstein Cohen Schlesinger & Kuh, LLP ("Warshaw" or "Respondent") brought an action to recover unpaid legal fees on November 25, 2009. R. 254-258. Soon thereafter on February 8, 2010, Petitioner asserted counterclaims for legal malpractice and breach of contract. R. 260-271.

The basis of Petitioner's counterclaim was that Respondent was responsible for the fact that the federal judge dismissed his viable claim for discriminatory termination on January 31, 2004. Petitioner alleged that Respondent committed legal malpractice because they failed to defend his claim for discriminatory termination on January 31, 2004, by using the evidentiary path that the McDonnell Douglas path opened up. This evidentiary path clearly points in one direction: because of the fact that Petitioner can establish his prima facie case for discriminatory termination on January 31, 2004, and because of the fact that the WPMC and GWP defaulted on their burden of production, as a matter of law judgment must be entered in favor of Petitioner, if a jury believes that he was terminated.

On August 26, 2011, Warshaw moved to dismiss Petitioner's counterclaim for malpractice on the ground that Petitioner's counterclaim is barred by documentary evidence and fails to state a cause of action.

Respondent submitted Mr. Lee's sworn testimony in the form of an *Affidavit in Support of Motion to Dismiss Defendant's Counterclaim* dated August 25, 2011, and

in the form of a *Reply Affidavit in Support of Motion to Dismiss Defendant's Counterclaim* dated November 14, 2011. Respondent also submitted Mr. Lew's *Memorandum of Law in Support of Plaintiff's Motions to Dismiss First Counterclaim* dated August 26, 2011.

In his *Affidavit in Support of Motion to Dismiss Defendant's Counterclaim*, Mr. Lee testified as follows:

> Although Longmire now claims that his so-called "discriminatory termination claim" was his "primary claim" in the case (see Counterclaim, paragraph 21), all of the documentary evidence shows that not only was this not the primary claim, it was not even a secondary claim. (See Lee Affidavit in Support of Motion to Dismiss Defendant's Counterclaim, paragraph 46, page 11)

In his *Memorandum of Law in Support of Plaintiff's Motions to Dismiss First Counterclaim* dated August 26, 2011, Mr. Lew wrote that "[a]lthough Longmire now claims that his so-called "discriminatory termination claim" that he was fired because of his race was the primary claim in the case (see Counterclaim, paragraph 21), as set forth in the Lee Affidavit, all of the evidence shows that not only was this not the primary claim, it was not even a secondary claim." (See *Lew Memorandum of Law in Support of Plaintiff's Motions to Dismiss First Counterclaim*, page 10). In his *Reply Affidavit in Support of Motion to Dismiss Defendant's Counterclaim* dated November 14, 2011, Mr. Lee testified as follows:

22. The first point, failing to raise plaintiff's purportedly discriminatory termination claim in the context of McDonnell Douglas Corp. v. Green, is wrong because (a) discriminatory termination was not Longmire's claim....

[...]

43. While Longmire does not, and cannot dispute that the documentary evidence submitted on Warshaw Burstein's motion (including his own written admissions) is genuine and accurate, he asks the Court to ignore such documentary evidence in which he himself sets for what he wanted his claim to be from the outset – and it was never the so-called "discriminatory termination claim."

44. Thus "discriminatory termination" could not have been his primary claims as this was never even alleged as a claim in the complaint or in its successive amendments.

46. Longmire made no response to our presenting his own voluminous e-mails which were annexed as Exhibit 27 through 45 to my moving affidavit because he simply cannot controvert his own words. Those words clearly demonstrate that before his case was dismissed, neither plaintiff nor Longmire ever considered the claim of being fired because he was biracial as one of Longmire's claims at all, much less as his so-called "primary claim."

(See *Reply Affidavit in Support of Motion to Dismiss Defendant's Counterclaim* paragraphs 22, 43, 44 and 46)(Emphasis in original)

In the documents that Respondent submitted to the court, Respondent argues that Longmire's legal malpractice counterclaim is a phony claim that Petitioner "cooked up" in order to somehow defraud Respondent out of $268,380.30, plus interest thereon for attorney's fees and disbursements that they alleged he owed to Respondent. In his *Affidavit in Support of Motion to Dismiss Defendant's Counterclaim*, Mr. Lee stated the following in relevant respect:

> 70. Thus it is apparent that Longmire is now rewriting history by again ***making up new claims in an effort to concoct a legal malpractice*** claim to avoid having to pay his considerable overdue legal fees to Plaintiff. (Emphasis added) (See Mr. Lee's *Affidavit in Support of Motion to Dismiss Defendant's Counterclaim*, paragraph 71, page 18).

In his *Reply Affidavit in Support of Motion to Dismiss Defendant's Counterclaim*, Mr. Lee stated the following in relevant respect:

> 73. We implore the Court, please to dispense with this – if I may be forgiven the vernacular – "phony" counterclaim and not be burdened with a huge amount of additional legal work in order to obtain the fees which have been denied our firm for so very many years.

(See *Reply Affidavit in Support of Motion to Dismiss Defendant's Counterclaim*, paragraph 73, page 21)

In his *Memorandum of Law in Support of Plaintiff's Motions to Dismiss First Counterclaim*, Mr. Lew wrote the following in relevant respect:

> Warshaw Burstein Cohen Schlesinger & Kuh, LLP ("Warshaw Burstein" or "plaintiff"), in this action to recover its legal fees and disbursements, submits this memorandum, together with the accompanying affidavit of Martin R. Lee, Esq. ("Lee Aff."), in support of its motion, pursuant to CPLR 3211(a)(1), to dismiss the first of two counterclaims that defendant Eric A. Longmire ("defendant" or "Longmire") has asserted against plaintiff, alleging legal malpractice, wherein the demanded an undetermined amount to be determined at trial.
>
> [...]
>
> This is a garden-variety action for recovery of legal fees owed by a client to his attorneys. In response to plaintiff's complaint, defendant has pleaded two patently frivolous counterclaims, i.e., for legal malpractice and breach of contract – representing a transparent attempt by defendant to intimidate plaintiff into withdrawing its complaint, thereby allowing defendant to escape his contractual obligation to pay the legal fees he incurred. Each of his counterclaims is entirely without merit. The instant motion addresses the first of these two counterclaims and argues that, as a matter of law, it must be dismissed.

1. Supreme Court of New York

Sua sponte and without notice to Petitioner, and without giving him the opportunity to respond beforehand, the Supreme Court of New York cited the follow reasons for denying his counterclaims.

1. Longmire could not establish the fourth element of his prima facie case for discriminatory termination because "...assuming that Longmire was terminated..., the circumstances surrounding his termination, as found by the federal court and reflected in the record, did not give rise to an inference of discrimination."

2. GWP sustained his burden of production because he had "articulated a nondiscriminatory reason for [Longmire's] termination, which was that he believed that Longmire quit or abandoned his position when he left on January 22, 2004."

3. The burden shifted to Longmire to show pretext, which he could not do because "Longmire's unsupported claims are insufficient to show both that the stated reason for his termination was false and the real reason was discrimination".

The court stated that it assumed that Longmire was terminated, and it recognized that "Longmire asserts that he did not resign..." R. 25.

The motion court went through all three steps of the *McDonnell Douglas* burden shifting framework. In the first step, the motion court skipped the third element (adverse employment actions) proceeded directly to the fourth element (circumstances giving rise to an inference of discrimination) of the prima facie case for discriminatory termination, where it found that Longmire could not establish the fourth element of his prima facie case for discriminatory termination because "...the circumstances surrounding his termination, as

found by the federal court and reflected in the record, did not give rise to an inference of discrimination."

The motion court then proceeded to the second step (production) and found that GWP "articulated a nondiscriminatory reason for [Longmire's] termination, which was that he believed that Longmire quit or abandoned his position when he left on January 22, 2004."

Finally, the motion court proceeded to the third step (pretext) and found that "Longmire's unsupported claims are insufficient to show both that the stated reason for his termination was false and the real reason was discrimination".

2. Appellate Division, First Department, Supreme Court of New York

On May 3, 2012, Petitioner filed an appeal to the Appellate Division of the Supreme Court of the State of New York (First Department).

Sua sponte and without notice to Petitioner, and without providing him an opportunity to respond, the Appellate Division denied Petitioner's appeal and concluded that Petitioner could not have established a prima facie case of race-based discrimination reasoning that Petitioner testified in the underlying suit that he voluntarily left his employment and that Petitioner alleged that if he was terminated, it was because he failed to commit perjury and not his race.

i. Referee's Report

After a court-ordered Referee investigation, the Referee published a report. DCD 440. In the report the referee recommended that the court find Petitioner not liable for legal fees to Respondent. DCD 440. Soon thereafter, Respondent moved to have the Report disregarded. Importantly, during the trial on November 27, 2012, Respondent through Mr. Lee admitted to having enough information to make out a case for employment discrimination and that Petitioner was in fact terminated. DCD 460.

3. State of New York Court of Appeals

Petitioner moved for leave to appeal to the New York Court of Appeals on June 6, 2019. DCD 645. On September 12, 2019, the court denied the motion without an opinion. DCD 655.

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. THE APPELLATE DIVISION'S ACTIONS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS. ACCORDING TO THE U.S. SUPREME COURT

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). And the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest," *Mullane v.*

Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). But we have also clearly recognized that the Due Process Clause does prescribe a constitutional minimum:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. It is against this standard that we evaluate the procedures employed in this case.

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). *See e.g.*, *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931). *See also Dent v. West Virginia*, 129 U.S. 114, 124-125 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S.

545, 552 (1965). *See also Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Significantly, "the Supreme Court has held that actions by appellate courts constitute governmental actions that are subject to these due process guarantees." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Not surprisingly, sua sponte orders have been reversed as a deprivation of due process where a party had no notice, and thus no opportunity to be heard, that such an order was under consideration. *See Eggleston v. Gloria N.*, 55 A.D.3d 309 (N.Y. 1st Dept. 2008); *Chase Home Fin., LLC v. Kornitzer*, 139 A.D.3d 784 (N.Y. 2d Dept. 2016) ("The sua sponte dismissal of the complaint...without affording the plaintiff any notice and opportunity to be heard, was improper...and amounted to a denial of the plaintiff's due process rights."); *Brody v. Brody*, 98 A.D.2d 702 (N.Y. 2d Dept. 1983) ("[The] sua sponte stay was in violation of plaintiff's due process rights, as she was never notified that such an order was under consideration."); *Leibowits v. Leibowits*, 93 A.D.2d 535 (N.Y.2d Dept.. 1983). Moreover, this court held in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) that the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."

The Appellate Division's actions, the laws of New York State and the rules of the Court of Appeals have operated to deny Petitioner's constitutional right to due process. According to the laws of New York State and the rules of the Court of Appeals, constitutional arguments have to be preserved and cannot be made for the first time with the Court of Appeals. *See Matter of*

Barbara C., 64 N.Y.2d 866, 868 (1986); *Matter of Peter L.*, 59 N.Y.2d 513, 519(1983); The New York Court of Appeals Civil Jurisdiction and Practice Outline, prepared by the Clerk's Office, New York Court of Appeals, states the following:

The general rule requires that constitutional questions be raised at the first available opportunity as a prerequisite to review in the Court of Appeals. *See e.g. Matter of Barbara C.* There is some indication that the Court may make an exception to this doctrine and examine a constitutional issue raised for the first time in the Court of Appeals if the issue implicates grave public policy concerns. *See Park of Edgewater v. Joy*, 50 NY2d 946, 949 (1980) *citing Massachusetts Natl. Bank v. Shinn*, 163 NY 360, 363 (1900).

Now, before this Court, for the first time the opportunity has presented itself for Petitioner to raise this constitutional question. As discussed above, the Appellate Division made its decision to dismiss Petitioner's appeal sua sponte and without notice to Petitioner, and without giving him the opportunity to respond. Therefore, the Appellate Division did not give Petitioner the opportunity to raise for the first time with the Appellate Division the constitutionality of its decision to dismiss his appeal sua sponte and without notice to him, and without giving him the opportunity to respond. As a result, Petitioner did not have the opportunity to preserve this constitutional argument, which, in turn, prevented him as a matter of law from raising for the first time this constitutional argument with the Court of Appeals.

As discussed below, the *McDonnell Douglas* framework provides Petitioner with the evidentiary path that leads to the inevitable conclusion: as a matter of law judgment must be entered in Petitioner's favor, if a jury believes that he was terminated on January 31, 2004. The Appellate Division's actions deprived Petitioner of his constitutional right to have his "day in court" and follow this evidentiary path. In *Trans World Airlines Inc. v. Thurston*, 469 U.S. 111 (1985) the Supreme Court recognized that the McDonnell Douglas method of proof was "designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" The rationale supporting the method is that "experience has proved that in the absence of any other explanation it is more likely than not that [the adverse employment actions] were bottomed on impermissible considerations." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580 (1978).

II. THE APPELLATE DIVISION AND COURT OF APPEALS ERRED IN DISMISSING PETITIONER'S CLAIM FOR LEGAL MALPRACTICE AGAINST RESPONDENT.

The Appellate Division's finding that Petitioner "testified in the underlying suit that he voluntarily left his former employment" does not prevent Petitioner from arguing what he argued to the Appellate Division, namely that judgment must be entered in his favor on his claim of discriminatory termination if a jury believes that he was terminated on January 31, 2004.

Importantly, there is no evidence that suggests Petitioner voluntarily left WPMC. In fact, the record

makes clear the Petitioner continuously maintained that he was terminated. See R. 1814. In Petitioner's exchange with GWP's counsel, Petitioner asserted he was terminated. R. 291.

There is no testimony from Petitioner in which Petitioner testified that he "g[a]ve up employment."[2] As stated below, Petitioner consistently testified by uttering the words "terminated", "termination", and "post-termination". Petitioner alleged that "[He] was terminated from [his] job at WPMC in 2004 because of the discrimination of [his] former employer...." Furthermore, there is no testimony where Petitioner testified, with respect to the events on January 22, 2004, that he was acting "of [his] free will." To the contrary, Petitioner testified that he was acting because GWP had pressured him to commit the crime of perjury. This testimony proves that Petitioner was not acting "of [his] free will" but because of outside pressure from his supervisor to commit the crime of perjury. Importantly, GWP did not ask any of Petitioner's white counterparts to commit perjury. Instead, GWP attempted to leverage Petitioner's race against him knowing that if he refused, Petitioner would be left jobless.

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[2] The legal definition of "voluntary quit" is to "'give up employment' 'of one's free will'" and the definition of "[r]esignation" is "[t]he act ... of surrendering or relinquishing an office." The Cambridge Dictionary defines "free will" as, "the ability to act and take choices independent of any outside influence" (*See*, http://dictionary.cambridge.org/us/dictionary/english/free-will). Therefore, the legal definition of "voluntarily quit" had two components: (1) the "give up employment" component; and (2) the "of one's free will" component. *Id. Airgas Specialty Gases Inc. v. Kumar*, 466 Fed. Appx. 41 (2d Cir. 2012)

Therefore, if the Appellate Division's finding is that Petitioner "testified in the underlying suit that he voluntarily left his former employment", then the Appellate Division's finding is in error, because it is contrary to the only sworn testimony that Petitioner presented, namely that he was terminated, and because the Appellate Division's finding lacks any evidentiary support and is against the clear weight of the evidence. See *Trans-Orient Marine Corporation v. Star Trading & Marine, Inc.*, 731 F. Supp. 619 (S.D.N.Y. 1990) noting "If a finding is directly contrary to the only testimony presented, it is properly considered to be clearly erroneous.); *See also Morris Plan Indus. Bank v. Finn*, 149 F.2d 591, 592 (2d Cir. 1945); *In re Hammons*, 438 F.Supp. 1143, 1149 (S.D.Miss.1977), rev'd on other grounds, 614 F.2d 399 (5th Cir. 1980); *see also Lame v. United States Dep't of Justice*, 767 F.2d 66, 70 (3d Cir. 1985) (factual findings clearly erroneous if unsupported by substantial evidence, lack adequate evidentiary support, or against clear weight of evidence)."

By finding that Petitioner testified at his deposition that he voluntarily quit, the Appellate Division erred because it resolved the central dispute in this case, whether or not Petitioner was terminated, whether actually or constructively, and it resolved this dispute in favor of GWP, WPMC, and the Respondent. In doing so, the Appellate Division improperly usurped the jury's province as fact-finder. In *Lucente v. International Business Machines Corporation*, 262 F. Supp. 2d 109 (S.D.N.Y. 2003), the court held that when "finding that plaintiff had been involuntarily terminated by IBM ...

the district court resolved numerous factual discrepancies in plaintiff's favor. In so doing, the court usurped the jury's province as fact-finder."

The Appellate Division's finding that Petitioner alleged that if he was terminated, it was because he failed to commit perjury and not his race is in error for the following reasons. *First*, in New York State, it is well settled law that "[u]ndeniably, a plaintiff is entitled to advance inconsistent theories in alleging a right to recovery." *Cohn v. Lionel Corp.*, 21 N.Y.2d 559, 563 (N.Y. 1968) Therefore, if Mr. Lee and Mr. Lew alleged in Petitioner's SAC that he was terminated because he failed to commit perjury and not his race, then as a matter of law Mr. Lee and Mr. Lew were also permitted to allege and did in fact allege that Petitioner was terminated on January 31, 2004 because of his race.

Second, the notion that Petitioner was terminated because he refused to commit perjury does not mean that there was no discrimination in his termination on January 31, 2004. If GWP viewed Petitioner as an "uppity nigger" because he refused to commit perjury, then his termination on January 31, 2004 was discriminatory.

Third, there is absolutely no evidence in the record that GWP and WPMC terminated Petitioner because he refused to commit perjury and not because of his race. Significantly, GWP and WPMC never provided any such evidence because they never gave any reason whatsoever as to why they terminated Petitioner on January 31, 2004. Furthermore, Petitioner did not provide any such evidence because he has none. As discussed above, Petitioner was working from home

when he learned secondhand that he was terminated. Therefore, Petitioner was not even around GWP to witness his mental process when he decided to terminate Petitioner on January 31, 2004.

Finally, by finding that Petitioner alleged that if he was terminated, it was because he failed to commit perjury and not his race, the Appellate Division resolved the central dispute in this case, whether or not Petitioner's termination on January 31, 2004 was because of his race, and it resolved this dispute in the favor of GWP, WPMC, and the Respondent. In doing so, the Appellate Division again improperly usurped the jury's province as fact-finder.

III. AS A MATTER OF LAW JUDGMENT MUST BE ENTERED IN FAVOR OF PETITIONER, IF A JURY DECIDES HE WAS TERMINATED, ACTUALLY OR CONSTRUCTIVELY

A. The evidence proves that petitioner unequivocally established a prima facie case of employment discrimination against his former employer if not for Respondent's negligence.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973), this Court established the burden-shifting framework for disparate treatment claims. *See also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981). First, the plaintiff must establish a prima facie case of employment discrimination. Second, the defendant is required to articulate a legitimate non-discriminatory reason for

the adverse employment action. Lastly, the plaintiff must show that the defendant's proffered legitimate non-discriminatory reason for the adverse employment action was pretextual. As noted in *Hishon v. King and Spalding*, it is unlawful for an employer to take adverse employment actions because of a plaintiff's protected trait. 467 U.S. 69, 73 (1984); *See also* 42 U.S.C. § 2000e–2(a) "It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

To establish a prima facie case through *McDonnell Douglas*, Petitioner must show (1) he is a member of a protected class; (2) he was qualified to hold and satisfactorily performed the duties of his position; (3) despite satisfactory performance, he was terminated; and (4) the position was opened and ultimately filled by someone outside of his protected class. *McDonnell Douglas*, 450 U.S. at 802-03. Alternatively, a plaintiff may satisfy the fourth requirement to make out a prima facie case by showing that the discharge occurred in circumstances giving rise to an inference of unlawful discrimination. *Id.*

Significantly, "[i]f the trier of fact believes the plaintiff's evidence, and if the defendant is silent in the face of the presumption of discrimination, judgment must be entered for plaintiff because no issue of fact remains in the case." *Burdine*, 450 U.S. at 254. The

Supreme Court stated in *Watson v. Fort Worth Bank & Trust*:

> The defendant then knows that its failure to introduce evidence of a nondiscriminatory reason will cause judgment to go against it unless the plaintiff's prima facie case is held to be inadequate in law or fails to convince the factfinder. It is this practical coercion which causes the McDonnell Douglas presumption to function as a means of 'arranging the presentation of evidence,' *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 986 (1988).

It is undisputed that Petitioner is a member of a protected class. Therefore, the first prong of *McDonnell Douglas* is satisfied. Second, WPMC and GWP never disputed Petitioner's qualifications. Moreover, as the evidence suggests, Petitioner was exemplary at his job. Petitioner was one of the most senior employees at WPMC, and his compensation reflects his outstanding workplace achievements.

As for the third prong, during WPMC's and GWP's motion for summary judgment, Respondent provided enough evidence for a federal judge to determine that Petitioner was terminated. As a result, the third element of *McDonnell Douglas* is satisfied. Moreover, Respondent's demand in paragraph 149 of the *SAC* includes a demand for "...salary, bonus, medical and fringe benefits he would have earned up to and including the date of normal retirement...." The nature of these items demanded can only have come about because Petitioner was terminated.

Even if this Court, despite the overwhelming evidence, determines that Petitioner was not fired, Respondent's testimony through Mr. Lee at the fee trial, among other things, unequivocally proves that Petitioner was constructively discharged and did not leave his job under his own volition or "free will". (See *Morris v. Schroder Capital Mgmt. Int'l*, 7 N.Y.3d 616 (2006), "Federal courts created the constructive discharge test in the context of employment discrimination cases for determining whether the employee's resignation was "voluntary.") Therefore, no matter if Petitioner was terminated or constructively discharged, he can establish a prima facie employment discrimination case. (*See Chertkova v. Connecticut General Life Ins. Co.*, 822 A.2d 372 (Conn. App. Ct. 2003) "One of the elements of a prima facie case of discriminatory discharge, as one might expect, is that the employee was discharged.... This element may be satisfied by a showing of an actual or a constructive discharge.") Here constructive discharge can be proven by the humiliation WPMC, GWP and its employees subjected Petitioner too and the unbearable work environment they fostered. To establish an abuse workplace, one must examine the totality of circumstances, the frequency, the severity, whether the conduct is humiliating or mere offense utterance and if the plaintiff's work performance was unreasonably interfered with. *Clarke County School District v. Breeden*, 532 U.S. 268 (2001).

During their motion for summary judgment, GWP and WPMC offered the *Affidavit of Kurt N. Schacht, Esq. in Support of Motion*, dated October 9, 2006, that describes Petitioner's working conditions and state of

mind just prior to when Petitioner "left" the office. R. 3509. Mr. Schacht's affidavit proves that if Petitioner quit, then he quit in order to escape intolerable employment requirements.

Mr. Schacht's affidavit proves that Petitioner complained to him about his intolerable working conditions. As an initial matter, the evidence proves that Mr. Schacht was the appropriate executive at WPMC with whom to lodge complaints. During WPMC's motion for summary judgment, in Mr. Schacht's affidavit, he testified that "[f]rom May 2001 until March 2004, I was employed at Wyser-Pratte Management Co., Inc. ('Wyser-Pratte'), where I held the titles, among others, of Chief Administrative Officer, Chief Compliance Officer and Chief Legal Officer. When I started, I was party to an employment contract dated May 14, 2001." *Affidavit of Kurt N. Schacht, Esq. in Support of Motion.*

Significantly, Mr. Schacht's employment contract proves that in effect Mr. Schacht was WPMC's human resources department and that it was his job at WPMC to address Petitioner's complaints about his intolerable work conditions. According to Mr. Schacht's employment contract, Section 4.2 entitled "General Specification of Duties," Mr. Schacht had the following duties, among others:

> Executive's duties shall include, but not be limited to, the duties and performance goals as follows:
>
> > 4.2.3 employ, pay, supervise, and discharge all employees of the Company, and determine

> all matters with regard to such personnel ... all in consultation with the CEO;
>
> 4.2.7 help assure that the Company will be operated in compliance with all legal requirements;

Therefore, it was Mr. Schacht's job to "determine all matters with regard to such personnel...all in consultation with the CEO", as well as to "help assure" that WPMC committed no crimes.

In his affidavit, Mr. Schacht testified as follows:

> During the weeks leading up to Mr. Longmire's departure from Wyser-Pratte, that is, in late 2003 – early 2004, Mr. Longmire and I discussed his deteriorating relationship with Mr. Wyser-Pratte. Specifically, Mr. Longmire said he did not know what to do, but that he couldn't work here anymore. He also said he was wasting his time coming to work because he was not engaged in the business anymore, could not discuss the portfolio anymore with Mr. Wyser-Pratte, and felt completely disconnected from everything. He said he needed to get out. Mr. Longmire also said he believed everyone at Wyser-Pratte hated him. Mr. Longmire told me that he was also anxious about Mr. Wyser-Pratte's pending divorce and the possibility of having to testify.
>
> Mr. Longmire raised with me whether he should resign or take some time off from work. [...]

> On or about January 22, 2004, Mr. Longmire stopped coming to work.

(See R. 3509, paragraphs 3-5, pages 1-2)

Mr. Schacht testified that "...Mr. Longmire and I discussed his deteriorating relationship with Mr. Wyser-Pratte. Specifically, Mr. Longmire said he did not know what to do, but that he could not work here anymore. He also said he was wasting his time coming to work because he was not engaged in the business anymore, could not discuss the portfolio anymore with Mr. Wyser-Pratte, and felt completely disconnected from everything. He said he needed to get out." *Id.* Furthermore, Mr. Schacht testified that "Mr. Longmire told me that he was also anxious about Mr. Wyser-Pratte's pending divorce and the possibility of having to testify".

Although Petitioner's SAC does not use the phrase "constructive discharge", the allegations in Petitioner's SAC are enough to encompass a theory of constructive discharge. See *Fitzgerald v. Henderson*, 36 F. Supp. 2d 490 (N.D.N.Y 1999) ("Finally, we have difficulty with the district court's summary dismissal of Fitzgerald's claim that she was constructively discharged. Preliminarily, we note that although the specific phrase "constructive discharge" was not used in the amended complaint, the pleading asserted that Gerling continually harassed Fitzgerald, that he did so deliberately and in bad faith as retribution for her refusal of his sexual advances, and that his abuse so persisted and escalated that it essentially brought on a psychological breakdown, causing her to became unable

to work at all. Such allegations are ample to encompass a theory of constructive discharge.")

Petitioner alleged that GWP continually harassed Petitioner to go outside of his job responsibilities and commit perjury regarding the SEC Telxon insider trading investigation. A reasonable person in Petitioner's shoes would have felt compelled to resign.

A jury can find that GWP automatically trapped Petitioner into a corner and forced him in the unacceptable position of having to choose between keeping his job and facing criminal liability. *See Higginbotham v. Allwaste, Inc.*, 889 S.W.2d 411 (Tex. App. 1994) ("...when an employer asks an employee to perform some act which is illegal, he automatically puts the employee to the 'unacceptable' choice of risking criminal liability or being discharged because the employee is placed under the onus of being terminated for insubordination.").

Therefore, if Petitioner quit, which is not the case, then he was forced to do so against his free will and a jury can be satisfied that Petitioner's "working conditions [were] so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Additionally, Petitioner had zero reasons to leave WPMC absent GWP's consistent workplace abuse. Petitioner received a lucrative salary and already was a senior employee on Wall Street.

Furthermore, the fact that Petitioner was continually harassed to commit a crime, perjury, establishes as a matter of law a constructive discharge. *See Strozinsky v. School District of Brown Deer*, 237

Wis. 2d 19, 614 N.W.2d 443, 2000 Wisc. LEXIS 441, 2000 WI 97, 16 I.E.R. Cas. (BNA) 879 ("Intolerable conditions can arise, however, when the employer requests or requires an employee to engage in illegal acts."); *Jacobs v. Universal Development Corp.*, 53 Cal. App. 4th 692, 62 Cal. Rptr. 2d 446, 1997 Cal. App. LEXIS 151, 97 Cal. Daily Op. Service 1573, 12 I.E.R. Cas. (BNA) 1211, 97 Daily Journal DAR 2277 ("This is further illustrated by constructive discharge law, which expressly protects an employee who quits after being subjected to a continuous pattern of adverse working conditions.) As shown by *Smith v. Brown-Forman Distillers Corp.*, 196 Cal.App.3d 503 (1987), intolerable conditions may arise when an employee has been required to violate the law at the employer's direction." In *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 876 P.2d 1022 (1994) the court held that, in some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.

Even Mr. Schacht's testimony supports the inference that Petitioner was constructively discharged going into January 22, 2004. For example, as discussed above Mr. Schacht testified that "[Petitioner] also said he was wasting his time coming to work because he was not engaged in the business anymore, could not discuss the portfolio anymore with Mr. Wyser-Pratte, and felt completely disconnected from everything", which as a matter of law supports an inference of constructive discharge. See R. 350. ("With respect to the asserted change in job responsibilities and stature, evidence of a

reduction in job responsibilities to the point where an employee has nothing meaningful to do with her time can lead to an inference of constructive discharge....") (*See Halbrook v. Reichhold Chemicals, Inc.*, 735 F. Supp. 121, 126 (S.D.N.Y. 1990).

To satisfy the fourth element of establishing a prima facie employment discrimination case, Petitioner need only show that he was replaced by someone outside of his protected class. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802; *Owens v. New York City Hous. Auth.*, 934 F.2d 405, 408-09 (2d Cir.), cert. denied, 502 U.S. 964, 112 S.Ct. 431, 116 L.Ed.2d 451 (1991); *Sweeney v. Research Found. of State Univ. of New York*, 711 F.2d 1179, 1184-85 (2d Cir. 1983). In *Bridget Gladwin v. Rocco Pozzi and County of Westchester*, 403 Fed Appx 603, 606 (2d Cir. 2010), plaintiff satisfied the de minimus burden required to establish a prima facie case by showing she was replaced by a white male, thus creating circumstances giving rise to an inference of discrimination. Additionally, in *Zimmerman v. Assocs. First Capital Corp.*, 251 F.3d 376, 381 (2d Cir. 2001), the court noted that "the mere fact that plaintiff was replaced by someone outside the protected class will suffice for the required inference of discrimination at the prima facie stage." *See also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *Byrnie v. Town of Cromwell*, 243 F.3d 93 (2d Cir. 2001); *Tarshis v. Riese Organization*, 211 F.3d 30 (2d Cir. 2000); *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235 (2d Cir. 1995).

In GWP's deposition, he admitted that Petitioner was replaced by Mr. Treanor, a white male.

Q Who's Adam Treanor?
A He's my director of research.
Q Did you hire him?
A I did.
Q Was he hired to replace the plaintiff?
A Yes, he was.

(GWP Depo., 142:18-24). Furthermore, WPMC and GWP admitted that Mr. Treanor was a white male in their answer. R. 1978.

Moreover, Petitioner can establish the fourth element of a prima facie case for discriminatory termination by showing that he was replaced by a significantly less qualified white male. Petitioner alleged in his *Second Amended Complaint* that:

> 43. At the time GWP hired Mr. Treanor to be WPMC's Director of Research, Mr. Treanor had neither merger arbitrage and corporate governance investing experience, nor "buy side" experience, other than the small expose he had received while he worked for the defendants, spending a great deal of time working for plaintiff, as a summer associate during the months of May of 2000 to August of 2000.

This disparity in qualifications between Petitioner and Mr. Treanor support the inference that Petitioner's terminate occurred under circumstances giving rise to an inference of discrimination. *See Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-57 (2006).").

B. WPMC and GWP Failed to Provide a Legitimate, Non-Discriminatory Explanation for Petitioner's Discharge on January 31, 2004.

The Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), carefully described the burden that shifts to the defendant once a prima facie case is made out. The Court there said:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. **To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.**

(emphasis added).

To accomplish this, the defendant must clearly set forth the reasons for the adverse employment action. *Id.* This burden of production includes providing evidence that providing a lawful explanation for their actions and to frame the factual issue with sufficient clarity so that

the plaintiff will have a complete and fair opportunity to demonstrate pretext. *Id.* Thus, aided by the *McDonnell Douglas* presumption, which is designed to force employers to come forward with reasons, "a plaintiff who proves the minimal prima facie case is entitled to prevail as a matter of law even without evidence that would support a reasonable finding of discriminatory motivation, if the employer does not come forward with a reason." *Cabrera v. Jakabovitz,* 24 F.3d 372 (2d Cir. 1994).

Nowhere in the record is there a scintilla of evidence produced by WPMC or GWP detailing a legitimate, non-discriminatory reason for Petitioner's termination on January 31, 2004. For that matter, nor did WPMC or GWP proffer a nondiscriminatory reason for pressuring Petitioner to commit the required perjury. As a matter of law, WPMC and GWP defaulted on their burden of production and summary judgment should have been ruled in favor of Petitioner. On their motion for summary judgment, the employer defendants studiously avoided the question of whether Petitioner had quit or was fired – their papers do not mention it at all. R. 2858-2897. GWP and WPMC avoided joining issue on this question because to do so would have defeated their motion for summary judgment for the simple reason that they denied terminating Petitioner of January 31, 2004. That being the case, they never met their burden of production, having denied taking any adverse employment action.

C. If Needed, Petitioner Could Show Pretext If Afforded the Opportunity.

Evidence indicating that an employer misjudged an employee's performance or qualifications is, of course, relevant to the question whether its stated reason is a pretext masking prohibited discrimination. *Tyler v. ReMax Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000); *Alexander v. Fulton County*, 207 F.3d 1303, 1340 (11th Cir. 2000) (noting that 'evidence showing an employer hired a less qualified applicant over the plaintiff may be probative of whether the employer's proffered reason for not promoting plaintiff was pretextual.).

Courts have recognized that an employer's disregard or misjudgment of a plaintiff's job qualifications may undermine the credibility of an employer's stated justification for an employment decision. *See Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996).

The fact that the GWP and WPMC terminated the significantly more qualified black male and replaced him by hiring a significantly less qualified white male constitutes strong evidence that GWP terminated Petitioner with the intent to discriminate against him. *See Stratton v. Department for the Aging for the City of New York*, 132 F.3d 869 (2d Cir. 1997) ("Actions taken by an employer that disadvantage an employee for no logical reason constitute strong evidence of an intent to discriminate. *Bullard v. Sercon Corp.*, 846 F.2d 463, 466 (7th Cir. 1988) (the fact that an employee is fired "without good cause" may in some cases be evidence of discrimination); *In re Lewis*, 845 F.2d 624, 633 (6th Cir.

1988) (Employer's decision to fire plaintiff "may have been so unusual or idiosyncratic as to shed light upon [its] motivation in firing her. The more questionable the employer's reason, the easier it will be for the jury to expose it as pretext."); *Mesnick v. General Electric Co.*, 950 F.2d 816, 823-24 n. 5 (1st Cir. 1991) ("if the employer offers a shaky, hard-to-swallow reason for its actions, logic counsels that the plaintiff's follow-on burden [to prove pretext] should become correspondingly lighter.").

In conclusion, the evidence proves that Respondent had all requisite information and elements to guide the lower courts through a *McDonnell Douglas* analysis. In fact, Respondent through Mr. Lee admitted that he could have established Petitioner's prima facie case for employment discrimination. As noted in their *Pre-Argument Statement*, WPMC and GWP botched their burden of production. Therefore, Respondent through Mr. Lee and Mr. Lew were required to make the most basic legal arguments, and they failed to do so causing great harm to Petitioner, their erstwhile client.

CONCLUSION

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

Respectfully submitted,

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