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NO. 21-
21-214

Supreme Court of the United States

Shantubhai N. Shah, Pro Se, Petitioner

v.

Meier Enterprises, Inc., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner claims of employment discrimination were denied by the District Court of Oregon, affirmed by the Ninth Circuit Court of Appeals, both using the Same-Actor Inference standard, not codified by the Congress in Title VII language.

1. Whether the Ninth Circuit Court of Appeals Same-Actor Employment Discrimination Inference Standard creates an Issue of Genuine Material Facts for a Fair-Minded Jury (U.S. Constitution Seventh Amendment) to Decide Title VII of the Civil Rights Act of 1964 Violation, in Contrast with the 2nd and 7th Circuits Summary Judgment Standard, viewed in Light Most Favorable to the Complainant?

Petitioner motion for Remand was denied by the District Court and Appeals interpretation of what is adequate service of summons to a defendant, in contrast with the precedent by the State Supreme Court. 28 U.S. Code § 1447. Respondent did not remove the case during the first receipt of summons and complaint, pursuant to 28 U.S. Code § 1446 - Procedure for removal of civil actions.

2. Whether the Court of Appeals Should Decide a meaning of a State Statute, Certify the Question to the State Supreme Court, or Remand the Case to the State Trial Court, when a Case is Removed for a Federal Question Under 28 U.S.C. § 1441?

PETITION FOR A WRIT OF CERTORARI

Pro Se Petitioner Shantubhai N. Shah, respectfully petitions this court for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to resolve aforementioned two questions for the justice to prevail for:

1) the minority and/or older employees hiring and firing practice affirmed by the Same-actor Nondiscrimination Inference Standard at the 9th Circuit, while disallowed at the 7th, 8th, and 11th Circuit Courts of Appeals and,

2) the plaintiffs who oppose the removal of their cases to the federal court for the removal process defects, ignored by the federal trial and appeals courts in conflict with: a) the United States Constitution, b) Federal Removal Statutes, and c) the Rules of State Civil Service Procedure.

PARTIES TO THE PROCEDDING

Petitioner: Shantubhai N. Shah is an 80-year-old, Asian American U.S. Citizen.

Respondent: Meier Enterprises, Inc., incorporated in the State of Washington.

RELATED PROCEEDING

United States Court of Appeals (9th Circuit): Shantubhai N. Shah v. Meier Enterprises Inc. et al (District Court of Oregon No. 3:17-cv-00226-JE, Filed April 26, 2018) (Appendix 1).

Court of Appeals for the 9th Circuit Case No. 18-35962 (Argued and Submitted April 13, 2021 — Seattle, Washington, Filed May 17, 2021) (Appendix 2).

Ninth Circuit Petition for reh'g denied, June 17, 2021 (Appendix 9).

JURISDICTION

This court has a Jurisdiction in this case pursuant to Rule 10 (a) since the United States Court of Appeals for the 9th Circuit has:

1) entered a decision in contrast with the precedents by The United States Supreme Court and the Circuit Court of Appeals for the 7th, 8th, and 11th Circuits on the same important matter, and

2) decided an important state statute in a way that conflicts with prior decisions by the Oregon Supreme Court, so as to call for an exercise of this Court's supervisory power.

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INTRODUCTION

Petitioner is a registered professional engineer in Oregon and Washington with over forty years' experience in engineering projects and department management, including General Services Administration prime contract for twin projects to protect federal buildings at large, and the Bonneville Power Administration Headquarters Building Electrical Systems, prior to the brief employment with the Respondent, an engineering services organization based in Kennewick, Washington.

Respondent invited Petitioner for an interview to Respondent's Kennewick, WA office, proposed by an employment agency for an Electrical Department Manager position, for which he had extensive experience, but Respondent hired him out of necessity to a subordinate position of Senior Electrical Engineer and Project manager at Respondent's remote field office in Vancouver Washington for a short time, vacated by the resignation of an engineer at Vancouver office during the time of Petitioner's interview.

Within two months after hiring Petitioner, Respondent hires a several years younger Caucasian employee with no experience in engineering department management to the open position of Electrical Engineering Department Manager with a much higher salary and a bonus, that was not offered to the Petitioner, and terminates him transferring his electrical engineering projects to the younger Caucasian employee.

Respondent does not fill the Vancouver office project manager position, and closes the Vancouver office after a few months of Petitioner termination.

STATEMENT OF THE CASE

District Court's Opinion,[1] is a Respondents' pretext, since Petitioner was invited for an interview based on his qualifications for the vacant Department position, verified with Petitioner's three references by the employment agency engaged by Respondent.

Petitioner's Work performance is a pretext also, since there was no work performance formal review made before Petitioner was let go, after hiring a Caucasian younger candidate for the advertised position. Three-month review was done for all other employees, while petitioner was let go within two months without a review to save employment agency's finder fee. These genuine materials facts are the jury function, which U. S. District Court Opinion linked, with a Same Actor Inference[2], in light most favorable to the movant, rather than "when viewed in light most favorable to the complainant", a summary judgment requirement.[3] The 2nd U.S. Circuit Court of Appeals reversed a summary judgment for an employer in an age discrimination case, holding that

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[1] Appendix 1, Opinion and Order - 20a "Plaintiff's lack of qualifications for the Group Manager position as opposed to the Senior Electrical Engineer/Project manager position, and Plaintiff's unsatisfactory work performance."

[2] Appendix 1, Opinion and Order -20a "[t]he same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory action." Coghlan v. Am. Seafoods Co., 413 F.3d 1090, 1096 (9th Cir. 2005)

[3] 14 CFR § 16.26 (c) (1)

the lower court "failed to construe the evidence in the light most favorable to the [the employee] and to draw all permissible inferences in [his] favor.[4]

District Court of Oregon failed[5] to construe genuine material facts from Plaintiff's Response to Defendant's pretext in light most favorable to complainant, jury could determine.

Defendants treated Petitioner disparately than Respondents similarly situated Caucasian employees Messrs. Zimmer, Waterman, and Ferris,[6] as in McKinney, "Yet patch after patch, the defense arguments for summary judgment still will not hold water. McKinney presented evidence that he was treated differently than his similarly situated colleagues who are not black."[7]

However, the Ninth Circuit embraced the Same Actor Inference[8] standard in the light most favorable to the movant, rather than viewing the material facts in the light most favorable for the nonmovant as the common law summary judgment standard, considering the fact that all department managers hired previously by the defendant were Caucasian, none represented by a member of the minority group, a racial animus towards an interviewee protected by Title VII. This genuine issue of material fact alone against the L&I pretext proffered by the defendant to consider is a jury

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[4] *Weiss v. JP Morgan Chase & Company,* 2d Circ., No. 08-0801, June 5, 2009.
[5] Appendix 1 Opinion and Order of U.S. District Court of Oregon 18-35962 Page 19
[6] Appendix 3, Pages 33a-35a, Plaintiff's Response to Defendants Cross Motion May 28, 2018
[7] Appendix 5, *McKinney v. Office of Sheriff of Whitley County*, No. 16-4131, 2017 WL 3389370 (7th Cir. Aug. 8, 2017)
[8] Appendix 2, Page 28a, Memorandum of the U.S. Court of Appeals for the Ninth Circuit 18-35962

function. Same-Actor Inference, an additional burden[9] on the claimant, must be denied at a summary judgment.

Here there is a genuine issue of material facts of strong prima facia evidence of age and race discrimination, that Plaintiff was denied a vacant electrical department manager position though qualified and experienced for the open position and was offered a temporary lower position of a project manager for a remote office out of necessity, keeping the managerial position vacant, later filled with a younger less experienced Caucasian employee, terminating the several years elder employee and transferring his work to a newly hired department manager assignment prior to his start.

This extraordinarily strong showing of discrimination[10], ignored by the District Court, alone to support an inference that the defendant based its employment decision on an illegal criterion, is sufficient to deny summary judgment for the movant.

Title VII does not codify "extraordinarily strong showing of discrimination", a subjective term used by 9th Circuit giving different meaning to diverse individuals.

REASONS FOR GRANTING CERTIORARI

[9] Appendix 8, 7th Circuit Review, Page 168a
[10] Appendix 1 Page 21a, U.S. District Court of Oregon Opinion and Order

I. SAME ACTOR DISCRIMINATION CIRCUIT SPLIT

There is a split among the 1st, 2nd, 3rd, 4th, 9th, and 10th Circuit Courts of Appeals, as against the precedents of the United States Supreme Court, and the 7th, 8th, and 11th Circuits Courts of Appeals[11], in similarly situated cases for the manifest meaning of Same Actor Inference discrimination against the older and minority workers' rights under the Title VII of the Civil Rights Act of 1964 and ADEA.

Question for this court to resolve is, whether the Same Actor who hires a Title VII and ADEA protected employee and replaces him (or her) in a short time span with a younger and less experienced employee(s), giving him (or her) higher wages and bonus that was not offered to the older employee, could be found guilty of discrimination.

a. Same Actor Employment Discrimination Inference Jurisprudence

Despite the vast scientific knowledge, many federal courts today elaborate an antidiscrimination jurisprudence that imposes on claimants, evidentiary burdens which reflect the belief that discrimination against members of stigmatized groups necessarily manifests as old-fashioned, blatant prejudice.[12]

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[11] See *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 847 (1st Cir. 1993); Cordell v. Verizon Commc'n, Inc., 331 F.App'x. 56, 58 (2d Cir. 2009); Waldron v. SL Industries Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995); Coghlan v. Am. Seafoods Co. LLC., 413 F.3d 1090, 1096-97 (9th Cir. 2005); Antonio v. Sygma Network Inc., 458 F.3d 1177, 1183 (10th Cir. 2006).

[12] See Nier & Gaertner, supra note 4, at 215; Victor D. Quintanilla, Critical Race Empiricism: A New Means to Measure Civil Procedure, 3 U.C. IRVINE L. REV. 187 (2013); Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101

This worldview is in marked tension with the best scientific evidence available on how discrimination, in fact, operates in American society against stigmatized groups. As a consequence, the startling and widening societal disparities in education, employment, housing, and criminal justice between groups on account of their race, sex, and/or national origin fall farther and farther beyond reach of existing federal antidiscrimination laws.[13] One of the most egregious examples of the epistemological and material tension between federal employment discrimination law and psychological science is the doctrine known as the same-actor inference of nondiscrimination.[14]

When originally elaborated by the 4th Circuit in *Proud v. Stone*, the doctrine applied only when an "employee was hired and fired by the same person within a relatively short time span."[15] In the two decades since, the doctrine has widened and broadened in scope. The same-actor inference of nondiscrimination now extends to many employment contexts beyond hiring and firing,[16] to scenarios in which the "same person" entails groups of decision

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HARV. L. REV. 1331 (1988); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987); Alan D. Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1977). California Law Review February 2016, Vol. 104, Victor D. Quintanilla & Cheryl R. Kaiser (Appendix 2)

[13] See Quintanilla, supra note 9, at 214–15; Derrick A. Bell, Jr., Racial Realism, 24 CONN. L. REV. 363 (1992)

[14] Proud v. Stone, 945 F.2d 796 (4th Cir. 1991); infra Part I.A; see, e.g., Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996), abrogated on other grounds by Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) (Age Discrimination in Employment Act (ADEA) case); EEOC v. Our Lady of Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir. 1996) (Title VII race discrimination case); infra Part II.A.

[15] Proud, 945 F.2d at 798; infra Part I.A.

[16] See infra Part II.B.1.

makers who make employment decisions,[17] and the "short time span" has been elastically extended to over twelve years.[18]

While the outer boundaries of the doctrine are both nebulous and in flux, the same-actor inference may be applicable when the same-actor has taken both a positive and adverse employment action toward a claimant who brings an employment discrimination suit. Per the same-actor doctrine, when a supervisor first behaves in a way that benefits an employee and then subsequently takes adverse employment action against that employee, many federal courts conclude that the supervisor's adverse treatment of the employee is presumptively nondiscriminatory, adopting the strong inference that the supervisor's negative employment decision was not motivated by bias. This strong inference of nondiscrimination is said to be legally justifiable on grounds of "common sense" about how humans behave and economic rationality.

The Court in *Brown v. Board of Education,* relying on academic studies, pointed to changes in society's understanding of the stigmatizing effects of racial discrimination in reaching its result, noting that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson,*

[17] See infra Part II.B.1
[18] See infra Part II.B.1.

this finding [of racial stigma] is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."[19]

The Court later characterized *Brown* as having overruled *Plessy*.[20] Regardless of whether the *Casey* plurality's account of the Court's decisions in *West Coast Hotel* and *Brown* was completely accurate, it is clear that, throughout the Court's history, at least some Justices have considered changes in factual understandings to be a key element in determining whether to retain or overrule precedent.

Logically, the same actor inference suffers from the assumption that employers who harbor discriminatory intent will always act on it, at least when hiring. This is questionable and should be critically examined in any case. For example, if the only qualified candidate is within the protected age class, the discriminatory employer might accept the "psychological costs" of associating with applicant, at least until someone not in the disfavored class is available as in this case only candidate available to Respondent, until few weeks later Respondent found a much younger candidate he could live with.

Other circuits have minimized the importance of the same-actor inference, emphasizing that although a court may infer an absence of

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[19] *Brown*, 347 U.S. at 494-95.

[20] Bob Jones Univ. v. United States, 461 U.S. 574, 592-93 (1983) ("Prior to 1954, public education in many places still was conducted under the pall of *Plessy v. Ferguson*, 163 U. S. 537 (1896); racial segregation in primary and secondary education prevailed in many parts of the country. This Court's decision in *Brown v. Board of Education*, 347 U. S. 483 (1954), signaled an end to that era.") (citation omitted).

discrimination where the same individual hired and fired the plaintiff, such an inference is not required. *Haun v. Ideal Indus., Inc.*, 81 F.3d 541, 546 (5th Cir. 1996) ("While evidence of [same actor] circumstances is relevant in determining whether discrimination occurred, we decline to establish a rule that no inference of discrimination could arise under such circumstances."); *Waldron v. SL Indus., Inc.*, 56 F.3d 491, 496 n.6 (3d Cir. 1995) (noting that the same-actor inference "is simply evidence like any other and should not be afforded presumptive value").

The same-actor inference is not codified in Title VII, nor any other federal civil rights statute.[21] The same-actor inference has been adopted across all U.S. Circuit Courts, but its application is not uniform. Some circuits, including the First, Second, Third, Ninth, and Tenth, have adopted the Fourth Circuit's use of the same-actor inference and apply it to discrimination claims at the pleading and summary judgment stage.[22] Other circuits have limited the scope of the common inference to cases where there are genuine issues of material fact.[23]

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[21] Appendix 6, SEVENTH CIRCUIT REVIEW Volume 13 Fall 2017, McKinney v. Office of Sheriff of Whitley Cnty., 866 F.3d 803, 814-15 (7th Cir. 2017). MICHAEL G. ZOLFO

[22] See LeBlanc v. Great American Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993); Cordell v. Verizon Commc'n, Inc., 331 F.App'x. 56, 58 (2d Cir. 2009); Waldron v. SL Industries Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995); Coghlan v. Am. Seafoods Co. LLC., 413 F.3d 1090, 1096-97 (9th Cir. 2005); Antonio v. Sygma Network Inc., 458 F.3d 1177, 1183 (10th Cir. 2006).

[23] See, e.g., Brown v. CSC Logic Inc., 82 F.3d 651, 658 (5th Cir. 1996); Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 573 (6th Cir. 2003); Kells v. Sinclair Buick-GMC Truck, Inc., 210 F.3d 827, 835 (8th Cir. 2000) (abrogated on other grounds by Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011)).

The 7th Circuit has adopted the narrowest application of the same-actor inference, holding that the inference should only be considered by the ultimate trier of fact and should not be applied in motions to dismiss or motions for summary judgment.[24]

The 11th Circuit has taken a similar approach to the Seventh Circuit. *Williams v. VITRO SERVICES CORP.* (No. 97-2518, Eleventh Circuit) "Summary judgment is appropriate where there is no genuine issue of material fact. See Fed. R. Civ. P. 56(c). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (citation and internal quotation omitted). On a motion for summary judgment, we must review the record, and all its inferences, in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962).

In an employment discrimination case, "the plaintiff must produce sufficient evidence to support an inference that the defendant employer based its employment decision on an illegal criterion." *Alphin v. Sears, Roebuck & Co.,* 940 F.2d 1497, 1500 (11th Cir.1991) (quoting *Halsell v.*

[24] McKinney v. Office of Sheriff of Whitley Cnty., 866 F. 3d 803, 814-15 (7th Cir. 2017).

Kimberly-Clark Corp., 683 F.2d 285, 290 (8th Cir.1982)). At the summary judgment stage, our inquiry is "whether an ordinary person could reasonably infer discrimination if the facts presented remained unrebutted." Id. (quoting *Carter v. City of Miami,* 870 F.2d 578, 583 (11th Cir.1989)).

Once a plaintiff has established a prima facie case and has put on sufficient evidence to allow a factfinder to disbelieve an employer's proffered explanation for its actions, that alone is enough to preclude entry of judgment as a matter of law. *Combs v. Plantation Patterns,* 106 F.3d 1519, 1532 (11th Cir.1997), cert. denied, 522 U.S. 1045, 118 S.Ct. 685, 139 L.Ed.2d 632 (1998).

The 11th circuit has adopted a variation of the test articulated by the Supreme Court for Title VII claims in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), for cases arising under the ADEA. *Mitchell v. Worldwide Underwriters Ins. Co.,* 967 F.2d 565, 566 (11th Cir.1992). In order to make out a prima facie case for an ADEA violation, the plaintiff must show that he (1) was a member of the protected age group, (2) was subject to adverse employment action, (3) was qualified to do the job, and (4) was replaced by a younger individual. See *Benson v. Tocco,* 113 F.3d 1203, 1207-08 (11th Cir.1997). These criteria are slightly different in both an RIF case

and where a position is eliminated in its entirety; in these instances, the plaintiff establishes a prima facie case by demonstrating (1) that he was in a protected age group and was adversely affected by an employment decision[2] , (2) that he was qualified for his current position or to assume another position at the time of discharge, and (3) evidence by which a fact finder reasonably could conclude that the employer intended to discriminate on the basis of age in reaching that decision. Id. at 1208."

The circuit courts have applied varying weights to the strength or value of the inference that obtains when the hirer and firer are the same actor. See, e.g., *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270-71 (9th Cir.1996) ("[W]here the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive."); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir.1996) ("This 'same actor' inference has been accepted by several other circuit courts, and we now express our approval."); *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 959 (4th Cir.1996) ("[B]ecause Houseman is the same person who hired Evans, there is a powerful inference that the failure to promote her was not motivated by discriminatory animus.") (internal quotation and citation omitted); *E.E.O.C. v. Our Lady of Resurrection Med. Ctr.*, 77 F.3d 145, 152 (7th Cir.1996) ("If Boettcher wished to discriminate against Braddy because of her

race, she could have refused to hire her in the first place, or she could have discharged her because of her deficient qualifications. Boettcher did neither.... The same hirer/firer inference has strong presumptive value."). But see *Waldron v. SL Industries, Inc.*, 56 F.3d 491, 496 n. 6 (3rd Cir.1995) ("[W]here ... the hirer and firer are the same and the discharge occurred soon after the plaintiff was hired, the defendant may of course argue to the factfinder that it should not find discrimination. But this is simply evidence like any other and should not be accorded any presumptive value.").

The Seventh Circuit Court of Appeals addressed a common misunderstanding concerning the evidence in discrimination cases and the appropriate standard at summary judgment.

In *McKinney v. Office of Sheriff of Whitley County*, No. 16-4131, 2017 WL 3389370 (7th Cir. Aug. 8, 2017), the sheriff hired, and later fired, the first African-American police officer employed by Whitley County. The plaintiff filed suit against his former employer, alleging race discrimination. The sheriff moved for summary judgment, which the trial court granted, but the Seventh Circuit Court of Appeals reversed, finding that the trial court had applied the incorrect standard and that the plaintiff's evidence was sufficient to survive summary judgment.

Although the opinion has several interesting aspects, the most important part of the decision involves the Court's discussion of the "same-

actor" inference and the common misimpression by employers, and some attorneys, that think nondiscrimination should be conclusively established when a supervisor fires an employee after previously making an unbiased decision to hire that employee.

The Same Actor Inference says it is reasonable to assume that if a person was unbiased at Time A (when he decided to hire the plaintiff), he was also unbiased at Time B (when he fired the plaintiff)." *Perez v. Thorntons, Inc.*, 731 F.3d 699, 710 (7th Cir. 2013). However, it is only an inference and the Seventh Circuit "clarified that this inference is not a conclusive presumption and that it should be considered by the ultimate trier of fact rather than on summary judgment or the pleadings." *McKinney*, at *9 (citation omitted).

Examining the evidence in the light most favorable to Perez, and construing all inferences in her favor, we will affirm summary judgment only if there are no genuine issues of material fact and Thorntons is entitled to judgment as a matter of law. *Naficy v. Illinois Dep't of Human Servs.*, 697 F.3d 504, 509 (7th Cir.2012).

b. Ninth Circuit Decision in contrast with precedents

Ninth Circuit affirmed District Court of Oregon Summary Judgment based on the inference of a same-actor who hires and then fires him in two months strongly in favor of the movant rather than the nonmovant of the summary judgment motion ignoring the material fact that, Shah was discriminated from

the hiring stage though he was experienced, qualified, and interviewed for the department position, but was not offered the position and was asked to work in a field office at a lower position and salary, keeping the department position open, and the vacant position was later filed up by a less experienced Caucasian younger employee with a higher salary, is a genuine material fact that should be voted by a jury at a trial.

c. Ninth Circuit in contrast to McDonnell Douglas

There is strong inference here that the defendant discriminated Shah from the interview stage, parallel to *McDonell Douglas v. Green* (1973) in which the African American Plaintiff, "(ii) applied and was qualified for a job the employer was trying to fill; (iii) though qualified, he was rejected; and (iv) thereafter the employer continued to seek applicants with complainant's qualifications." *McDonell Douglas v. Green* P. 411 U. S. 802 (1973). Under the same circumstances Ninth Circuit determination for Petitioner is exactly opposite to McDonnell Douglas.

The Supreme Court's opinion in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (Appendix 5).

("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."). Although the factfinder is

permitted to draw this inference, it is by no means a mandatory one, and it may be weakened by other evidence. * * * We therefore specifically hold that where, as in this case, the factfinder decides to draw the same-actor inference, it is insufficient to warrant summary judgment for the defendant if the employee has otherwise raised a genuine issue of material fact.

Based on the record (Appendix 3), a jury must weigh the genuine material facts in this case and decide why Meier Enterprises chose to treat Shah differently than other employees. "Based on this record, a jury must sort out the conflicting evidence and decide why Thorntons chose to treat arguably similar wrongdoing so differently." Perez v. Thorntons quoted above.

II. OREGON STATUTE QUESTION

There is a split within the Ninth Circuit panel members' Opinion, and the Oregon Supreme Court's previous decisions in similarly situated cases, in the manifest meaning of the Oregon Statute of Civil Procedure (ORCP 7D) for reasonably calculated sufficient service [25] of summons and complaint process by First Class Mail with restricted delivery to a defendant. One (1) of the three (3) Ninth Circuit Panel Members, Judge O'Scannlain, *J.*, dissenting in Shah V. Meier (18-35962) (Appendix 2, Page 29a, 30a, 31a)

a. Reasonably Calculated Method of Service

[25] Appendix 7, *Edwards v. Edwards* TC 16-85-06382; CA A48610; SC S36265; 801 P.2d 782 (1990) 310 Or. 672

ORCP 7D describes the "manner of service," but it does not set out every last way in which service may be accomplished. *Lake Oswego Review, Inc. v. Steinkamp*, 298 Or 607, 695 P2d 565 (1985). ORCP 7 contains the words "shall" and "may": service shall meet the federal due process standard and "may" be accomplished in numerous specified ways. ORCP 7 D.

"Compliance with methods or manners of service which are preceded by the word 'may' is not required. The methods of service listed in ORCP 7 D. (2) – (4) are not exclusive of other methods of service reasonably calculated to apprise defendant of the action." *Id.*, at 613-614. Rule 7 requires adequate notice, accomplished in a manner "reasonably calculated * * * to apprise the defendant * * * of the action." *Id.*, at 614.

Under 28 U.S.C. § 1441 (c) JOINDER OF FEDERAL LAW CLAIMS AND STATE LAW CLAIM: "(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims ....."

CONCLUSION

I

This court's balancing power could resolve the Same Actor Inference split that exists among various circuits in psychologically different treatment of individuals protected under Title VII, recommended by the 7th and 11th

Circuit Court of Appeals in favor of plaintiffs, in contrast to the decisions made by the 4th and 9th Circuit Courts of Appeals made in favor of defendants.

II

Respondent did not remove the case during the first 30 days from receipt of a pleading through certified mail. 28 U.S. Code § 1446 (b) (1). District Court was required to sever, Plaintiff's claim of adequate service, Oregon statute ORCP 7 (D), and remand to State court, but did not.

Petitioner humbly requests a Certiorari to the Ninth Circuit Court to:

1) Reverse Ninth Circuit Same Actor Inference Standard,

2) Remand case to the state trial court for adjudication, or present a question to the State Supreme Court to decide the meaning of the state statute for adequate Service of Summons with a First Class and Certified USPS Mail.

Respectfully Submitted on August 7, 2021.

Shantubhai N. Shah, Petitioner, Pro se