20-7289

No. _____

ORIGINAL

IN THE

Supreme Court of the United States

Bobby Campbell,

Petitioner,

v.

Bottling Group LLC.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

Context: In 1973 this Court established the *McDonnell Douglas* analysis for Title VII employment discrimination cases.[1] This analysis is a three-step burden-shifting framework now used for summary judgment motions: If 1) a plaintiff establishes a prima facie case of discrimination, then 2) the defendant-employer must provide a legitimate and non-discriminatory reason for the adverse employment action at issue; if, and only if, such a reason has evidentiary support, then 3) the plaintiff must show that the defendant's reason was pretext for discrimination.[2] A result implying discrimination sends the case to a jury otherwise it ends.

A prima facie case consists of: 1) plaintiff being part of a protected class; 2) plaintiff having been qualified for the position; 3) plaintiff having been fired; and 4) the firing implying discrimination.[3] Discrimination can be implied by the employer's less favorable treatment of the plaintiff compared to

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[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[2] *Morales*, 374 F. Supp. 3d at 268.

[3] *Id.*

a similarly situated employee, a comparator, outside of the protected class who committed comparable conduct.[4] This creates another factual issue: whether the defendant's reason is pretext for discrimination.[5]

Finding discrimination is, therefore, essential. The result directly leads to either dismissal or a jury. Without direct evidence, finding differently treated similarly situated comparators is key. This factual finding is often made by courts without a uniform method.

1. Does the 7th Amendment to the United States Constitution prohibit courts from measuring degrees of similarity to grant summary judgment on the factual issue of who is a similarly situated employee, and is a uniform objective standard the proper way to decide this issue?

2. Can an accuracy disclaimer of a map website used to track miles, and knowledge that a mileage calculation does not perfectly track actual routes reasonably support that a mileage report was fabricated or knowingly inaccurate?

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[4] *Id.*

[5] *Campbell*, No. 19-1345-cv at 6.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Bobby Campbell was the Plaintiff in the United States District Court for the Western District of New York and the Appellant at the United States Court of Appeals for the Second Circuit. Respondent Bottling Group, LLC, was the Defendant in the District Court and the Appellee in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Bobby Campbell is an individual and brings the claims in this matter on his own behalf. Respondent Bottling Group, LLC is a subsidiary of Pepsico, Inc.

RELATED CASES

Morales v. Bottling Grp., LLC, 374 F. Supp. 3d 257 (W.D.N.Y. 2019)

TABLE OF CONTENTS

QUESTIONS PRESENTED I

PARTIES TO THE PROCEEDINGS BELOW III

CORPORATE DISCLOSURE STATEMENT III

RELATED CASES III

TABLE OF CONTENTS IV

TABLE OF AUTHORITIES VI

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS and ORDER BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 3

Amendment VII 3

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED 3

Rule 56. Summary Judgment 3

STATUTORY PROVISION INVOLVED 4

STATEMENT OF THE CASE 5

I. FACTS. 6

II. PROCEDURAL HISTORY. 10

REASONS FOR GRANTING THE PETITION 13

I. Varied Application of the Mcdonnell Douglas Analysis Widely Eviscerates 7th Amendment Rights. 13

A. THERE IS AN IMPORTANT AND RECURRING PROBLEM. 14

1. A Comparator "Checklist" Is Better Than The Varied Measuring Of Degrees Of Similarity. 15

II. Petitioner Was Entitled To Deference And Good Math 19

CONCLUSION 22

APPENDIX A: Opinion of the United States Court of Appeals for the Second Circuit, Filed May 21, 2020

APPENDIX B: Opinion of the United States District Court for the Western District of New York, Filed April 15, 2019

APPENDIX C: Order of the United States Court of Appeals for the Second Circuit, Denying Rehearing, Filed September 8, 2020

APPENDIX D: Counterstatement to Plaintiff's Statement of Material Facts

APPENDIX E: Memorandum of Law in Support of Defendant's Motion for Summary Judgment

TABLE OF AUTHORITIES

Cases

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). I

Green v. McDonnell Douglas Corp., 318 F. Supp. 846 (1970). 13

Wimbley v. Cashion, 588 F.3d 959 (8th Cir. 2009) 15

Coleman v. Donahoe, 667 F.3d 835, (7th Cir. 2012) 15

Lewis v. City of Union City, 918 F.3d 1213 (11th Cir. 2019) 16

Graham v. Long Island Railroad, 230 F.3d 34, 40 (2d Cir. 2000). 16

Blaise v. Verizon N.Y. Inc., No. 19-1028 (2nd Cir. March 19, 2020) 18

Tolan v. Cotton, 572 U.S. 650 (2014). 20

Rules and Statutes

Federal Rule of Civil Procedure 56(a) passim

42 U.S.C. § 2000e-2(a)(1) passim

Other Authorities

Suja A. Thomas, *Reforming The Summary Judgment Problem: The Consensus Requirement*, 86 Fordham. L. Rev. 2241 (2018). 1

NASA, Mars Climate Orbiter, NASA Space Science Coordinated Archive (last visited January 15, 2021) 4

C. William Thomas, The Rise and Fall of Enron, J. of Accountancy (April 1, 2002) 4

Brief in Opposition For Respondent, Ameer Siddiqui v. NetJets Aviation, Inc., No. 19-500 at 10. 14

PETITION FOR WRIT OF CERTIORARI

Bobby Campbell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS and ORDER BELOW

The order of the Court of Appeals for the Second Circuit denying rehearing for Docket number 19-1345, dated September 8, 2020, is unreported. (Appendix A)

The opinion of the Court of Appeals for the Second Circuit (App. B) is a summary order and unreported but found by its reference: *Campbell v. Bottling Grp.*, No. 19-1345-cv (2d Cir. May. 21, 2020). (Appendix B)

The opinion of the District Court for the Western District of New York (App. C) is reported at *Morales v. Bottling Grp., LLC*, 374 F. Supp. 3d 257 (W.D.N.Y. 2019). (Appendix C)

JURISDICTION

On Thursday, March 19, 2020, this Court issued an Order granting an extension of time to file petitions allowing 150 days from a final order or denial of rehearing. The Court of Appeals for the Second Circuit affirmed the District Court's decision on May 21, 2020. The Second Circuit then denied rehearing on September 8, 2020. The Order of the Supreme Court of the United States allows until February 4, 2021 for this Petition. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment VII
In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

Fed. R. Civ. P. 56(a)

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964

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.

42 U.S.C. § 2000e-2(a)(1)

STATEMENT OF THE CASE

This case is about miscalculation. Using the wrong unit of measure cost NASA a quarter-billion-dollar robot on Mars.[6] Tricky accounting by Enron caused $74 billion in public losses.[7] Pepsi's subsidiary, Bottling Group LLC's, mileage audit caused the firing of only Black employees in the merchandiser position. Petitioner, Bobby Campbell, was one of them. Mr. Campbell sued for discrimination but he lost in summary judgment.

The lower courts decided that the audit showed Mr. Campbell had no similarly situated co-workers and thus was not discriminated against. The facts and the math show the contrary and should have been enough to defeat summary judgment because the relevant legal standards were satisfied. All that remained was a factual mathematical issue concerning

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[6] NASA, *Mars Climate Orbiter*, NASA Space Science Coordinated Archive (last visited January 15, 2021), https://nssdc.gsfc.nasa.gov/nmc/spacecraft/display.action?id=1998-073A#:~:text=Launch%20costs%20are%20estimated%20at,and%20Mars%20are%20favorably%20aligned.

[7] C. William Thomas, *The Rise and Fall of Enron*, J. of Accountancy (April 1, 2002), https://www.journalofaccountancy.com/issues/2002/apr/theriseandfallofenron.html

the audit. A jury should resolve this issue.

I. FACTS.

To illustrate the main point, the facts are taken directly from the lower court opinions and two of Respondent's District Court filings for summary judgment:

1) Counterstatement to Plaintiff's Statement of Material Facts filing for summary judgment in the District Court attached as Appendix [D].

2) Memorandum of Law in Support of Defendant's Motion for Summary Judgment attached as Appendix [E].

In September of 2014, Bobby Campbell started working at Bottling Group's Rochester, New York location. Mr. Campbell was hired to be an Account Merchandiser ("Merchandiser"). This meant that he had to drive between Bottling Group's distribution plant and various stores to manage their supply of Pepsi products. Merchandisers use their own cars for this work-related travel and then submit reimbursement requests based on their work mileage. Mr. Campbell also went through the appropriate training and policy reviews that one would

expect at the commencement of a new job. This included an in-store service process guideline that Merchandisers were required to follow.[8]

Mr. Campbell knew that he needed to submit his mileage for reimbursement and he was instructed by his superior that he could count miles between Bottling Group's plant and stores. Aside from that, Bottling Group's training and policies "did not contain a policy pertaining to tracking mileage ... did not contain a procedure pertaining to tracking mileage ... Merchandisers were not required to drive a set number of miles."[9] Apparently this meant that, "[t]herefore, [Mr.] Campbell was aware of the mileage policy."[10] There was no mileage policy.

Mr. Campbell "received an annual raise and was awarded 'Employee of the Month'" while he was employed at the Rochester location.[11] Problems began in the Spring of 2015. Mr. Campbell had some performance issues due to health problems

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[8] Memo of Law 57-11 pp.2-3

[9] Counterstatement 64-main pp.3-4

[10] *Id.*

[11] Memo of Law 57-11 at 5

and had three different supervisors leading up to his termination.[12] The first two were White; the last one was Black. [13] These problems are not the focus here because Bottling Company claimed that a mileage reimbursement audit was the only reason Mr. Campbell was fired.[14]

In June of 2015, Mr. Campbell's superiors first brought up his mileage reimbursement requests.[15] His superiors thought his mileage was too high, so Mr. Campbell offered to compromise; no deal ended up being necessary. The next week, his superiors performed an audit of mileage reimbursement requests for ten Merchandisers: seven were White, two were Black, and one was Hispanic.[16] The audit looked at the same time period for each Merchandiser.

The audit worked like this: The supervisor reviewed the store stops and entered the general location of each store into

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[12] *Id.* at .6-9

[13] *Id.* at 5

[14] Counterstatement 64-main p.8

[15] Memo of Law 57-11at 9-10

[16] *Id.* at 10

MapQuest to calculate the total amount of miles that Merchandiser drove while on the job.[17] Miles between Bottling Group's Rochester plant were also added to each Merchandiser's totals.[18] The MapQuest result was compared to each Merchandiser's mileage report. "The amount of miles driven depends on the shift."[19] MapQuest disclaims accuracy and Respondent acknowledged that the "mileage calculation did not 'perfectly track[] the actual routes taken by merchandisers'."[20]

For the relevant time period, Mr. Campbell reported that he drove 1,876 miles; the MapQuest result was 1,299 miles. This is a 577 mile difference and accounted for $331.78 of reimbursement. Mr. Campbell was fired on July 6, 2015.[21] His superiors said that over-reporting miles violated the company rule against misrepresentation of facts or falsification of

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[17] *Id.*

[18] *Id.*

[19] Counterstatement 64-main p.4

[20] COA 2 p.5

[21] Memo of Law 57-11 at 11

company records.[22]

A White Merchandiser reported that he drove 730 miles; the MapQuest result was 694 miles, which is a 36 mile difference.[23] Another White Merchandiser reported that he drove 460 miles; the MapQuest result was 404 miles, which is a 56 mile difference.[24] Neither was fired.[25] Mr. Campbell drove many more miles than the White Merchandisers by any measure, logically allowing for more MapQuest miscalculation. In addition to Mr. Campbell, Respondent also fired Roberto Morales for reporting more miles than the audit. Mr. Morales also sued for employment discrimination. No White merchandisers were fired despite having reported more miles than the audit.

On July 10, 2015, Bottling Group made and distributed a mileage policy.[26] Mr. Campbell was unable to resolve the issue

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[22] *Id.*

[23] Counterstatement 64-main p.6 footnote 9

[24] *Id.*

[25] *Id.* at 22-23

[26] *Id.* at 7

with the company and then began this litigation after receiving an EEOC right to sue letter.

II. PROCEDURAL HISTORY.

Mr. Campbell timely filed his Complaint in the Western District of New York on August 29, 2016 suing for discrimination based on his race and color in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2018) ("Title VII").[27] After discovery, Bottling Group moved for summary judgment and won on April 15, 2019.[28] The crux of the District Court decision was the court finding that Mr. Campbell "ha[d] not established that non-minority, similarly situated employees were treated more favorably than him."[29] The District Court highlighted the difference in a miscalculated over-reporting percentage between Mr. Campbell and the White Merchandisers, and "[did] not find this vast difference to be 'comparable conduct'."[30] Mr. Morales's lawsuit

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[27] Memo of Law 57-11 at 13

[28] *Morales v. Bottling Grp., LLC*, 374 F. Supp. 3d 257 (W.D.N.Y. 2019).

[29] *Id.* at 270

[30] *Id.*

was combined with this one and dismissed for the same reasons.

Mr. Campbell timely appealed the decision to the Second Circuit and the Court of Appeals affirmed on May 21, 2020.[31] The Second Circuit also hinged its decision on the mileage discrepancy from the MapQuest audit. Specifically, the validity of the audit was found not to be an improper factual or credibility determination despite the MapQuest accuracy disclaimer and Bottling Group's knowledge that the audit did not track actual routes taken by Merchandisers.[32] The Second Circuit decided that the disclaimer and fake route calculations did not support that the audit report was fabricated or knowingly inaccurate.[33] Lastly, the Second Circuit did not find the White Merchandisers to be similarly situated to Mr. Campbell solely because of the difference in the number of miles over-reported according to the audit.[34]

Mr. Campbell timely filed a petition for rehearing but the

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[31] *Campbell v. Bottling Grp.*, No. 19-1345-cv (2d Cir. May. 21, 2020)

[32] *Id.* at 5

[33] *Id.*

[34] *Id.* at 6

Second Circuit ordered that petition denied on September 8th, 2020.[35] Mr. Campbell now petitions this Court for a writ of certiorari.

[35] Appendix A

REASONS FOR GRANTING THE PETITION

I. Varied Application of the Mcdonnell Douglas Analysis Widely Eviscerates 7th Amendment Rights.

First and foremost, the Court in *Mcdonnell Douglas* created the eponymous framework after the District Court fully tried the case.[36] Moreover, the Court ordered a retrial using the new framework.[37] This analysis was meant for factfinders, nonetheless, courts use it to decide whether to send a case to factfinders. This has resulted in courts deciding vital issues of fact, primarily, who is a similarly situated comparator, with vague tests and without adequate evidence review.[38] This Court should formally adopt a "checklist" method to determine who is a comparator. This works for any fact pattern, avoids rigid definitions, and preserves 7th Amendment rights to a jury trial.

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[36] *Green v. McDonnell Douglas Corp.*, 318 F. Supp. 846 (1970).

[37] *McDonnell Douglas*, 411 U.S. at 807.

[38] Suja A. Thomas, *Reforming The Summary Judgment Problem: The Consensus Requirement*, 86 Fordham. L. Rev. 2241 (2018).

A. THERE IS AN IMPORTANT AND RECURRING PROBLEM.

Constant pain signifies a medical problem. In law, and in history, constant complaints signify the dire need for a solution.

This Court receives countless petitions to define, "similarly situated," according to an opposition to a petition for this Court to solve the issue.[39] The Court has repeatedly denied these petitions, and the problem has worsened.[40] We are at the point in this area of law where rolling dice better predicts summary judgment survival than does researching case law. It is time for a real solution.

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[39] Brief in Opposition For Respondent, *Ameer Siddiqui v. NetJets Aviation, Inc.*, No. 19-500 at 10.

[40] See Pet. for Writ of Cert., Trask v. Shulkin, 137 S. Ct. 1133 (2017) (No. 16-513), 2016 WL 6069225; Pet. for Writ of Cert., Burley v. National Passenger Rail Corp., 136 S. Ct. 1685 (2016) (No. 15-1104), 2016 WL 837385; Pet. for Writ of Cert., Paske v. Fitzgerald, 136 S. Ct. 536 (2015) (No. 15-162), 2015 WL 4651685; Pet. for Writ of Cert., Hoffman v. Baylor Health Care System, 136 S. Ct. 45 (2015) (No. 14-1323), 2015 WL 2085233; Pet. for Writ of Cert., Johnson v. Securitas Sec. Services USA, Inc., 135 S. Ct. 1715 (2015) (No. 14- 951), 2015 WL 495313; Pet. for Writ of Cert., Shipman v. United Parcel Service, Inc., 135 S. Ct. 981 (2015) (No. 14-558), 2014 WL 6334236; Pet. for Writ of Cert., Bone v. G4S Youth Services, LLC, 133 S. Ct. 1252 (2013) (No. 12-704), 2012 WL 10646763.

B. A Comparator "Checklist" Is Better Than The Varied Measuring Of Degrees Of Similarity.

Without a uniform standard, courts will continue to use vague tests that subject cases to the views of individual judges rather than ensure that the law is correctly applied and the Constitution is respected.

1. No Uniform Method Exists Among The Circuits

The 8th Circuit looks to see if comparators are "similarly situated in all relevant respects," allowing it to choose to ignore differences in severity of similar conduct.[41] The 7th Circuit checks whether similarly situated employees are directly comparable in all material respects and permits ignoring "minor differences" in supervisors, job roles, and conduct severity.[42] The 11th Circuit actually made a checklist: same basic conduct; same employment policies; same supervisor; same disciplinary

[41] *Wimbley v. Cashion*, 588 F.3d 959 (8th Cir. 2009), (Finding a single accidental pepper spray discharge to be similar to two intentional discharges used in conjunction with physical abuse).

[42] *Coleman v. Donahoe*, 667 F.3d 835, (7th Cir. 2012), (Applying a flexible standard to find knife wielding attackers, with different job functions and supervisors, similarly situated to an employee who made a threat).

history.[43] The checklist works better than a nicely worded test because it provides a nearly objective binary standard instead of allowing courts to measure degrees of similarity and impermissibly decide issues of fact. Simply put, checklists prevent miscalculation. Vague tests can be easily misapplied and cause varied results even within the same circuit.

2. No Uniform Method Exists Even Within A Circuit

Second Circuit case law exemplifies why a uniform checklist is proper. A main *McDonnell Douglas* case in that circuit highlighted that "[w]hether two employees are similarly situated ordinarily presents a question of fact for the jury," and made a two-item checklist to decide the issue: 1) subject to same workplace standards; and 2) conduct of comparable seriousness. [44] The Second Circuit there decided that the District Court impermissibly decided questions of fact because the comparators also violated company policy, and a "jury could further

[43] *Lewis v. City of Union City*, 918 F.3d 1213 (11th Cir. 2019), (Finding no comparator because different employment policies applied and different conduct was at issue).

[44] *Graham v. Long Island Railroad*, 230 F.3d 34, 40 (2d Cir. 2000).

rationally find that a violation for excessive absenteeism and one for alcohol use were of comparable seriousness in light of the categorical standard contained in the ... agreements."[45] Issues of fact were left to a jury, unlike in this case where facts were weighed.

The Second Circuit here found that Mr. Campbell had no similarly situated comparators by measuring degrees of similarity and impermissibly deciding issues of fact. The Second Circuit here decided there was no comparable conduct of comparable seriousness because a 60 mile overreport was less than a 577 mile overreport. This was despite the comparators doing the same conduct, having the same job, supervisors, workplace policy (existent or not), and similar overreport proportions[46]. The only differences were race and total mile counts.

3. A Checklist Is The Solution

Twenty years of case law is not why these cases were

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[45] *Id.* at 43.

[46] See the mathematical analysis that was due, *infra* Section II.

decided differently. The Second Circuit's reasoning in another 2020 case, *Blaise v. Verizon*,[47] would have resulted in Mr. Campbell defeating summary judgment. There, the test for similarly situated was a checklist: 1) same discipline standards, and 2) comparable conduct.[48] Like in *Graham*, the Second Circuit in *Verizon* only looked at the conduct and not the degree of similarity. The comparators and the plaintiff there all altered time sheets in violation of company policy and thus the court determined that they were similarly situated comparators, with absolutely no mention of the number of hours falsified or the amount of wages stolen. This is, either shockingly or outrageously, in stark contrast to the granular and purely numerical differences fixated on in Mr. Campbell's case.

The same court decided the same issue differently in two cases with the same facts: A company fired a Black man for falsifying company records; there were also White employees who similarly falsified company records in violation of company policy. But in one case there were no similarly situated

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[47] *Blaise v. Verizon N.Y. Inc.*, No. 19-1028 (2nd Cir. March 19, 2020)

[48] *Id.*

comparators, and in the other there were. A similar checklist analysis in Mr. Campbell's case would have resulted in his comparators being similarly situated. But, instead of a jury trial, Mr. Campbell got a flawed and inattentive math review.[49] The same goes for Mr. Morales's case. The Court has an opportunity here to bring order to the unconstitutional chaos that plagues the fates of countless discrimination cases all over America.

II. Petitioner Was Entitled To Deference And Good Math

There were many errors and genuine disputes of fact in this case that should have prevented summary judgment from being granted. Respondent and the lower courts either committed significant miscalculations or they simply did not understand the math involved in this case. Either way, once a court starts doing math, there must be a genuine issue of material fact regarding the result. The genuine fact disputes are laid out in Respondent's lower court filings and in the fact

[49] See the mathematical analysis that was due, *infra* Section II.

section of this petition.

The lower courts accepted Bottling Group's audit report as valid and legitimate despite summary judgment standards and the various issues the report had. "Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, there is no genuine dispute as to any material fact," drawing all inferences in favor of the nonmovant. [50] The courts needed to view the evidence to favor Mr. Campbell's position as he never moved for summary judgment.

The evidence was as follows: Respondent used a map website that disclaimed accuracy; Respondent did not use actual routes that Mr. Campbell drove; only minorities were fired as a result of the audit; there were no maximum mile levels; there was no mileage tracking policy until after Mr. Campbell was fired. In a light that favors Mr. Campbell's case, these facts imply discrimination. Furthermore, in Respondent's Counterstatement of Material Facts, they twice write that there was no policy or procedure about mileage tracking but Mr.

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[50] *Tolan v. Cotton*, 572 U.S. 650 (2014).

Campbell was aware of the mileage tracking policy.[51] If that is not a genuine dispute then that sentence must have been read incorrectly.

In scrutinizing numbers in this case, as opposed to in *Verizon*, the lower courts needed to thoroughly analyze what the numbers meant. Mr. Campbell reported that he drove 1,876 miles; the audit reported 1,299; difference of 577. One of the White comparators reported that they drove 460 miles; the audit reported 404 miles; difference of 56. By either report, Mr. Campbell drove much more and this is important when rightfully considering that MapQuest was not accurate and actual routes were not measured. Mr. Campbell had more miles for MapQuest to incorrectly count and more routes to be incorrectly measured. Mr. Campbell's percentage error was about 30%; the White merchandiser's was about 10%.[52] Mr. Campbell drove about three times as many miles and the audit showed about three times the percent error. The margin of

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[51] Counterstatement 64-main pp.3-4

[52] These percent errors were calculated by Respondent and submitted to the lower courts and they are clearly miscalculated. The actual percentages would have helped Respondent's case. However, this analysis focuses on the proportions between the percentages and thus the correct numbers would result in the same reasoning.

error would logically be higher in his case. Whether this was a NASA error or an Enron error, however, is for a jury to decide.

CONCLUSION

The greatest engineers in the world got the math wrong on a mission to Mars. The world's best accountants and financial analysts missed a massive fraud by a stock market giant. In this case, an admittedly flawed audit calculation was used to justify Mr. Campbell's termination and was not given due analysis. The courts inadequately reviewed the math intensive and easily misleading audit. The calculation cost Mr. Campbell his livelihood; summary judgment cost him his 7th Amendment right to a jury, and justice.

The petition for a writ of certiorari should be granted.