APPENDIX 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SHANTUBHAI SHAH, Plaintiff, v. MEIER ENTERPRISES, INC., a Washington Corporation; PAUL GIEVER, CEO/President; STEVEN ANDERSON, an Individual; and BOBBI KEEN, an Individual; Defendants.	Civil No.: 3:17-cv-00226-JE OPINION AND ORDER

Shantubhai N. Shah
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Portland, OR 97223

Plaintiff *pro se*

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Attorney for Defendants

JELDERKS, Magistrate Judge:

Pro se Plaintiff Shah brings this action against Defendants Meier Enterprises, Inc. ("Meier"); and individuals Paul Giever, Steven Anderson, and Bobbi Keen alleging age, race, and national origin discrimination under federal and Washington state laws, whistle blower retaliation under Oregon and Washington state laws; and common law retaliatory wrongful discharge.[1]

The parties have filed cross motions for summary judgment. Plaintiff has also filed two motions for sanctions, a motion to withdraw consent to Magistrate Judge Jurisdiction, a motion for reconsideration of this Court's Opinion and Order denying Plaintiff leave to file a Second Amended Complaint, and a motion for "Leave to file Plaintiff's Affidavit in Support of First Amended Motion for Summary Judgment."

Plaintiff's motions for sanctions, motion for reconsideration and motion to withdraw consent are denied. Plaintiff's motion for leave to file an affidavit is granted.

For the reasons set forth below, Defendants' motion for summary judgment is granted and Plaintiff's motion for summary judgment is denied.

Background

Plaintiff was 77 years old at the time of filing and was 75 years old during the relevant period. He was born in India and identifies himself as an Asian American. (Am.Compl. ¶¶ 2, 14). During the relevant time period, Plaintiff was a "Registered Professional Engineer" in Oregon

[1] In his Amended Motion for Summary Judgment Plaintiff, for the first time, alleged a claim of common law fraud. Plaintiff subsequently withdrew this claim in his Response to Defendants' Cross Motion for Summary Judgment.

and Washington who was employed by Meier Enterprises as a Sr. Electrical Engineer/Project Manager. (Am.Compl. ¶¶ 16, 17).

Meier Enterprises is a privately-held Washington Corporation with its principal place of business in Kennewick, Washington. It is also a registered foreign corporation with Oregon's Secretary of State. (Am.Compl. ¶3; Meier Ent., Inc. Answer ¶3; Anderson Decl. ¶2). It is a full-service, architectural and engineering consulting firm. (Anderson Decl. ¶2). Defendant Steve Anderson was the President of Meier from 2006 through August 2016. (Anderson Decl. ¶3). Defendant Paul Giever succeeded Anderson and currently holds the position of President. (Giever Depo. p. 5). Defendant Bobbi Keen is the Controller/Human Resources Director. (Keen Decl. ¶1).

Five Group Managers and the Controller/Human Resources Director report directly to the President. (Keen Decl. ¶2). Meier's strategic committee, which consisted of Defendant Anderson, Defendant Giever, Defendant Keen, CAO/Director of Marketing Denise Sweeden, and Director of Projects Anthony Cockbain, is responsible for hiring professional engineers. (Keen Decl. ¶11). Meier uses several different avenues to find qualified candidates, including Volt Workforce Solutions, which was how Defendants were put in contact with Plaintiff. (Keen Decl. ¶¶4, 7).

Meier was seeking to fill both an Electrical Group Manager position and a Senior Electrical Engineer/Project Manager position. (Keen Decl. ¶5, 6). After being contacted by Volt, Keen, Anderson and Mechanical Group Manager Colin Bates interviewed Plaintiff by phone on March 10, 2016. (Keen Decl. ¶8; Anderson Decl. ¶¶5, 6). Meier did not consider Plaintiff for the Group Manager position after the initial interview because he lacked Washington Labor and Industries ("L&I") familiarity and experience and because he and his work were unknown to

Defendants. (Keen Depo. pp. 32, 33, 34, 37, 39-40, 41-42; Anderson Depo. pp. 40-41, 42, 44-45, 78-79; Anderson Decl. ¶6). Instead, Meier asked Plaintiff to continue the interview process for the Senior Electrical Engineer/Project Manager position in the Vancouver, Washington office. This position would report to the Electrical Group Manager. (Shah Depo. p. 16, Depo. Ex. 2). Plaintiff flew to Kennewick, Washington on March 14, 2016, for an in-person interview with Anderson, Bates and electrical professional engineer consultant Pam Arneson. (Shah Depo. pp. 18, 20; Keen Decl. ¶10). On March 21, 2016, Plaintiff had an in-person interview in the Vancouver office with Anderson and several of the Vancouver employees. (Anderson Decl. ¶5). Plaintiff testified that no one made any comments about his age, race or national origin during the interview process. (Shah Depo. pp. 21-22). Meier offered Plaintiff the Senior Electrical Engineer/Project Manager position on March 22, 2016 and Plaintiff began work that same day. (Shah Depo. p. 22; Depo. Ex. 3). Plaintiff was informed that he was being hired on an at-will basis and that the first 60 days of employment constituted a probationary period. (Shah Depo. p. 23; Depo. Ex. 3).

Meier received Kelly Waterman's resume on April 6, 2016, for the Electrical Group Manager position. (Keen Decl. ¶16). Waterman is younger than Plaintiff and is Caucasian. (Def. Reply p. 2). Waterman had experience with Washington L&I and knew the local L&I reviewer. (Keen Depo. p. 37). Waterman and his work were also known to Meier's clients and he had demonstrated an ability to successfully manage difficult projects. (Keen Depo. pp. 33, 37; Anderson Decl. ¶23). Meier sent an offer letter to Waterman on April 26, 2016. (Keen Decl. ¶16).

In the meantime, Anderson was serving as the interim Electrical Group Manager and was managing the administrative functions of the Electrical Group. (Anderson Decl. ¶4). He assigned

Plaintiff as the professional electrical engineer for the Pasco High School project. (Anderson Decl. ¶7). Plaintiff was responsible for the original electrical design package sent to L&I for state required review. The submittal was twice rejected. (Anderson Decl. ¶7). Plaintiff was asked to address the reviewer comments. In an email dated Wednesday, April 27, 2006, Anderson asked Plaintiff to discuss concerns raised during the L&I review process and informed Plaintiff that Meier could not afford any further delay. (Shah Depo. Ex. 10). Plaintiff emailed Pam Arneson regarding the reviewer's comments and responded by email to Anderson that he would be out of town until Monday. (Shah Depo. Exs. 10, 15). Anderson raised additional issues with Plaintiff's work performance in an email later that day, telling Plaintiff he needed to pay closer attention to detail and that he had been removed from the Pasco High School job "because this was not happening." (Shah Depo. Ex. 12; Anderson Decl. ¶¶7-9). Plaintiff responded "I trusted Doug (Farris, the electrical designer) to do what he was doing on different plans. In rush job out of door we make errors that should not happen. I will give utmost attention and not trust designers." (Shah Depo. Ex. 13). Defendants found it necessary to hire an outside consultant to correct and carry on the work that Plaintiff had been assigned. (Anderson Decl. ¶8).

In an email dated May 2, 2016. In his email Plaintiff wrote:

> I have major concerns about projects designed by Doug without my directions or supervision and it takes lot [sic] of time and effort to understand what he has done . . . . He hardly ever talks to me what he is doing. . . . There is not a direct link all hours of work between us. Doug is unorganized and makes lots of errors in assumptions and names of panel. I cannot trust his design work without my engineering directions.
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> I would be doing injustice both to Meier and its clients by stamping drawings of projects designed without my directions or supervision.
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> In addition it's a violation of engineering practice to stamp drawings not done under engineer's supervision or directions. My suggestions would be to design projects by Zack in Vancouver office with my directions so I have comfort as an Engineer of Record.

(Shah Depo. Ex. 18.).

In response, Anderson advised Plaintiff by email that he had been hired to direct and review the work of the engineers and designers. (Shah Depo. Ex. 19; Anderson Decl. ¶9). He informed Plaintiff that an outside consultant had been hired to review Plaintiff's work and that was "not good." Anderson indicated that he would talk to Farris about Plaintiff's comments but that Plaintiff needed to "concentrate on your project requirements and they need to improve." (Shah Depo. Ex. 19). Plaintiff advised Anderson that he would be taking the next two days off from work, time off he had failed to properly request under Meier company policy. (Shah Depo. pp. 70, 72; Depo. Ex. 21).

During Plaintiff's employment period, the strategic committee met on April 14, 2016 and April 26, 2016 and discussed, among other items, concerns about Plaintiff's work performance. (Anderson Decl. ¶12; Keen Decl. ¶ 11). The committee discussed concerns that had been expressed by other staff and whether Meier should continue Plaintiff's employment despite Plaintiff being involved in several projects. (Keen Decl. ¶13, Anderson Decl. ¶¶12-13).

On May 3, 2016, one of Meier's clients on a different project identified significant issues with the electrical portion of a draft report that was Plaintiff's responsibility. (Shah Depo. Ex. 22). One of Plaintiff's colleagues also raised issues with Plaintiff's thoroughness and level of contribution. (Shah Depo. Ex. 23; Newell Decl. ¶¶4, 6). These concerns were communicated to Plaintiff on May 3, 2006. (Shah Depo. Ex. 23). Based on Plaintiff's unsatisfactory work performance on the Pasco High School project, client complaints about his work product on a separate project, and the questionably timed and improperly requested time off, the strategic committee decided to terminate Plaintiff's employment. (Anderson Decl. ¶ 21). Plaintiff was not

given a formal warning to improve his work because he was in his probationary period. (Keen Depo. p. 74).

Under its agreement with Volt, Meier would incur an $18,500 recruiter fee if Plaintiff stayed with Meier more than 60 days. (Keen Decl. ¶¶6,15). The last day to terminate Plaintiff's employment without incurring the fee was May 9, 2016. (Keen Decl. ¶15). On May 9, 2016, after 60 days of employment and only 35 days of work, Anderson met with Plaintiff in the Vancouver office, told him it was not working out and asked for the Meier keys. (Shah Depo. pp.103-104; Anderson Decl. ¶22).

Later on May 9th, Plaintiff filed a complaint with the Board of Professional Engineers and Land Surveyors. (Shah Depo. pp. 106-107; Depo. Ex. 25). Plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC) in July 2016. (Shah Depo. p. 115).

Waterman began working for Meier on May 31, 2016, as the Group Manager in Meier's Kennewick office. (Keen Decl. ¶16). In September 2016, Meier's Vancouver office was closed down and Plaintiff's position was never filled. (Keen Depo. pp. 25, 68; Depo Ex. 1; Anderson Depo. p. 86).

Evaluating Motions for Summary Judgment

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548 (1986). The moving party may discharge this burden by showing that there is an absence of evidence to support the nonmoving party's case. *Id.* When the

moving party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and show that there is a genuine issue for trial. *Id.*

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987). Reasonable doubts concerning the existence of a factual issue should be resolved against the moving party. *Id.* at 630–31. The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986). No genuine issue for trial exists, however, where the record as a whole could not lead the trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348 (1986).

Where parties file cross-motions for summary judgment, the court "evaluate[s] each motion separately, giving the non-moving party in each instance the benefit of all reasonable inferences." *A.C.L.U. of Nev. v. City of Las Vegas,* 466 F.3d 784, 790–91 (9th Cir.2006) (quoting *A.C.L.U. of Nev. v. City of Las Vegas (A.C.L.U. I),* 333 F.3d 1092, 1096–97 (9th Cir.2003)).

Discussion

I. Statutory Whistleblower Claims

Plaintiff has asserted whistleblower claims under both Washington and Oregon state law. Where, as here, the laws of more than one jurisdiction arguably apply to an issue, a federal court exercising diversity jurisdiction must apply the choice of law rules of the state in which it is located. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). To resolve choice of law questions, the Oregon Supreme Court has adopted the "most significant relationship" approach of the Restatement (Second) of Conflict of Laws in determining the appropriate

substantive law. *Casey v. Manson Constr. & Eng'g Co.*, 247 Or. 274, 287–88 (1967). However, Oregon state law requires that courts first make a threshold determination that there is an actual conflict between the law of the forum and that of another state. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 951 (9th Cir. 2005)(citing *Portland Trailer & Equip., Inc. v. A–1 Freeman Moving & Storage, Inc.*, 182 Or.App. 347, 49 P.3d 803, 806 (Or.Ct.App.2002). If no material conflict exists between the laws or interests of the forum and the other state, we apply forum law. *Portland Trailer,* 49 P.3d at 806.

Plaintiff brings whistleblower claims under ORS 659A.199 and ORS 659A.030. Oregon's whistleblower statutes make it an unlawful practice for an employer – public or private – to retaliate against an employee who has in good faith reported information that "the employee believes is evidence of a violation of state or federal law, rule or regulation." ORS 659A.199. Oregon Revised Statute ORS 659A.030(f) makes it unlawful for "any person" to retaliate against "any other person" who has opposed any unlawful discriminatory practice under ORS 659A.030 or who has filed a complaint, testified or assisted in any proceeding under that chapter.

Plaintiff also asserts whistleblower retaliation under Revised Code of Washington (RCW) Sections 49.17.160 and 19.60.210. As correctly stated by Defendants, RCW 49.17.160 protects an employee who files a complaint under the Washington Industrial Safety and Health Act (WISHA). Section 49.60.210 prohibits retaliation against those who oppose any practices forbidden by Chapter 49.60. This Chapter sets forth Washington's anti-discrimination law. Washington statutes do not contain a provision similar to ORS 659A.199 that apply to private employees. *See* RCW 42.40, 42.41.

With the apparent conflict between Washington's and Oregon's statutory treatment of whistleblower retaliation it is necessary to proceed to apply Oregon's choice of law test. Under

the Restatement, a court should consider the following contacts to determine which state has "the most significant relationship" to the case: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered. *Restatement (Second) of Conflict of Laws* § 145.

Here, Washington has the most significant contacts. The employment relationship, the alleged unlawful conduct by Defendants; and the residency and place of business of the Defendants are all in Washington. Only Plaintiff's residency in Oregon weighs in favor of applying Oregon substantive law. Accordingly, Washington law applies to all of Plaintiff's state law claims and those claims asserted under Oregon state law are dismissed.

Having concluded that Washington law applies to Plaintiff's state law claims, we turn next to the specifics of his statutory whistleblower retaliation claim. This claim asserts that Plaintiff's reporting to Defendants of violations of engineering regulations and his filing of a formal complaint with the Washington Department of Labor were protected activities under RCW Sections 49.17.160 and 49.60.210. (Am.Compl. ¶¶ 42-50). Defendants argue that none of these provisions applies to the facts of this case. I agree.

As noted above RCW 49.17.160 protects an employee who files a complaint under the Washington Industrial Safety and Health Act (WISHA). Plaintiff did not file a claim under WISHA. In addition, the complaint Plaintiff did make to Washington's Board of Professional Engineers and Land Surveyors was filed after he was terminated. The other purported statutory basis for Plaintiff's claim, Section 49.60.210, prohibits retaliation against those who oppose any practices forbidden by Chapter 49.60. This Chapter sets forth Washington's anti-discrimination law. There is no evidence in the record that Plaintiff opposed any unlawful practice under

Chapter 49.60 while in Defendants' employ. Plaintiff did not file his EEOC complaint until after he was terminated. Plaintiff cannot establish a *prima facie* case of whistleblower retaliation under either of statutes upon which he relies. Accordingly, Plaintiff's statutory whistleblower claims fail as a matter of law.

II. Wrongful Discharge

Count 1 of Plaintiff's Whistleblower Retaliation Claim alleges common law wrongful discharge against Defendant Meier. Plaintiff alleges that Defendant Meier wrongfully discharged Plaintiff in retaliation for notifying Meier of misconduct and reporting Meier's misconduct to a regulatory agency. Plaintiff also alleges that Meier discharged him for "refusing to commit an illegal act, ignoring and supporting the unlicensed and unsupervised practice of engineering." (Am.Compl. ¶¶ 34-41).

As an initial matter and as discussed above, Plaintiff's allegation that he was terminated in retaliation for reporting misconduct to a regulatory agency is unsupported by the record. The evidence supports only the conclusion that Plaintiff's reports to the Board of Professional Engineers and Land Surveyors and the EEOC were filed after he was terminated and thus cannot support a claim for retaliatory discharge.

In a very limited exception to at-will employment doctrine, Washington courts have allowed a wrongful discharge claim on public policy grounds. *Gardner v. Loomis Armored Inc.*, 128 Wash. 2d 931, 936, 913 P.2d 377, 379 (1996). Public policy tort actions are allowed in four different situations: "(1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer

misconduct, *i.e.*, whistleblowing." *Gardner v. Loomis Armored Inc.*, 128 Wash. 2d at 936, 913 P.2d at 379 (1996)(citing *Dicomes v. State,* 113 Wash.2d 612, 618, 782 P.2d 1002 (1989)). Plaintiff's Amended Complaint asserts a claim based on the first and fourth of these situations.

In order to establish a claim under Washington law for wrongful discharge involving alleged violations of public policy, a Plaintiff must show "1) the existence of a clear public policy (the *clarity* element); 2) that discouraging the conduct in which [he] engaged would jeopardize the public policy (the *jeopardy* element); 3) that his public-policy-linked conduct was a substantial factor in (i.e. the cause of) the employer's decision to discharge him (the *causation* element); and 4) that employer is not able to offer an overriding justification for the dismissal (the *absence of justification* element). *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 971 (9th Cir. 2002)(citing *Ellis v. City of Seattle,* 142 Wash.2d 450, 13 P.3d 1065, 1070 (2000) (en banc)(citations and internal quotations omitted)).

Plaintiff alleges that Defendant Meier violated RCW Section 18.43, which, he asserts, helps protect public health and safety through the regulation of engineers. Plaintiff contends that he notified Defendants of regulatory violations in an email dated May 2, 2016. In his email Plaintiff writes:

> I have major concerns about projects designed by Doug without my directions or supervision and it takes lot [sic] of time and effort to understand what he has done . . . . He hardly ever talks to me what he is doing. . . . There is not a direct link all hours of work between us. Doug is unorganized and makes lots of errors in assumptions and names of panel. I cannot trust his design work without my engineering directions.
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> I would be doing injustice both to Meier and its clients by stamping drawings of projects designed without my directions or supervision.
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> In addition it's a violation of engineering practice to stamp drawings not done under engineer's supervision or directions. My suggestions would be to design projects by Zack in Vancouver office with my directions so I have comfort as an Engineer of Record.

(Shah Depo. Ex. 18.).

In his motion for summary judgment, Plaintiff asserts that this email alerted Defendant Meier that it was violating WAC 196-27A-020(1)(c). (Pl. Am. MSJ, p. 5). This regulation sets forth that "[r]egistrants must inform their clients or employers of the harm that may come to the life, health, property and welfare of the public at such time as their professional judgment is overruled or disregarded. If the harm rises to the level of an imminent threat, the registrant is also obligated to inform the appropriate regulatory agency." This regulation reflects a public policy of safeguarding the public from harm that may arise from disregard of the judgment of those operating in the capacity of registered professional engineers. Thus the "clarity element" is met. *See Danny v. Laidlaw Transit Servs., Inc.,* 165 Wash. 2d 200, 219, 193 P.3d 128, 137 (2008) (The "clarity" element does not require us to evaluate the employer's conduct at all; the element simply identifies the public policy at stake.).

Turning to the "jeopardy element," I conclude that the evidence fails to show that Plaintiff engaged in particular conduct that directly related to or was necessary for the effective enforcement of the public policy at issue. *See Rose v. Anderson Hay & Grain Co.*, 184 Wash. 2d 268, 277, 358 P.3d 1139, 1143 (2015). Plaintiff testified that the email discussed concerns that Doug Farris was working remotely and it was difficult to supervise his work. (Shah Depo. p. 79). Plaintiff testified that, at the time, his email was a "suggestion" to Steve Anderson and that he "was not thinking of legal action." (Shah Depo. pp. 80-81).

The evidence supports only the conclusion that Plaintiff communicated with his supervisor that he was dissatisfied with the working relationship he had with Doug Farris and the necessity to supervise Farris' work remotely. The vague language of Plaintiff's May 2nd email is insufficient to constitute notice to his employer under WAC 196-27A-020 and Plaintiff has

provided no other evidence that he either engaged in whistleblowing conduct or refused to commit an illegal act. In the absence of such evidence, Plaintiff cannot establish the jeopardy element necessary to support his claim. Therefore, Defendant's motion for summary judgment on the wrongful discharge claim is granted.

III. Age Discrimination Claim Under Washington Law

Under RCW Section 49.60.180(1) and Washington Administrative Code (WAC) 162-04-010, the protected class of workers is those from 40 to 70 years of age. It is undisputed that Plaintiff was 75 years old at the time of the alleged discriminatory conduct. Accordingly, Plaintiff's age discrimination claim under Washington state law fails.

IV. Remaining Discrimination Claims

As noted above, Plaintiff has also asserted claims of race and national origin discrimination under federal and Washington state law and a claim for age discrimination under federal law.

A. Standards

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623 et *seq.*, makes it unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's age. Protection under the ADEA extends to all individuals who are at least 40 years old. 29 U.S.C. § 631(a).

Title VII prohibits employers from making adverse employment decisions based upon an individual's race or national origin. *See* 42 U.S.C. § 2000e–2(a). The court applies the same analytical framework to both Title VII and ADEA claims. *Wallis v. J.R. Simplot Co.*, 26 F .3d 885, 888 (9th Cir.1994).

Washington courts look to Title VII case law for instruction or persuasive authority in construing WLAD. *See Glasgow v. Georgia–Pacific Corp.,* 103 Wash.2d 401, 693 P.2d 708, 711, n. 2 (1985). Accordingly, the court's analysis of federal law applies to Plaintiff's claim for race and national origin discrimination under the Washington Law Against Discrimination (WLAD) as well. *See Hardage v. CBS Broadcasting Inc.,* 427 F.3d 1177, 1183 (9th Cir.2005); *Alonso v. Qwest Commc'ns. Co., LLC,* 178 Wash.App. 734, 315 P.3d 610, 616, n. 11 (Wash.Ct.App.2013) ("Because our discrimination laws substantially parallel Title VII of the Civil Rights Act of 1964, we may look to federal law for guidance.").

For claims alleging violation of the ADEA or Title VII, federal courts apply a "burden shifting" method first set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). The plaintiff carries the initial burden of establishing a *prima facie* case of discrimination. *Id.* at 802. That burden may be met by offering either direct evidence of discriminatory intent or through the framework set out in *McDonnell Douglas. Wallis,* 26 F.3d at 889. Under the *McDonnell Douglas* framework, a plaintiff can establish a *prima facie* case of unlawful discrimination by showing that he belonged to a protected class, was qualified for the position in question, was subjected to an adverse employment action, and others, who were similarly situated but not in the protected class, were treated more favorably. *E.g., Aragon v. Republic Silver State Disposal Inc.,* 292 F.3d 654, 658 (9th Cir. 2002), *as amended* (July 18, 2002)(citations omitted); *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 142 (2000). Establishing a *prima facie* case creates a presumption of unlawful discrimination. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981).

Under the *McDonnell Douglas* framework, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Once the

defendant meets this burden of production, the presumption of unlawful discrimination "simply drops out of the picture" *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511 (1993), and the plaintiff then bears the burden of demonstrating that the employer's proffered reason is pretextual. *Burdine,* 450 U.S. at 256. This may be accomplished either by persuading the trier of fact that a discriminatory reason more "likely motivated the employer or ... by showing that the employer's proffered explanation is unworthy of credence." *Id.*

A plaintiff may show that the employer's proffered reason is not credible because it is internally inconsistent or is otherwise not believable. *Chuang v. University of California, Davis Board of Trustees,* 225 F.3d 1115, 1127 (9th Cir.2000). However, a plaintiff "must do more than establish a *prima facie* case and deny the credibility of the [defendant's] witnesses." *Wallis,* 26 F.3d at 890 (citation omitted). If the plaintiff presents evidence that is sufficient to persuade the trier of fact that the defendant's proffered reason is false, intentional discrimination may be inferred based upon disbelief of the employer's reason and the existence of a *prima facie* case of discrimination. *Nidds v. Schindler Elevator Corp.,* 113 F.3d 912, 918 n. 2 (9th Cir.1996)(cert. denied 522 U.S. 950 (1997)).

B. Analysis

Plaintiff alleges that age was a substantial factor in Defendants' decision to terminate his employment and that, after he was terminated, Defendants hired a younger, less experienced replacement. Plaintiff also alleges that he was treated differently and ultimately terminated because of his race and national origin. Defendants contend that Plaintiff fails to establish a *prima facie* case of discrimination for either his age or race and national origin claims. Defendants argue that, even if Plaintiff establishes a *prima facie* case, Defendants have offered

legitimate, non-discriminatory reasons for terminating Plaintiff's employment and Plaintiff has not produced any evidence that the proffered reasons are pretextual.

After a thorough review of the record, I conclude that Plaintiff has failed to establish a *prima facie* case of discrimination based on age, race or national origin. It is undisputed that Plaintiff was a member of classes protected by WLAD (for race and national origin claims only), Title VII and the ADEA and that he suffered an adverse employment action. However, Plaintiff has not provided any direct evidence of discriminatory intent or any evidence to support the second and third prongs of the *McDonnell Douglas* test.

First, Plaintiff has offered no evidence of discriminatory intent. Plaintiff testified in his deposition that throughout his entire employment with Meier no one ever said anything about his race, national origin or age and nothing was ever said that could even be interpreted to be about his age, race or national origin. (Shah Depo. p. 115). Plaintiff also testified that no one made any comments about his age, race or national origin during the interview process. (Shah Depo. pp. 21-22). Plaintiff's employment was terminated after less than two months. Anderson and the other members of the strategic committee were involved in both Plaintiff's hiring and termination. Such circumstances undermine any inference of discriminatory animus. *See Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270–71 (9th Cir. 1996) (employer's initial willingness to hire the plaintiff is strong evidence the employer is not biased against that protected class).

Second, Plaintiff has produced no evidence to rebut Defendants' evidence that he was not qualified for the Group Manager position, the position that was eventually given to Kelly Waterman. Defendants offered deposition testimony and declarations that Meier did not consider Plaintiff for the Group Manager position after the initial interview because he lacked Washington

L&I familiarity and experience and because he and his work were unknown to Defendants. (Keen Depo. pp. 32, 33, 37, 39-40, 41-42; Anderson Depo. pp. 40-41, 42, 44-45, 78-79; Anderson Decl. ¶6). Instead, Meier considered and hired Plaintiff as a Senior Electrical Engineer/Project Manager.

Furthermore, Plaintiff has failed to point to evidence that shows that his work performance was satisfactory during the less than 60 days he was in Defendants' employ. On Wednesday, April 27, 2006, Anderson asked Plaintiff to discuss concerns raised during the L&I review process and informed Plaintiff that Meier could not afford any further delay. Plaintiff responded by email that he would be out of town until Monday. Anderson raised additional issues with Plaintiff's work performance in an email later that day, telling Plaintiff he needed to pay closer attention to detail and that he had been removed from the Pasco High School job "because this was not happening." Defendants found it necessary to hire an outside consultant to correct and carry on the work that Plaintiff had been assigned. (Shah Depo. Ex. 12; Anderson Decl. ¶¶ 7-9). In an email dated May 2, 2006, Anderson advised Plaintiff that he needed to "concentrate on your project requirements and they need to improve." (Shah Depo. Ex. 19). Plaintiff advised Anderson that he would be taking the next two days off from work. The next day, one of Meier's clients on a different project identified significant issues with the electrical portion of a draft report that was Plaintiff's responsibility. (Shah Depo. Ex. 22). One of Plaintiff's colleagues also raised issues with Plaintiff's thoroughness and level of contribution. (Shah Depo. Ex. 23; Newell Decl. ¶¶4, 6). These concerns were communicated to Plaintiff on May 3, 2006. (Shah Depo. Ex. 23).

The evidence documents multiple complaints from several sources regarding Plaintiff's work performance, Plaintiff's failure to properly request time off and apparent disinclination to

accept responsibility for tasks within his job description. Plaintiff has not come forward with any significantly probative evidence to show there is a genuine issue regarding this prong of the *McDonell Douglas* test.

Finally, Plaintiff has not produced any evidence that similarly situated individuals outside the protected classes were treated more favorably in either the decision not to hire Plaintiff for the Group Manager position or to terminate his employment. Plaintiff asserts that he was differently treated because Meier hired Kelly Waterman, who was younger than Plaintiff and Caucasian, for the Group Manager position. As discussed above, Defendants offered deposition testimony and declarations that Meier did not consider Plaintiff for the Group Manager position after the initial interview because he lacked Washington L&I familiarity and experience and because he and his work were unknown to Defendants. In contrast, Kelly Waterman had experience with Washington L&I and knew the local L&I reviewer. (Keen Depo. p. 37). Waterman and his work were also known to Meier's clients and demonstrated an ability to successfully manage difficult projects. (Keen Depo. pp. 33, 37; Anderson Decl. ¶23).

Plaintiff also cannot establish that after his termination his position was filled with someone outside the protected classes. Plaintiff asserts that he was replaced by Kelly Waterman. However, the timeline of events disproves this argument. Plaintiff's initial interview was on March 10, 2016, after which Defendants, for the reasons discussed above, no longer considered Plaintiff qualified for the Group Manager position. Plaintiff was hired and started work on March 22, 2016 in Meier's Vancouver office. Meier received Waterman's resume on April 6, 2016 and sent an offer letter to him on April 26, 2016. Plaintiff was terminated on May 9, 2016. Waterman began working for Meier on May 31, 2016 as the Group Manager in Meier's Kennewick office. In September 2016, the Vancouver office was closed down and Plaintiff's

position was never filled. Even viewing all the evidence in a light most favorable to Plaintiff, the evidence does not support the conclusion that similarly situated individuals outside the protected classes were treated more favorably than Plaintiff.

Because Plaintiff has not produced evidence from which a trier of fact could conclude that he has satisfied second or fourth prongs of the *McDonell Douglas* test, he has not established a *prima facie* case of age, race or national origin discrimination.

Even assuming Plaintiff could establish a *prima facie* case, Defendants proffered legitimate, non-discriminatory reasons for not offering Plaintiff the Group Manager position and for Plaintiff's termination – i.e. 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. Plaintiff has not introduced any evidence suggesting that these reasons were pretextual. As noted above, where, "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 action." *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1096 (9th Cir. 2005) (citation and internal quotations omitted); *see also Bradley*, 104 F.3d at 270–71. An "extraordinarily strong showing of discrimination [is] necessary to defeat the same-actor inference." *Coghlan*, 413 F.3d at 1097 (citation omitted). Plaintiff has not made any such showing here. Accordingly, Defendants' motion for summary judgment on Plaintiff's federal age discrimination claim and federal and state race and national origin claims is granted.[2]

[2] Plaintiff also asserts that individual Defendants Anderson, Keen and Giver violated RCW 49.60.220 by aiding, abetting or otherwise inciting Meier to unlawfully discharge Plaintiff. In the absence of support for Plaintiff's discrimination claims, Plaintiff's aiding and abetting claim fails as a matter of law.

Conclusion

Plaintiff's motions for sanctions (#138, #154); motion for reconsideration (#140); and motion to withdraw consent to Magistrate Judge jurisdiction (#139) are DENIED. Plaintiff's motion for leave to file an affidavit (#123) is GRANTED. For the reasons set out above, Defendants' motion for summary judgment (#129) is GRANTED and Plaintiff's motion for summary judgment (#72, #78) is DENIED.

DATED this 13th day of September, 2018.

/s/ John Jelderks
John Jelderks
U.S. Magistrate Judge

APPENDIX 2

NOT FOR PUBLICATION

FILED

MAY 17 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHANTUBHAI N. SHAH, Plaintiff-Appellant, v. MEIER ENTERPRISES, INC., et al., Defendants-Appellees.	No. 18-35962 D.C. No. 3:17-cv-00226-JE MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernandez, District Judge, and
John Jelderks, Magistrate Judge, Presiding

Argued and Submitted April 13, 2021
Seattle, Washington

Before: O'SCANNLAIN and CALLAHAN, Circuit Judges, and FITZWATER,** District Judge.
Dissent by Judge O'SCANNLAIN

In this removed action alleging employment discrimination claims, plaintiff

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

Shantubhai N. Shah ("Shah") appeals the summary judgment dismissing his claims and the order denying his motion to remand.[1] We have jurisdiction under 28 U.S.C. § 1291 and affirm.

We review both the denial of Shah's motion to remand and the grant of summary judgment *de novo*. *See, e.g., L.F. v. Lake Wash. Sch. Dist. #414*, 947 F.3d 621, 625 (9th Cir. 2020) (summary judgment); *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 692 (9th Cir. 2005) (motion to remand). We review the evidence favorably to Shah as the party opposing defendants' motion for summary judgment. *See, e.g., Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 832 (9th Cir. 2002).

Because the parties are familiar with the facts and procedural history, we restate only what is necessary to explain our decision.

I

The question whether the district court[2] erred in denying Shah's motion to

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[1] The United States Magistrate Judge decided Shah's motion to remand as a non-dispositive matter, and the district judge affirmed the magistrate judge's ruling after Shah objected. Before the magistrate judge ruled on the parties' cross-motions for summary judgment, all parties consented to the magistrate judge's jurisdiction. Although Shah sought to withdraw his consent, the magistrate judge denied the motion when he decided the parties' cross-motions for summary judgment and other motions. The rulings on appeal were therefore decided by judicial officers with authority to act.

[2] The "district court" means the magistrate judge who decided the motion to remand and the district judge who affirmed the magistrate judge's decision.

remand turns on whether Shah properly served defendant Meier Enterprises, Inc. ("Meier")[3] with the summons and complaint on November 23, 2016, or did not properly serve Meier until later, on January 20, 2017. The district court held that proper service was not made until January 20, 2017, so removal on February 10, 2017—i.e., within 30 days of January 20, 2017—was timely, and the motion to remand must be denied. The question whether Meier was properly served on November 23, 2016, or not until January 20, 2017, is governed by Oregon law. *See, e.g., Whidbee v. Pierce Cty.*, 857 F.3d 1019, 1023 (9th Cir. 2017) ("When a case is removed from state court to federal court, the question whether service of process was sufficient prior to removal is governed by state law." (citations omitted)).

Shah maintains that the district court improperly placed the burden on him to prove that his selected method of service on November 23, 2016—certified mail, with restricted delivery—was reasonably calculated to inform Meier of the pending action. Although the district court did make such a statement in its opinion and order, the court also properly recognized that there is a presumption against removal and that "the defendant always has the burden of establishing that removal is proper" (quoting

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[3] Although Shah also sued four individually-named defendants and three groups of defendants, only Meier removed the case. Meier maintained in the notice of removal that the consent to removal of the other defendants was unnecessary because they had not been properly served. The motion to remand turned on whether service on Meier was proper.

Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)). And the district court acknowledged that "[t]he removal statute is strictly construed and 'any doubt about the right of removal requires resolution in favor of remand'" (quoting *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009)). We therefore conclude from our holistic reading of the district court's opinion and order that it did not improperly shift the burden to Shah to establish that removal was improper.

Nor did the district court err in holding that Shah's attempted service on November 23, 2016 was improper. Regardless whether under Oregon law service by mail on a corporation can ever be effective if attempted without requesting a return receipt[4]—a question we need not decide in this case—Shah's attempt to serve Meier did not satisfy Oregon's "reasonable notice" standard.

Under Oregon law, "[s]ummons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend." Or. R. Civ. P. 7D(1). If service is by a method specifically permitted under Rule 7D(3), it is presumptively adequate. If not, the court must determine whether the method used satisfies the "reasonable notice" standard

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[4] *See Edwards v. Edwards*, 801 P.2d 782, 786 (Or. 1990) ("No Oregon case upholds service of summons by mail as adequate unless receipt is acknowledged by defendant.").

under Rule 7D(1). *Baker v. Foy*, 797 P.2d 349, 354-55 (1990). Here, service was not effected by a method specifically permitted under Rule 7D(3), so the reasonable notice standard under Rule 7D(1) applies. The court must consider the totality of the circumstances as they were known to Shah at the time of service. *See Paschall v. Crisp*. 910 P.2d 407, 411 (Or. Ct. App. 1996) (citation omitted).

The district court did not err in concluding that Shah failed to give Meier reasonable notice through the November 23, 2016 attempt at service. According to the "proof" of delivery (a U.S. Postal Service tracking slip), the complaint and summons were delivered on November 28, 2016 at 12:58 p.m. to "Front Desk/Reception" at Meier's office. Even assuming that the documents were handed to a particular person (as opposed to, say, being deposited in a receptacle as part of the daily mail delivery), it is simply a matter of speculation whether the delivery was made to someone whose duties imposed the degree of responsibility that should accompany the handling of documents of the importance of legal process. Indeed, Oregon's primary service method for a corporation suggests the recipient of service should be "a registered agent, officer, or director of the corporation; or . . . any clerk on duty in the office of a registered agent." Or. R. Civ. P. 7D(3)(b)(i). Under the totality of the circumstances known to Shah, the form of service attempted on November 23, 2016 did not give Meier reasonable notice.

Accordingly, because the November 23, 2016 attempt at service was not proper and Meier removed the case within 30 days of being properly served on January 20, 2017, the district court did not err in denying Shah's motion to remand.

II

Turning to the merits, we hold that the district court correctly granted summary judgment dismissing Shah's claims.

Shah's discrimination claims based on Meier's decision not to hire him for the Group Manager position fail because he has not created a genuine issue of material of fact under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A reasonable jury could not find, based on the posted job description and lack of interview questions regarding Shah's L&I experience alone, that Meier's proffered reason for not hiring him—his lack of Washington Labor & Industry experience—was not the real reason.

Shah's discrimination claims based on his termination similarly fail under *McDonnell Douglas* because he has not shown that similarly situated individuals were treated more favorably. Nor has he offered any evidence that would enable a reasonable jury to find that Meier's proffered reasons for his termination—his poor performance and failure to follow company policy with respect to time off—were not the real reasons for his termination. Moreover, where "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 action." *Bradley v. Harcourt, Brace & Co.* 104 F.3d 267, 270-71 (9th Cir. 1996). Shah offers no evidence that would support the reasonable finding that those responsible for his termination did not actually believe that his performance was poor.

Accordingly, the judgment of the district court is

AFFIRMED.

Shah v. Meier Enterprises, Inc., No. 18-35962

O'Scannlain, J., dissenting:

Although I agree with the memorandum's analysis of the merits of Shah's employment discrimination claim, I would not have reached that issue because I do not agree that we should affirm the district court's denial of Shah's motion to remand this case to state court at this point. Prudence and comity, I suggest, should have had us first certify the underlying unresolved question of state civil procedure to the Oregon Supreme Court.

I therefore respectfully dissent.

I

Whether Meier Enterprises' notice of removal was timely turns on the question of whether Shah's first attempted service by mail was valid under the governing Oregon Rules of Civil Procedure. And, as the majority observes, that question in turn becomes: Was Shah's mailing of notice to an officer in Meier's principal place of business via first class mail with restricted delivery—but without a return receipt—"reasonably calculated" to inform Meier of the action? *See* Or. R. Civ. P. 7D(1); *Davis Wright Tremaine, LLP v. Menken*, 45 P.3d 983, 987 (Or. Ct. App. 2002).

On this question, Oregon law is not clear. To be sure, as the majority observes, no Oregon case appears to have upheld service by mail where no return

receipt was requested. *See Edwards v. Edwards*, 801 P.2d 782, 786 (Or. 1990). But, equally important, the majority has not identified any case which holds that a return receipt is *always* required in order for service by mail to be "reasonably calculated" to inform the defendant of the action.

Indeed, some Oregon courts have suggested (but not held) that sending mail by restricted delivery—which requires the mail carrier to deliver the parcel only to the addressee—might provide *greater* assurance that the defendant receives notice of the action than a simple request for a return receipt (which requires only that the person who receives the parcel sign for it). *See, e.g.*, *Murphy v. Price*, 886 P.2d 1047, 1049 (Or. Ct. App. 1994) ("[Without restricted delivery] anyone at that address—a roommate, a neighbor, defendant's landlord—could have signed for the receipt . . . with no assurances that the defendant would ever see the papers."); *see also Lake Oswego Review, Inc. v. Steinkamp*, 695 P.2d 565, 569 (Or. 1985) (discussing increased likelihood that a restricted delivery will be delivered to the addressee); *Davis Wright Tremaine*, 45 P.3d at 988 ("[A]s a general rule, service by mail on an individual must be by restricted delivery—*i.e.*, only the person being served can either accept or refuse the mailing—to satisfy the reasonable notice standard . . . ."); *id.* at 989 ("[D]ecisions of the Oregon Supreme Court and of our court . . . have repudiated [the] premise that mere service by certified mail, without *some* more particularized assurance or confirmation of delivery to the defendant,

e.g., restricted delivery, return receipt requested, etc., was sufficient to satisfy ORCP 7D(1)." (emphasis added)). Such cases do not inspire confidence that our court has properly applied Oregon law.

II

In these circumstances, I would have preferred that we certify this open question of law to the Oregon Supreme Court, which surely has a far greater interest than does our court in defining what methods of service are acceptable for lawsuits initiated within its own state courts. Given the relative frequency with which Oregon courts have been called upon to address questions of appropriate forms of mailed service, it may well have been inclined to accept certification.

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

SHANTUBHAI N SHAH, an Individual, Plaintiff, v. MEIER ENTERPRISES, Inc. a Washington Corporation, PAUL GIEVER, CEO/President, STEVE ANDERSON, an Individual, BOBBI KEEN, an Individual, Defendants.	Case No. 3:17-CV-00226-JE **PLAINTIFF'S RESPONSE TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT** **Oral Argument Requested by Telephone**

LR 7-1 (a) CERTIFICATE

Response to Cross Motion is filed via US First Class Mail on May 21, 2018 [Order 146].

The Response Brief contains 20 Pages and 4900 words excluding certificates.

I. INTRODUCTION

This case arises from Plaintiff's unlawful termination a week after Plaintiff makes "**Whistleblower report of improper actions by employees**" about Defendants' unlicensed, unsupervised employees performing engineering practice "in violation of state law or regulation." **(MEIER 000887, Meier Employee Policy Manual Page 10)**

Plaintiff **Shantubhai N. Shah, 77 years old and of Indian decent,** is a registered engineer **licensed to practice in both Oregon and Washington. (Shah Decl. 1)**

Plaintiff was hired by Defendant Meier Enterprises ("Meier") as a Senior Engineer and Project Manager. In a matter of weeks, Plaintiff encountered hostile treatment, and **gross disregard for the Washington State Engineering practice rules.** After raising an internal complaint to defendants, Defendants terminated Plaintiff's employment. **(Shah Decl. 5, 13, 15)**

Based on Defendants' conduct, Plaintiff has asserted claims of several counts of Whistleblower Retaliation, and Discrimination based on Plaintiff's Age and Race. **(Shah Decl. 16)**

Through a cross-motion for summary judgment, Defendants largely ignore their burden using pretexts and untruthful declarations for termination and ask the court to ignore evidence of their wrongful motives. As explained further below, **Defendants motions are precluded by genuine disputes of material fact, must therefore be denied.**

II. RELEVANT FACTS

A. Plaintiff a Registered Professional Engineer for 40 plus years Entitled to Statutory Protection from Discrimination as a Protected Class.

Plaintiff was born in India and became the US Citizen in 1976, and a registered professional engineer since 1978. **(Shah Decl. 1)**

Plaintiff has extensive previous experience as an electrical professional engineer, project manager, and department manager. **(Shah Decl. 2, 3)**

B. Defendants did not hire Plaintiff as Electrical Group Manager.

During the third week of February 2016 employment agency Volt Resources contacts Plaintiff for a position of Defendants' Electrical Department Group Manager to manage electrical projects from Defendants' Kennewick, Washington office. Volt resources **recommended Defendants** "as EE Group Manager" with Plaintiff's 3-page resume and two references from professional engineers **Mark Van Duser** and **Bart Makadia** who vouched Plaintiff's **40-year** plus experience as a professional electrical engineer. **(Shah Decl. 7)**

Primary requirement of the vacant position was registration as a professional engineer and 15 years of professional experience in projects management **(MEIER 000148-149)**. Plaintiff met both the qualifications.

Plaintiff indicated his interest to work as an electrical department manager relying on his previous experience on his resume managing electrical groups as a registered professional electrical engineer with 40 plus years, **not offered to Plaintiff** and left vacant position. **(Shah Dec. 6, 7, 8)**

C. Defendants hire Plaintiff as a Senior Electrical Engineer and Project Manager

On **March 26, 2016** after a telephone interview with Plaintiff, followed by (2) in-person interviews with Defendants' mechanical and electrical department staff at their **Kennewick** and **Vancouver** offices, and with their recommendations, Defendants employed Plaintiff as a registered professional engineer in Oregon and Washington to work on Defendants' electrical projects management from **Vancouver** office staffed with only

(2) employees, to replace electrical engineer **Dennis Zimmer who resigned** and to continue operating as a remote engineering office to market Defendants' engineering services to Portland area clients, though it did not have any local projects. **(MEIER 000600, 000860, 000863)**

Zimmer was once disciplined for complaints against him from Defendants' clients but was **not terminated (MEIER 000617).**

Defendants treated Plaintiff disparately from similarly placed employee and discriminated and retaliated for his whistleblowing. **(Shah Dec. 5)**

D. Defendants hire Waterman and reassign Plaintiff's projects to him

Defendants on **April 20, 2016** employed a professional electrical engineer, **Kelly Waterman (MEIER 000146-147)**, a **Caucasian** with a **12-year experience (MEIER 000139)** and several years younger to Plaintiff as an Electrical Group Manager, **the position that was not offered to Plaintiff** and at a 25% higher salary, and **$5,000 Employment Offer (MEIER 000121) bonus not offered to Plaintiff (MEIER 000175-176)** to manage same projects, that Plaintiff was assigned to work from Defendants' **Vancouver** office. **(Shah Decl. 5, 11)**

Defendants following the appointment of Waterman and his complaint of May 3, 2016, reassigned projects assigned to Plaintiff to "new department manager" Waterman on **May 6, 2016 (PLAINTIFF 00009, 00010)** and supervise electrical designer Doug Farris from Kennewick office, **leaving Plaintiff with no work** from Vancouver office. Waterman was given 60 Day probationary evaluation **that was not offered to Plaintiff**. Plaintiff was

discriminated by not offering the position though he exceeded Defendants' experience requirements, while offered to a younger and less experienced employee. **(MEIER 000123)**

E. Based on good faith belief Plaintiff reported state rule violations to Defendants and to EEOC. (Shah Dec. 13, 16)

On **April 26, 2018** Defendant Anderson thanks Plaintiff for getting done "L&I comment response letter" and asks Plaintiff to forward to Pam for her review as company policy to review final product by a third person. **(MEIER 000862)**

On **May 2, 2016 @ 7:56 AM** Plaintiff in his best belief pursuant to Defendants' "Open Door" policy complained in an email to his supervisor **Steve Anderson** Defendants' violation of electrical engineering practice of **Washington State law. (MEIER 000877)**

Plaintiff in his good faith belief complaint to State of Washington State Board of Registration for Professional Engineers and Land Surveyors cited deficient engineering documents, prepared by unlicensed Electrical Engineer **Doug Farris** without a supervision of a licensed engineer **(MEIER 000070-000071)**, given to Plaintiff for final review **(MEIER 000886)**, the practice Plaintiff opposed citing State law for engineering.

After two weeks of review by an electrical consultant **Pam** of Farris work, questions on unsupervised Electrical Engineer Farris prepared plans persisted two days after the termination of Plaintiff. **(MEIER 000864).**

Defendants' list deceivingly shows (6) employees including Doug Farris (marked X) as engineers, not licensed by WA Department of Licensing. **(PLAINTIFF 000002)**

Previously designer Zackary Erz also informed his supervisor Colin Bates and Defendant Steve Anderson about the poor quality of Farris work. Defendants knowingly allowed Farris to perform engineering and design unsupervised, in violation of the state law for engineering practice to be performed under direct supervision of licensed engineers. **(Shah Decl. 12)**

While Doug Farris was not disciplined by Defendants, until Waterman on June 17, 2016 citing Plaintiff's complaint, Plaintiff was terminated without giving him a reason, benefit of doubt, or corrective action, a discriminately disparate treatment. **(MEIER 000166, 000167)**

F. Plaintiff immediately encountered harassment from Defendants.

Following Plaintiff's complaint pursuant to Defendants' Open Door and Whistleblower policies Defendants retaliated against Plaintiff with adverse action in violation of their Affirmative Action Plan, Equal Opportunity Employment, Title VII anti-discrimination of Race and National Origin, and ADEA policies. **(Meier Employee Manual Page No. 7, 9, and 10)**

Within an hour of Plaintiff's complaint on **May 2 at 7:56 AM, Defendant Anderson at 9:00 AM retaliates** and asks Erz to watch Plaintiff rather than resolving plans prepared by Farris. **(MEIER 000865, 000875)**

Defendants on **May 3, 2016** conspired secretly to terminate Plaintiff **(MEIER 000191)**, after completion of Cooper George Building Project # 16-7951 **"Due Diligence Report"** by Plaintiff on **May 9, 2016** was released on **May 12, 2016. (MEIER 000723)**

G. Defendants terminated Plaintiff's employment.

In retaliation to Plaintiff's whistleblowing of state law violation pursuant to Defendants' "Open Door" policy, Defendants terminated his employment effective May 9, 2016.

H. Defendants close floundering Vancouver office

Designer Erz was let go from **Vancouver office** after a few months of Plaintiff's termination. Plaintiff after making certain Erz is working alone without engineer's supervision a **violation of state law** complained to State Board of Engineering that Vancouver office was performing engineering practice without a residence engineer in Vancouver office. It's like a nurse or PA running a medical clinic without a doctor's guidance.

Meier tried to find additional staff to place in Vancouver but without luck to get new projects that could be performed from Vancouver office. Since Meier was inadequately staffed at Vancouver office and struggling without much success due to competition with large engineering firms established in Portland Metro area for decades.

Three months after **Plaintiff was** let go, Defendants as a cost cutting measure **on August 9, 2016** decided to **close Vancouver** office about **(MEIER 000719)** followed by the departure **of Erz, Defendant Steve Anderson,** and **Marketing Manager Denise Sweeden** who mismanaged marketing efforts to keep Vancouver office fully functioning which did not grow beyond a two-person office. Plaintiff's replacement **Waterman** also

did not survive the hectic projects and left within a year of his employment with Defendants (MEIER 000141)

III. STANDARD OF REVIEW

Summary judgment is only appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FRCP 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but "only determine[s] whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir.1994) (*citing O'Melveny & Myers*, 969 F.2d at 747). Material facts are those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. When deciding a motion for summary judgment, the Court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v. O'Melveny & Myers*, 969 F.2d 744, 747 (9th Cir.1992), *rev'd on other grounds*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994); see also *Sicilia v. Boeing Co.*, 775 F. Supp. 2d 1243, 1248 (W.D. Wash. 2011) (summarizing standard when evaluating whistleblower retaliation claim). Here, Defendants ignore this heavy burden, often relying on their own testimony and disregarding Plaintiff's allegations and testimony.

IV. LEGAL ARGUMENT

A. There is a Genuine Issue of Fact Supporting Plaintiff's Discrimination Claim.

The Ninth Circuit Court of Appeal's age discrimination ruling in the case of Francis v. Johnson No. 13-15534 overturned a District Court's ruling on a federal age discrimination

complaint. The Ninth Circuit's decision, which was issued on August 3, 2015, sets an important precedent for how Ninth Circuit courts must handle claims arising under the Age Discrimination in Employment Act (ADEA). The decision includes the following holding:

If an employee files an ADEA complaint after being turned down for a promotion and the claimant is less than 10 years older than the employee who received the promotion, then there is a rebuttable presumption that the difference in age is insubstantial. However, as in the instant case there's a substantial difference an age difference of 10 years or more between the Plaintiff and his replacement Waterman who took over Plaintiff's projects management, there is a rebuttable presumption that the difference in age is substantial. (This is the standard that has previously been applied by the Seventh Circuit.)

Legal Standard

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants, to be successful, must prove that, in considering the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, . . . there is no genuine issue as to any material fact and that they are entitled to a judgment as a matter of law." See Fed. R. Civ. P. 56(c). An issue is "material" if the dispute may affect the outcome of the suit under the governing law and is "genuine" if a reasonable jury could return a verdict for the nonmoving party. Anderson v. 4 Liberty Lobby, Inc.

In the instant case Defendants have articulated their legitimate pretext argument of plaintiff's termination as a rebuttal to Plaintiff's prima facia of discrimination by age, national origin, and

retaliation immediately following his complaint the **proximity of a decision next day on May 3, 2016 to terminate him on May 9, 2016,** after Plaintiff completes his Due Diligence Report on Cooper George Building in Spokane, Washington he visited for inspection along with a Mechanical Engineer Jerimiah Newell that was issued to client after his departure on **May 12, 2016** raises an issue of Material fact. **(MEIER 000723)**

Plaintiff an Asian American was not hired as an Electrical Group Manager though he presented far superior qualifications and references than a Caucasian Waterman who was substantially younger and less experienced candidate was chosen over the Plaintiff within four weeks after Plaintiff's was appointed to a remote office in Vancouver with inadequate staff also raises the issue of Material Fact for age, race and equal pay discrimination, hence Defendant's Cross Motion must be denied. **(Shah Decl. 11)**

B. There is a Genuine Issue of Fact Supporting Plaintiff's Wrongful Discharge Claim.

Defendants could have terminated Plaintiff prior to his complaint of Defendants' engineering services state law violation or after the probationary review upon completion of sixty day as was given to Waterman but did not and retaliated proximately after Plaintiff complained to his supervisor, raises the issue of Material Fact to a fact finder, that would rebut Defendants' pretexts. Client Pete Miller response to Defendants' draft report on Cooper George Building shows "overall satisfaction of the report and lots of good information", with comments and suggestions on mechanical, fire protection, plumbing

and electrical systems, typical to all draft reports and preliminary plans issued which are not final.

Defendants' make an issue of electrical comments of the report that was issued to client without keeping Plaintiff in the loop or asking him concerns by Jerimiah Newell he raises after the fact following comments received from client, while Anderson not critical of mechanical, fire protection, and plumbing comments of the report prepared by Mechanical Engineer Newell, raises the issue of Material Facts of pretext by Defendants. **(MEIER 000842)**

C. Plaintiff as a Whistleblower, Entitled to Statutory Protection.

Defendants' "Whistleblower" and "Open Door" policy require an employee in his official duty to report "an action by other employees that is a violation of any federal, state, or local law or regulation." **(Employee Manual Page 10, 11)**

Plaintiff in his good faith belief and official duty as a Project Manager reported to his supervisor Defendant Anderson the violation of state law of engineering malpractice by his subordinate employee Doug Farris as required by these policies, is entitled to statuary protection. **(Plaintiff 000001)**

Subsequent, to Defendants' unlawful termination, Plaintiff in his good faith belief made a complaint of state law violation to the Washington State Board of Registration for Professional Engineers and Land Surveyors and EEOC. **(MEIER 000080, 000081, 000173)**

D. Defendants' Declarations in Support of Cross Motion are pretextual

Though, Defendants' Cross Motion for Summary Judgment 'combined' with their Response to Plaintiff's Amended Motion for Summary Judgment, without obtaining court's prior permission was in violation of U.S. District Court of Oregon local rules[1], and FRCP Rule 12 (c), court order [Document 141] permitted to file Response to Defendants' Cross Motion.

Plaintiff seeks court permission and requests Court to use: Depositions of Anderson, Newell, and Keen referenced hereinafter, submitted with Plaintiff's Motion to strike (that was denied) in response to "Defendants' Cross Motion and Response to Plaintiff's Motion filed by Plaintiff", which are not duplicated with this response due to huge amount of paper work reduction to be filed.

Court should treat Defendants' Cross Motion as a Rule 12(c) motion, since the pleadings are closed. In order to determine whether Cross Motion summary judgment is appropriate all of the facts delineated in the Cross Motion should be viewed in the light most favorable to the plaintiff as the non-moving party.[2] With close examination of accompanying **Shah Declaration**, in comparison with the following untruthful statements and dates proffered by the Defendants' Declarations, Defendant's Cross Motion pleadings would fail to controvert the allegations in Plaintiff's Amended Motion for Summary Judgment.

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[1] **Motions may not be combined with any response**, reply, or other pleading. **LR 7-1 (b)** (Emphasis added)

[2] See Saldana v. Kmart Corp., 260 F.3d 228, 232 (3d Cir. 2001) (holding that court should view facts in light most favorable to non-moving party and draw all inferences in that party's favor); see also Skoczylas v. Atlantic Credit & Fin., Inc., 2002 WL 55298, at *2 (E.D. Pa. Jan. 15, 2002) ("When considering a motion for summary judgment, a court must view all facts and inferences in a light most favorable to the nonmoving party." (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986))); see also Brown v. Muhlenburg Township, 269 F.3d 205, 208 (3d Cir. 2001) (citing Beers-Capitol v. Whetzel, 256 F.3d 120, 130 n.6 (3d Cir. 2001)).

1) Defendants filed two (2) sets of **"redundant" (identical)** Table of Contents, Table of Authorities, Legal Memorandums, and **"impertinent" (irrelevant) and "scandalous" (discreditable) matter [3] and "pretextual" (untruthful, hoax, or made-up story to make believe falsehood)** with following (3) Declarations, made under the penalty of perjury in support of Defendants' Response and Cross Motion:

a) **Jeremiah Newell**, Meier mechanical engineer by trade having no education, certification, or training in electrical engineering deceivingly declares, **"I was "very frustrated"** with Mr. Shah's (electrical) contribution to (Cooper George MEP) 90% report" but Newell does not check with Plaintiff if Newell was missing anything before he submits the report to Meier Client Mr. Pete Miller. (Defendants' Cross Motion, Decl. Jeremiah Newell Page 2, Paragraph 4) Defendant Anderson **disparately** protects Newell for not checking with Shah before he submits report.

Newell Decl. Page 2, Paragraph 6 tells a deceiving date **May 2, 2016**, Exhibit 23 (1of 2), in fact it's **May 3, 2016@11.27 AM**, 27 hours after Anderson's inquiry of **May 2, 2016 8:29 AM, 30 minutes after Plaintiff's complaint to Anderson on May 2 @ 7:56 AM. (MEIER 000816)**

Anderson was framing up Plaintiff by asking Colin and Newell to give a bad report, "I was little annoyed **last week** with what Shantu contributed." **If Newell was annoyed last week, why didn't he not report to Anderson or chat with Plaintiff last week**? Right after Plaintiff's complaint Anderson retaliated

[3] **The court may strike** from a pleading an **insufficient defense** or **any redundant**, immaterial, **impertinent**, or **scandalous matter.** Fed R. Civ. P. 12 (f) (Emphasis added).

against Plaintiff rather than investigating problem with Doug Farris and finding a problem solution.

Timing exposes pretext. Men lie, documents tell the truth.

Only message Newell sends "last week" to Plaintiff on April 26 at 4:32 PM, "I have got a little more to add and then I'll send you the final Rev. A", but Newell did not show his "**frustrations**" in his email to Plaintiff. There is no document or email produced showing Newell ever sent "final 90%" report to Shah for his final review before he submitted to Mr. Pete Miller on April 26, 2016. "Final" Due Diligence report jointly prepared by Newell and Shah (completed before his termination) was submitted on May 12, 2016 three-days after Plaintiff May 9 adverse action by Anderson. **(Exhibits MEIER 000723, 000821)**

As a matter of fact, Newell's supervisor and Meier Mechanical Department Manager Mr. Colin Bates **tells the total truth** "Client seems to be satisfied with our work" **May 3, 2016** email to defendants Anderson and Keen. **Though Anderson and Keen evades leadership and conspires to retaliate. (MEIER 000191)**

Newell's declaration is a pretext to Retaliation, made-up after Plaintiff on May 2, 2016, 7:56 AM pursuant to Meier's Employee Manual "Whistle Blower" and "Open-Door" Policy, complained to Defendant Anderson, Doug Farris work without Plaintiff's supervision quoting "Washington state law violation of

engineering practice to stamp drawings **not done** under engineer's (Plaintiff's) supervision".[4]

Plaintiff opposed Meier's engineering practice violation of Washington state law. Unlicensed Anderson monitored Doug and Plaintiff's work and gave Doug directions in violations of Washington Law **WAC 106-25-070 (PLAINTIFF 000001, Shah Decl. 13, Meier Employee Manual Page 10, 11; MEIER 000877)** Plaintiff made recommendation to Defendant Anderson "to design projects by Zack in Vancouver office with my directions so I have comfort as an Engineer of Record"

Plaintiff was given **disparate treatment** by Anderson **who knew Farris poor work performance**, not disciplined and terminated Farris, until June 22, 2016 by Kelly Waterman, citing Doug problems related to May 2 complaint by Shah to Anderson. **(Exhibits MEIER 000224, 000226, 000809)**

b) **Defendant Bobbi Keen** having no engineering background untruthfully declares "the (Strategic) committee met on April 14 (9:45 AM) and April 26, 2016 (12:02 PM). We discussed his work performance." (Defendants' Cross Motion Decl. Bobbi Keen Page 3, Paragraph 13) when there was no such issue existed, discussed, recorded, or produced by defendants as of April 26, 12:02 PM Strategic Committee Meeting **(MEIER 000786-000788)** discuss only "interviewing and selecting" candidate Kelly Waterman, as an Electrical Group Manager (Lead Job) in those two meetings with $125,000 salary plus a $5,000 bonus offer (Exhibit MEIER

[4] Plans, specifications, plats, and reports prepared by the registrant shall be signed, dated, and stamped with said seal or facsimile thereof. Such signature and stamping shall constitute a certification by the registrant that the same was prepared by or under his or her direct supervision and that to his or her knowledge and belief the same was prepared in accordance with the requirements of the statute. RCW 18.43.079

000146-147), the position that was denied to 75-year old Plaintiff of Asian descent with a three-times professional electrical engineering practice that of Waterman much younger than Plaintiff. **(PLAINTIFF 000007-000008)**

Plaintiff was offered a 25% lower salary with no bonus **(MEIER 000664)** though Plaintiff and Waterman both candidates for Lead Job were Professional Engineers, licensed to practice electrical engineering in Washington.

All department managers at Meier including Mr. Waterman were of White race. Plaintiff's hiring turned out a temporary measure after Waterman was hired on April 26, 2018, who carried over projects assigned to Shah, proving racial and age **disparity** in hiring and compensation, is motivation factor for Discrimination[5].

Defendant Steve Anderson's May 3, 2016 decision to terminate Plaintiff on May 9, 2016, was **for** Shah's complaint on May 2, 2016 and to save his (agency) hiring fee" **(MEIER 000191)** because Volt had placed Waterman as a Lead Job after Plaintiff was denied the position **(Defendants' Cross Motion Decl. Bobbi Keen, Page 3, Paragraphs 15-16)**. Decisionmaker Defendant Anderson lacks experience, training, qualifications, and knowledge of electrical engineering to make what is right and wrong in engineering reports

[5] The plaintiff may recover on a showing that the alleged discriminatory employment practice was based on an individual's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a)(1). The plaintiff may prevail by showing that the discrimination was "a motivating factor" in the employment decision even though other factors also motivated the decision. *Washington v. Garrett*, 10 F.3d 1421, 1433 n.15 (9th Cir.1993); *see also Costa v. Desert Palace, Inc.*, 299 F.3d 838, 853-59 (9th Cir.2002) (en banc), *aff'd*, 539 U.S. 90 (2003) ("Put simply, the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played 'a motivating factor.'"); *see also E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015) (explaining that phrase "because of" "typically imports, at a minimum, the traditional standard of but-for causation," but Title VII relaxes this standard "to prohibit even making a protected characteristic a 'motivating factor' in an employment decision") Ninth Circuit Court 10. Civil Rights Title VII - Comment

and is biased to Plaintiff since Plaintiff challenged ongoing wrongful engineering practice under his supervision.

May 3, 2016 **proximate** decision to discharge Plaintiff, a day after his complaint of May 2, 2016 establishes Title VII **"but for" standard**[6].

On May 6, 2016 Plaintiff's electrical projects were transferred to Waterman with a 12-year architectural consulting. If Meier retained Shah beyond **May 9, 2016** Meier would have paid employment agency Volt duplicate 18% fees for both Shah and Waterman. **(PLAINTIFF 000009-000010, MEIER 00139)**

c) Decisionmaker Steve Anderson, Meier's former CEO having no electrical engineering experience, education, or WA State certification proffers **contradictory** reason, "Mr. Shah's **unfamiliarity with L&I**" for not hiring Plaintiff as an Electrical Group Manager (Lead Job)", but Anderson assigns Plaintiff the same "L&I (project) for the state required review as a Professional Electrical Engineer." **(Defendants' Cross Motion, Decl. Steve Anderson Page 2, Paragraph 6 and 7)** Position Job Description does not mention L&I. **(Exhibit MEIER 000148-149)** Last sentence of Paragraph 6 is another unbelievable lie, "distribute work as a Senior Electrical Engineer/Project Manager **before putting him in Lead supervisor role.**" As a matter of fact, Meyer was interviewing and hiring Mr. Waterman as an Electrical Group Manager, a Lead Job as the Strategic Committee Meetings April 14 and 26 Staffing Notes show. (Exhibits MEIER 000786-000788). Anderson Decl. Paragraph 7 has another hoax, "Mr. Shah did the Original

[6] In retaliation claims, however, the correct standard in determining causation is the "but-for" standard and not the "motivating factor" standard. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013)

design." In fact, Plaintiff protested on **November 2, 2016 & 7:56 AM** "It's a state violation of engineering practice to stamp drawings not done under engineer's supervision". **(Shah Dec. 12 and 13, PLAINTIFF 000001)**

Plaintiff was assigned L&I Project to review when Anderson was "pushing Doug Farris to come through", though Anderson's pretextual reason of "**unfamiliarity with L&I**" for not offering Plaintiff Electrical Department Group Manger position recommended by Volt with two references, is unworthy of credence. **(Exhibit MEIER 000644-647, 000665-666, 000886)**

Plaintiff as an examiner on March 26, 2018 asked Deponent Anderson a question: "So why was not he offered again electrical department manager position?" Anderson's answer does not mention L&I requirement. **(Anderson Dep. Page 79)** L&I pretext of not offering Plaintiff Lead Job was invented first time following Anderson's deposition, next day on April 27, 2018 by Defendant Keen's testimony. No prior testimony or record shows it. (Keen Dep. Pages 38-68) These pages also highlight **disparate treatment** given to Plaintiff, a new-kid-on-the-block, from that of Doug Farris's. Doug was protected by Anderson from Disciplinary action. No records or memos produced of what was asked during Plaintiff and Waterman interviews of their L & I experience and no document exists what was discussed between Defendant Anderson and Denise Sweeden hearsay regarding Plaintiff's termination as Keen admits. **(Keen Dep. Pages 63-74)**

Anderson Decl. Page 4, Paragraphs 13 and 14 are fabricated hearsay as pretext. There are no docs produced or email exists that corroborate Ms. Sweeden story. Documents produced do not narrate dates or sources or their statements. If the committee discussed it,

these important records or the dates of "heated exchanges" between Defendant Anderson and Collin Bates do not exist in Plaintiff's employee records and were not among nearly 1000 documents Defendants produced. It's a hoax. (Hoax - "falsehood deliberately fabricated to masquerade as the truth" – Wikipedia)

Even if someone would believe for a second Anderson's scandalous falsehood of "heated exchanges" with Mechanical Department Manager Colin Bates, it shows Defendant Anderson's state of mind and the quality of his leadership as a CEO of not resolving employee's suggestions but attacking subordinate's opinions and framing Defendant for the sole purpose of discrimination.

Entire Anderson Deposition **(Pages:10-111)** by Pro se Shah, shows Anderson-supervised electrical department was disorganized/floundering. Defendant Anderson takes the responsibility (52:17), resulting from lack of his engineering training, knowledge, understanding, and making rash decisions. Since Anderson was CEO/President, no Meier employee could bell the cat, until Plaintiff opposed Meier's engineering practice violation of state law. Anderson supervision and leadership problems existed before Plaintiff was hired. **(MEIER 000809)**

Anderson didn't care about "Resume - Shantu Shah" which mentions Shah's department management experience with an engineering firm in Eugene, Oregon, and Volt recommendations by two (2) licensed engineers Bart Makadia and Mark Van Duser with their phone numbers listed. Waterman Resume lacks electrical department management experience. **(Dep. Anderson Page 109, Exhibits MEIER 000647, MEIER 000139, 000665)** These and many other hoax, after hoax in three (3) declarations by Anderson, Keen, and Newell, would not stand a trial, too many to

argue, would be a pretext for the fact finder. These declarations with holes in its jetliner windows would cripple the high-flying Meier defense at a trial. Fact finder would not buy it.

Viewing the evidence as whole with a "3-part burden shifting analysis" of McDonnell Douglas, **declarations proffered under oath** by Newell Jerimiah, Defendant Bobbi Keen, and Defendant Steven Anderson, are **pretext for Retaliation, and age and race discrimination**[7], must be stricken.

E. Plaintiff Concedes this is Not a Fraud Case.

V. CONCLUSION

For the foregoing reasons, Defendants' cross-motion for summary judgment should be denied and Plaintiff awarded appropriate relief. [8]

Respectfully submitted to court on this 21st day of May 2018.

By: _____

Shantubhai N. Shah, Pro Se Plaintiff
6637 SW 88th Place,
Portland, OR 97223 Phone: 503-272-8843

[7] The burden-shifting framework in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-04 (1973), is as follows: [t]he employee must first establish a prima facie case of discrimination. If he does, the employer must articulate a legitimate, nondiscriminatory reason for the challenged action. Finally, if the employer satisfies this burden, the employee must show that the reason is pretextual either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Davis v. Team Elec. Co., 520 F.3d 1080, 1089 (9th Cir. 2008) (internal quotation marks and citations omitted)

[8] *See* 42 U.S.C. § 2000e-5(g)(1) (providing for reinstatement, back pay and "any other equitable relief as the court deems appropriate"). The 1991 amendments added the legal remedies of compensatory and punitive damages. 42 U.S.C. § 1981a(a)(1).

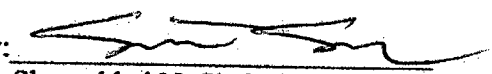
CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 21, 2018, I filed the foregoing proposed **Plaintiff's Response to Defendants' Cross Motion for Summary Judgment** with the following:

US District Court of Oregon
Portland Division
Mark O. Hatfield U.S. Courthouse
1000 S.W. Third Ave.
Portland, OR 97204

I also hereby certify that on May 21, 2018, I served a copy of the **Plaintiff's Response to Defendants' Cross Motion for Summary Judgment** via First Class Mail on the following:

Krishna Balasubramani OSB No. 942431
SATHER, BYERLY & HOLLOWAY, LLP
111 SW Fifth Ave, Suite 1200
Portland, OR 97204-3613

By: 

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SHANTUBHAI N SHAH, an Individual, Plaintiff, MEIER ENTERPRISES, INC, a Washington Corporation, PAUL GIEVER, CEO/President, STEVE ANDERSON, an Individual, BOBBI KEEN, an Individual, Defendants.	Case No.: 3:17-cv-00226-JE PLAINTIFF'S DECLARATION IN SUPPORT OF RESPONSE TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

I, Shantubhai N. Shah, declare, the following facts are based on my personal knowledge:

1. I am a professional electrical engineer registered in Oregon and Washington since 1978, born in India in 1940, and became U.S. Citizen in 1976.

2. Prior to immigrating to USA, I have managed ethically 50 plus employees at Gujarat State Electricity Board Power Distribution Substation in Gujarat India.

3. I have operated Engineering Design Corporation as an owner at 5150 SW Griffith Drive, Beaverton, Oregon from 1985 for 20 years and managed my employees with respect pursuant to equal employment opportunity/ADEA.

4. As a professional engineer I always supervised employees' design work pursuant to engineering practice rules, never disciplined by licensing authority.

5. **On March 10, 2016**, I had a phone interview by Defendant's staff, followed by two personal interviews at their Kennewick, and Vancouver Washington offices respectively on **March 14 and March 21, 2016**, as a result I was offered the position of Sr. Electrical Engineer and Project Manager to manage projects in Oregon and Washington, at Defendants' Vancouver, Washington office beginning **March 22, 2016** to replace electrical engineer Dennis Zimmer position, who resigned with a 2-week notice. **(MEIER 000175, 000176)**

6. Prior to my interviews with Meier Enterprises staff and before the vacancy in Vancouver office, Erin Wellnitz of Volt Resources contacted me for a vacant Position of Electrical Department Manager with Defendants' Kennewick office.

7. In response to her contact with me I provided my professional experience resume to Volt Resources describing my experience of my own firm as a principal, and with Bonny Bennet and Peters Inc. as an Electrical Department Manager in Eugene Oregon, and two references from Mr. Mark Van Duser, PE, and Mr. Bart Makadia, PE about my 40 plus years of experience with them in Idaho, Oregon, and Washington state projects as a licensed professional engineer. **(MEIER 000643 thru 000649, 000665-666)**

8. Position for the Electrical Department Group Manager was kept open, though I expressed my interest in lead position, relying on my experience as a Manager.

9. At no time I was asked about my experience with the Labor and Industry (L&I) State of Washington, or my familiarity with Defendants' clients either by Volt Resources or Defendants' staff during my interviews, nor was one of the Requirements of vacant positions nor I was asked about it after I was hired.

10. During my six weeks of employment at Vancouver office there were no major local projects that could be designed in that office. Major projects I was assigned were near to Kennewick office with 50- person staff, while the Vancouver office staffed with a designer Zackery Erz, ran inefficiently due to lack of staff.

11. During my third official visit on **April 26, 2016** to Meier office in Kennewick Mr. Steve Anderson introduced me to a young Professional Electrical Engineer, Mr. Kelly Waterman, a Caucasian with 12-years of experience, who was offered Electrical Department Group Manger position at a higher salary than Plaintiff's.

12. Erz advised me not to trust work performed by Mr. Doug Farris. On April 4, 2016 Erz complained Farris's poor quality of work to Mr. Anderson and his direct supervisor Mr. Colin Bates. **(MEIER 000809)** During my three official visits to Kennewick office for personal training, I found Farris, an unlicensed Electrical Engineer working on a Washington School L&I plans without directions by a professional engineer. I was provided desk next to Farris.

13. Mr. Anderson was Doug's supervisor and was pushing Farris to complete project documents and advised me to review of Farris designed work as a "company policy to be reviewed by a third party", I opposed on **May 2, 2016** at

7:58 AM via email, as it was riddled with errors since it was prepared by Farris unlicensed engineer in violation of the State of Washington Engineering Rules. **(MEIER 000762)**

14. After hiring of Mr. Waterman, and within an hour following my good faith belief complaint about Defendants' practice of unsupervised engineering work in violation of the state law, I found Mr. Anderson was hostile to me via emails **(MEIER 000875, 000877)** and the work assigned to me was rescheduled on **May 6, 2016** for the New Department Manager, Mr. Waterman. **(PLAINTIFF 000009-000010)** I realized I was being discriminated and retaliated against.

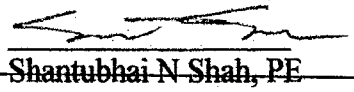
15. On **May 9, 2016** after a week of my complaint, Defendants' retaliated, terminating my employment with Defendants 2-weeks prior to my prescheduled 60-day probationary review, contrary to Defendants' "Affirmative Action Plan", "Equal Employment", "Title VII", "Whistleblower", "Age" and "Open Door" policies, without telling me a specific reason. **(Meier Manual Pages 7, 10, 11)**

16. On **July 25, 2016** based on my good faith belief I filed a charge against Defendants of Discrimination by Race, Age, and Retaliation with Washington State Human Rights Commission. On **August 16, 2016** U.S. Equal Employment Opportunity Commission advised Defendants discrimination charge occurred from **March 22 and May 9, 2016. (MEIER 000173, 000178)**

17. I have read Declarations by Defendants, majority of which are pretextual hoax.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on: May 21, 2018



Shantubhai N Shah, PE

WAC 196-25-070

Providing direct supervision.

Direct supervision means the actions by which a licensee maintains control over those decisions that are the basis for the findings, conclusions, analyses, rationale, details, and judgments required for the preparation of engineering or land surveying plans, specifications, plats, reports, and related activities. **Direct supervision** requires providing personal direction, oversight, inspection, observation and supervision of the work being certified.

These actions may include, but are not limited to: Direct face-to-face communications; written communications; U.S. mail; electronic mail; facsimiles; telecommunications, or other current technology. Contractual or employment relations must be in place between the licensee and unlicensed preparer to qualify as direct supervision. Mentoring is not direct supervision. Drawing or other document review after preparation without involvement in the design and development process as described above cannot be accepted as direct supervision.

[Statutory Authority: RCW 18.43.035. WSR 10-05-017, § 196-25-070, filed 2/4/10, effective 3/7/10; WSR 06-22-033, § 196-25-070, filed 10/25/06, effective 11/25/06. Formerly WAC 196-23-030.]

(PLAINTIFF 000001)

- An agreed upon work schedule between the Employee and the company that regularly allows the Employee to work from the Employee's home, rather than from the principal place of employment.
- Work from home at least one day every two weeks regularly.
- A work alternative mutually agreed upon between the Employee and management.

There may be occasions when work-from-home or work at an alternate site occurs and is approved by an Employee's supervisor. These instances of alternate work are negotiated between the Employee and his/her manager on a case-by-case basis and are not considered telecommuting.

Affirmative Action Plan

Meier has an Affirmative Action Plan that meets the federal government requirements of being a company of 50+ Employees and holding federal contracts. The President/CEO has the ultimate responsibility for ensuring that equal employment opportunity and affirmative action receive the high level of priority that is due this activity. The Controller has been designated as the Equal Employment Coordinator of the company and has the full support of the President/CEO and other key management in carrying out these duties.

Equal Opportunity Employer

Meier is an Equal Opportunity Employer. This means that we will extend equal opportunity to all individuals without regard to gender, race, religion, color, sex, national origin, sexual orientation, gender identity, age, disability, handicap or veteran status, citizenship, marital status, or any other factor protected by law. This affirms Meier's commitment to the principles of fair employment and the elimination of all vestiges of discriminatory practices that may exist. We encourage all Employees to take advantage of opportunities for promotion as they occur. Meier will not require an Employee or perspective Employee to submit genetic information or submit to screening for genetic information as a condition of employment.

Race, Color, Religion, Sex, National Origin

Title VII of the Civil Rights Act of 1964, as amended, protects applicants and Employees from discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment, on the basis of race, color, religion, sex (including pregnancy), or national origin. Religious discrimination includes failing to reasonably accommodate an Employee's religious practices where the accommodation does not impose undue hardship.

Disability

Title I and Title V of the Americans with Disabilities Act of 1990, as amended, protect qualified individuals from discrimination on the basis of disability in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. Disability discrimination includes not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or Employee, barring undue hardship.

Age

The Age Discrimination in Employment Act of 1967, as amended, protects applicants and Employees 40 years of age or older from discrimination based on age in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment.

Genetics

Title II of the Genetic Information Nondiscrimination Act of 2008 protects applicants and Employees from discrimination based on genetic information in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. GINA also restricts employers'

Whistleblower

Washington State's whistleblower law gives every Employee the statutory right to report all improper actions of other Employees. Meier encourages its Employee to exercise this right when necessary. "Improper action" means any of the following actions, undertaken by an Employee, within the performance of his or her official duties: 1) an action that is violation of any federal, state, or local law or regulation; 2) an action that is an abuse of authority; and/or, 3) an action that is substantial and specific danger to worker health and safety or to the public health and safety.

Employee, who become aware of an improper action, as defined above, should report it directly to the manager/corporate officer/board member at the organizational level immediately above the infraction level in accord with established organizational lines. Identity of the reporting Employee will be kept confidential to the extent possible under law unless the reporting Employee authorizes the disclosure of his or her name. Prompt action to properly investigate will be taken and the reporting Employee will be advised of the results of the investigation. Retaliatory action is prohibited against those reporting in good faith.

Ethical Conduct

We are committed to employing the highest quality people and strictly adhering to ethical and fair practices in our business activities. We expect 100% commitment from you and require integrity and high ethical standards in all business activities.

Employees should not accept gifts, make personal investments, or participate in interests or associations that may interfere with the independent exercise of your judgment, the performance of your responsibilities, and the best interest of Meier. You are not authorized to provide professional services to a competitor or other company that may be a conflict of interest with your work at Meier.

Every Employee has some degree of access to Meier data, plans, decisions, customer lists, and/or other confidential information. No Employee may use or release this kind of information, except as required for the performance of his or her job duties. You should also treat as confidential any information of a personal nature regarding your co-workers. This also applies to the use of inside information about firms with which Meier is considering an association.

While representing Meier, you are expected to comply with all laws and regulations; deal honestly with all customers, suppliers, and consultants; and, use Meier resources properly.

If you are unsure whether a situation represents a conflict of interest, please contact your manager to review the situation.

Employee Behavior/Personal Conduct

Professional behavior standards are necessary for the efficient operation of Meier and for the protection of everyone's rights and safety. Conduct that interferes with operations, brings discredit to Meier, or is offensive to customers or fellow Employees will not be tolerated, whether it occurs on or off company time or company property.

Meier reserves the right to determine what conduct is inappropriate under any circumstances and what level of discipline such conduct warrants. Any questions should be directed to your manager or human resources.

Open Door

Meier encourages Employees to discuss any subject pertaining to their employment with their manager. If, for any reason, an Employee does not feel comfortable talking with his/her manager, they should contact President/CEO, Controller, Chief Administrative Officer or Human Resources.

Personnel Records/Updating Personal Information

Personnel files contain information about employment, including employment resumes, acknowledgements and performance reviews. Protected information such as social security numbers, birthdates and marital status will be kept in a separate file. Meier generally regards these files as confidential and limits access to such information. Medical information is kept separate from general employment records and is available to others only in very limited circumstances. An Employee should contact his/her manager or Human Resources if Employee would like to review the information in his/her file. If an Employee disagrees with anything in his/her file, the Employee may add a statement reflecting your disagreement. Employee are responsible for notifying Human Resources of any changes in the following areas: name, address, and/or home telephone number; marital status change: there may be a need to update W-4s and health benefit enrollment forms; changes in designated beneficiaries; and/or, newly acquired eligible dependent children [NOTE: they must be enrolled within thirty-one (31) days to receive health benefits].

As a practice Meier does not provide a copy of your Employee file upon termination.

Matching Gift Program

All Meier Employees are eligible to participate in the matching gift program. Eligibility of 501(c)(3) organizations to receive this match is a eligibility requirement of the company's corporate giving, i.e.: The recipient organization must be tax-exempt, nonprofit, and hold a current Section 501(c)(3) determination letter from the Internal Revenue Service (IRS). The organization must be classified by the IRS as a public charity. The organization/project must serve the local community. No goods or service may be received by the Employees' family or other designated individuals in exchange for the matching gift. All matching gifts will be mailed directly to the non-profit from the company.

Travel

Meier has a written travel instruction that can be found on SharePoint/Human Resources/Manuals and Instructions. The instruction is to provide guidelines and define the process for domestic and international travel as well as, the use of the Meier vehicles.

DRUG FREE WORKPLACE

Meier maintains a drug free and non-smoking work environment. Chewing tobacco and e-cigarettes must be kept discrete and not observable, especially to Clients.

Meier will follow Federal not State laws relative to illegal drugs. Meier has a longstanding commitment to provide a safe and productive work environment. Alcohol and drug abuse pose a threat to the health and safety of employees and to the security of our equipment and facilities

The following work rules apply to all employees:
Whenever employees are working, are operating any company vehicle, are present on company premises, or are conducting related work off-site, they are prohibited from:

- Using, possessing, buying, selling, manufacturing or dispensing an illegal drug (to include possession of drug paraphernalia).
- Being under the influence of alcohol or an illegal drug as defined in this section.

RESPONSE - 60a

First	Last	Ext.	Ir	Title	Cell Phone	Work Hours
Aaron	Pierce	6922	AMr	Network Support Administrator	366-7799	8:30 – 5:30
Alex	Butterfield	6923	APB	Mechanical Engineer	360-513-2903	7:30 – 4:30
Anthony	Cockbain	6936	AGC	Director of Projects	460-7776	8:30 – 5:30
Bill	Moore	6949	BHM	Sr. Mechanical Designer	737-7807	7:30 – 4:30
ob	Goodman	6943	RLG	Sr. Mechanical Engineer	509-528-9672	M-Th 9:00 – 1:00
Bob	Parks	6981	RJP	Project Manager	378-5888	7:30 – 4:30
Bob	Simmons	6917	RWS	Sr. Electrical Designer		7:30 - 4:30
Bobbi	Keen	6908	BAK	Controller	509-539-8093	7:30 – 4:30
Brandy	Taylor	6921	BET	Project Accountant	460-8007	M – Th: 7:00 – 4:30 F: 7:00-11:00
Brian	Burke	6927	BTB	IT Manager	430-6815	7:00 – 4:00
Brooklynn	Jefferson	6968	BNJ	Marketing Coordinator/Tech Writer		7:00 – 3:30
Colin	Bates	6962	CMB	Mechanical Group Manager	554-3139	8:00-5:00
Dale	Green	6925	DEG	Mechanical Technical Manager	551-8578	7:30 – 4:30
Dave	West	6914	DWW	Mid-Level Civil Designer		
Dennis	Zimmer	6947	DJZ	Sr. Electrical Engineer	360.947.9950	8:00 - 5:00
Derek	Archer	6982	DLA	Mechanical Engineer	539-2995	8:00 – 5:00
Denise	Sweeden	6932	DKS	Director of Marketing/CAO	947-2353	7:30 – 4:30
Diana	Linsove	6971	DLL	HR Coordinator		7:30 – 4:30
Donna	Busselman	6974	DLB	Electrical Designer		M-Th 6:00 – 2:30, F 6:00 – 12:00
Donna	Williams	6928	DCW	Administrative Assistant		8:00 – 5:00
Doug	Eadie	6935	DRE	Senior Architect	947-2331	7:30 – 4:30
Doug	Farris	6984	DCF	Electrical Engineer	509-406-0280	7:30 – 4:30
Ed	Luebben	6965	ETL	Senior Architect	509-520-6099	7:30 – 4:30
Eliot	Black	6919	ETB	Architectural Intern	314-607-2911	9:30 – 6:30
Eric	Ferguson	6924	EEF	Civil Engineer		
Gale	Culbertson	6957	GAC	Construction Manager/Estimator	961-3458	M-Th 6:00 – 4:30
Gary	Fleming	6934	GDF	Structural Group Manager	987-2296	7:30 - 4:30
Janae	Day	6955	EJD	Sr. Architectural Designer	948-2556	9:30 – 4:30
Jason	Ingalls	6916	JEI	Civil Engineer/Assistant Project Manager	509-759-5300	M-Th 6:00 – 4:30
Jason	Walters	6979	JAW	Civil Engineer		
eremiah	Newell	6918	JJN	Mechanical Engineer	509-727-7607	7:00 – 4:00
il	Shuttleworth	6964	JTS	Structural Engineer	509-840-3343	M - Th 9:00 - 6:00
Joel	Money	6972	JMM	Drafter	509-378-2527	7:30 – 4:30
Kevin	Miller	6992	KDM	Sr. Electrical Engineer	947-8482	7:30 – 4:30
Kristi	Shumway	6951	KMS	Structural Design Engineer		7:30 – 4:30
Melissa	Slater	6980	MBS	Sr. Structural Designer/ Asst. Proj. Mgr.	509-412-2585	6:00 – 4:00 M-Th
Mike	DaValle	6961	MTD	CADD Lead/Sr. Designer	528-1112	8:00 – 5:00
Monica	Fine	6986	MLF	CADD Lead/Sr. Mechanical Designer		8:00 – 4:30
Nathaniel	Weinman	6950	NRW	Mechanical Engineer	509-308-1818	7:30 – 4:30
Paul	Giever	6933	PMG	Structural Technical Manager	539-8731	7:30 – 4:30
Renata	Presby	6930	RP	Architectural Group Manager	947-6868	7:00 – 3:00
Rick	Ahrens	6967	RSA	Structural Engineer	509-460-7093	7:00 – 4:00
Shantu	Shah	6942	SNS	Project Manager		
Shari	Matthews	6931	SJM	Document Control/Records Mgmt Clerk	528-9509	7:30 – 4:00
Steve	Anderson	6945	SRA	President	948-6501	7:30 - 4:30
Tamra	Lehuta	6915	TEL	Landscape Designer		
Tony	Vader	6958	TSV	Structural Design Engineer	360-601-6957	7:30 – 4:30
Will	Pickett	6987	WWP	Senior Project Manager		7:30 – 4:30
Zack	Erz	6973	ZJE	CADD Lead/ Sr. Electrical Designer	788-5071	7:30 – 4:30
	Manhattan	6989		Columbia	6956	Reactor 6977

OFFICE ADDRESS: 12 W. Kennewick Ave. Kennewick, WA 99336

DID Prefix: 737-XXXX

Phone: 735-1589
Fax: 783-5075

Meier Engineering
101 E. 8th St., Suite 230
Vancouver, WA 98660

Phone: 360-696-8498
Vanc. Conf. Room: 6975

PLAINTIFF 000002

RESPONSE -61a

tp://meierinc.com)

Meier Architecture • Engineering announces new hire

Posted on April 7, 2016 (http://meierinc.com/meier-architecture-%e2%80%a2-engineering-announces-new-hire-4/) by Meier Inc. Admin (http://meierinc.com/author/meier-inc-admin/)

Mr. Shantu Shah, PE, – Senior Electrical Engineer, joins Meier with more than 40 years of electrical engineering and project management experience. Shantu will provide electrical engineering to Meier and its clients and will be responsible for electrical and lighting analyses, design of electrical systems, and development of control systems for municipal, industrial, healthcare, educational and commercial facilities. Additional experience includes design of power distribution systems, determination of lighting layouts and fixture selections, and review of designs for code compliance. As Sr. Electrical Engineer, he performs engineering studies, conceptual and definitive designs, prepares drawings and specifications, and provides calculations and sketches. Shantu has a Post Baccalaureate Electrical engineering degree from North Carolina State University and B.S.E.E. from Maharaja Sayajirao University in Baroda, India. Shantu is a registered Professional Engineer in Oregon and Washington. He is a Vice President of Professional Engineers Society, Columbia Chapter.

Posted in News/Blog (http://meierinc.com/category/news-blog/) |

« Meier makes the move to downtown Kennewick (http://meierinc.com/meier-makes-the-move-to-downtown-kennewick/)

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ARCHIVES

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June 2014 (http://meierinc.com/2014/06/)

NEWS

Meier makes the move to downtown Kennewick (http://meierinc.com/meier-makes-the-move-to-downtown-kennewick/)

Meier was featured in the Tri-City Herald Progress 2016. A link to the article can be found here: http://www.tri-cityherald.com/news/special-reports/progress-edition/article67556692.html

Meier Architecture • Engineering announces new Electrical Group Manager

Posted on June 14, 2016 by Meier Inc. Admin

Mr. Kelly Waterman, PE, LEED AP, MBA – Electrical Group Manager, joins Meier with more than 12 years of experience as an electrical engineering consultant [and architectural lighting designer]. Kelly's experience ranges from design production to overall project and business management. His expertise includes advanced architectural lighting analysis/modeling, daylight studies, BIM Modeling, photo realistic lighting design renderings, and the utilization of database driven applications to optimize electrical design efficiency and accuracy. Kelly adds exceptional value by blending form with function and providing early architectural input during the design process to integrate the electrical systems into the building. Kelly holds a Master of Business and Bachelor of Science in Electrical Engineering from Gonzaga University. Kelly is a registered Professional Engineer in Washington and a LEED Accredited Professional. Kelly also served as a faculty member at Lightfair International 2015, teaching a workshop on the integration of lighting into architecture and the implementation of control systems.

Posted in News/Blog |

« Rick Ahrens Earns Professional Structural Engineering License

Meier Architecture • Engineering Paul Giever To Take Reins as Company Looks to Accelerate Strategic Direction Initiatives »

Electrical Active Projects 5/06/2016 HOT, important
Need to transfer this sheet into Bobbi's new department manager's spreadsheet. Talk to Brandy

Colin
7309 – IHS Chemawa Health Modernization – (Field observation report - Shantu) Due 5/9 am
7326 – Quincy Muni Complex SLJMA (const. admin) – Doug, Shantu. Additional scope coming from Bob. Doug and Bob went to meeting, get hour for phasing put together Cost due 4/18?
7526 – IHS – Wellpinit – Shantu, very small review effort remain 5/16
7657 – Johansson Arch - Kyocera Industrial – Zack – June construction support
7747 – MJ Neal Associates – Twin River Community Facility – Doug / Shantu review by 4/12, incorporate changes 4/13, Finish and stamp estimate date ?
7789 – MJ Neal Associate – Doug / Shantu, Finish and stamp estimate date ?
7792 – Olson Kundig Arch – Heritage University – Doug, Zack RFI const support, new classroom scope BG7?
7795 – Salcido – Wenatchee Data Center – HOLD Doug (Bob Parks PM)
7861 – Eric Lanciault Arch – Gental Dental, comments coming Shantu California stamp
7862- Pacific Tech Const – Fort Vancouver – Zack Nathaniel, NO stamp, RFI support
7893 – Akana – MEP – NOT STARTED yet conference call Wednesday - Zack
7917 – CERSD MEP upgrades – Generator Doug/Zack Pam review for Stamp 90% out
7935 – Akana – Duck Valley – review performance Spec – Doug DUE 5/5 did it get done?
7936 – IHS – Wellpinit Modernization IPC - Doug, waiting on Arch DUE 5-12
7951 – Otak Cooper George Building, Spokane MEP Assessments – 100% write up due – Electrical Report to review for formatting and grammar/spelling check Shantu Report DUE 5/9 Doug to review Shantu report Monday

Doug Eadie
7470 – Port of Kennewick – Bruker renovation – Doug (submittal) talk to Jeramiah wire size?
7763 – Maniilaq Services – US Post Office – Doug (submittal only)
7767 – PDS – Building report Done – Doug (Design, service change required if changes needed)
7889 – Andy Market Walla Walla – renovation – Doug (Shantu to STAMP) due?
7937 – Prosper Ventures – Parkway Renovations elect contract to Tim Linenbrink (needs backgrounds)
7948 – Record Storage Remodel – Review and Stamp Pam Arneson
7918 – HAPO – Remodel, get started, Final next due date? – contract to Pam
7929 – PHS Freezer Warehouse Pam and Doug Addendum due 5/12

Gary
7855 – Design West – Phase 3 –Needs Panel loads – L&I review - (L&I needs PHS load history, should be available 4/25?)
7349 – Intermech support for Tony – Donna (on going)

Paul
7833 – PNNL – Port of Tacoma – out for review – Pam has contract
7887 – PNNL – KiBe High School – Doug, ask Paul to stamp
7922 – PNNL – SRPM-210 DD Garden City – Elect?
Jason
7561 – Loofburrow – Washington Elementary – submittal WA-Media Center, Shantu Due 5/2
7626 – West Valley SD – office addition – (review – hold) Doug

RESPONSE - 64a

Ed
7654 – Lourdes – Cafeteria remodel – Doug (submittals) minor comments, mostly Mech
7692 – Lourdes – lobby remodel contractor to pick up from City
7726 – Blue Mountain Human Society – remodel – Done (hold to June) Gazebo Mod Possible
7734 – Lourdes Generator Design, Doug - contractor to pick up from City
7793 – Benton County – Justice Center – contract to Pam out
7821 – St Joes – Office Building – Start estimated pushed back to August 15th ish – contract with Pam
7837 – SARC – Office building – 100% CD's complete, too expensive! redesign possible?
7847 – Union County Public Works - Rappel Base Building significant effort, est. start 6/15
7860 – Port of Sunnyside – wine production Facility Next due date 5/18? Zack – contract to Pam
7967 – Croskey Properties – Queensgate Due dates?
Jeremiah
Will
7969 BG1/phase 1d – ENW Firing Range – Doug (site trip 5/9-10) Pam needs contract, Bob lighting layout due 5/18
Steve
7919 – Ross-Brandt – Humidity Protection – Pam to answer comments back to client

PROPOSALS:
15-0273 – Elect re-scope
15-0389 – Cherry City big project review with Zack and Shantu
15-0450 – Apollo – Basin Disposal get with Gary (hand off)?
16-0049 – check with Ed
16-0081 Energy Electric – Holiday Inn – been submitted Dennis to check
16-0095 Clark PUD – River Road Generation Plant – lighting – Dennis submitted
16-0099 Manley Arch – Quest Academy TI – MEP Colin & Shantu
Akana New Proposals
P16-0125 – Uptic Studios – Proposal went out 4/8
P15-0273 - City of Yakima Engineering Services: Community Center Renovations will begin mostly focused on HVAC – some Electrical will trickle as a result; Change of focus to expansion of existing Police facility due to poor assessment of proposed facilities to renovate.
P16-0138: Student Union Housing – out
P16-0139: Orchard Highlands Retirement Community – Generator Addition – Proposal has not been started been on our radar for 2 weeks - On the verge of being fired due to lack of movement, waiting for a proposal to be written and signed before proceeding further
P16-0145 – Otak - out

STATE OF WASHINGTON
BOARD OF REGISTRATION FOR
PROFESSIONAL ENGINEERS AND LAND SURVEYORS
P.O Box 9025, Olympia WA 98507-9025 (Correspondence)
P.O Box 35001, Seattle WA 98124-3401 (Remittance)

Board Staff	(360) 664-1575
Fax	(360) 570-7098
Web Site	dol.wa.gov

August 17, 2016

Meier Enterprises, Inc.
Attn: Paul Giever, PE
12 W Kennewick Ave
Kennewick WA 99336

RE: Preliminary Investigation # 16-05-0001

Dear Mr. Giever:

Recently the Board received a complaint against Meier Enterprises regarding their engineering business activities. The allegations were that the firm was performing electrical engineering work and they do not have an electrical professional engineer on staff. On August 11, 2016, the Board's Practice Committee (PC) reviewed a synopsis of the complaint documentation along with your responses.

Based on a review of the information received, the PC tabled the complaint for additional information. On August 17, 2016, I called you and informed you of the PC's decision. At that time I requested a copy of the report mentioned in the complaint and any other additional information you might want to include. This letter is a reminder of the PC's decision to table the complaint.

Once all the information is received it will go to the PC for further review. You will be notified in writing of the decision made and whether an investigation will be pursued.

Thank you for your cooperation in this matter. If you have any questions or further concerns, please feel free to contact me at (360) 664-1571 or jpettainen@dol.wa.gov .

Sincerely,

John Pettainen
Investigator

August 17, 2016

RE: Case Number 16-05-0001

In Response to phone request August 17, 2016:

Please find the requested document "Due Diligence Report, Rev. 0, and Dated May 12, 2016". We have also attached a copy of the pages out of our Agreement for Services in which we specifically stated the report and associated sketches would be non-stamped-not for construction. The Agreement also states the standard we are following is ASTM E2018-01. This standard under Heading 6 states (pages attached) that the qualifications may include professional education, training experience, certifications or professional licensing/registration In other words, and a professional license is not required for this type of assessment. The client agreed to these services. Please let us know if you need additional information. I will be out of the office 8/18-8/19 if you need answers before 8/22 please call Paul Giever, 509-735-1589.

Thanks

Bobbi

RESPONSE - 67a

PL
AUG 10th

STATE OF WASHINGTON

BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

P.O.BOX 9025 (Correspondence) • P.O.BOX 9048 (Remittance)
OLYMPIA, WASHINGTON 98507

Board Staff (360) 664-1575
Fax (360) 664-2551
Web Site dol.wa.gov

May 18, 2016

Meier Enterprises, Inc.
Attn: Paul Giever, PE
12 W Kennewick Ave
Kennewick WA 99336

Dear Mr. Giever,

The Board of Registration for Professional Engineers and Land Surveyors ("Board") is the state agency responsible, under the provisions of 18.43 RCW, for licensing and regulating the practice of engineering and land surveying in this state.

On May 16, 2016, our office received a complaint concerning the business activities of Meier Architecture Engineering. The complaint was filed by Shantubhai Natvarlal Shah. A preliminary investigation has been opened, for your reference the case number is **#16-05-0001**. A copy of the complaint is enclosed.

As the assigned investigator I would like you to understand that there has been no determination as to whether any laws or rules under the Board's authority have been violated. The investigation process is merely the method to obtain the most complete and correct information pertaining to the allegations made.

- The purpose of this letter is to request a detailed response to the allegations.

In addition to the above noted requested information, please feel free to provide any additional information you feel may be beneficial in providing a complete understanding of this matter. This information must be received in this office no later than **June 9, 2016.**

We listed the firm Meier Enterprises, Inc. as the respondent in this case. The complaint listed 4 individuals and the firm. The letter is being sent to Mr. Giever as the Designated Engineer for the firm. There has been no complaint submitted concerning Mr. Giever, he is our starting point for correspondence with the firm concerning this complaint.

If you have any questions call me at 360-664-1571 or via email at jpettainen@dol.wa.gov

Sincerely,

John Pettainen
Investigator

Enclosures

RECEIVED
MAY 16 2016
BOARD OF REG FOR
PROF ENGINEERS & LAND SURVEYORS
STATE OF WA

WASHINGTON STATE DEPARTMENT OF LICENSING

Engineer/Land Surveyor/On-site Designer Complaint

You can use this form to file a complaint against a service provider or professional licensee. If you have any questions, call (360) 664-1575.

Send this form and any required enclosures to: Fax: (360) 570-7098; Email: **DFCCompliance.dol.wa.gov**; or mail to:

Board of Registration for Professional Engineers and Land Surveyors
Department of Licensing
PO Box 9025
Olympia WA 98507-9025

Enclose the following:

- A detailed explanation of your complaint; this must include dates, other parties involved, and a summary of any efforts you have already made to resolve the problem. Describe events in the order they occurred.
- Copies of all documents that relate to the complaint.

Business or person you are filing a complaint about

PRINT or TYPE Profession or type of business

☒ Engineer ☐ Land-surveyor
☐ On-site designer

Service provider or professional licensee name (Last, First, Middle)	License number (If known)
Newell Jeremiah, Bates Colin, Anderson Steven, Ferris Doug	48297, 47055, NA, NA Respy.

Business name	
Meier Architecture Engineering	

(Area code) Telephone number and extension	(Area code) Fax number	Email or web address
509-735-1589		www.meierinc.com

Business address		
12 W. Kennewick Ave		
City	**State**	**ZIP code**
Kennewick	WA	99336

Your contact information

Name (Last, First, Middle)		
Shah Shantubhai Natvarlal		
Business name (If any)		
(Area code) Telephone number and extension	**(Area code) Alternate telephone number**	**Email address**
503-245-1722	503-890-0012	shantu.shah@gmail.com
Mailing address		
6637 SW 88th Place		
City	**State**	**ZIP code**
Portland	OR	97223

Complaint summary

Provide a brief summary of your complaint. Attach an additional sheet if necessary.

Practicing electrical engineirng without education/license in electrical.
Unfair; untimley dealing by Jeremiah Newell with fellow professional engineer.
Steve Anderson supervsing, making decsions, and directing electrical staff without enginering license.
Doug Ferris pepares plans, visits facilties, takes electrical panels phtotos, makes load calucaltions without electircal license directed by Mr. Anderson.
Please see attached email correspondance for additional information and project list (Confidential- not for public records) by Streve Anderson directing designers what to do.

The information I have provided above is true and correct, and I have provided all required enclosures to which I have access.

X _____ 05/16/2016
Signature Date

We are committed to providing equal access to our services. If you need accommodation, please call (360) 664-1578 or TTY (360) 664-0116.

RESPONSE- 69a

Meier

ARCHITECTURE • ENGINEERING

PAYROLL CHANGE NOTICE

DATE OF CHANGE	EMPLOYEE #	SOCIAL SECURITY NO
12/2/16		

NAME	ADDRESS
Kelly Waterman	

PHONE	CITY/STATE/ZIP	DEPARTMENT	STATUS

THE CHANGE(S):

Check all boxes that are applicable	From	To
☐ DEPARTMENT		
☐ JOB TITLE		
☐ STATUS		
☐ RATE		
☐ ADDRESS/PHONE		
☐ BENEFIT PLAN		
☐ SPOT BONUS		
☒ OTHER Employment Offer		5000

THE REASON FOR THE CHANGE(S):

☐ HIRED
☐ RE-HIRED
☐ PROMOTION
☐ DEMOTION
☐ TRANSFER
☐ MERIT INCREASE
☐ WAGE SCALE CHANGE
☐ LEAVE OF ABSENCE FROM _____ (DATE) UNTIL _____ (DATE)

☒ PROBATIONARY PERIOD COMPLETED
☐ SPOT BONUS
☐ RE-EVALUATION OF EXISTING JOB
☐ RESIGNATION
☐ RETIREMENT
☐ LAYOFF
☐ DISCHARGE

TYPE OF LEAVE: _____

EXPLANATION: _____

AUTHORIZATION:

RECOMMENDED BY: Robert M Gross	DATE 12/2/16
APPROVED BY: Bobbi Reen	DATE 12/2/16

Rec of the letter

MEIER 000121

NEW HIRE EMPLOYEE CHECKLIST

NAME OF FORM	COMPLETED
Email to IT	5/3/16 ✓
Employee Name: Kelly A. WATERMAN	
Employee no:	338
Home phone: Cell: 5099946750	
Start Date	5/31/2016
Employee Resume	6/1/16
Offer Letter with employee signature	4/26/16
Pre-employment testing	6/1/16
Admin. New Hire checklist	5/3/16
Mentor Assigned - Colin Bates	5/31/16
Trainer Assigned - Anthony Ishee	5/31/16
Employee Emergency Information Form	6/1/16
W-4 Form (Needed for payroll immediately)	6/1/16
Department of Justice I-9	6/1/16
E-Verify	6/1/16
Employee Manual signature page	6/15/16
Quality Assurance Orientation/QA Statement	
QA statement copy to Document Control	
Drafting Standards Orientation	
Payroll Direct Deposit Form	6/1/16
Support enforcement	6/1/16
Medical Insurance (eligible date) 8/1/16	7/25/16
Dental / Life Insurance (eligible date) 8/1/16	7/25/16
Section 125 Plan (Flex / Premium Only Plan) 8/1/16	7/25/16
401k Participation Form/faxed to ~~Nationwide~~	✓
United Way Participation Form	
ESOP Summary/beneficiary form	6/1/16
Signed Job Description	6/1/16
60 Day Evaluation Scheduled (@55 days)	7/29/16
For Official Use Only (FOUO)	6/1/16
Employee Fund Participation Form	6/1/16
Non-Compete	offer ltr HR
Key issued 445 Moon Security	5001 6/14/16 email forwarded
Utilization goal	65%
R2A2 Classification	6/1/16
New Hire Orientation-walk around office intro to staff	6/1/16
Skill Set Checklist	6/1/16
CRM WIG	
Salary Matrix	
60 day counter added to payroll calendar	6/6/16
Create professional growth fund folder	6/6/16
Vivid Learning - safety training	5/17/16
added to payroll things first payroll hourly?	5/31/16
	6/1/16

Meier Folder to include:	
Org. Chart	✓ new one to be signed
Updated phone list	✓
Seating charts	
Benefit summary sheet	✓
Wellness card	✓
Payroll/Holiday Calendar	✓
Phone ref. guide	✓

401K meeting w/ Jay 6/6/16 ✓
add to Calendar
~~5-31-16 @ 10:00~~

MSA docs

RESPONSE -71a

KELLY WATERMAN
PE, LEED AP, MBA

EMPLOYMENT HIGHLIGHTS

Kelly is a licensed Electrical Engineer & LEED Accredited Professional with 12 years of experience in architectural consulting. Over the course of his career his responsibilities have covered the spectrum of electrical consulting, from CAD/BIM production to overall project and business management. He has a passion for architectural lighting and controls design, and his expertise in this area has been recognized both by the local and national design communities. In 2015, Kelly was selected as a faculty member and speaker at LightFair International, the largest architectural lighting conference and trade show in North America. Kelly also provides value to clients by performing advanced daylight studies, and provides early architectural input during the design process to integrate the electrical systems into the building. Kelly can help design ceilings, evaluate finishes, and help develop the overall building geometry to allow for the seamless integration of building systems into the architectural design. His unique ability to combine form & function continues to provide clients with exceptional value and aesthetically pleasing, comfortable, and user friendly living, learning, and healing environments.

RELEVANT WORK EXPERIENCE

DEI ELECTRICAL CONSULTANTS, INC.
Professional Senior Engineer | Lighting Designer | Project Manager
Spokane Valley, Washington | December 2011 – Present

- Electrical Project Manager and Senior Design Engineer.
- Specialized Lighting & Controls Design, Overall General Power & Systems Design.
- Contract Management, General Management, Marketing, Web Design/Management.
- Responsible for both design & overall project management and delivery.
- Production of Construction Documents, Specifications, CAD drawings, and Building Information Modeling (BIM). Fluent in AutoDesk Revit.
- Responsible for organizing and implementing in-house educational programs for training and professional development.
- Speaker / Faculty at LightFair International 2015 in New York City, New York: *"Integrated Architectural Lighting Design & the Implementation of Effective, Code-Compliant Control Systems."*

NAC | ENGINEERING (NAC, INC.)
Professional Engineer | Lighting Designer | Project Manager
Spokane, Washington | November 2005 – December 2011

- Electrical Project Manager & Design Engineer.
- Lighting Designer & Architectural Daylight Studies.
- Architectural Design related to lighting & daylighting: Ceiling design, glazing selections, building envelope, & finish selections.

MW CONSULTING ENGINEERS
Engineer in Training | Electrical Designer
Spokane, Washington | August 2004 – October 2005

- Electrical Designer / Engineer in Training. Electrical design & specifications.
- CAD & BIM document production. Technical specification writing.

EDUCATION

GONZAGA UNIVERSITY | Spokane, WA | 2004
SCHOOL OF ENGINEERING
Bachelor Of Science in Engineering - Electrical

- Graduated with Cum Laude Honors in 2004 – 3.53/4.0 GPA.
- President's List: Fall 2000, Fall 2003
- Dean's List: Spring 2001, Fall 2002, Spring 2003
- Scholarships: Regents Scholarship, Schilling Scholarship, Walter Toly Scholarship, Carl M Hansen Foundation Scholarship.

GONZAGA UNIVERSITY | Spokane, WA | 2008
GRADUATE SCHOOL OF BUSINESS ADMINSTRATION
Master of Business Administration (MBA)

- Completed Masters Business Program while working as full time Engineering Technician.
- 3.88/4.0 GPA

BUTTE HIGH SCHOOL | Butte, MT | 2000

- Class Rank: 1 of 389 - Valedictorian – 4.0/4.0 GPA

MEIER 000139

RESPONSE -72a

Kelly Waterman, PE
[redacted]

February 13, 2017

Mr. Paul Giever, PE/SE
President
Meier Architecture & Engineering
12 W Kennewick Ave
Kennewick, WA 99356

Mr. Giever:

Please accept this letter as my formal resignation from my position as Electrical Group Manager at Meier Architecture and Engineering. My resignation is in no way a reflection on Meier, and is simply related to long pending circumstances developing in the personal lives of myself, and more notably, my staff. We have discussed these circumstances on multiple occasions, and I feel that you have a good understanding of the situation at hand.

I would like to thank you for the opportunity that I have had with Meier, and am grateful for the growth and insight that I have gained during my employment here. I have enjoyed working with this great group of people, and hope that I can continue to build on both the personal and professional relationships that have begun during my time here.

Per our previous discussion, I have every intention of helping Meier with their existing electrical work load, and furthermore would like to maintain a working relationship moving forward if you determine that is a course of action you would like to pursue. To that end, and given the circumstances regarding the departure dates that my current staff have previously indicated, I feel that it makes sense that my last day aligns relatively closely to theirs, which would be February 24, 2017. However, I understand that you may wish to discuss other options for my last day, which I am open to consider. However, I do feel that I will be less effective than I could be otherwise if I am here without my critical electrical staff, and unable to guide them through this transition. I believe the opportunity to maintain continuity and functionality regarding the situation at hand is reliant on a clean transition. We can determine what makes the most sense for everyone in a follow up discussion.

Again, I am grateful for the opportunity to have been a part of Meier, and I hope that we can find a mutually beneficial path forward to continue our relationship.

Sincerely,

Kelly A Waterman, PE

Meier
ARCHITECTURE • ENGINEERING

April 26, 2016

KellyWaterman
[redacted]

RE: EMPLOYMENT

Dear Kelly:

It is a pleasure to offer you a position with Meier Architecture • Engineering (the Company). Following are the key points associated with the offer.

TITLE:	Electrical Group Manager
LABOR CATEGORY:	Your position will be considered as a Full-time Exempt position paid on a bi-weekly salary basis. This classification is defined as a full-time exempt employee who is scheduled to work 80 hours during each two-week pay period.
ASSIGNMENT:	Kennewick, Washington
COMPENSATION:	$120,000 annually, $5,000 bonus after a successful 6 month evaluation
PRIMARY HIRE DATE:	May 31, 2016 or sooner
SUPERVISOR:	Steve R. Anderson, President/CEO
OTHER:	Monthly cell phone reimbursement of $90
BENEFITS FOLLOWING 60 DAY PROBATION:	Premera Blue Cross Medical, Voluntary VSP Vision Assurant Dental/Group Life/LTD/AD&D Personal Leave, PLA starts at 120 hours 401K Match

Eligibility for medical, vision, and dental benefits is the 1st day of the month following an initial 60 day probationary period.

Employment with the Company is voluntary and as an employee you are free to resign at any time for any reason. Similarly, the Company has the same right to terminate the employee at any time, for any reason. While the Company hopes the employment relationship will be long and mutually beneficial, the Company can give no guarantee or assurance, either expressed or implied, of continued employment. Your employment may be contingent upon successfully completing any background investigation, drug or alcohol screening tests, medical, physical, or other requirements of the client to which you are

12 W. Kennewick Ave. | Kennewick, WA 99336 | M 509.735.1589 | F 509.783.5075 | www.meierinc.com

assigned. Should the results of any of the above mentioned investigations or tests not meet the minimum requirements of the client, this offer may be rescinded in its entirety and employment may be terminated immediately upon discovery of the information.

During the Term of my employment and for a period of one (1) year after the end of the Term, I will not engage in, be employed by, perform services for, participate in the ownership, management, control or operation of, or otherwise be connected with, either directly or indirectly, any Competing Business within 100 miles. I will not induce, or attempt to induce, any employee of the Company to leave such employment to engage in, be employed by, perform services for, participate in or otherwise be connected with, either directly or indirectly, any Competing Business.

As evidence of your acceptance of this offer, please sign below and return a copy of this letter to me as soon as possible.

Human Resources will schedule a time to complete your new hire paperwork on your first day. If you have any questions, please feel free to call me at (509) 735-1589.

Sincerely,

Bobbi A. Keen

Bobbi A. Keen
Controller

I have read, understand, and accept the terms of employment as outlined in this letter.

Kelly Waterman

Name

April 26, 2016

Date

Meier Architecture • Engineering
Job Description

May 31, 2016

Full-Time, Exempt Position

Title: Electrical Engineering Group Manager

Basic Responsibilities: Meets project development goals (new projects). Responsible for the performance and bi-annual evaluation of all engineers and designers assigned to the discipline. Conducts him/herself in a professional and ethical manner.

Organizational Relationship: Reports to the President/CEO. Confers with the Director of Projects for the delivery of engineering services. Confers with the Director of Marketing in matters related to corporate strategic plan and business development.

Essential Functions: To perform this job successfully, an individual must be able to perform each essential duty satisfactorily. The requirements listed below are representative of the knowledge, skill, and/or ability required. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

- Represents the engineering group for all discipline meetings and planning.
- Responsible for discipline staff utilization and staffing requirements. Works with the Director of Projects and President/CEO to assess staffing requirements based on contracted backlogs.
- Works closely with Director of Marketing on proposal forecasting and marketing efforts.
- Responsible for scheduling engineering staff resources to ensure that appropriate staff is available to each Project Manager to meet project schedules.
- Mentors and provides guidance and on-the-job training to department staff.
- Enforces general organization-wide and engineering-specific policies, procedures and work instructions.
- Keep the Director of Projects closely apprised of any project activities that may impact deliverable schedules, staffing requirements, technical or financial performance of projects.
- Develops implements and approves all discipline engineering standards and details.
- Ensures that documents requiring a professional engineering seal have the appropriate reviews and approval and is responsible for all discipline engineering documents delivered.
- Confers with the Director of Projects and/or President/CEO for approval of contracts.

- Responsible for internal training of discipline engineering staff assigned to the discipline to ensure the adoption, implementation, and enforcement of all corporate procedures related to the delivery of engineering services.
- Recommends external staff training that is in alignment with the strategic plan.
- Ensures appropriate internal progress reviews for each project prior to final approval and delivery to client.
- Work to meet or exceed QA standards.
- Other duties as assigned.

Supervisory Responsibility:
This position is responsible for managing the Electrical Department.

Skill, Knowledge, Education and Experience:
- Registered Professional Electrical Engineer.
- 10 years of engineering experience; 5 years' experience as a Project Manager or equivalent.
- Strong organizational skills.

Work Environment:
This position operates in a professional office environment.

Physical Demands:
This position is largely a sedentary role. May be subject to bending, reaching, kneeling, stooping and lifting up to ten (10) pounds. May require travel to project locations.

This position routinely uses standard office equipment such as computers, phones, photocopiers, and fax machines.

Kelly Waterman
Signature

Kelly Waterman
Print Name

06/01/2016
Date

Bobbi A Keen

From: Steve Anderson
Sent: Monday, May 2, 2016 5:48 PM
To: Doug C Farris
Subject: concerns

Doug,

I have received an email from Shantu about concerns on your engineering and communication skills. I have addressed my concerns with Shantu and that's why Pam is doing the L&I submission. Shantu did bring up some valid points though, you do need to work on being more organized and careful with back checks and please make sure your responses are timely. My suggestion is to keep a list of commitments, I think it will help.

The other improvement areas are still the same, get your time card done Friday and keep your area clean.

I will be out in meeting all day tomorrow, but we can talk on Wednesday.

Steve R. Anderson
President / CEO

Meier
ARCHITECTURE • ENGINEERING

509-735-1589 Main
509-737-6945 Office
509-948-6501 Cell

Meier
ARCHITECTURE • ENGINEERING

DATE: **June 17, 2016**

TO: Doug Farris

FROM: Kelly Waterman

RE: Performance

Nature of New Disciplinary Action

Personal space-you need to be cognizant of personal space. Keep your work at your desk.

Follow management instructions.

Relevant Past Occurrences or Active Disciplinary Actions

Email from Steve Anderson on May 2, 2016 regarding paying attention to your work. You have not been doing this-Specifically you sent panel schedules to a client with the wrong project.

Required Corrections

Pay attention to detail.

Keep your work in your space.

Follow management instructions and guidance.

Appeal Rights

You have the right to appeal this disciplinary action. To be eligible, you must submit your appeal to Human Resources within 3 working days of receiving this disciplinary action.

Supervisor's Signature

Supervisor's Signature: _____ Date: _____

<NOTE: AN EMPLOYEE'S SIGNATURE IS NOT REQUIRED BUT IS RECOMMENDED; YOU ARE NOT REQUIRED TO INCLUDE THE ACKNOWLEDGEMENT LANGUAGE BELOW.>

Employee Acknowledgement

I acknowledge that I have received this disciplinary letter. I understand that my signature below does not necessarily imply agreement with the disciplinary action taken.

Employee's Signature: _____ Date: _____

cc: Personnel File

RESPONSE -79a

EEOC Form 5 (11/09)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

- [ ] FEPA
- [X] EEOC

551-2016-01556

Washington State Human Rights Commission and EEOC

State or local Agency, if any

Name (Indicate Mr., Ms., Mrs.)	Home Phone (Incl. Area Code)	Date of Birth
Mr. Shantu N. Shah	(503) 245-1722	11-02-1940

Street Address: 6637 S.W. 88th Place, Portland, OR 97223

City, State and ZIP Code

RECEIVED SEATTLE FEPA/EEOC 2016 JUL 27 P 12:56

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name	No. Employees, Members	Phone No. (Include Area Code)
MEIER ARCHITECTURE ENGINEERING	15 - 100	

Street Address: Attn: Diana Linsowe, Human Resources, 12 W. Kennewick Ave., Kennewick, WA 99336

City, State and ZIP Code

Name	No Employees, Members	Phone No. (Include Area Code)

Street Address: City, State and ZIP Code

DISCRIMINATION BASED ON (*Check appropriate box(es).*)

- [X] RACE
- [ ] COLOR
- [ ] SEX
- [ ] RELIGION
- [ ] NATIONAL ORIGIN
- [X] RETALIATION
- [X] AGE
- [ ] DISABILITY
- [ ] GENETIC INFORMATION
- [ ] OTHER (*Specify*)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest: 04-22-2016 Latest: 05-09-2016

- [ ] CONTINUING ACTION

THE PARTICULARS ARE (*If additional paper is needed, attach extra sheet(s)*):

I was hired on or about March 22, 2016 as a senior electrical engineer/project manager, BY MS. DIANA LINSOWE, HR COORDINATOR. SEE ATTACHED LETTER.

On or about May 9, 2016, I was discharged, BY MR. STEVE ANDERSON, AFTER I ADVISED HIM DESIGNERS ARE NOT SUPERVISED BY PROFESSIONAL ENGINEER.

I believe that I was discharged due to my race, Asian, in violation of Title VII of the Civil Rights Act of 1964, as amended (Title VII); and due to my age, 75 years, in violation of the Age Discrimination in Employment Act, as amended (the ADEA); and in retaliation for protests I made of race and age discrimination, in violation of Title VII and the ADEA. I WAS REPLACED BY AN ELECTRICAL ENGINEER ABOUT HALF OF MY AGE. HE WAS OFFERED JOB TWO WEEKS BEFORE MY TERMINATION.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

07/25/2016 — Date — Charging Party Signature

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (*month, day, year*)

Meier
ARCHITECTURE • ENGINEERING

March 22, 2016

Shantu N. Shah
6637 SW 88th Place
Portland, OR 97223

RE: EMPLOYMENT

Dear Shantu:

It is a pleasure to offer you a position with Meier Architecture • Engineering (the Company). Following are the key points associated with the offer.

TITLE:	Sr. Engineer/Project Manager
LABOR CATEGORY:	Your position will be considered as a Full-time Exempt position paid on a bi-weekly salary basis. This classification is defined as a full-time exempt employee who is scheduled to work 80 hours during each two-week pay period.
ASSIGNMENT:	Vancouver, Washington
COMPENSATION:	$100,000 annually
PRIMARY HIRE DATE:	March 22, 2016
SUPERVISOR:	Steve R. Anderson, President/CEO
OTHER:	The Company will pay for mileage and hotel while you are in the Tri-Cities for new hire training. Monthly cell phone reimbursement of $50
BENEFITS FOLLOWING 60 DAY PROBATION:	Premera Blue Cross Medical, Voluntary VSP Vision Assurant Dental/Group Life/LTD/AD&D Personal Leave 120 hours (accrued bi-weekly at 4.61 hours) 401K Match

Eligibility for medical, vision, and dental benefits is the 1st day of the month following an initial 60 day probationary period.

Employment with the Company is voluntary and as an employee you are free to resign at any time for any reason. Similarly, the Company has the same right to terminate the employee at any time, for any reason.

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While the Company hopes the employment relationship will be long and mutually beneficial, the Company can give no guarantee or assurance, either expressed or implied, of continued employment. Your employment may be contingent upon successfully completing any background investigation, drug or alcohol screening tests, medical, physical, or other requirements of the client to which you are assigned. Should the results of any of the above mentioned investigations or tests not meet the minimum requirements of the client, this offer may be rescinded in its entirety and employment may be terminated immediately upon discovery of the information.

During the Term of my employment I will not engage in, be employed by, perform services for, participate in the ownership, management, control or operation of, or otherwise be connected with, either directly or indirectly, any Competing Business within 100 miles. For a period of one (1) year after the end of my employment, I will not induce, or attempt to induce, any employee of the Company to leave such employment to engage in, be employed by, perform services for, participate in or otherwise be connected with, either directly or indirectly, any Competing Business.

As evidence of your acceptance of this offer, please sign below and return a copy of this letter to me as soon as possible.

Human Resources will schedule a time to complete your new hire paperwork on your first day. If you have any questions, please feel free to call me at (509) 735-1589.

Sincerely,

Diana Linsowe

Diana Linsowe
HR Coordinator

I have read, understand, and accept the terms of employment as outlined in this letter.

Name

03/22/2016
Date

U.S. Equal Employment Opportunity Commission
Seattle Field Office
909 First Avenue
Suite 400
Seattle, WA 98104-1061

NOTICE OF CHARGE OF DISCRIMINATION

(This Notice replaces EEOC FORM 131)

DIGITAL CHARGE SYSTEM

August 16, 2016

To: Denise Sweeden
HR Executive
MEIER ARCHITECTURE ENGINEERING
12 W. Kennewick Ave.
Kennewick, WA 99336

This is notice that a charge of employment discrimination has been filed with the EEOC against your organization by Shantubhai N. Shah, under: Title VII of the Civil Rights Act (Title VII) and The Age Discrimination in Employment Act (ADEA). The circumstances of the alleged discrimination are based on Retaliation, Race, and Age, and involve issues of Discharge that are alleged to have occurred on or about Mar 22, 2016 through May 09, 2016.

The Digital Charge System makes investigations and communications with charging parties and respondents more efficient by digitizing charge documents. The charge is available for you to download from the EEOC Respondent Portal, EEOC's secure online system.

Please follow these instructions to view the charge within ten (10) days of receiving this Notice:

1. Access EEOC's secure online system: **https://nxg.eeoc.gov/rsp/login.jsf**
2. Enter this EEOC Charge No.: **551-2016-01556**
3. Enter this password: [redacted]

Once you log into the system, you can view and download the charge, and electronically submit documents to EEOC. The system will also advise you of possible actions or responses, and identify your EEOC point of contact for this charge.

APPENDIX 4

McDONNELL DOUGLAS CORPORATION, Petitioner, v. Percy GREEN.

Supreme Court

411 U.S. 792

93 S.Ct. 1817

36 L.Ed.2d 668

McDONNELL DOUGLAS CORPORATION, Petitioner,
v.
Percy GREEN.

No. 72—490.

Argued March 28, 1973.

Decided May 14, 1973.

Syllabus

Respondent, a black civil rights activist, engaged in disruptive and illegal activity against petitioner as part of his protest that his discharge as an employee of petitioner's and the firm's general hiring practices were racially motivated. When petitioner, who subsequently advertised for qualified personnel, rejected respondent's re-employment application on the ground of the illegal conduct, respondent filed a complaint with the Equal Employment Opportunity Commission (EEOC) charging violation of Title VII of the Civil Rights Act of 1964. The EEOC found that there was reasonable cause to believe that petitioner's rejection of respondent violated § 704(a) of the Act, which forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory employment conditions, but made no finding on respondent's allegation that petitioner had also violated § 703(a)(1), which prohibits discrimination in any employment decision. Following unsuccessful EEOC conciliation efforts, respondent brought suit in the District Court, which ruled that respondent's illegal activity was not protected by § 704(a) and dismissed

the § 703(a)(1) claim because the EEOC had made no finding with respect thereto. The Court of Appeals affirmed the § 704(a) ruling, but reversed with respect to § 703(a)(1), holding that an EEOC determination of reasonable cause was not a jurisdictional prerequisite to claiming a violation of that provision in federal court. Held:

1. A complainant's right to bring suit under the Civil Rights Act of 1964 is not confined to charges as to which the EEOC has made a reasonable-cause finding, and the District Court's error in holding to the contrary was not harmless since the issues raised with respect to § 703(a)(1) were not identical to those with respect to § 704(a) and the dismissal of the former charge may have prejudiced respondent's efforts at trial. Pp. 798—800.

2. In a private, non-class-action complaint under Title VII charging racial employment discrimination, the complainant has the burden of establishing a prima facie case, which he can satisfy by showing that (i) he belongs to a racial minority; (ii) he 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. P. 802.

3. Here, the Court of Appeals, though correctly holding that respondent proved a prima facie case, erred in holding that petitioner had not discharged its burden of proof in rebuttal by showing that its stated reason for the rehiring refusal was based on respondent's illegal activity. But on remand respondent must be afforded a fair opportunity of proving that petitioner's stated reason was just a pretext for a racially discriminatory decision, such as by showing that whites engaging in similar illegal activity were retained or hired by petitioner. Other evidence that may be relevant, depending on the circumstances, could include facts that petitioner had discriminated against respondent when he was an employee or followed a discriminatory policy toward Minority employees. Pp. 802—805.

8 Cir., 463 F.2d 337, vacated and remanded.

Veryl L. Riddle, St. Louis, Mo., for petitioner.

Louis Gilden, St. Louis, Mo., for respondent.

Mr. Justice POWELL delivered the opinion of the Court.

1
The case before us raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. § 2000e et seq.

2

Petitioner, McDonnell ... glas Corp., is an aerospace ar ... rcraft manufacturer headquartered in St. Louis, Missouri, where it employs over 30,000 people. Respondent, a black citizen of St. Louis, worked for petitioner as a mechanic and laboratory technician from 1956 until August 28, 1964[1] when he was laid off in the course of a general reduction in petitioner's work force.

3
Respondent, a long-time activist in the civil rights movement, protested vigorously that his discharge and the general hiring practices of petitioner were racially motivated.[2] As part of this protest, respondent and other members of the Congress on Racial Equality illegally stalled their cars on the main roads leading to petitioner's plant for the purpose of blocking access to it at the time of the morning shift change. The District Judge described the plan for, and respondent's participation in, the 'stall-in' as follows:

4
'(F)ive teams, each consisting of four cars would 'tie up' five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour.

5
'Acting under the 'stall in' plan, plaintiff (respondent in the present action) drove his car onto Brown Road, a McDonnell access road, at approximately 7:00 a.m., at the start of the morning rush hour. Plaintiff was aware of the traffic problems that would result. He stopped his car with the intent to block traffic. The police arrived shortly and requested plaintiff to move his car. He refused to move his car voluntarily. Plaintiff's car was towed away by the police, and he was arrested for obstructing traffic. Plaintiff pleaded guilty to the charge of obstructing traffic and was fined.' 318 F.Supp. 846.

6
On July 2, 1965, a 'lock-in' took place wherein a chain and padlock were placed on the front door of a building to prevent the occupants, certain of petitioner's employees, from leaving. Though respondent apparently knew beforehand of the 'lock-in,' the full extent of his involvement remains uncertain.[3]

7

Some three weeks fol .ng the 'lock-in,' on July 25, 19__, petitioner publicly advertised for qualified mechanics, respondent's trade, and respondent promptly applied for re-employment. Petitioner turned down respondent, basing its rejection on respondent's participation in the 'stall-in' and 'lock-in.' Shortly thereafter, respondent filed a formal complaint with the Equal Employment Opportunity Commission, claiming that petitioner had refused to rehire him because of his race and persistent involvement in the civil rights movement, in violation of §§ 703(a)(1) and 704(a) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2(a)(1) and 2000e—3(a).[4] The former section generally prohibits racial discrimination in any employment decision while the latter forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment.

8

The Commission made no finding on respondent's allegation of racial bias under § 703(a)(1), but it did find reasonable cause to believe petitioner had violated § 704(a) by refusing to rehire respondent because of his civil rights activity. After the Commission unsuccess-fully attempted to conciliate the dispute, it advised respondent in March 1968, of his right to institute a civil action in federal court within 30 days.

9

On April 15, 1968, respondent brought the present action, claiming initially a violation of § 704(a) and, in an amended complaint, a violation of § 703(a)(1) as well.[5] The District Court, 299 F.Supp. 1100, dismissed the latter claim of racial discrimination in petitioner's hiring procedures on the ground that the Commission had failed to make a determination of reasonable cause to believe that a violation of that section had been committed. The District Court also found that petitioner's refusal to rehire respondent was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities. The court concluded that nothing in Title VII or § 704 protected 'such activity as employed by the plaintiff in the 'stall in' and 'lock in' demonstrations.' 318 F.Supp., at 850.

10

On appeal, the Eighth Circuit affirmed that unlawful protests were not protected activities under § 704(a),[6] but reversed the dismissal of respondent's § 703(a)(1) claim relating to racially discriminatory hiring practices, holding that a prior Commission determination of reasonable cause was not a jurisdictional prerequisite to raising a claim under that section in federal court. The court ordered the case remanded for trial of respondent's claim under § 703(a)(1).

11

In remanding, the Co. . of Appeals attempted to set fo. standards to govern the consideration of respondent's claim. The majority noted that respondent had established a prima facie case of racial discrimination; that petitioner's refusal to rehire respondent rested on 'subjective' criteria which carried little weight in rebutting charges of discrimination; that, though respondent's participation in the unlawful demonstrations might indicate a lack of a responsible attitude toward performing work for that employer, respondent should be given the opportunity to demonstrate that petitioner's reasons for refusing to rehire him were mere pretext.[7] In order to clarify the standards governing the disposition of an action challenging employment discrimination, we granted certiorari, 409 U.S. 1036, 93 S.Ct. 522, 34 L.Ed.2d 485 (1972).

12

* We agree with the Court of Appeals that absence of a Commission finding of reasonable cause cannot bar suit under an appropriate section of Title VII and that the District Judge erred in dismissing respondent's claim of racial discrimination under § 703(a)(1). Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42 U.S.C. §§ 2000e—5(a) and 2000e—5(e). The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts. The Commission itself does not consider the absence of a 'reasonable cause' determination as providing employer immunity from similar charges in a federal court, 29 CFR § 1601.30, and the courts of appeal have held that, in view of the large volume of complaints before the Commission and the nonadversary character of many of its proceedings, 'court actions under Title VII are de novo proceedings and . . . a Commission 'no reasonable cause' finding does not bar a lawsuit in the case.' Robinson v. Lorillard Corp., 444 F.2d 791, 800 (CA4 1971); Beverly v. Lone Star Lead Construction Corp., 437 F.2d 1136 (CA,5 1971); Flowers v. Local 6, Laborers International Union of North America, 431 F.2d 205 (CA7 1970); Fekete v. United States Steel Corp., 424 F.2d 331 (CA 3 1970).

13

Petitioner argues, as it did below, that respondent sustained no prejudice from the trial court's erroneous ruling because in fact the issue of racial discrimination in the refusal to re-employ 'was tried thoroughly' in a trial lasting four days with 'at least 80%' of the questions relating to the issue of 'race.'[8] Petitioner, therefore, requests that the judgment below be vacated and the cause remanded with instructions that the judgment of the District Court be affirmed.[9] We cannot

agree that the dismiss. i respondent's § 703(a)(1) clai.. was harmless error. It is not clear that the District Court's findings as to respondent's § 704(a) contentions involved the identical issues raised by his claim under § 703(a)(1). The former section relates solely to discrimination against an applicant or employee on account of his participation in legitimate civil rights activities or protests, while the latter section deals with the broader and centrally important question under the Act of whether for any reason, a racially discriminatory employment decision has been made. Moreover, respondent should have been accorded the right to prepare his case and plan the strategy of trial with the knowledge that the § 703(a)(1) cause of action was properly before the District Court.[10] Accordingly, we remand the case for trial of respondent's claim of racial discrimination consistent with the views set forth below.

II

14
The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. Griggs v. Duke Power Co., 401 U.S. 424, 429, 91 S.Ct. 849, 852, 28 L.Ed.2d 158 (1971); Castro v. Beecher, 459 F.2d 725 (CA1 1972); Chance v. Board of Examiners, 458 F.2d 1167 (CA2 1972); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (ED Va.1968). As noted in Griggs, supra:

15
'Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

16
What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.' Id., 401 U.S., at 430—431, 91 S.Ct., at 853.

17
There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral

employment and pers ..nel decisions. In the implemen. ..n of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

18

In this case respondent, the complainant below, charges that he was denied employment 'because of his involvement in civil rights activities' and 'because of his race and color.'[11] Petitioner denied discrimination of any kind, asserting that its failure to re-employ respondent was based upon and justified by his participation in the unlawful conduct against it. Thus, the issue at the trial on remand is framed by those opposing factual contentions. The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case.[12] We now address this problem.

19

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[13] In the instant case, we agree with the Court of Appeals that respondent proved a prima facie case. 463 F.2d 337, 353. Petitioner sought mechanics, respondent's trade, and continued to do so after respondent's rejection. Petitioner, moreover, does not dispute respondent's qualifications[14] and acknowledges that his past work performance in petitioner's employ was 'satisfactory.'[15]

20

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.

21

The Court of Appeals intimated, however, that petitioner's stated reason for refusing to rehire respondent was a 'subjective' rather than objective criterion which 'carr[ies] little weight in rebutting charges of discrimination,' 463 F.2d, at

343. This was among t. statements which caused the a.. enting judge to read the opinion as taking 'the position that such unlawful acts as Green committed against McDonnell would not legally entitle McDonnell to refuse to hire him, even though no racial motivation was involved . . . .' Id., at 355. Regardless of whether this was the intended import of the opinion, we think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled. Respondent admittedly had taken part in a carefully planned 'stall-in,' designed to tie up access to and egress from petitioner's plant at a peak traffic hour.[16] Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.[17] In upholding, under the National Labor Relations Act, the discharge of employees who had seized and forcibly retained an employer's factory buildings in an illegal sit-down strike, the Court noted pertinently:

22
'We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property . . . Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression.' NLRB v. Fansteel Corp., 306 U.S. 240, 255, 59 S.Ct. 490, 496, 83 L.Ed. 627 (1939).

23
Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

24
Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment.[18]

On the latter point, [redacted]stics as to petitioner's employ[redacted]t policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (CA10 1970); Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co., and the Concept of Employment Discrimination, 71 Mich.L.Rev. 59, 91—94 (1972).[19] In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

25

The court below appeared to rely upon Griggs v. Duke Power Co., *supra,* in which the Court stated: 'If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.' 401 U.S., at 431, 91 S.Ct., at 853, 28 L.Ed.2d 158.[20] But Griggs differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Id., at 430, 91 S.Ct., at 853. Respondent, however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of 'artificial, arbitrary, and unnecessary barriers to employment' which the Court found to be the intention of Congress to remove. Id., at 431, 91 S.Ct., at 853.[21]

III

26

In sum, respondent should have been allowed to pursue his claim under § 703(a) (1). If the evidence on retrial is substantially in accord with that before us in this case, we think that respondent carried his burden of establishing a prima facie case of racial discrimination and that petitioner successfully rebutted that case. But this does not end the matter. On retrial, respondent must be

afforded a fair opportur to demonstrate that petitioner . ssigned reason for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy. In the absence of such a finding, petitioner's refusal to rehire must stand.

27
The cause is hereby remanded to the District Court for reconsideration in accordance with this opinion.

28
So ordered.

29
Remanded.

1

His employment during these years was continuous except for 21 months of service in the military.

2

The Court of Appeals noted that respondent then 'filed formal complaints of discrimination with the President's Commission on Civil Rights, the Justice Department, the Department of the Navy, the Defense Department, and the Missouri Commission on Human Rights.' 463 F.2d 337 (8 Cir., 1972).

3

The 'lock-in' occurred during a picketing demonstration by ACTION, a civil rights organization, at the entrance to a downtown office building which housed a part of petitioner's offices and in which certain of petitioner's employees were working at the time. A chain and padlock were placed on the front door of the building to prevent ingress and egress. Although respondent acknowledges that he was chairman of ACTION at the time, that the demonstration was planned and staged by his group, that he participated in and indeed was in charge of the picket line in front of the building, that he was told in advance by a member of ACTION 'that he was planning to chain the front door,' and that he 'approved of' chaining the door, there is no evidence that respondent personally took part in the actual 'lock-in,' and he was not arrested. App. 132—133.

The Court of Appeals majority, however, found that the record did 'not support the trial court's conclusion that Green 'actively cooperated' in chaining the doors of the downtown St. Louis building during the 'lock-in' demonstration.' 463 F.2d; at 341. See also concurring opinion of Judge Lay. Id., at 344. Judge Johnsen, in

dissent, agreed with the District Court that the 'chaining and padlocking (were) carried out as planned, (and that) Green had in fact given it . . . approval and authorization.' Id., at 348.

In view of respondent's admitted participation in the unlawful 'stall-in,' we find it unnecessary to resolve the contradictory contentions surrounding this 'lock-in.'

4

Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e—2(a) (1), in pertinent part provides:

'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 . . ..'

Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e—3(a), in pertinent part provides:

'It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . ..'

5

Respondent also contested the legality of his 1964 discharge by petitioner, but both courts held this claim barred by the statute of limitations. Respondent does not challenge those rulings here.

6

Respondent has not sought review of this issue.

7

All references are to Part V of the revised opinion of the Court of Appeals, 463 F.2d, at 352, which superseded Part V of the court's initial opinion with respect to the order and nature of proof. 463 F.2d 337.

8

Tr. of Oral Arg. 11.

9

Brief for Petitioner 40.

10

The trial court did not discuss respondent's § 703(a)(1) claim in its opinion and denied requests for discovery of statistical materials which may have been relevant to that claim.

11

The respondent initially charged petitioner in his complaint filed April 15, 1968, with discrimination because of his 'involvement in civil rights activities.' App. 7, 8. In his amended complaint, filed March 20, 1969, plaintiff broadened his charge to include denial of employment because of race in violation of § 703(a)(1). App. 27.

12

See original opinion of the majority of the panel which heard the case, 463 F.2d, at 338; the concurring opinion of Judge Lay, id., at 344; the first opinion of Judge Johnsen, dissenting in part, id., at 346; the revised opinion of the majority, id., at 352; and the supplemental dissent of Judge Johnsen, id., at 353. A petition for rehearing en banc was denied by an evenly divided Court of Appeals.

13

The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

14

We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an exclusionary effect on minority applicants, such requirements must be 'shown to bear a demonstrable relationship to successful performance of the jobs' for which they were used, Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). Castro v. Beecher, 459 F.2d 725 (CA1 1972); Chance v. Board of Examiners, 458 F.2d 1167 (CA2 1972).

15

Tr. of Oral Arg. 3; 463 F.2d, at 353.

16

The trial judge noted that no personal injury or property damage resulted from the 'stall-in' due 'solely to the fact that law enforcement officials had obtained notice in advance of plaintiff's (here respondent's) demonstration and were at the scene to remove plaintiff's car from the highway.' 318 F.Supp. 846, 851.

17

The unlawful activity in this case was directed specifically against petitioner. We need not consider or decide here whether, or under what circumstances, unlawful activity not directed against the particular employer may be a legitimate justification for refusing to hire.

18

We are aware that some of the above factors were, indeed, considered by the District Judge in finding under § 704(a), that 'defendant's (here petitioner's) reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff's participation in the 'stall in' and 'lock in' demonstrations.' 318 F.Supp., at 850. We do not intimate that this finding must be overturned after consideration on remand of respondent's § 703(a)(1) claim. We do, however, insist that respondent under § 703(a)(1) must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised.

19

The District Court may, for example, determine, after reasonable discovery that 'the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices.' See Blumrosen, supra, at 92. We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire. See generally United States v. Bethlehem Steel Corp., 312 F.Supp. 977, 992 (WDNY 1970), order modified, 446 F.2d 652 (CA2 1971). Blumrosen, supra, n. 19, at 93.

20

See 463 F.2d, at 352.

21

It is, of course, a predictive evaluation, resistant to empirical proof, whether 'an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer.' 463 F.2d, at 353. But in this case, given the seriousness and harmful potential of respondent's participation in the 'stall-in' and the accompanying inconvenience to other employees, it cannot be said that petitioner's refusal to employ lacked a rational and neutral business justification. As the Court has noted elsewhere:

'Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust.' Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 720, 71 S.Ct. 909, 912, 95 L.Ed. 1317 (1951).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)

Syllabus **Case**

U.S. Supreme Court

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)

Anderson v. Liberty Lobby, Inc.

No. 84-1602

Argued December 3, 1985

Decided June 25, 1986

477 U.S. 242

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

In *New York Times Co. v. Sullivan,* 376 U. S. 254, it was held that, in a libel suit brought by a public official (extended by later cases to public figures), the First Amendment requires the plaintiff to show that, in publishing the alleged defamatory statement, the defendant acted with actual malice. It was further held that such actual malice must be shown with "convincing clarity." Respondents, a nonprofit corporation described as a "citizens' lobby" and its founder, filed a libel action in Federal District Court against petitioners, alleging

that certain statements in a magazine published by petitioners were false and derogatory. Following discovery, petitioners moved for summary judgment pursuant to Federal Rule of Civil Procedure 56, asserting that, because respondents were public figures, they were required to prove their case under the *New York Times standards,* and that summary judgment was proper because actual malice was absent as a matter of law in view of an affidavit by the author of the articles in question that they had been thoroughly researched and that the facts were obtained from numerous sources. Opposing the motion, respondents claimed that an issue of actual malice was presented because the author had relied on patently unreliable sources in preparing the articles. After holding that *New York Times* applied because respondents were limited-purpose public figures, the District Court entered summary judgment for petitioners on the ground that the author's investigation and research and his reliance on numerous sources precluded a finding of actual malice. Reversing as to certain of the allegedly defamatory statements, the Court of Appeals held that the requirement that actual malice be proved by clear and convincing evidence need not be considered at the summary judgment stage, and that, with respect to those statements, summary judgment had been improperly granted, because a jury could reasonably have concluded that the allegations were defamatory, false, and made with actual malice.

Held: The Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment. Pp. 477 U. S. 247-257.

(a) Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and

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determine the truth of the matter, but to determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. Pp. 477 U. S. 247-252.

(b) A trial court ruling on a motion for summary judgment in a case such as this must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists, that is, whether the evidence is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Pp.

477 U. S. 252-256.

(c) A plaintiff may not defeat a defendant's properly supported motion for summary judgment in a libel case such as this one without offering any concrete evidence from which a reasonable jury could return a verdict in his favor, and by merely asserting that the jury might disbelieve the defendant's denial of actual malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Pp. 477 U. S. 256-257.

241 U.S.App.D.C. 246, 746 F.2d 1563, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, *post,* p. 477 U. S. 257. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C.J., joined, *post,* p. 477 U. S. 268.

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JUSTICE WHITE delivered the opinion of the Court.

In *New York Times Co. v. Sullivan,* 376 U. S. 254, 376 U. S. 279-280 (1964), we held that, in a libel suit brought by a public official, the First Amendment requires the plaintiff to show that, in publishing the defamatory statement, the defendant acted with actual malice -- "with knowledge that it was false, or with reckless disregard of whether it was false or not." We held further that such actual malice must be shown with "convincing clarity." *Id.* at 376 U. S. 285-286. *See also Gertz v. Robert Welch, Inc.,* 418 U. S. 323, 418 U. S. 342 (1974). These *New York Times* requirements we have since extended to libel suits brought by public figures as well. *See, e.g., Curtis Publishing Co. v. Butts,* 388 U. S. 130 (1967).

This case presents the question whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies. The United States Court of Appeals for the District of Columbia Circuit held that that requirement need not be considered at the summary judgment stage. 241 U.S.App.D.C. 246, 746 F.2d 1563 (1984). We granted certiorari, 471 U.S. 1134 (1985), because that holding was in conflict with decisions of several other Courts of Appeals, which had held that the *New York Times* requirement of clear and convincing evidence must be considered on a motion for summary judgment. [Footnote 1] We now reverse.

I

Respondent Liberty Lobby, Inc., is a not-for-profit corporation and self-described "citizens' lobby." Respondent Willis Carto is its founder and treasurer. In October, 1981,

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The Investigator magazine published two articles: "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler." These articles were introduced by a third, shorter article entitled "America's Neo-Nazi Underground: Did Mein Kampf Spawn Yockey's Imperium, a Book Revived by Carto's Liberty Lobby?" These articles portrayed respondents as neo-Nazi, anti-Semitic, racist, and Fascist.

Respondents filed this diversity libel action in the United States District Court for the District of Columbia, alleging that some 28 statements and 2 illustrations in the 3 articles were false and derogatory. Named as defendants in the action were petitioner Jack Anderson, the publisher of The Investigator, petitioner Bill Adkins, president and chief executive officer of the Investigator Publishing Co., and petitioner Investigator Publishing Co. itself.

Following discovery, petitioners moved for summary judgment pursuant to Rule 56. In their motion, petitioners asserted that, because respondents are public figures, they were required to prove their case under the standards set forth in *New York Times*. Petitioners also asserted that summary judgment was proper because actual malice was absent as a matter of law. In support of this latter assertion, petitioners submitted the affidavit of Charles Bermant, an employee of petitioners and the author of the two longer articles. [Footnote 2] In this affidavit, Bermant stated that he had spent a substantial amount of time researching and writing the articles, and that his facts were obtained from a wide variety of sources. He also stated that he had at all times believed, and still believed, that the facts contained in the articles were truthful and accurate. Attached to this affidavit was an appendix in which Bermant detailed the sources for each of the statements alleged by respondents to be libelous.

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Respondents opposed the motion for summary judgment, asserting that there were numerous inaccuracies in the articles and claiming that an issue of actual malice was presented by virtue of the fact that, in preparing the articles, Bermant had relied on several sources that respondents asserted were patently unreliable. Generally, respondents charged that petitioners had failed adequately to verify their information before publishing.

Respondents also presented evidence that William McGaw, an editor of The Investigator, had told petitioner Adkins before publication that the articles were "terrible" and "ridiculous."

In ruling on the motion for summary judgment, the District Court first held that respondents were limited-purpose public figures, and that *New York Times* therefore applied. [Footnote 3] The District Court then held that Bermant's thorough investigation and research and his reliance on numerous sources precluded a finding of actual malice. Thus, the District Court granted the motion and entered judgment in favor of petitioners.

On appeal, the Court of Appeals affirmed as to 21 and reversed as to 9 of the allegedly defamatory statements. Although it noted that respondents did not challenge the District Court's ruling that they were limited-purpose public

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figures, and that they were thus required to prove their case under *New York Times,* the Court of Appeals nevertheless held that, for the purposes of summary judgment, the requirement that actual malice be proved by clear and convincing evidence, rather than by a preponderance of the evidence, was irrelevant: to defeat summary judgment, respondents did not have to show that a jury could find actual malice with "convincing clarity." The court based this conclusion on a perception that to impose the greater evidentiary burden at summary judgment

"would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well."

241 U.S.App.D.C. at 253, 746 F.2d at 1570. The court then held, with respect to nine of the statements, that summary judgment had been improperly granted because "a jury could reasonably conclude that the . . . allegations were defamatory, false, and made with actual malice." *Id.* at 260, 746 F.2d at 1577.

II

A

Our inquiry is whether the Court of Appeals erred in holding that the heightened evidentiary requirements that apply to proof of actual malice in this *New York Times* case need not be considered for the purposes of a motion for summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment

the Federal Rules of Civil Procedure provides that summary judgment

"shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported

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motion for summary judgment; the requirement is that there be no genuine issue of material fact.

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. *See generally* 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim, and not a criterion for evaluating the evidentiary underpinnings of those disputes.

More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. In *First National Bank of Arizona v. Cities Service Co.*, 391 U. S. 253 (1968), we affirmed a grant of summary judgment for an antitrust defendant where the issue was whether there was a genuine factual dispute as to the existence of a conspiracy. We noted Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment

"may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial."

We observed further that

"[i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to

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trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."

391 U.S. at 391 U. S. 288-289. We went on to hold that, in the face of the defendant's properly supported motion for summary judgment, the plaintiff could not rest on his allegations of a conspiracy to get to a jury without "any significant probative evidence tending to support the complaint." *Id.* at 391 U. S. 290.

Again, in *Adickes v. S. H. Kress & Co.*, 398 U. S. 144 (1970), the Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. We reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury . . . to infer from the circumstances" that there had been a meeting of the minds. *Id.* at 398 U. S. 158-159.

Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. As *Adickes, supra,* and *Cities Service, supra,* indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service, supra,* at 391 U. S. 288-289. If the evidence is merely colorable, *Dombrowski v. Eastland,* 387 U. S. 82 (1967) (per curiam), or is not significantly probative,

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Cities Service, supra, at 391 U. S. 290, summary judgment may be granted.

That this is the proper focus of the inquiry is strongly suggested by the Rule itself. Rule

clarity.

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The case for the proposition that a higher burden of proof should have a corresponding effect on the judge when deciding whether to send the case to the jury was well made by the Court of Appeals for the Second Circuit in *United States v. Taylor*, 464 F.2d 240 (1972), which overruled *United States v. Feinberg*, 140 F.2d 592 (1944), a case holding that the standard of evidence necessary for a judge to send a case to the jury is the same in both civil and criminal cases, even though the standard that the jury must apply in a criminal case is more demanding than in civil proceedings. Speaking through Judge Friendly, the Second Circuit said:

"It would seem at first blush -- and we think also at second -- that more 'facts in evidence' are needed for the judge to allow [reasonable jurors to pass on a claim] when the proponent is required to establish [the claim] not merely by a preponderance of the evidence but . . . beyond a reasonable doubt."

464 F.2d at 242. The court could not find a "satisfying explanation in the *Feinberg* opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury." *Ibid.* The *Taylor* court also pointed out that almost all the Circuits had adopted something like Judge Prettyman's formulation in *Curley v. United States*, 160 F.2d 229, 232-233 (1947):

"The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether, upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that, upon the evidence, there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the

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two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter."

This view is equally applicable to a civil case to which the "clear and convincing" standard applies. Indeed, the *Taylor* court thought that it was implicit in this Court's adoption of the clear-and-convincing-evidence standard for certain kinds of cases that there was a "concomitant duty on the judge to consider the applicable burden when deciding whether to send a case to the jury." 464 F.2d at 243. Although the court thought that this higher standard would not produce different results in many cases, it could not say that it would never do so.

Just as the "convincing clarity" requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment. When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: it makes no sense to say that a jury could reasonably find for either party without some

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benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. 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 nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes,* 398 U.S. at 398 U. S. 158-159. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment, or that

the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U. S. 249 (1948).

In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding

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either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not. [Footnote 7]

III

Respondents argue, however, that, whatever may be true of the applicability of the "clear and convincing" standard at the summary judgment or directed verdict stage, the defendant should seldom, if ever, be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on *Poller v. Columbia Broadcasting Co.*, 368 U. S. 464 (1962), for this proposition. We do not understand *Poller,* however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor, and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing, in turn, evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Based on that Rule, *Cities Service,* 391 U.S. at 391 U. S. 290, held that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without offering "any

significant probative evidence tending to support the complaint." As we have recently said, "discredited testimony

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is not [normally] considered a sufficient basis for drawing a contrary conclusion." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U. S. 485, 466 U. S. 512 (1984). Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery. We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

IV

In sum, a court ruling on a motion for summary judgment must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists -- that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Because the Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment, we vacate its decision and remand the case for further proceedings consistent with this opinion.

It is so ordered.

[Footnote 1]

See, e.g., Rebozo v. Washington Post Co., 637 F.2d 375, 381 (CA5), *cert. denied*, 454 U.S. 964 (1981); *Yiamouyiannis v. Consumers Union of United States, Inc.*, 619 F.2d 932, 940 (CA2), *cert. denied*, 449 U.S. 839 (1980); *Carson v. Allied News Co.*, 529 F.2d 206, 210 (CA7 1976).

[Footnote 2]

The short, introductory article was written by petitioner Anderson, and relied exclusively on the information obtained by Bermant.

[Footnote 3]

In *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 418 U. S. 351 (1974), this Court summarized who will be considered to be a public figure to whom the *New York Times* standards will

who will be considered to be a public figure to whom the *New York Times* standards will apply:

"[The public figure] designation may rest on either of two alternative bases. In some instances, an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy, and thereby becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions."

The District Court found that respondents, as political lobbyists, are the second type of political figure described by the *Gertz* court -- a limited-purpose public figure. *See also Waldbaum v. Fairchild Publications Inc.,* 201 U.S.App.D.C. 301, 306, 627 F.2d 1287, 1292, *cert. denied.* 449 U.S. 898 (1980).

[Footnote 4]

Our analysis here does not address the question of the initial burden of production of evidence, placed by Rule 56 on the party moving for summary judgment. *See Celotex Corp. v. Catrett, post,* p. 477 U. S. 317. Respondents have not raised this issue here, and, for the purposes of our discussion, we assume that the moving party has met initially the requisite evidentiary burden.

[Footnote 5]

This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

[Footnote 6]

In many cases, however, findings are extremely helpful to a reviewing court.

[Footnote 7]

Our statement in *Hutchinson v. Proxmire,* 443 U. S. 111, 443 U. S. 120, n. 9 (1979), that proof of actual malice "does not readily lend itself to summary disposition" was simply an acknowledgment of our general reluctance

"to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws."

Calder v. Jones, 465 U. S. 783, 465 U. S. 790-791 (1984).

JUSTICE BRENNAN, dissenting.

The Court today holds that

"whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case,"

ante at 477 U. S. 255. [Footnote 2/1] In my view, the Court's analysis is deeply flawed,

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and rests on a shaky foundation of unconnected and unsupported observations, assertions, and conclusions. Moreover, I am unable to divine from the Court's opinion how these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment. Accordingly, I respectfully dissent.

To support its holding that, in ruling on a motion for summary judgment, a trial court must consider substantive evidentiary burdens, the Court appropriately begins with the language of Rule 56(c), which states that summary judgment shall be granted if it appears that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Court then purports to restate this Rule, and asserts that

"summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

Ante at 477 U. S. 248. No direct authority is cited for the proposition that, in order to determine whether a dispute is "genuine" for Rule 56 purposes, a judge must ask if a "reasonable" jury could find for the nonmoving party. Instead, the Court quotes from *First National Bank of Arizona v. Cities Service Co.,* 391 U.S.

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253, 391 U. S. 288-289 (1968), to the effect that a summary judgment motion will be defeated if

"sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial,"

ante at 477 U. S. 249, and that a plaintiff may not, in defending against a motion for

summary judgment, rest on mere allegations or denials of his pleadings. After citing *Adickes v. S. H. Kress & Co.*, 398 U. S. 144 (1970), for the unstartling proposition that "the availability of summary judgment turn[s] on whether a proper jury question [is] presented," *ante* at 477 U. S. 249, the Court then reasserts, again with no direct authority, that, in determining whether a jury question is presented, the inquiry is whether there are factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Ante* at 477 U. S. 250. The Court maintains that this summary judgment inquiry "mirrors" that which applies in the context of a motion for directed verdict under Federal Rule of Civil Procedure 50(a):

"whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law."

Ante at 477 U. S. 251-252.

Having thus decided that a "genuine" dispute is one which is not "one-sided," and one which could "reasonably" be resolved by a "fair-minded" jury in favor of either party, *ibid.*, the Court then concludes:

"Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: it makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are, in fact, provided by the applicable evidentiary standards."

Ante at 477 U. S. 254-255.

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As far as I can discern, this conclusion, which is at the heart of the case, has been reached without the benefit of any support in the case law. Although, as noted above, the Court cites *Adickes* and *Cities Service,* those cases simply do not stand for the proposition that, in ruling on a summary judgment motion, the trial court is to inquire into the "one-sidedness" of the evidence presented by the parties. *Cities Service* involved the propriety of a grant of summary judgment in favor of a defendant alleged to have conspired to violate the antitrust laws. The issue in the case was whether, on the basis of the facts in the record, a jury could *infer* that the defendant had entered into a conspiracy to boycott. No direct evidence of the conspiracy was produced. In agreeing with the lower courts that the *circumstantial* evidence presented by the plaintiff was insufficient to take the case to the jury, we observed

that there was "one fact" that petitioner had produced to support the existence of the illegal agreement, and that that single fact could not support petitioner's theory of liability. Critically, we observed that

"[t]he case at hand presents peculiar difficulties because the issue of fact crucial to petitioner's case is also an issue of law, namely the existence of a conspiracy."

391 U.S. at 391 U. S. 289. In other words, *Cities Service* is, at heart, about whether certain facts can support inferences that are, as a matter of antitrust law, sufficient to support a particular theory of liability under the Sherman Act. Just this Term, in discussing summary judgment in the context of suits brought under the antitrust laws, we characterized both *Cities Service* and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U. S. 752 (1984), as cases in which "*antitrust law* limit[ed] the range of permissible inferences from ambiguous evidence. . . ." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U. S. 574, 475 U. S. 588 (1986) (emphasis added). *Cities Service* thus provides no authority for the conclusion that Rule 56 requires a trial court to consider whether direct evidence produced by the parties is "one-sided." To the contrary, in *Matsushita,* the most recent

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case to cite and discuss *Cities Service,* we stated that the requirement that a dispute be "genuine" means simply that there must be more than "some metaphysical doubt as to the material facts." 475 U.S. at 475 U. S. 586. [Footnote 2/2]

Nor does *Adickes,* also relied on by the Court, suggest in any way that the appropriate summary judgment inquiry is whether the evidence overwhelmingly supports one party. *Adickes,* like *Cities Service,* presented the question of whether a grant of summary judgment in favor of a defendant on a conspiracy count was appropriate. The plaintiff, a

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white schoolteacher, maintained that employees of defendant Kress conspired with the police to deny her rights protected by the Fourteenth Amendment by refusing to serve her in one of its lunchrooms simply because she was white and accompanied by a number of black schoolchildren. She maintained, among other things, that Kress arranged with the police to have her arrested for vagrancy when she left the defendant's premises. In support of its motion for summary judgment, Kress submitted statements from a deposition of one of its employees asserting that he had not communicated or agreed with the police to deny plaintiff service or to have her arrested, and explaining that the store had taken the challenged action not because of the race of the plaintiff, but because it was fearful of the

reaction of some of its customers if it served a racially mixed group. Kress also submitted affidavits from the Chief of Police and the arresting officers denying that the store manager had requested that petitioner be arrested, and noted that, in the plaintiff's own deposition, she conceded that she had no knowledge of any communication between the police and any Kress employee, and was relying on circumstantial evidence to support her allegations. In opposing defendant's motion for summary judgment, plaintiff stated that defendant, in its moving papers, failed to dispute an allegation in the complaint, a statement at her deposition, and an unsworn statement by a Kress employee, all to the effect that there was a policeman in the store at the time of the refusal to serve, and that it was this policeman who subsequently made the arrest. Plaintiff argued that this sequence of events "created a substantial enough possibility of a conspiracy to allow her to proceed to trial. . . ." 398 U.S. at 398 U. S. 157.

We agreed, and therefore reversed the lower courts, reasoning that Kress

"did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some

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Kress employee that petitioner not be served."

Ibid. Despite the fact that *none of the materials relied on by plaintiff* met the requirements of Rule 56(e), we stated nonetheless that Kress failed to meet its initial burden of showing that there was no genuine dispute of a material fact. Specifically, we held that, because Kress failed to negate plaintiff's materials suggesting that a policeman was in fact in the store at the time of the refusal to serve,

"it would be open to a jury . . . to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds,' and thus reached an understanding that petitioner should be refused service."

Id. at 398 U. S. 158.

In *Adickes,* we held that a jury might permissibly infer a conspiracy from the mere presence of a policeman in a restaurant. We never reached, and did not consider, whether the evidence was "one-sided," and, had we done so, we clearly would have had to affirm, rather than reverse, the lower courts, since, in that case, there was no admissible evidence submitted by petitioner, and a significant amount of evidence presented by the defendant tending to rebut the existence of a conspiracy. The question we did reach was simply

tending to rebut the existence of a conspiracy. The question we did reach was simply whether, as a matter of conspiracy law, a jury would be entitled, again, as a matter of law, to infer from the presence of a policeman in a restaurant the making of an agreement between that policeman and an employee. Because we held that a jury was entitled so to infer, and because the defendant had not carried its initial burden of production of demonstrating that there was no evidence that there was not a policeman in the lunchroom, we concluded that summary judgment was inappropriate.

Accordingly, it is surprising to find the case cited by the majority for the proposition that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Ante* at 477 U. S. 249. There was, of course, *no* admissible evidence in *Adickes* favoring the nonmoving plaintiff; there was only an

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unrebutted assertion that a Kress employee and a policeman were in the same room at the time of the alleged constitutional violation. Like *Cities Service, Adickes* suggests that, on a defendant's motion for summary judgment, a trial court must consider whether, as a matter of the substantive law of the plaintiff's cause of action, a jury will be permitted to draw inferences supporting the plaintiff's legal theory. In *Cities Service,* we found, in effect, that the plaintiff had failed to make out a *prima facie* case; in *Adickes,* we held that the moving defendant had failed to rebut the plaintiff's *prima facie* case. In neither case is there any intimation that a trial court should inquire whether plaintiff's evidence is "significantly probative," as opposed to "merely colorable," or, again, "one-sided." Nor is there in either case any suggestion that, once a nonmoving plaintiff has made out a *prima facie* case based on evidence satisfying Rule 56(e) that there is any showing that a defendant can make to prevail on a motion for summary judgment. Yet this is what the Court appears to hold, relying, in part, on these two cases. [Footnote 2/3]

As explained above, and as explained also by JUSTICE REHNQUIST in his dissent, *see post* at 477 U. S. 271, I cannot agree that the authority cited by the Court supports its position. In my view, the Court's result is the product of an exercise

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akin to the child's game of "telephone," in which a message is repeated from one person to another and then another; after some time, the message bears little resemblance to what was originally spoken. In the present case, the Court purports to restate the summary judgment test, but, with each repetition, the original understanding is increasingly distorted.

But my concern is not only that the Court's decision is unsupported; after all, unsupported views may nonetheless be supportable. I am more troubled by the fact that the Court's opinion sends conflicting signals to trial courts and reviewing courts which must deal with summary judgment motions on a day-to-day basis. This case is about a trial court's responsibility when considering a motion for summary judgment, but in my view, the Court, while instructing the trial judge to "consider" heightened evidentiary standards, fails to explain what that means. In other words, how does a judge assess how one-sided evidence is, or what a "fair-minded" jury could "reasonably" decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

The Court's opinion is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions:

"[I]t is clear enough from our recent cases that, at the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter. . . ."

Ante at 477 U. S. 249.

"Our holding . . . does not denigrate the role of the jury. . . . 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 nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."

Ante at 477 U. S. 255.

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But the Court's opinion is also full of language which could surely be understood as an invitation -- if not an instruction -- to trial courts to assess and weigh evidence much as a juror would:

"When determining if a genuine factual issue . . . exists . . a trial judge must *bear in mind the actual quantum and quality* of proof necessary to support liability. . . . For example, *there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity* to allow a rational finder of fact to find actual malice by clear and convincing evidence."

Ante at 477 U. S. 254 (emphasis added).

"[T]he inquiry . . . [is] whether the evidence presents a *sufficient* disagreement to require submission to a jury, or whether *it is so one-sided* that one party must prevail as a matter of law."

Ante at 477 U. S. 251-252 (emphasis added).

"[T]he judge must ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."

Ante at 477 U. S. 252.

I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," *i.e.,* the importance and value, of the evidence in light of the "quantum," *i.e.,* amount "required," could *only* be performed by weighing the evidence.

If, in fact, this is what the Court would, under today's decision, require of district courts, then I am fearful that this new rule -- for this surely would be a brand new procedure -- will transform what is meant to provide an expedited "summary"

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procedure into a full-blown paper trial on the merits. It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the "quantum" of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with all of the evidence he can muster in support of his client's case. Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then, in my view, grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

It may well be, as JUSTICE REHNQUIST suggests, *see post* at 477 U. S. 270-271, that the Court's decision today will be of little practical effect. I, for one, cannot imagine a case in which a judge might plausibly hold that the evidence on motion for summary judgment was sufficient to enable a plaintiff bearing a mere preponderance burden to get to the jury -- *i.e.,* that a *prima facie* case had been made out -- but insufficient for a plaintiff bearing a clear-and-convincing burden to withstand a defendant's summary judgment motion.

Imagine a suit for breach of contract. If, for example, the defendant moves for summary judgment and produces one purported eyewitness who states that he was present at the time the parties discussed the possibility of an agreement, and unequivocally denies that the parties ever agreed to enter into a contract, while the plaintiff produces one purported eyewitness who asserts that the parties did in fact come to terms, presumably that case would go to the jury. But if the defendant produced not one, but 100 eyewitnesses, while the plaintiff stuck with his single witness, would that case, under the Court's holding, still go to the jury? After all, although the plaintiff's burden in this hypothetical contract action is to prove his case by a mere preponderance of the evidence, the judge, so the Court tells us, is to "ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Ante* at 477 U. S. 252. Is there, in this hypothetical example, "a sufficient disagreement to require submission

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to a jury," or is the evidence "so one-sided that one party must prevail as a matter of law"? *Ante* at 477 U. S. 251-252. Would the result change if the plaintiff's one witness were now shown to be a convicted perjurer? Would the result change if, instead of a garden variety contract claim, the plaintiff sued on a fraud theory, thus requiring him to prove his case by clear and convincing evidence?

It seems to me that the Court's decision today unpersuasively answers the question presented, and in doing so raises a host of difficult and troubling questions for which there may well be no adequate solutions. What is particularly unfair is that the mess we make is not, at least in the first instance, our own to deal with; it is the district courts and courts of appeals that must struggle to clean up after us.

In my view, if a plaintiff presents evidence which either directly or by permissible inference (and these inferences are a product of the substantive law of the underlying claim) supports all of the elements he needs to prove in order to prevail on his legal claim, the plaintiff has made out a *prima facie* case, and a defendant's motion for summary judgment must fail, regardless of the burden of proof that the plaintiff must meet. In other words, whether evidence is "clear and convincing," or proves a point by a mere preponderance, is for the factfinder to determine. As I read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain.

[Footnote 2/1]

The Court's holding today is not, of course, confined in its application to First Amendment cases. Although this case arises in the context of litigation involving libel and the press, the Court's holding is that,

"in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden."

Ante at 477 U. S. 254. Accordingly, I simply do not understand why JUSTICE REHNQUIST, dissenting, feels it appropriate to cite *Calder v. Jones*, 465 U.S. 783 (1984), and to remind the Court that we have consistently refused to extend special procedural protections to defendants in libel and defamation suits. The Court today does nothing of the kind. It changes summary judgment procedure for all litigants, regardless of the substantive nature of the underlying litigation.

Moreover, the Court's holding is not limited to those cases in which the evidentiary standard is "heightened," *i.e.*, those in which a plaintiff must prove his case by more than a mere preponderance of the evidence. Presumably, if a district court ruling on a motion for summary judgment in a libel case is to consider the "quantum and quality" of proof necessary to support liability under *New York Times, ante* at 477 U. S. 254, and then ask whether the evidence presented is of "sufficient caliber or quantity" to support that quantum and quality, the court must ask the same questions in a garden variety action where the plaintiff need prevail only by a mere preponderance of the evidence. In other words, today's decision, by its terms, applies to *all* summary judgment motions, irrespective of the burden of proof required and the subject matter of the suit.

[Footnote 2/2]

Writing in dissent in *Matsushita*, JUSTICE WHITE stated that he agreed with the summary judgment test employed by the Court, namely, that

"[w]here 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.'"

475 U.S. at 475 U. S. 599. Whether the shift, announced today, from looking to a "reasonable," rather than a "rational," jury is intended to be of any significance, there are other aspects of the *Matsushita* dissent which I find difficult to square with the Court's holding in the present case. The *Matsushita* dissenters argued:

"... [T]he Court summarizes *Monsanto Co. v. Spray-Rite Service Corp., supra*, as holding that 'courts should not permit factfinders to infer conspiracies when such inferences are

ground that the plaintiff has failed to produce sufficient evidence of malice. The only evidence of malice produced by the plaintiff is the same testimony of witness A, who is duly impeached by the defendant for the prior perjury conviction. In addition, the trial judge has now had an opportunity to observe the demeanor of witness A, and has noticed that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers.

May the trial court, at this stage, grant a directed verdict? Again, surely not; we are still dealing with "credibility determinations."

The defendant now puts on its testimony, and produces three witnesses who were present at the time when witness A alleges that the reporter said she had not checked the story and had grave doubts about its accuracy as to plaintiff. Witness A concedes that these three people were present at the meeting, and that the statement of the reporter took place in the presence of all these witnesses. Each witness categorically denies that the reporter made the claimed statement to witness A.

May the trial court now grant a directed verdict at the close of all the evidence? Certainly the plaintiff's case is appreciably weakened by the testimony of three disinterested witnesses, and one would hope that a properly charged jury would quickly return a verdict for the defendant. But as long as credibility is exclusively for the jury, it seems the Court's analysis would still require this case to be decided by that body.

Thus, in the case that I have posed, it would seem to make no difference whether the standard of proof which the plaintiff had to meet in order to prevail was the preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. But if the application of the standards makes no difference in the case that I hypothesize, one may fairly ask in what sort of case *does* the difference in standards

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make a difference in outcome? Cases may be posed dealing with evidence that is essentially documentary, rather than testimonial; but the Court has held in a related context involving Federal Rule of Civil Procedure 52(a) that inferences from documentary evidence are as much the prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U. S. 564, 470 U. S. 574 (1985). The Court affords the lower courts no guidance whatsoever as to what, if any, difference the abstract standards that it propounds would make in a particular case.

There may be more merit than the Court is willing to admit to Judge Learned Hand's observation in *United States v. Feinberg,* 140 F.2d 592, 594 (CA2), *cert. denied,* 322 U.S. 726 (1944), that "[w]hile at times it may be practicable" to

"distinguish between the evidence which should satisfy reasonable men and the evidence which should satisfy reasonable men beyond a reasonable doubt[,] . . . in the long run, the line between them is too thin for day-to-day use."

The Court apparently approves the overruling of the *Feinberg* case in the Court of Appeals by Judge Friendly's opinion in *United States v. Taylor,* 464 F.2d 240 (1972). But even if the Court is entirely correct in its judgment on this point, Judge Hand's statement seems applicable to this case, because the criminal case differs from the libel case in that the standard in the former is proof "beyond a reasonable doubt," which is presumably easier to distinguish from the normal "preponderance of the evidence" standard than is the intermediate standard of "clear and convincing evidence."

More important for purposes of analyzing the present case, there is no exact analog in the criminal process to the motion for summary judgment in a civil case. Perhaps the closest comparable device for screening out unmeritorious cases in the criminal area is the grand jury proceeding, though the comparison is obviously not on all fours. The standard for allowing a criminal case to proceed to trial is not whether the government has produced *prima facie* evidence of guilt beyond

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a reasonable doubt for every element of the offense, but only whether it has established probable cause. *See United States v. Mechanik,* 475 U. S. 66, 475 U. S. 70 (1986). Thus, in a criminal case, the standard used prior to trial is much more lenient than the "clear beyond a reasonable doubt" standard which must be employed by the finder of fact.

The three differentiated burdens of proof in civil and criminal cases, vague and impressionistic though they necessarily are, probably do make some difference when considered by the finder of fact, whether it be a jury or a judge in a bench trial. Yet it is not a logical or analytical message that the terms convey, but instead almost a state of mind; we have previously said:

"Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests . . . may well be largely an academic exercise. . . . Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be *unknowable*, given that factfinding is a process shared by countless thousands of

individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence."

Addington v. Texas, 441 U. S. 418, 441 U. S. 424-425 (1979) (emphasis added).

The Court's decision to engraft the standard of proof applicable to a factfinder onto the law governing the procedural motion for a summary judgment (a motion that has always been regarded as raising a question of law, rather than a question of fact, *see, e.g., La Riviere v. EEOC,* 682 F.2d 1275, 1277-1278 (CA9 1982) (Wallace, J.)), will do great mischief, with little corresponding benefit. The primary effect of the Court's opinion today will likely be to cause the decisions of trial judges on summary judgment motions in libel cases to be

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more erratic and inconsistent than before. This is largely because the Court has created a standard that is different from the standard traditionally applied in summary judgment motions without even hinting as to how its new standard will be applied to particular cases.

Oral Argument - December 03, 1985

McKINNEY v. OFFICE OF SHERIFF OF WHITLEY COUNTY

No. 16-4131.

866 F.3d 803 (2017)

Terrance S. McKINNEY, Plaintiff-Appellant, v. OFFICE OF the SHERIFF OF WHITLEY COUNTY, Defendant-Appellee.

United States Court of Appeals, Seventh Circuit.

Argued April 19, 2017.

Decided August 8, 2017.

Attorney(s) appearing for the Case

Robert O. Vegeler, Attorney, Vegeler Law Office, Fort Wayne, IN, for Plaintiff-Appellant.

Julie J. Havenith, Attorney, Law Offices of Travelers Insurance, Merrillville, IN, for Defendants-Appellees.

Before Bauer, Posner, and Hamilton, Circuit Judges.

Hamilton, *Circuit Judge.*

In 2013 the Sheriff of Whitley County, Indiana hired the County's first black police officer ever, Terrance McKinney. Nine

[866 F.3d 805]

months later, McKinney was fired. He sued for race discrimination. The district court granted summary judgment for the Office of the Sheriff, and McKinney has appealed.

We reverse. Viewed in the light most favorable to plaintiff McKinney, his extensive evidence adds up to a strong case of race discrimination. As we explain in detail, the defendant has offered an ever-growing list of rationales for firing McKinney that fall apart in the face of his evidence. The Sheriff's termination letter provided three reasons for his discharge. Four days later, the Whitley County Board of Commissioners sent McKinney another letter that added two more reasons. After McKinney brought suit, the defense added three more reasons. 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. He also presented substantial evidence that the many rationales offered for firing him were baseless and pretextual. In addition, the district court erred by disregarding most of McKinney's evidence, improperly discounting his testimony as "self-serving," and misreading our precedent on the "common actor" inference that is sometimes argued in discrimination cases. We remand for trial.

I. *Factual and Procedural Background*

A. *McKinney's Tenure as a Deputy Sheriff*

Because the Office of the Sheriff moved for summary judgment, we construe all evidence and present the facts in the light most favorable to McKinney, who was the non-moving party. E.g., *Chaib v. GEO Group, Inc.*, 819 F.3d 337, 340 (7th Cir. 2016). On August 5, 2013, then-Sheriff Mark Hodges hired

McKinney as a full-time merit officer. This on entails a one-year probationary period during which the Sheriff may fire the officer at his sole discretion, i.e., without approval from the merit board. See Ind. Code § 36-8-10-10(b). The probationary period is intended to ensure that new officers are capable of performing their duties before they benefit from state law that requires good cause for firing and provides extensive procedural protections. See Ind. Code § 36-8-10-11.

McKinney was Whitley County's first black merit officer. Sheriff Hodges discussed McKinney's race with him during his job interview, and McKinney later testified that he did not expect that he would experience racial discrimination at the Sheriff's Office. After he began, however, a number of incidents started to make him feel uncomfortable. One officer used the "n-word" in front of him. Once when buying coffee, McKinney's fellow officer said that he wanted his "coffee black like my partner." McKinney also testified that the other officers refused to train him and sometimes would not speak to him. Sheriff Hodges told McKinney that he should watch the movie "42," which is about Jackie Robinson breaking the color barrier in major league baseball in 1947. Hodges told McKinney that the movie would "help [him] out."

On May 15, 2014, Sheriff Hodges fired McKinney. The termination notice gave three reasons: submitting false work hours while attending the Indiana Law Enforcement Academy; violating the standard operating procedure that requires filing complete monthly reports; and violating the standard operating procedure that governs fueling county vehicles. Four days later, the Whitley County Board of Commissioners sent McKinney a termination letter that added two more reasons for his discharge: damaging a county vehicle and "failure to complete a transport and follow verbal instructions." After McKinney

brought suit, the defense added three more reasons, claiming that McKinney once texted while driving, crashed a county vehicle, and was late transporting a juvenile to court. These various rationales and McKinney's evidence undermining their credibility are discussed below in Part II-C.

B. *Discrimination Lawsuit*

After he was terminated, McKinney brought suit against the Office of the Sheriff of Whitley County and Deputy Sheriff Tony Helfrich on several theories. The only claim on appeal is McKinney's claim against his employer, the Office of the Sheriff itself, for race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. The Office of the Sheriff moved for summary judgment, arguing that McKinney "pointed to no direct evidence of racial discrimination." The defense also argued that McKinney could not establish discrimination through the burden-shifting approach adapted from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), because he did not meet the Sheriff's legitimate employment expectations. As evidence of this, the defense relied on Sheriff Hodges' affidavit, which listed the various rationales that had accumulated since McKinney was fired.

McKinney responded that the racial comments, social exclusion at work, and failure to train provided direct evidence of discrimination. He also submitted unusually detailed evidence — including testimony, interrogatory answers, relevant gas receipts, scheduling records, prisoner transport records, the Sheriff's standard operating procedures, and much more — to show that the supposed reasons for firing him were not only wrong but so baseless as to support an inference of pretext, meaning dishonesty.

The district court granted summary judgment for the defense. *McKinney v. Office of the Sheriff of Whitley County*, No. 1:15-cv-79, 2016 WL 6680288 (N.D. Ind. Nov. 14, 2016). The court wrote that McKinney failed to specify "any direct evidence of discrimination." It also expressed displeasure with the format of McKinney's response to the motion for summary judgment, writing that McKinney "points in general to his Statement of Genuine Issues of Fact" but does "not specify which facts would constitute such direct evidence." The court apparently refused to consider these facts, saying it "is not the Court's job to sift through the record to determine whether there is sufficient evidence to support a party's claim." 2016 WL 6680288, at *5.

The district court also determined that McKinney failed to establish a prima facie case under the *McDonnell Douglas* framework because he failed to meet the Sheriff's legitimate employment expectations. The court based this conclusion almost exclusively on Sheriff Hodges' version of events from his affidavit. The court did not address most of McKinney's evidence, writing that "all that McKinney offers is his own assertions that he was meeting Defendant's legitimate job expectations." The court discounted this testimony as "self-serving, speculative, and conclusory." In addition, the court noted the "strong presumpti[on]" against finding discrimination when the same person both hires and fires a plaintiff-employee: "If Sheriff Hodges wanted to discriminate against McKinney based on his race, he could have refused to hire him in the first place."

II. *Analysis*

A. *Legal Standards*

Summary judgment is appropriate only if the "materials in the record, including depositions, documents, electronically

stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Magin v. Monsanto Co.*, 420 F.3d 679, 686 (7th Cir. 2005), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To the extent the district court's ruling was based on its local rules, we review the application of those rules for abuse of discretion. See *Friend v. Valley View Comm. Unit School Dist. 365U*, 789 F.3d 707, 710 (7th Cir. 2015); *Harmon v. OKI Systems*, 115 F.3d 477, 481 (7th Cir. 1997) (district court did not abuse discretion by overlooking moving defendant's technical failure to comply with local summary judgment rule where opposing party was not prejudiced).

Title VII prohibits an employer from discharging an employee because of that person's race. See 42 U.S.C. § 2000e-2(a)(1). A plaintiff may prove race discrimination either directly or indirectly, and with a combination of direct and circumstantial evidence. The direct method requires the plaintiff to set forth "sufficient evidence, either direct or circumstantial, that the employer's discriminatory animus motivated an adverse employment action." *Coleman v. Donahoe*, 667 F.3d 835, 845 (7th Cir. 2012). The indirect method allows a plaintiff to prove discrimination by using the burden-shifting approach articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See *Coleman*, 667 F.3d at 845.

In *Ortiz v. Werner Enterprises, Inc.*, 834 F. ...0, 765 (7th Cir. 2016), we clarified that the "direct" ... ndirect" methods are not subject to different legal standards. Courts should not sort evidence of discrimination "into different piles, labeled `direct' and `indirect,' that are evaluated differently." *Id.* at 766. Instead, there is a single inquiry: it is "simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race ... caused the discharge." *Id.* at 765. Our decision in *Ortiz* did not alter "*McDonnell Douglas* or any other burden-shifting framework, no matter what it is called as a shorthand." *Id.* at 766.

The *McDonnell Douglas* burden-shifting framework is designed to "sharpen the inquiry into the elusive factual question of intentional discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.8, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The plaintiff carries the initial burden of establishing a prima facie case of discrimination, which can be accomplished by setting forth evidence that: "(1) she is a member of a protected class, (2) her job performance met [the employer's] legitimate expectations, (3) she suffered an adverse employment action, and (4) another similarly situated individual who was not in the protected class was treated more favorably than the plaintiff." *Burks v. Wisconsin Dep't of Transportation*, 464 F.3d 744, 750-51 (7th Cir. 2006) (citation omitted). Once established, this prima facie case creates a presumption of discrimination, and the "burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason" for its employment decision. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817. "When the employer does so, the burden shifts back to the plaintiff, who must present evidence that the stated reason is a `pretext,' which in turn permits an inference of unlawful discrimination." *Coleman*, 667 F.3d at 845, quoting *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. 1817.

B. *Plaintiff's Presentation of Evidence*

It is undisputed that McKinney is a member of a protected class and suffered

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an adverse employment action. To defeat summary judgment by the burden-shifting route, McKinney must also come forward with evidence that he was meeting the Sheriff's legitimate employment expectations and that a similarly situated employee who is not in his protected class was treated more favorably. McKinney presented substantial documentary and testimonial evidence to support his claim, but the district court seems to have disregarded most of his evidence in favor of Sheriff Hodges' affidavit. We first sort out the evidence properly before the district court and then turn to the employer's stated rationales for firing McKinney.

The employer's motion for summary judgment was typical of many such motions in employment discrimination cases. It offered plausible rationales for the employer's action and challenged the plaintiff, who has the burden of persuasion on all or nearly all issues, to come forward with enough evidence to reach a jury.

Plaintiff responded with three documents. Docket entry 30 in the district court docket was a 25-page legal memorandum in opposition to the motion. Docket entry 31 was called Plaintiff's Statement of Genuine Disputes, and it had over 30 pages of detailed factual assertions with numerous citations to supporting evidence. The third document was an evidentiary appendix to the legal memorandum, containing around 125 pages of the evidence cited in the Statement of Genuine Disputes.

The district court disregarded most of McKinney's evidence, and that choice lies at the root of the erroneous grant of summary judgment. The court said McKinney presented no direct evidence of racial discrimination because he "points in general to his Statement of Genuine Issues of Fact" but does "not specify which facts would constitute such direct evidence." The court seemed to indicate that this rendered McKinney's filings noncompliant with the Northern District of Indiana's Local Rule 56-1, but it did not explain further. Instead, the court noted that it need not "sift through the record to determine whether there is sufficient evidence to support a party's claim" and it is the "advocate's job ... to make it easy for the court to rule in his client's favor." 2016 WL 6680288, at *5 (citations and quotations omitted.)

The district court was entitled to seek specific guidance through the record, but McKinney provided it here. A party seeking or opposing summary judgment must support his factual assertions about disputed facts with citations to "particular parts of the materials in the record," and the court need consider only the cited materials (though it may consider other materials in the record). Fed. R. Civ. P. 56(c)(1) & (c)(3). A party opposing summary judgment does not meet this obligation by simply dropping a stack of paper into the court file (literally or electronically) and asserting that someone who reads the stack will find a genuine issue of material fact. Accordingly, we have routinely affirmed grants of summary judgment when non-moving parties have failed to guide the court through their evidence. See, e.g., *Sommerfield v. City of Chicago*, 863 F.3d 645, 650, Nos. 12-1506 & 13-1265, 2017 WL 2962243, at *3 (7th Cir. July 12, 2017) (affirming partial summary judgment: the judge "rightly declined to wade through the voluminous record to find evidence on a counseled plaintiff's behalf"); *Ammons v. Aramark Uniform Services, Inc.*, 368 F.3d 809, 817-18 (7th Cir. 2004) ("[W]here a non-moving party denies a factual allegation by the party moving for summary judgment, that denial must include a specific reference to the affidavit or other part of the record that supports such a denial. Citations to an entire transcript of a deposition

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or to a lengthy exhibit are not specific and are, accordingly, inappropriate."); see also *Friend*, 789 F.3d at 710-11; *Davis v. Carter*, 452 F.3d 686, 692 (7th Cir. 2006).

Like many district courts, the Northern District of Indiana has adopted local rules regarding the format of summary judgment filings aimed at avoiding such failings and promoting sound decisions on the merits instead of procedural slipups. We review for abuse of discretion the district court's enforcement of its local rules. *Friend*, 789 F.3d at 710.

In this case, the court's explanation of this important issue was terse, and its exact concerns about McKinney's filings are unclear. As best we can tell, there was no valid ground for refusing to consider McKinney's evidence. Plaintiff's legal memorandum, statement of genuine issues of fact, and supporting evidence provide what the district court said was missing: a detailed and organized guide to plaintiff's evidence supporting his assertions of disputed facts and his legal arguments.

The district court asserted that McKinney failed to "specify which facts" support his claim, but in saying that, the court cited one of many pages on which McKinney *did* include a citation to the specific, relevant facts: "McKinney in the Statement of Genuine Disputes has presented at length in Dispute 9 what a reasonable trier of fact could determine includes direct evidence supporting racial discrimination." Dkt. No. 30 at 11. Turning to "Dispute 9," the reader finds detailed factual assertions about arguably direct evidence of discrimination, supported by specific citations to supporting evidence. Dkt. No. 31 at 18.

We see nothing in the Northern District's Local Rule 56-1 that plaintiff failed to satisfy, and the district court and the employer have not identified such a failing.[1] The rule specifies the "Required Filings" for a party opposing summary judgment, which include a response brief and any materials that the party claims raise a genuine dispute. In addition, the rule notes that the "response brief or its appendix must include a section labeled `Statement of Genuine Disputes' that identifies the material facts that the party contends are genuinely disputed."

McKinney's brief opened by noting his two concurrent filings and how they complied with local rules: "This Brief in response, as well as the Appendix, are filed pursuant to Federal Rule of Civil Procedure 56 and N.D. Ind. L.R. 56-1(b). The Appendix, which is separately filed pursuant to (b)(2), includes a section labeled `Statement of Genuine Disputes' and contains the material facts that the Plaintiff contends are related to facts that are genuinely disputed." Dkt. No. 30 at 1. In addition, the second page of McKinney's brief included citations to the "Statement of Genuine Disputes," listing where each factual dispute was discussed in that filing. *Id.* at 2.

It is also unclear what action, if any, the district court took in response to the perceived deficiency of McKinney's filings. The court did not strike any part of the filings, and it expressly considered portions

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of McKinney's testimonial evidence. However, it did not address most of McKinney's other evidence, which, to be frank, demolishes the employer's shifting list of rationales. The court instead relied on the Sheriff's affidavit to determine that McKinney did not meet the Sheriff's legitimate employment expectations. Because the court did not explain its apparent rejection of McKinney's evidence and we see no violation of Local Rule 56-1, we must conclude that the court abused its discretion when it failed to consider fully McKinney's evidence.

C. *The Employer's Stated Rationales for Firing Plaintiff*

The most striking features of this lawsuit are the sheer number of rationales the defense has offered for firing plaintiff and the quality and volume of evidence plaintiff has collected to undermine the accuracy and even the honesty of those rationales. We review these matters in detail, for they are the heart of the case.

1. *The Sheriff's Original Reasons*

When Sheriff Hodges fired McKinney, he gave three reasons. None holds water, at least for purposes of summary judgment.

a. *Falsified Hours at the Indiana Law Enforcement Academy?*

First, the Sheriff claims, McKinney falsified his hours while attending the Indiana Law Enforcement Academy. That Academy is in Plainfield, Indiana, which is approximately 140 miles from the Sheriff's Department in Whitley County. McKinney began a fifteen-week course at the Academy in March 2014. The course entailed ten hours per day at the Academy (including breakfast and lunch) from Monday to Thursday. McKinney stayed overnight on the Academy's campus and ate most meals in the Academy's cafeteria. McKinney's supposedly falsified hours are the hours he recorded for breakfast and lunch to reach ten-hour work days.

McKinney presented ample evidence that he did not fail to meet legitimate employment expectations by falsifying hours and that this rationale was false. The Sheriff has no written policy governing how to calculate compensable hours while attending the Academy. McKinney presented emails showing (a) that he had asked both the Sheriff's administrative assistant and the Chief Deputy Sheriff how he should record his hours at the Academy, and (b) that both confirmed he should record ten hours per day. McKinney also testified that he asked Sheriff Hodges himself about his hours at the Academy, and the Sheriff said: "It's ten-hour days. Any time that you do outside of that ten hours, like you got night classes ... just blot down your time." And the Sheriff later confirmed that McKinney was correctly documenting his hours, telling him "just keep doing what you're doing." Finally, McKinney presented timesheets showing how other officers had calculated their time while attending the Academy. *None of them clocked out for lunch.* They all just recorded ten-hour days. Based on this evidence, a jury could reasonably infer that Sheriff Hodges' first stated rationale for firing McKinney was not just a misunderstanding but a pretext.

b. *Missing Monthly Report?*

Second, the Sheriff claimed McKinney did not meet legitimate employment expectations because he failed to comply with the standard operating procedure that required him to submit complete monthly reports. As a preliminary matter, there simply is no standard operating procedure governing monthly reports. McKinney testified to this effect, and the Sheriff appears to acknowledge this in an interrogatory response.

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The supposed infraction involved one missing monthly report, and that was for a month that McKinney spent entirely in training at the Academy. McKinney testified that since the monthly report simply lists his law enforcement activities (e.g., number of traffic stops, arrests, etc.), he had no reason to submit it while training at the Academy. Since he had already submitted his gas receipts, it would have amounted to "turn[ing] in a blank document." McKinney testified that no one told him to submit a monthly report for his time at the Academy until four days before his termination. Once he was told the report was needed, he submitted it within an hour. The defendant has not tried to refute McKinney's evidence on this point. It simply states on appeal that he "did not turn in his monthly report as required by the Whitley County Sheriff's Department [standard operating procedures]." Firing someone for violating a standard operating procedure that does not actually exist, or about which he was not told, could easily be found to be a pretext.

c. *Misusing Gasoline Credit Card?*

Third, the Sheriff claimed McKinney vio[illegible]le standard operating procedure that governs fuelin[illegible]y vehicles. This is so, the Sheriff said, because McKinney used his official gasoline credit card to fuel his county-provided car while attending the Academy in Plainfield instead of using the designated county gas facility in Whitley County. In this instance, there was a standard operating procedure, but McKinney presented substantial evidence that he did not actually violate it. He also presented evidence that he received express permission from his supervisors to use his credit card and that other officers used their credit cards in the same way he had. This evidence would allow a jury to find that the Sheriff's rationale was both wrong and dishonest.

The relevant part of the standard operating procedure reads: "Gasoline credit cards shall be ... Used only with a county commission [i.e., vehicle] when fueling at the county facility is not available; Used only for purchases of gas and oil without prior approval from the Sheriff or Chief Deputy." McKinney presented evidence that the county facility in Whitley was "not available" when he was approximately 140 miles away at the Academy in Plainfield. McKinney testified that several senior officers instructed him that he was required to keep his fuel tank at least half full in case of emergencies. Basic math shows that his squad car could not make the round trip to and from Plainfield on one tank of gas, let alone half a tank, so he had to use his gas credit card to fuel his vehicle when he was at the Academy. McKinney also testified that before leaving for the Academy the Chief Deputy Sheriff asked: "[Y]ou got your gasoline credit cards? ... you're gonna need those." Finally, McKinney presented dozens of gas receipts from other officers that spanned several years. *They had also used their gas cards to fuel their county-owned vehicles while attending the Academy.* Again, this evidence would easily support an inference that the Sheriff's rationale for firing McKinney was not merely mistaken but dishonest.

2. *The Commissioners' Rationales*

Four days after the Sheriff issued the initial termination letter, the Whitley County Board of Commissioners added two new reasons for McKinney's discharge. The County Board said that McKinney damaged a county vehicle and failed to complete a detainee transport. For summary judgment purposes, these two rationales fare as poorly as the Sheriff's first three.

The vehicle damage, as explained by McKinney's testimony, was a slight ding to

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the side view mirror of his squad car. This damage occurred when he was responding quickly to an emergency message that an officer was in trouble. After the emergency was resolved (fortunately it turned out to be a false alarm), McKinney reported the ding on his mirror, and he was told by a detective that it was "No big deal." Nonetheless, the Sheriff testified that McKinney violated the standard operating procedure that requires officers to report an accident from the scene where the accident occurred.

Once again, the Sheriff seems to have misconstrued his own standard operating procedures. The policy says in relevant part: "All such crashes shall be investigated at the scene, as soon as possible, unless an emergency or other justifiable reason causes a delay." McKinney presented evidence that he was responding to an emergency. The employer has not disputed his evidence. Based on this record, McKinney's conduct simply did not violate the standard operating procedure. What's more, McKinney testified that another new officer who was white had an accident that tore off the front bumper of his squad car. That officer did not receive a reprimand. Instead, other officers joked about the accident and gave him the wrecked bumper as a gag gift at a Christmas party.

The Commissioners' second new rationale was McKinney's "Failure to complete a transport" and to follow certain unspecified instructions. McKinney presented evidence that he completed the transport as ordered. He submitted the actual transport records that include the date, time, and location of the completed transport, along with signatures by the approving officials. As for the "instructions," McKinney testified in detail, explaining how he followed the exact instructions that he received. Again, considering the evidence in the light reasonably most favorable to McKinney, his evidence refuting the charges is so specific that a jury could reasonably conclude that these added rationales for his firing were not only mistaken but dishonest.

3. *Still More Rationales*

After McKinney brought suit, the defense offered three more rationales for McKinney's termination: texting while driving; an accident in a vehicle; and a late transport of a juvenile to court. The Sheriff's Office did not develop these rationales and mentions them only in passing on appeal. McKinney offered evidence controverting or explaining these as well, just as with the first five rationales for his termination.

The Sheriff testified that another officer reported that she saw McKinney texting while driving. McKinney told the Sheriff that he was not texting, but rather using his phone's GPS function. The Sheriff said "regardless, he admitted to using his phone while driving which is contrary to our [standard operating procedures] and is extremely unsafe." Yet again, the Sheriff misreads his own standard operating procedures. The relevant provision says only that cell phones may "not be used for texting while the vehicle is in motion," and it specifically permits some uses of cell phones: "Use of cellular telephones while driving is permitted only when it can be done safely." McKinney presented evidence that he was not texting and that he was using his phone in a way permitted by the relevant standard operating procedure.

The Sheriff's Office also asserts that McKinney had a second "chargeable accident" with a vehicle (the first was the ding to his side mirror), but does not explain any further. In his deposition McKinney indicated this accident occurred while he was driving in a snowstorm and slid off the road into a guardrail.

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The defense also now claims that McKinney was late transporting a juvenile to a court proceeding. Again, McKinney explained the incident in detailed testimony. In short, he was told that two juveniles were at the same location when they were not, and as a result, the transport was about one minute late.

The Sheriff's Office failed to explain these rationales at all, and McKinney presented evidence to challenge or explain them. The fact that the defendant did not offer any of these rationales at the time it fired McKinney also calls into question whether any of these reasons actually motivated the firing, so these could easily be deemed pretexts, as well.

Thus, McKinney offered substantial circumstantial evidence at summary judgment to support his claim of racial discrimination. The core question is "simply whether [McKinney's] evidence would permit a reasonable factfinder to conclude that the plaintiff's race ... caused the discharge." *Ortiz*, 834 F.3d at 765. McKinney's evidence would easily support such a finding. He offered various forms of evidence — including testimony, interrogatory answers, internal department documents, and more — to show that: officers and supervisors made inappropriate racial remarks to him; he was socially ostracized; supervisors failed to train him adequately; he was fired for conduct that supervisors expressly authorized (e.g., recording ten-hour days at the Academy, using his gas card, and more); he was treated more harshly than other employees for the same conduct (e.g., dinging his side mirror); he was penalized for violating standard operating procedures that either did not exist or that he did not in fact violate (e.g., the monthly report, use of his cell phone's GPS function); and more. In response, the Sheriff's Office has offered sparse evidence, relying almost exclusively on an affidavit from Sheriff Hodges. After reviewing this evidence, a reasonable factfinder could conclude that McKinney was fired because of his race.

McKinney also offered sufficient evidence to satisfy the *McDonnell Douglas* burden-shifting framework. At the first stage of *McDonnell Douglas*, where McKinney must establish a prima facie case, our inquiry is objective. We do not inquire into the subjective belief of the employer, such as whether the employer made an honest mistake. The *McDonnell Douglas* division of labor reserves that consideration for the pretext analysis. E.g., *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1251 (7th Cir. 1990) ("[T]he determination of whether a plaintiff is `qualified' requires an objective analysis. As such, an employer's knowledge or lack of knowledge is of no relevance at the prima facie stage of the case."); see also *Pilditch v. Board of Education of City of Chicago*, 3 F.3d 1113, 1117 (7th Cir. 1993) (at prima facie stage, relevant question is not whether employee satisfied employer's legitimate employment expectations "in the subjective sense" but rather "whether the employee is able to put on objective evidence that he is sufficiently competent to satisfy the legitimate expectations of an employer").

Here, McKinney presented evidence that rebuts defendant's claim that he did not meet legitimate employment expectations. He also presented evidence that shows he was treated differently than similarly situated employees who were not in his protected class. Because it is also undisputed that McKinney is a member of a protected class and suffered an adverse employment action, he has established a prima facie case of discrimination. See *Burks*, 464 F.3d at 750-51.

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The Sheriff's Office has satisfied the second step of *McDonnell Douglas* by articulating what would be legitimate, nondiscriminatory reasons for the termination. See *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817. That shifted the burden to McKinney to offer evidence that the stated reasons were pretexts. As we explained above, McKinney has presented ample evidence that the stated non-discriminatory reasons are pretextual. Evidence that the employer has offered false reasons for its actions permits an inference of unlawful discrimination. See *Coleman*, 667 F.3d at 845, quoting *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. 1817; *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 (L.Ed.2d 105 2000) ("it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation").

E. *Additional Issues*

The foregoing warrants reversal, but we write further to note two additional legal errors in the summary judgment order. First, the court was wrong to discount McKinney's testimony as "self-serving, speculative, and conclusory." Our cases for at least the past fifteen years teach that "Self-serving affidavits can indeed be a legitimate method of introducing facts on summary judgment." *Widmar v. Sun Chemical Corp.*, 772 F.3d 457, 459-60 (7th Cir. 2014) (citations omitted). We have tried often to correct "the misconception that evidence presented in a `self-serving' affidavit is never sufficient to thwart a summary judgment motion." *Payne v. Pauley*, 337 F.3d 767, 773 (7th Cir. 2003); see especially *Hill v. Tangherlini*, 724 F.3d 965, 967 & n.1 (7th Cir. 2013) (overruling earlier cases indicating "self-serving" evidence could not be used to show genuine dispute of fact) ("Deposition testimony, affidavits, responses to interrogatories, and other written statements by their nature are self-serving. As we have repeatedly emphasized over the past decade, the term `self-serving' must not be used to denigrate perfectly admissible evidence through which a party tries to present its side of the story at summary judgment.") (citations omitted).

Second, the district court seems to have overestimated the strength of the "common actor" inference when it wrote that if the Sheriff had wanted to discriminate against McKinney, he would have refused to hire him in the first place. As we have explained, the "common 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). The district court used this principle by relying on our decision in *EEOC v. Our Lady of Resurrection Medical Center*, 77 F.3d 145, 151-52 (7th Cir. 1996). Our cases since then, however, have 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. See, e.g., *Perez*, 731 F.3d at 709 ("The `common actor' or `same actor' inference is a reasonable inference that may be argued to the jury, but it is not a conclusive presumption that applies as a matter of law.... That inference is `something for the trier of fact to consider.'") (citations and quotations omitted); *Hermreiter v. Chicago Housing Authority*, 315 F.3d 742, 747 (7th Cir. 2002) ("It is misleading to suggest (as some cases do) that [the common actor inference] creates a `presumption' of nondiscrimination, as that would imply that the employee must meet it or lose his case. It is just something for the trier of fact to consider.") (citations omitted); *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 361

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(7th Cir. 2001) ("We emphatically rejected the `same-actor inference' in the race-discrimination setting in *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 745 (7th Cir. 1999)....").

We have tried to impose limits on the common actor inference to ensure it does not outgrow its usefulness. The inference may be helpful in some limited situations, which is why "we allow the jury to hear such evidence and weigh it for what it is worth." *Perez*, 731 F.3d at 710. There are many other occasions, however, where it is unsound to infer the absence of discrimination simply because the same person both hired and fired the plaintiff-employee. Examples abound. The same supervisor may need to fill a position quickly, then later when the exigency subsides, fire the employee due to unlawful bias. The same supervisor could both hire a woman and then refuse to promote her for discriminatory reasons. The same supervisor could both hire a woman and later fire her because she became pregnant. Cf. *Young v. United Parcel Service, Inc.*, 575 U.S. ____, ____, 135 S.Ct. 1338, 1343, 191 L.Ed.2d 279 (2015) ("The Pregnancy Discrimination Act makes clear that Title VII's prohibition against sex discrimination applies to discrimination based on pregnancy."). The list could go on, but only one more example is needed. The same supervisor could hire a county's first black police officer, hoping there would be no racial friction in the workplace. But after it became clear that other officers would not fully accept their new black colleague,

that same supervisor could fire the black [illegible]er because of his race based on a mistaken notion of th[illegible]ater good" of the department. 4

For the foregoing reasons, we REVERSE [illegible]istrict court's grant of summary judgment, and we RE[illegible]ND for further proceedings on McKinney's Title VII claim consistent with this opinion.

FootNotes

1. The Northern District's Local Rule 56-1 states in relevant part:

> (b) Opposing Party's Obligations.
>
> (1) Required Filings. A party opposing the motion must, within 28 days after the movant serves the motion, file and serve
>
> (A) a response brief; and
>
> (B) any materials that the party contends raise a genuine dispute.
>
> (2) Content of Response Brief or Appendix. The response brief or its appendix must include a section labeled Statement of Genuine Disputes that identifies the material facts that the party contends are genuinely disputed so as to make a trial necessary.

2. Our caution toward the common actor inference is supported by substantial research in the social sciences. See, e.g., Victor D. Quintanilla & Cheryl R. Kaiser, *The Same-Actor Inference of Nondiscrimination: Moral Credentialing and the Psychological and Legal Licensing of Bias*, 104 Cal. L. Rev. 1, 6, 11-18 (2016) ("the implicit behavioral theories underpinning the same-actor doctrine have been discredited by decades of psychological science on aversive racism, implicit bias, and moral licensing").

Edwards v. Edwards

801 P.2d 782 (1990)

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Laverne Watts EDWARDS, Petitioner On Review, v. Ernest Jackson EDWARDS, Respondent On Review.

TC 16-85-06382; CA A48610; SC S36265.

Supreme Court of Oregon, In Banc.

Argued and Submitted November 1, 1989.

Decided November 26, 1990.

*783 Ira L. Gottlieb, Portland, argued the cause for petitioner on review. With him on the petition were Lawrence D. Gorin, Portland and Keller, Gottlieb & Gorin, Portland.

John G. Cox, Eugene, argued the cause for respondent on review.

Before PETERSON, C.J., and LINDE, CARSON, JONES, GILLETTE, VAN HOOMISSEN and FADELEY, JJ.[*]

FADELEY, Justice.

Plaintiff relies on service by certified mail, return receipt requested, addressed to an individual defendant's Nevada post office box, to constitute sufficient service of summons and complaint in an Oregon action. That mail was not delivered to defendant but was, instead, returned to plaintiff by the postal authorities rubber-stamped "UNCLAIMED." The Court of Appeals affirmed a circuit court judgment dismissing the complaint because of insufficient service. Edwards v. Edwards, 96 Or. App. 623, 773 P.2d 809 (1989). We affirm.

Plaintiff filed her complaint pro se in August of 1985.[1] Plaintiff's testimony at an evidentiary hearing, held to determine the sufficiency of the mailed service, disclosed that she knew of the opportunity to serve defendant by personal service in California during September of 1985. The trial court found that personal service could have been undertaken in California but was not attempted. Instead, plaintiff mailed the summons and complaint to defendant's Nevada post office box address on October 9, 1985. After leaving notices to pick up certified mail three times in October and on November 1, 1985, the Nevada postal officials, by rubber-stamped directions, returned the mail to plaintiff as sender. Plaintiff's hearing testimony also disclosed that she knew defendant travelled extensively, having been in at least five states in the first nine months of 1985.

More than 30 days after the mailing to defendant's post office box, plaintiff delivered a notice of default to the office of the lawyer who had represented defendant in the 1978 dissolution and in related, subsequent but completed appeals and proceedings therein. Shortly thereafter, defendant challenged the sufficiency of service of the summons and complaint in the August, 1985, action by a special appearance motion to dismiss under ORCP 21 A(5) signed by that lawyer.[2]

*784 Following the hearing and briefing by the parties, the trial judge ruled as follows:

"Evidence presented at the hearing discloses that Petitioner had an opportunity to serve Defendant at the parties' daughter's residence in Monrovia, California. This, Plaintiff declined to do. Instead, her papers were mailed to a post office address in Minden, Nevada, which was not determined to be the dwelling or abode of Defendant. Actual notice upon Defendant is contended based upon his handwriting appearing upon rejected envelopes other than the one mailed by Petitioner's affiant [i.e., other than the certified, return receipt requested, mailing envelope sent to defendant's Nevada post office box]. Other, admittedly inadequate, service was attempted by mailing copies of the papers to the Defendant's attorney John Cox, Defendant's mother, and Defendant's daughter. These attempts are described by Plaintiff as `good faith efforts to provide actual notice of the proceeding.' "Based upon the foregoing, I make the following findings and conclusions: "1. Actual knowledge of the proceeding is insufficient absent adequate service. "2. Personal service

could have been undertaken at the parties' daughter's residence in California but was not attempted. "3. Acts supporting substituted service are lacking. "4. Service by mail by itself upon an individual is not prescribed and does not constitute adequate service. "5. Copies of complaint and summons to Defendant's attorney, mother, and daughter do not cure the inadequacy of service. "6. Rule 7G is not available to cure the defect. ORCP 7 (D)(6)(a)[[3]] was not utilized to seek judicial determination of a method of service which under the circumstances would have been reasonably calculated to apprise the Defendant of the existence and pendency of the action. "It is my conclusion that, under all of the circumstances, the mailing of the complaint and summons, by Plaintiff or Plaintiff's agent, certified mail, return receipt requested, was not reasonably calculated to give Defendant notice of the pendency of the action and the opportunity to appear and defend. Service is found to be inadequate."[4] CONSTITUTIONAL STANDARD FOR SERVICE

What must court records show to establish adequate service of summons and complaint? The short answer is compliance with ORCP 7 D. A more detailed answer follows, including discussion of a number of ORCP subsections and the relative efficacy of several methods of service on individuals.

*785 Those rules currently are embodied in ORCP 7 D, modified on some occasions and to some extent by ORCP 7 E, 7 F, and 7 G.

Summons shall be served in any manner reasonably calculated, under all of the circumstances, to apprise defendant of the court action and to afford a reasonable opportunity to defend against plaintiff's invocation of the court's power. See ORCP 7 D(1). [5] The required service of summons may be in a manner specified in ORCP 7 D or some other rule or statute. ORCP 7 D(1). The rule refers to several discrete methods of service of summons. One is "personal service * * * upon defendant or an agent of defendant * * *." Another is service by mail. That latter method of serving a defendant is the one used in this case. The nature of adequate service is further spelled out by categories of the defendants to be served, including individual as opposed to corporate defendants, as follows:

"D.(3) Particular defendants. Service may be made upon specified defendants as follows: "D.(3)(a) Individuals. "D.(3)(a)(i) Generally. Upon an individual defendant, by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons * * *."

A specific rule for service on individual defendants provides that they may be served personally, or by substitute service at their dwelling houses or usual places of abode, or at their offices. ORCP 7 D(3)(a)(i). Also permissible is any other method of service which is

most reasonably calculated to apprise the defendant of the action, provided that alternate method has been authorized in advance by a court upon a showing by affidavit. ORCP 7 D(6)(a). Service by mail or publication may be permitted for any class of defendants including individuals. ORCP 7 D(1).[6]

Where any service by any manner detailed in the preceding paragraph is accomplished, the defendant is brought within the power of the court to decide the matter in dispute. However, some manners or methods of service presumptively meet the "reasonably calculated to apprise" standard. Others do not, and adequacy to meet that standard must be supported case by case.

A. Presumptively Adequate Service

Personal or substituted service on an individual defendant at his or her dwelling or office is presumptively adequate. The presumption of adequate service, which attaches to service on an individual in a manner specified in ORCP 7 D(3)(a)(i) only, does not apply to mailed service on an individual, because that subparagraph does not list mailed service. In this case, no presumptively adequate method of service on an individual was used. Neither personal service nor substituted service at defendant's dwelling or place of abode, or at his office, was attempted. See ORCP 7 D(2)(c). Although service by mail on an *786 individual is not presumed adequate, lack of that presumption does not foreclose a holding that mailed service is adequate in light of individual circumstances, for example, where a trial court orders that mode of service as the one most likely to achieve its function and defendant receives the mail.

B. Other Service Adequacy

Because the general standard of service in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend, ORCP 7 D(1) expressly permits service by mail, that method may be used to serve individuals.[7] However, adequacy of service by mail on an individual will be decided case by case because there is no presumption of adequacy of that method of service on an individual.

In absence of a presumption, the burden is on plaintiff to show that, in the individual circumstances, the manner of service employed was reasonably calculated to apprise the defendant of the action and to afford a reasonable opportunity to defend. Stated another way, when plaintiff decided to forego personal service on defendant in California, she assigned herself the burden to show the adequacy of the alternate method which she chose.

This court recently adopted a methodology to test adequacy of service under ORCP 7. Baker v. Foy, 310 Or. 221, 228-29, 797 P.2d 349 (1990).[8] The methodology employs a series of questions. 310 Or. at 229, 797 P.2d 349.

The first question was the method of service specifically permitted for use upon the particular defendant by ORCP 7 D(3) is answered "No" in this case because the method of service is not one specifically provided for by the rule governing service on individuals. ORCP 7 D(3)(a). Therefore, the methodology adopted in Baker requires asking a second question, which is:

"Question 2. Does the manner of service employed by plaintiff satisfy the `reasonable notice' standard of adequate service set forth in ORCP 7 D(1)?" 310 Or. at 229.

That question is also answered "No" in this case. Service by mail, to be adequate, cannot be based upon a mailing returned by the post office and marked by it "UNCLAIMED." No Oregon case upholds service of summons by mail as adequate unless receipt is acknowledged by defendant. It must be sent "return receipt requested," as ORCP 7 D(2)(d) expressly requires. See also ORS 174.160 (allowing for "any mailing method that provides for a return receipt"). However, ORCP 7 D(2)(d) only prescribes the method of mailing to be used when a mailed service is attempted; it does not itself describe circumstances under which mailed service may be adequate service. In Lake Oswego Review v. Steinkamp, 298 Or. 607, 695 P.2d 565 (1985), defendant signed a receipt for a deliver-to-addressee-only certified mail, return receipt requested, envelope. Analogous federal mailed-service rules require acknowledgement of receipt for validity. Merrill, Jurisdiction and Summons in Oregon 203, note 153 to § 2.11 (1986).

The Oregon Council on Court Procedures did not adopt the federal rules permitting service by mail generally, if an acknowledgement of receipt is obtained. As Merrill observes, id. at 156,

*787 "While other jurisdictions, including the federal courts, allow some type of service of summons by mail for individual defendants, the Council [on Court Procedures] decided that mail was not sufficiently reliable to be specified as a general service method for all circumstances." (Footnotes omitted.)

Choice of a less likely method of service, by mailing to a post office box held by a frequent sojourner in other states, does not seem reasonably calculated to apprise that sojourner, especially not where a plaintiff decides against the more likely method of personal service upon him at a place and time that plaintiff knows defendant will be there.

Assuming, as plaintiff argues, that defendant declined to accept the certified-mail envelope (which the record does not demonstrate) and two regular-mail envelopes forwarded by his relatives, the things he declined to accept were three envelopes bearing his former wife's return address. There is no indication that the envelopes contained summons and complaint. The exterior of the envelopes do not communicate any notice that an action exists or is pending. Plaintiff concedes that the regular mail, sent to defendant via his relatives, is not sufficient service but argues that she hoped to provide a chance of actual notice thereby. However, the unopened regular-mail envelopes in the record, described in the appendix, disclose that plaintiff's return address is typed on their upper left corners and that they were returned to that address. Perhaps they prove that defendant knew his former wife was trying to communicate with him and that he was not interested. They do not prove that defendant knew he was being haled into an Oregon court.

Even if the contents of those envelopes had been disclosed to the defendant by being brought forth in his presence, the rule of Lake Oswego Review v. Steinkamp, supra that service by mail which does not comply with the service-by-mail rule, but which is more likely to be received by the defendant than mailing under the rule, and which is delivered to and accepted by the defendant, is adequate service also brings plaintiff no comfort. First, the mail was not delivered to and signed for by defendant, as in Steinkamp. Second, Steinkamp excuses the defect in service by mail by reference to the second sentence of ORCP 7 G, which requires a court to disregard any error in service of summons that does not materially prejudice the substantive rights of the party served. The Steinkamp court found no material prejudice, because Mr. Steinkamp actually and personally received and signed for the envelope containing summons and complaint. The court observed that the certified mail used there was more likely to result in adequate notice to defendant than ORCP 7 F(2)(d) requires, because it was sent restricted to delivery to addressee only. Service by an authorized, but not presumptive, method was accomplished. 298 Or. at 614, 695 P.2d 565. As Steinkamp makes clear, adequate service is, itself, a prerequisite to disregarding errors in content or service of a summons under the authority of the second sentence of ORCP 7 G. Id. 298 Or. at 614 n. 2, 695 P.2d 565.

Plaintiff also argues that defendant must have had actual notice because of the fact that he made a special appearance. Of course, accepting this argument would make ORCP 21 A(5), providing for a motion to dismiss for "insufficiency of service of summons," a dead letter. That aside, the argument proves too much. It would erase the rules stating what is required for adequate service and replace them with a new standard of actual notice, the effect of which would be to require an evidentiary hearing in each case to determine whether the

court had jurisdiction of the parties claimed to be on actual notice. See Merrill, supra, at 140, § 2.01.

Plaintiff's delivery on November 22, 1985, of a notice of default in the newly instituted case to defendant's lawyer in a prior, separate legal proceeding may have prompted that lawyer to overturn many stones in search of defendant, enlisting the aid of many people. Thus, the special appearance does not prove that the legally inadequate earlier attempt to serve defendant *788 by leaving summons and complaint at a lawyer's office actually achieved notice. But assuming that in some word-of-mouth fashion defendant received actual notice that plaintiff had instituted a new action against him in Lane County, Oregon, the method employed of leaving a summons in a new case at the office of a lawyer employed by defendant on other matters does not rise to the required level that it be reasonably calculated to apprise defendant of the pendency of that new action. The fact of actual notice would not excuse use of an unauthorized method of attempting service, although it could excuse lesser defects in the form or issuance of summons under ORCP 7 G (first sentence).

Adequate service is required by ORCP 7 D, not just word-of-mouth notice. Otherwise, a plaintiff could ring a defendant on the telephone, tell him about the action, avoid the requirements of ORCP 7 D that service of summons and complaint be made, and deprive a court asked to enter a default of any records showing whether the defendant had been apprised of the action except a plaintiff's word on it.

Furthermore, in this case, the hearing evidence concerning plaintiff's testimony of her knowledge of defendant's whereabouts does not support the assumption that defendant received actual notice by plaintiff's efforts to serve summons by mail. After the complaint was filed in August, 1985, plaintiff knew that, in September of 1985, defendant was in California, not Nevada. The certified mailing to Nevada was made on October 9, 1985. The envelope, mailed October 16, 1985, to defendant's mother and forwarded by her to Nevada, raises an inference that defendant was in Nevada on or near November 5, 1985, when it was returned to sender. Between October 9 and November 5, 1985, the letter sent by certified mail, return receipt requested, was returned from the Nevada post office box to Oregon.

When plaintiff gave notice of default on November 22, 1985, she knew that defendant had not received the certified mail and had not accepted or opened the regular-mail envelopes forwarded by his relatives, containing summons copies for the new action.

Recognizing, perhaps, the inadequacy of the service method that she used, plaintiff argues that certified mail service must be considered adequate, even where delivery is not reasonably calculated to be accomplished, in cases where a defendant is attempting to

avoid service of process. She does not point to anything in the service of process rules or decided cases as a basis for support of that argument. No fact was found by the trial judge that defendant attempted to avoid service. The trial judge found as fact that "[p]ersonal service could have been undertaken * * * but was not attempted." Plaintiff chose not to use personal service on defendant at that time.

The form of service chosen, in its notice aspect, must be substantially no less likely to bring home notice than other of the feasible and customary substitutes. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315, 70 S. Ct. 652, 657, 94 L. Ed. at 865, 874 (1950) (requiring "method * * * in itself reasonably certain to inform those affected" to satisfy due process).

There is no basis in the record or in any authority pointed out to us for answering the second question of the Baker v. Foy methodology in the affirmative. Because the answer is "No," the service attempted was inadequate.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is affirmed.

APPENDIX

Examination of the court record concerning the certified mailing reveals:

An unopened envelope mailed by certified mail with return receipt requested, addressed to defendant at the Nevada post office box. It bears the rubber-stamped legend "UNCLAIMED." Attached to the envelope is an unsigned, green, certified-mail return-receipt post card. Also affixed to the envelope are two postal department forms reciting that notices to pick up certified *789 mail were placed in the post office box on three different dates in October and on November 1, 1985. A rubber-stamped imprint in the shape of a hand, with index finger extended and the words "Return to Sender," points to plaintiff's return address in Eugene, Oregon, which is typed on the upper-left corner of the unopened envelope.

An appropriate affidavit confirms that certified true copies of the summons and the complaint were placed in the unopened envelope, and that it was mailed on October 9, 1985. Although the affidavit does not say certified mail was used, the envelope shows that it was, as hearing testimony confirms. The attached, unsigned postal card, intended as a record of receipt, shows that the postal system was requested to "show to whom, date and address of delivery."

In an effort, as plaintiff claims, to give actual notice to defendant, other mailings were made. The record discloses:

(1) A second unopened envelope sent by regular mail addressed to defendant "c/o Mrs. E.J. Edwards" at a Creswell, Oregon, address. The Creswell addressee, defendant's mother, crossed off her Oregon address, leaving the defendant's name, and wrote in the Nevada post office box address. This envelope bears the imprint of a postal department rubber stamp, showing that the mother remailed the envelope on October 18, 1985. In defendant's handwriting, the words "Return to Sender" appear above the original address. An arrow is drawn from those words to the typed return address of plaintiff in the upper-left corner. This letter was mailed from Eugene to defendant in care of his mother on October 16, 1985. On the envelope appears the date "November 5, 1985," and "Reno. NV 895," as rubber-stamped.

(2) A third unopened envelope is addressed to defendant "c/o Mrs. Douglas T. Wile," the daughter of plaintiff and defendant, at the daughter's California address. The address is lined through. Above it, in defendant's hand, is written "Return to Sender" with an arrow pointing to the return address of plaintiff. This envelope was first mailed from Eugene October 16, 1985, according to an affidavit.

(3) Copies of summons and complaint were also mailed to and personally delivered to the lawyer who represented the defendant in the 1978 dissolution and subsequent modification proceedings therein.

NOTES

[*] Linde, J., retired January 31, 1990; Jones, J., resigned April 30, 1990.

[1] The parties' marriage was previously and finally dissolved in Lane County, Oregon in 1978. The decree did not mention a future expectancy of a military retirement pension to be based on defendant's military career during the marriage. However, spousal support was ordered. By subsequent modification, based on occurrence of a condition that, under the parties' agreement, could terminate spousal support, that support was terminated before plaintiff commenced this action. See Edwards and Edwards, 73 Or. App. 272, 698 P.2d 542 (1985). After the agreement, confirmed in the final decree, monthly pension distribution commenced, payable solely to defendant. After the federal law changed, plaintiff filed an original complaint to institute a new case seeking "partition" of the pension and attempted the service by mail which is at issue.

[2] Plaintiff did not contend in the trial court that delivery of documents to that lawyer, who previously represented defendant in the completed dissolution, was adequate service. Only the certified mail sent to Nevada was argued to constitute service. Likewise, she did not contend that defendant's use of his mother's Oregon address for driver license, travel trailer, and other vehicle licenses or his ownership of Oregon real property, with tax statements sent to his mother's address, made his mother's address acceptable for service by mail purposes. No certified mail was sent there.

Plaintiff did not contend in the trial court, or in her assignment of error in the Court of Appeals, that regular mail sent to defendant in care of his mother in Oregon or his daughter in California constituted adequate service; rather, she relied upon the certified mail sent to Nevada. However, the Court of Appeals discussed the effect of the regular mail sent via defendant's relatives and to the lawyer who represented him in the prior dissolution case. Plaintiff argues to this court that the combination of those methods of attempting actual notice makes the certified mail, returned unclaimed, adequate service as "reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend." She argues that the methods attempted, each in itself insufficient, make the undelivered certified mail adequate service. The appendix to this opinion discloses details of the regular mail efforts.

[3] That rule in part provides:

"On motion upon a showing by affidavit that service cannot be made by any method otherwise specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: publication of summons; mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only; or posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response." (Emphasis added.)

[4] Letter ruling from Lane County Circuit Court Judge Pierre Van Rysselberghe to lawyers for plaintiff and defendant dated March 18, 1988.

[5] ORCP 7 D(1) states:

"Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and

pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of summons upon defendant or an agent of defendant authorized to receive process; * * * service by mail; or, service by publication."

[6] There are additional rules specific to service in situations described in those rules. See, e.g., ORCP 7 D(4)(a)(i) for service in some vehicle accident cases. If substitute service is the question, proof that an Oregon address was used to obtain a driver license or a vehicle title certificate does not necessarily prove a place of abode required for substitute service. See Thoenes v. Tatro, 270 Or. 775, 788, 529 P.2d 912 (1974) (college student in Colorado used parents' address for driver license and vehicle registration but usual place of abode was his apartment in Colorado for purposes of service of summons). Indeed, in Baker v. Foy, 310 Or. 221, 797 P.2d 349 (1990), this court affirmed a trial court's judgment dismissing a complaint for inadequacy of substitute service at a defendant's address shown on those records. The trial court in Baker found as fact that defendant did not reside at the address he provided.

[7] Of course, the requirements for service by mail provided in ORCP 7 D(2)(d) certified, return receipt required must be followed.

[8] That case holds inadequate an attempted substituted service on defendant's mother which included certified mail addressed to defendant at mother's address, as ORCP 7 D(2)(b) requires, even though defendant gave that address as his at the scene of the automobile accident which gave rise to the plaintiff's complaint, the vehicle which defendant, a teenager, was driving was titled to his mother there, and defendant's driver license listed that address as his residence. The fact that defendant did not live there meant he was not served at his usual place of abode and, therefore, the requirement for presumptive adequacy of the service was not met because the provisions of ORCP 7 governing substitute service were not satisfied, even though defendant admitted actual notice of the summons and complaint.

APPENDIX

SEVENTH CIRCUIT REVIEW Volume 13 Fall 2017

OUTGROWING ITS USEFULNESS: SEVENTH CIRCUIT LIMITS THE APPLICATION OF THE COMMON ACTOR INFERENCE IN TITLE VII DISCRIMINATION CASES

MICHAEL G. ZOLFO*

Cite as: Michael G. Zolfo, *Outgrowing Its Usefulness: Seventh Circuit Limits the Application of the Common Actor Inference in Title VII Discrimination Cases*, 13 SEVENTH CIRCUIT REV. 352 (2017), *at* https://www.kentlaw.iit.edu/sites/ck/files/public/academics/jd/7cr/v13/zolfo.pdf.

INTRODUCTION

Can a person harbor discriminatory views toward protected minority groups, yet still hire a member of that minority group as an employee? That is the question at the heart of the common actor inference in Title VII employment discrimination jurisprudence. The common actor inference holds if the same supervisor hires an employee from a protected minority group, and then fires that employee a short period of time later, there is a strong inference that discrimination did not factor in the employment decision.[1] Because the burden for proving Title VII discrimination on the basis of race, color, religion, sex, or national origin lies with the plaintiff, the common actor inference is a tool employer-defendants can use to defeat Title VII discrimination claims. However, in the Seventh Circuit's recent decision in *McKinney v. Sheriff of Whitley County*, the court not only critiqued the district court's reliance on the common actor inference,

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[1] Perez v. Thornton's, Inc., 731 F.3d 699, 710 (7th Cir. 2013).

where there are genuine issues of material fact.[7] The Seventh Circuit has adopted the most narrow application of the common 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.[8] The Eleventh Circuit has taken a similar approach to the Seventh Circuit.[9]

Section I of this comment will discuss the background that preceded the passage of Title VII, employees' protections under Title VII, and how a plaintiff brings a Title VII discrimination suit. Section II will discuss the background of *McKinney v. Office of Sheriff of Whitley County*, and how the Seventh Circuit reached its decision to limit the application of the common actor inference. Section III will explain why the Seventh Circuit made the right decision and will argue that other circuits should adopt the Seventh Circuit's approach.

I. TITLE VII HISTORY AND DEVELOPMENT

A. *Title VII Protects Members of Protected Classes from Employment Discrimination*

Federal protections against employment discrimination, known as the Title VII protections, emerge from the Civil Rights Act of 1964.[10] The Civil Rights Act was landmark legislation that emerged after a long, often bloody struggle to achieve equal rights for minorities in the

[7] *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)).

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

[9] Williams v. Vitro Serv. Corp., 144 F.3d 1438, 1443 (11th Cir. 1998).

[10] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000a *et seq.*).

United States.[11] The 1963 Civil Rights March in Birmingham, Alabama, and the horrifically violent response that accompanied it, is often credited with finally spurring Congress to act to protect certain employees from discrimination based on race, color, sex, religion, or national origin.[12] Despite fierce debate in Congress, the Act was politically popular enough to pass by well over 100 votes in the House of Representatives and with over two-thirds of the members in the U.S. Senate, enough to defeat a filibuster.[13]

Title VII of the Civil Rights Act specifically prohibits "employers," as defined by the Act,[14] "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."[15] The Act also states an employer cannot "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[16]

Title VII protects employees before and during their relationship with the employer.[17] Before the employment relationship officially exists, employers may not advertise for a position by indicating they

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[11] Emmanuel O. Iheukwumere & Philip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 TEMP. POL. & CIV. RTS. L. REV. 1, 21 (2001).

[12] *Id.* at 21-22.

[13] *Id.* at 22.

[14] With some exception, Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b) (2012).

[15] 42 U.S.C. § 2000e-2.

[16] *Id.*

[17] D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 95-96 (2013).

prefer to hire employers of a certain class, or that the employer will not hire a member of a protected class.[18] Second, employers cannot refuse to hire employees for a job because of their status as a member of a protected class.[19] Third, employers may not institute employment tests or training programs that are designed to discriminate against a protected class of employees or potential employees.[20] Title VII therefore provides remedies to any person who faces employment discrimination before the employer-employee relationship begins.[21]

Title VII also protects employees once their official relationship with an employer begins. An employer is prohibited from firing an employee solely because of their race, color, religion, sex, or national origin.[22] Employers cannot refuse to assign an employee to certain duties solely because of their membership in a protected class.[23] Employers cannot unfairly segregate or classify their employees at work because of the employee's membership in a protected class.[24] Employers also cannot promote or refuse to promote an employee based on their, race, color, sex, religion, or national origin.[25]

Title VII protects employees who oppose unlawful employment practices or file a complaint against their employer for discriminatory practices.[26] This includes protections that allow employees to participate in investigations of their employer for discriminatory employment practices.[27] Title VII prohibits an employer from retaliating "against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful

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[18] 42 U.S.C § 2000e-3(b) ("class" as used in this sentence means race, color, sex, religion, or national origin).

[19] Greene, *supra* note 17, at 95.

[20] 42 U.S.C. §§ 2000e-2(d); 2000e-2(h).

[21] 42 U.S.C. § 2000e-5.

[22] 42 U.S.C. § 2000e-2(a).

[23] *Id.*

[24] Greene, *supra* note 17, at 94

[25] 42 U.S.C. § 2000e-2.

[26] Greene, *supra* note 17, at 95.

[27] *Id.*

employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[28]

Title VII goes beyond merely providing employees with protection from employment discrimination. It also provides employees with enforcement provisions and remedies for any discrimination they may face. Title VII created the Equal Employment Opportunity Commission (EEOC) which has the power to investigate, study, intervene, and assist employees who believe they have been victims of prohibited discrimination by their employer or potential employer.[29] The EEOC is designed to work with state and local employment enforcement agencies to ensure all claims are investigated thoroughly.[30] The EEOC serves as an enforcement, investigatory, and regulatory body.[31]

Title VII also specifically allows the Attorney General to bring an action against employers for discriminatory employment practices in United States District Courts.[32] Notably, Title VII also contains a fee-shifting provision that awards a prevailing plaintiff attorney fees if he or she can prove employment discrimination under § 2000e-2(m).[33] Awards of attorney fees are not the norm in U.S. civil cases, and

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[28] 42 U.S.C. § 2000e-3(a).

[29] 42 U.S.C. § 2000e-4.

[30] 42 U.S.C. § 2000e-5 ("[i]n the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials.")

[31] *Id.*

[32] 42 U.S.C. §·2000e-6.

[33] 42 U.S.C. 2000-e-5(k) ("[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."); 42 U.S.C. § 2000e-2(m).

special fee provisions in legislation are a sign that Congress wished to encourage private lawyers to bring a certain type of litigation.[34]

B. Bringing a Title VII Claim as a Plaintiff

Based on the preceding section, it would be easy to conclude that Title VII's employment protections make it easy for a plaintiff to prevail on an employment discrimination claim. Title VII defines forbidden acts employers may not engage in, creates an investigative and enforcement agency to examine Title VII claims, and provides incentives to pursue Title VII actions. However, Title VII's broad provisions and years of judicial interpretation have made it very difficult for a plaintiff to prevail on a Title VII claim.

Title VII was never intended to protect an employee from being discharged or passed over for any reason other than prohibited discrimination. Title VII does not protect an employee from being discharged for poor performance, inappropriate work activity, poor judgment, or disputes with management.[35] Title VII's protections are thus limited only to cases where the plaintiffs can prove they suffered an adverse employment action *because of* their race, religion, color, sex, or national origin. A Title VII discrimination case over unlawful termination is thus decided on the limited scope of whether "the evidence would permit a reasonable factfinder to conclude that the plaintiff's race [religion, color, sex or national origin] . . . caused the discharge."[36]

A plaintiff may prove race discrimination by either direct or indirect proof, relying on direct or circumstantial evidence.[37] Because direct proof of discrimination is usually present in only the most blatant cases, most Title VII cases require indirect proof of

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[34] Jeffrey A. Blevins and Gregory J. Schroedter, *The Civil Rights Act of 1991: Congress Revamps Employment Discrimination Law and Policy*, 80 ILL. B.J. 336, 336 (1992).

[35] Hill v. St. Louis University, 123 F.3d 1114, 1120 (8th Cir. 1997).

[36] Ortiz v. Werner Enter. Inc., 834 F.3d 760, 765 (7th Cir. 2016).

[37] Coleman v. Donahue, 667 F.3d 835, 845 (7th Cir. 2012).

discrimination.[38] In order to "sharpen the inquiry into the elusive factual question of intentional discrimination" the United States Supreme Court and the Seventh Circuit have developed a distinct framework demonstrating what a plaintiff needs to prove to prevail on a Title VII discrimination claim.[39] The United States Supreme Court established a framework, for plaintiffs who are bringing indirect proof of discrimination, in *McDonnell Douglas Corp. v. Green.*[40]

C. The McDonnell Douglas Framework

In *McDonnell Douglas*, the plaintiff, an African-American man, was laid off as part of general workforce reduction by the McDonnell Douglas Corporation.[41] The plaintiff and other workers protested these firings as racially motivated and staged protests at the McDonnell Douglas job site.[42] After the protests ended, plaintiff noticed McDonnell Douglas was advertising for open positions, including the position the plaintiff used to hold.[43] McDonnell Douglas declined to rehire the plaintiff, citing his participation in the protest activities, and the plaintiff filed a complaint with the EEOC.[44] The EEOC found some cause that McDonnell Douglas had violated Title VII by refusing to rehire the plaintiff, and the plaintiff then brought an action in the district court.[45] The district court dismissed the plaintiff's claims, stating that McDonnell Douglas's "refusal to rehire respondent was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities" or his race or color.[46]

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[38] *Id.*

[39] Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n. 8 (1981).

[40] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[41] *Id.* at 794.

[42] *Id.* at 795.

[43] *Id.* at 796.

[44] *Id.*

[45] *Id.* at 797.

[46] *Id.*

Plaintiff appealed the district court's decision to the Eight Circuit Court of Appeals.[47] The Eight Circuit upheld some of the district court's decision, but reversed the district court's decision to dismiss the plaintiff's complaint for discriminatory hiring practices against McDonnell Douglas.[48] In explaining its decision to remand, the Eight Circuit attempted to create a framework for examining Title VII employment discrimination claims.[49] The Eight Circuit stated that when the district court considered the evidence offered by the plaintiff and McDonnell Douglas, the district court relied on subjective criteria which carried little weight in rebutting charges of discrimination.[50] The court explained that the plaintiff should be given the opportunity to demonstrate that McDonnell Douglas's reasons for refusing to rehire him were mere pretext for discriminatory purposes.[51] The Supreme Court granted certiorari to better clarify the Eight Circuit's standards for evaluating a plaintiff's Title VII employment discrimination claim.[52]

The Supreme Court created a four-element test for a plaintiff to establish a prima facie case of Title VII prohibited discrimination. The Supreme Court held that for a plaintiff to establish a prima facie case of racial discrimination in his hiring, the plaintiff must demonstrate: 1) he is a member of a racial minority; 2) he applied and was qualified for a position for which the employer was seeking applicants; 3) despite his qualifications for the position, he was rejected; and 4) after his rejection, the position remained open and the employer continued to seek applications from persons of plaintiff's qualifications.[53] The

[47] *Id.*

[48] *Id.* at 798.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 802. The McDonnell-Douglas framework is now used for any Title VII claim where discrimination is alleged, including race, religion, color, sex, or national origin. *See* Tristin K. Green, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CALIF. L. R. 983, 985 (1999).

Supreme Court agreed with the Eight Circuit that the plaintiff did demonstrate a prima facie case of race discrimination.[54]

After the plaintiff demonstrates a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for not hiring the plaintiff.[55] The Supreme Court stated it is not necessary for an employer to delineate every legitimate reason why an employer chose to fire or not hire an employee, but makes clear that any legitimate, nondiscriminatory reason for the employment decision relieves the employer from this burden.[56] The inquiry does not end if the employer demonstrates a legitimate, nondiscriminatory reason for the hiring decision. The burden then shifts back to the plaintiff to demonstrate through evidence that the employer's stated legitimate, nondiscriminatory reason for its hiring decision is mere "pretext" to hide or overshadow a discriminatory reason.[57] The Supreme Court then remanded the case to the district court with the instructions that the plaintiff's case should be evaluated with the tests stated in this decision, in what came to be known as the *McDonnell Douglas* burden-shifting framework.[58]

McDonnell Douglas is an example of the Supreme Court creating a test that the district courts and circuit courts can follow when interpreting and applying legislation from Congress. It also demonstrated the burdens a plaintiff carries in proving a Title VII discrimination case. The plaintiff not only carries the initial burden of proving a prima facie case, the plaintiff must also have sufficient evidence to prove that any legitimate, nondiscriminatory reason the employer offers for its decision is mere pretext for a discriminatory purpose.

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[54] *McDonnell Douglas*, 411 U.S. at 802.

[55] *Id.* at 802-803.

[56] *Id.*

[57] *Id.* at 807.

[58] *Id.*

D. Introduction of Common Actor Inference as an additional hurdle to a Title VII claim

The common actor inference is a judicially-created inference that weighs against the plaintiff in a Title VII case. The common actor inference developed after the Supreme Court established the *McDonnell Douglas* framework and is a way to help the judge or jury better apply the framework in a case. It is important to understand at what point in a Title VII case the common actor inference is considered, as it varies from circuit to circuit, and the inference can have a more substantial impact on a Title VII case based on when it is considered.

The first appearance of the common actor inference was in the Fourth Circuit Court of Appeals.[59] The Fourth Circuit articulated the test, which is "in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer."[60] The Fourth Circuit analyzed the common actor inference in the context of the *McDonnell Douglas* framework, and stated "[t]he relevance of the fact that the employee was hired and fired by the same person within a relatively short time span comes at the third stage of the analysis," when the plaintiff must demonstrate that the employer's stated reason for the employment action is mere pretext for a discriminatory purpose.[61] The court explained that if the same employer hired and fired the employee in a relatively short time span, this then "creates a strong inference that the employer's stated reason for acting against the employee is not pretextual."[62]

U.S. Courts of Appeals vary on what stage of litigation is appropriate to consider the common actor inference. There are

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[59] Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991).

[60] *Id.*

[61] *Id.* at 798.

[62] *Id.*

typically three ways a Title VII race discrimination case can reach a final judgment: 1) an order dismissing the complaint; 2) summary judgment before the case reaches the ultimate trier of fact; or 3) a final judgment rendered after trial to a judge or jury.[63] In *Proud v. Stone*, the Fourth Circuit considered evidence of the common actor inference when considering a motion to dismiss the plaintiff's Title VII complaint. Because a motion to dismiss is based solely on the pleadings, the Fourth Circuit established that the common actor inference can apply before the litigation moves to the fact-finding stage.[64] A majority of the other circuit courts have followed the Fourth Circuit's precedent and allow courts to consider the common actor inference when evaluating a plaintiff's claim in a motion to dismiss or in a summary judgment motion.[65] Other circuits have limited the application of the common actor inference to only when discrimination has been alleged and there are genuine issues of material fact.[66] However, in *McKinney v. Office of Sheriff of Whitley County*, the Seventh Circuit limited the application of the common actor inference to the narrowest of circumstances, and stated its concern that the common actor inference may be "outgrow[ing] its usefulness" in Title VII jurisprudence.[67]

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[63] *See* Nana Gyimah-Brempong, Tahl Rabino & Neonu Jewell, *Title VII of the Civil Rights Act of 1964*, 4 GEO. J. GENDER & L. 563, 587 (2002).

[64] *Stone*, 945 F.2d at 798.

[65] *See* 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).

[66] *See, e.g.,* 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)).

[67] McKinney v. Office of Sheriff of Whitley Cnty, 866 F.3d 803, 815 (7th Cir. 2017).

II. MCKINNEY V. OFFICE OF SHERIFF OF WHITLEY COUNTY

A. *Factual Background and District Court Decision*

Sheriff Mark Hodges of Whitley County, Indiana, hired Terrance McKinney as a full-time merit officer on August 5, 2013.[68] McKinney was the first-ever black officer in Whitley County.[69] The merit officer position carries a one-year "probationary period" where the officer can be fired at the sole discretion of the Sheriff, without input from the county merit review board.[70] The purpose of the probationary period is to allow a sheriff to determine if a new officer is capable of performing his or her duties before he or she benefits from state law that requires "good cause" for termination, as well as the law's procedural protections.[71]

Because McKinney would have been the first black officer in Whitley County history, Sheriff Hodges and McKinney discussed McKinney's race during the interview.[72] McKinney stated that he did not expect that he would experience racial discrimination at the Sheriff's Office.[73] However, throughout his employment, McKinney was able to point to specific instances when he was subjected to racist or discriminatory words and actions by his fellow officers. McKinney related that one officer used the "n-word" in front of him, that officers joked about ordering their coffee "like him," and that certain officers would not train him or even speak to him.[74] Sheriff Hodges recommended that McKinney watch the movie *42*, which depicts Jackie Robinson's battle to break the color barrier in baseball, and told him the movie would "help him out."[75]

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[68] *Id.* at 805.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*

On May 15, 2014, Sheriff Hodges fired McKinney, invoking the power he had as Sheriff under the "probationary period."[76] Sheriff Hodges' termination letter listed three reasons for firing McKinney: 1) submitting false work hours while attending the Indiana Law Enforcement Academy; 2) violating standard operating procedure for filing complete monthly reports; and 3) violating standard operating procedure for fueling county vehicles.[77] The Whitley County Board of Commissioners added more reasons for McKinney's firing in a termination letter sent four days after McKinney's firing, including damaging a county vehicle, failing to complete a transport, and failing to follow verbal instructions.[78]

After McKinney was terminated, he brought suit against the Office of the Sheriff of Whitley County and Deputy Sheriff Tony Helfrich in the District Court, alleging several theories, including race discrimination in violation of Title VII.[79] In the course of the defense, counsel for the Sheriff's office offered even more reasons for McKinney's firing, including texting while driving, crashing a county vehicle, and being late while transporting a juvenile to court.[80] After pleadings were filed and discovery was completed, the Sheriff's office moved for summary judgment, arguing that under the *McDonnell Douglas* framework, McKinney had failed to allege a prima facie case of discrimination in order to successfully meet the burden-shifting requirement.[81] The defense relied on an affidavit from Sheriff Hodges, which stated the reasons why McKinney was fired, and did not include any mention of McKinney's race.[82]

The district court ultimately ruled for the defense and granted summary judgment for the Sheriff's Office.[83] The court ruled that

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[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 806.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*

McKinney failed to present any direct evidence of discrimination.[84] The court also stated McKinney could not point to any direct evidence that would constitute a genuine issue of material fact.[85] The court further determined that McKinney failed to meet the Sheriff's legitimate employment expectations, based largely upon the Sheriff's affidavit.[86] The court also based its decision upon the "strong presumption against finding discrimination when the same person hires and fires a plaintiff-employee."[87] The district court stated "[i]f Sheriff Hodges wanted to discriminate against McKinney based on his race, he could have refused to hire him in the first place."[88]

B. 7th Circuit Decision in McKinney v. Office of Sheriff of Whitley County

McKinney appealed the district court's decision to the Seventh Circuit Court of Appeals. A panel consisting of Judges Bauer, Posner, and Hamilton unanimously reversed the district court's decision.[89] After a review of the factual and procedural background of the case, the Seventh Circuit began its analysis by examining McKinney's presentation of evidence and the Sheriff's stated reasons for firing McKinney.[90] The Seventh Circuit utilized the elements of prima facie case of race discrimination and the *McDonnell Douglas* framework in analyzing the district court's decision.[91]

First, the court examined whether McKinney had met the elements for a prima facie case of race discrimination, whether: 1) he is a member of a racial minority; 2) his job performance met the employer's legitimate expectations; 3) he suffered an adverse

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[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.* at 815.
[90] *Id.* at 808.
[91] *Id.* at 807.

employment action; and 4) another similarly situated individual who was not in the protected class was treated more favorably than him.[92] The court noted that it was undisputed that McKinney is a member of a protected class and that he suffered an adverse employment action.[93] The court stated that for McKinney to prevail under the *McDonnell Douglas* framework, he must present sufficient evidence to show that his performance met the Sheriff's legitimate employment expectations and that other similarly situated employees who are not in the protected class were treated more favorably.[94]

The court evaluated the weight of the evidence presented by both sides, noting that the Sheriff's Office offered plausible rationales for why McKinney did not meet the Sheriff's legitimate employment expectations.[95] However, the Seventh Circuit ruled that the district court did not give sufficient weight to McKinney's evidence.[96] The Seventh Circuit ruled the district court failed to properly consider McKinney's legal memorandum, the genuine issues of material fact he raised, and the supporting evidence that he offered to show he met the Sherriff's legitimate employment expectations. The Seventh Circuit particularly focused on "the sheer number of rationales the defense has offered for firing plaintiff and the quality and volume of the evidence plaintiff has collected to undermine the accuracy and even the honesty of those rationales."[97]

The court examined the Sheriff's stated reasons for the firing: 1) falsifying hours; 2) missing his monthly reports; 3) and misusing the gasoline credit card.[98] After a very thorough review of the Sheriff's evidence and McKinney's evidence, the court found that McKinney had presented sufficient evidence to at least raise a genuine issue of material fact as to whether the Sheriff's stated reasons for his

[92] *Id*
[93] *Id.* at 807-08.
[94] *Id.* at 808.
[95] *Id.* at 814.
[96] *Id.* at 813.
[97] *Id.* at 810.
[98] *Id.* at 810-11.

termination were "pretext" for discriminatory actions.[99] The court then pointed out that the Sheriff's office had offered even more explanations for McKinney's termination after it became clear that McKinney intended to sue for discriminatory employment practices.[100] The Seventh Circuit examined each of these additional reasons, and also found that the plaintiff had offered sufficient evidence in response to satisfy the *McDonnell Douglas* framework and avoid summary judgment.[101]

The Seventh Circuit reminded the district court that when evaluating McKinney's evidence under the *McDonnell Douglas* framework on a summary judgment motion, the question is "simply whether McKinney's evidence would permit a reasonable factfinder to conclude that the plaintiff's race . . . caused the discharge."[102] The court concluded that after evaluating McKinney's testimony, interrogatory answers, internal department documents, and other evidence, McKinney more than satisfied his burden under *McDonnell Douglas,* and that McKinney had presented enough evidence to permit a reasonable factfinder to question whether the Sheriff's stated reasons for firing were pretext for discriminatory actions.[103] As a result, the Seventh Circuit reversed the district court's grant of summary judgment to the Sheriff's Office, and remanded the case for further proceedings.[104]

The Seventh Circuit also took time to criticize the district court for "overestimat[ing] the strength of the 'common actor' inference."[105] The district court cited the common actor inference as further proof of its decision, holding that if the Sherriff had wanted to discriminate against McKinney, the Sherriff would have refused to hire him in the

[99] *Id.* at 813.
[100] *Id.* at 812.
[101] *Id.* at 814.
[102] *Id.* at 813.
[103] *Id.* at 813-14.
[104] *Id.* at 815.
[105] *Id.* at 814.

first place.[106] The district court relied on the Seventh Circuit's explanation of the common actor inference in previous cases such as *EEOC v. Our Lady of Resurrection Medical Center*, which led the district court to believe that the common actor inference applied at the pleading or summary judgment stage of a Title VII case.[107] In *McKinney*, however, the court seemed to walk back some of its position in *Our Lady of Resurrection*, stating that "this inference is not a conclusive presumption and . . . it should be considered by the ultimate trier of fact rather than on summary judgment or the pleadings."[108] The common actor inference may be argued to a jury or judge in a fact-finding endeavor, but it is not a conclusive presumption that applies as a matter of law.[109] The inference is "just something for the trier of fact to consider."[110]

The court further stated "[w]e have tried to impose limits on the common actor inference to ensure it does not outgrow its usefulness."[111] While the court acknowledged that it may be helpful to let the jury hear evidence of the common actor inference and weigh the inference in the case before it, the court stated the inference is helpful only "in some limited situations."[112] Yet, the court continued that "[t]here are many other occasions, however, where it is unsound to infer the absence of discrimination simply because the same person hired and fired the plaintiff-employee."[113]

As an example of such a situation, the court pointed out that an employer may need to quickly fill a position, and as a result hire an individual from a protected class because the supervisor had no other

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[106] *Id.*

[107] 77 F.3d 145, 151-52 (7th Cir. 1996).

[108] *McKinney*, 866 F.3d at 814.

[109] *Id.*

[110] *Id* (citing Herrnreiter v. Chicago Housing Authority, 315 F.3d 742, 747 (7th Cir. 2002)).

[111] *Id.* at 815.

[112] *Id.*

[113] *Id.*

choice.[114] Once other candidates for that position are available, especially non-minority candidates, the employer could then fire the minority employee for discriminatory reasons and hire a different employee from a non-protected class.[115] In this circumstance, it would not be appropriate to assume that the employer did not act in a discriminatory manner just because he or she hired and fired an employee from a protected class. Similarly, the court imagined how an employer could hire a woman, but then refuse to give her a promotion or a raise for discriminatory purposes.[116] The court also pointed out that an employer could hire a woman, but later fire her once she became pregnant, which would certainly qualify as a discriminatory action.[117]

In the closing paragraph of its analysis, the Seventh Circuit stated that "examples abound" for why the same employer could hire an employee with a nondiscriminatory purpose, but then later fire that same employee with a discriminatory purpose. The court asked the district court to image a scenario where:

> The same supervisor could hire a county's first black police officer, hoping there would be no racial friction in the workplace. But after it became clear that other officers would not fully accept their new black colleague, that same supervisor could fire the black officer because of his race based on a mistaken notion of the "greater good" of the department.[118]

Without expressly stating this is what happened in the case of Officer McKinney, the Seventh Circuit, at a minimum, demonstrated why the common actor inference should not be considered in a motion for

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[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*

summary judgment. There are simply too many plausible scenarios for why a supervisor may hire, and then later fire, an employee from a protected class for discriminatory reasons to accord the inference a significant amount of weight at the pleading or summary judgment stage of litigation.

McKinney is thus a stark limitation on the common actor inference in the Seventh Circuit. Although the court presented its holding in *McKinney* as a logical extension of its previous Title VII discrimination and common actor jurisprudence, this is the clearest the Seventh Circuit has been about the application of the common actor inference. The court definitively stated that the common actor inference is not a conclusive presumption that applies as a matter of law.[119] Therefore, the inference cannot be considered in a motion to dismiss or a summary judgment motion.[120] The inference is merely a consideration that the ultimate fact-finder, whether a judge or a jury, may weigh when making a decision. The Seventh Circuit thus presented a very narrow definition and use of the common actor inference.

III. ANALYZING THE SEVENTH CIRCUIT'S DECISION AND ITS IMPACT ON THE LEGITIMACY OF THE COMMON ACTOR INFERENCE

A. Seventh Circuit exposes logical flaws and uses negative tones when addressing the common actor inference

The Seventh Circuit's *McKinney* decision is notable for both the ease with which the Seventh Circuit found logical flaws in the common actor inference and the almost dismissive tone the court used when discussing the inference. After evaluating the approach other U.S. Circuit Courts of Appeals have taken toward the common actor inference, it is clear that the Seventh Circuit took the lead in criticizing the use of the common actor inference in Title VII cases. This becomes

[119] *Id.* at 814.
[120] *Id.*

abundantly clear upon a close reading of the court's legal analysis and the language it used when discussing the common actor inference.

The Seventh Circuit could have invalidated the district court's ruling in *McKinney* based solely the plaintiff's evidence, without addressing the district court's reliance on the common actor inference. McKinney appealed the district court's grant of summary judgment; all the Seventh Circuit needed to find to reverse the district court's decision was find a genuine issue of material fact that would require final adjudication by a judge or jury.[121] The court went through the facts presented to the district court in long and painstaking detail, and it found many issues of material fact that would be sufficient to reverse the grant of summary judgment.[122] However, the Seventh Circuit went beyond just invalidating the circuit court's decision based on genuine issues of material fact; it devoted an entire section to exposing the logical flaws in the common actor inference.[123]

The Seventh Circuit stated that "examples abound" of scenarios where it would be unsound to infer that the same supervisor hiring and firing an employee in a short time period did not have a discriminatory purpose for doing so.[124] Although the court stated that examples abound, it listed only four examples: 1) a supervisor hires an employee from a protected class out of necessity, then later fires that employee when members of a nonprotected class are available; 2) a supervisor who hires a woman, but refuses to promote her because of her gender; 3) a supervisor who hires a woman, but later fires her when she becomes pregnant; and 4) when a supervisor hires the county's first black police officer and then fires him because of racial friction in the department.[125] These are all very clear and easy-to-follow examples of how the common actor inference can be unsound, and unfairly slanted toward the supervisor who fires an employee from a protected class.

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[121] Fed. R. Civ. P. 56.

[122] *McKinney*, 866 F.3d at 807-13.

[123] *Id.* at 814-15.

[124] *Id.* at 815.

[125] *Id.*

However, as the Seventh Circuit suggested, these three examples are far from the only ones that expose flaws in the common actor inference. Imagine a supervisor who feels compelled to hire an employee from a protected class out of a company-wide push to increase diversity, only to later fire that employee for discriminatory reasons. Or, consider an all-male law firm who hires female partner to attract new female clients, only to later fire the female partner because she does not "fit-in" with the boy's club culture. One can also think of a scenario where a supervisor hires a Muslim man or woman, but then later fires him or her after a domestic terrorist attack because the supervisor does not want to associate with people of that religion. These are just a few of a multitude of "examples," as the Seventh Circuit said, that demonstrate the inherent flaws of the common actor inference, and cast doubt on its usefulness or probative value in Title VII discrimination cases.

It is also important to note the tone the court uses in discussing the common actor inference in *McKinney*. The Seventh Circuit opened its discussion of the common actor inference by stating "the district court seems to have overestimated the strength of the common actor inference" in reaching its decision.[126] In its very first sentence on the common actor inference, the Seventh Circuit signaled that the common actor inference is not an especially strong one because it has been "overestimated" by the district court.[127] The Seventh Circuit then explained its interpretation of the common actor inference and took the time to clearly explain to the district court how it improperly applied the Seventh Circuit's analysis.[128] The Seventh Circuit stated that the district court may have gone astray by relying on older Seventh Circuit cases such as *EEOC v. Our Lady of Resurrection Medical Center*, a 1996 case in which the Seventh Circuit implied the common actor inference could be used in summary judgment motions.[129] However, in *McKinney*, the Seventh Circuit pointed out that its decisions since *Our*

[126] *Id.* at 814.
[127] *Id.*
[128] *Id.*
[129] *Id.*

Lady of Resurrection have "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."[130]

The court then stated that it has tried to "impose limits on the common actor inference to ensure it does not outgrow its usefulness."[131] It refered to inference as "just something for the trier of fact to consider."[132] It stated that the inference may be helpful "in some limited situations."[133] The court then provided four clear examples of when the inference is illogical.[134] The combination of the court's tone and the narrow application it assigned to the common actor inference cannot help but the leave the reader with the impression the court does not look upon the inference with great favor. In the Seventh Circuit's own words, the inference is in danger of "outgrowing its usefulness," "just" something to be considered, and is only in helpful in "limited circumstances." These are not words or phrases that convey a positive connotation.

B. Circuit Courts should limit the application of the common actor inference to an evidentiary inference at the trial stage

Despite the Seventh Circuit's critique of the common actor inference and its logical flaws, the court did not completely scrap the use of the common actor inference in the Seventh Circuit.[135] Rather, the Seventh Circuit clearly stated limits on the inference and proscribes when the inference can be considered. The Seventh Circuit framed the common actor inference as an evidentiary issue, and it

[130] *Id.*

[131] *Id.* at 815.

[132] *Id.* at 814.

[133] *Id.* at 815.

[134] *Id.*

[135] *Id.* (["t]he inference may be helpful in some limited situations, which is why we allow the jury to hear such evidence and weigh it for what it is worth" (internal quotations omitted)).

stated the inference can only considered by the ultimate trier of fact at the trial stage of litigation.[136]

There are definite practical implications of the Seventh Court's decision in *McKinney* as it pertains to the common actor inference. A defendant may not assert the common actor inference as an affirmative defense; it can only be argued at trial as probative evidence. Therefore, when a plaintiff brings a Title VII complaint against a defendant-employer, even if the relationship between the plaintiff and supervisor would implicate the common actor inference, the defendant cannot use the inference to defeat a complaint in a motion to dismiss or in a summary judgment motion in the Seventh Circuit.

The court's decision removed one hurdle a plaintiff must overcome to successfully plead Title VII discrimination in the Seventh Circuit. A hypothetical Title VII plaintiff in the Seventh Circuit must first plead a prima facie case of discrimination: that he or she is a member of a protected class; that he or she was qualified for the position; and that he or she suffered an adverse employment action.[137] If the plaintiff can successfully plead a prima facie case, then pursuant to *McDonnell Douglas*, the burden shifts to the defendant to articulate legitimate, nondiscriminatory reason for the employment action.[138] At this stage in the litigation, there would be no reason for the defendant to assert a common actor inference (even if they could) because discriminatory acts by the defendant are not considered at this stage.[139] If the defendant articulates a legitimate, nondiscriminatory reason for the employment action, the burden shifts back to the plaintiff to demonstrate through evidence that the employer's reasons were "pretext" for a discriminatory purpose.[140] It is at this stage that the plaintiff begins presenting his or her evidence of the employer's discriminatory actions.

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[136] *Id.* at 814.

[137] *See* McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1973).

[138] *Id.* at 802-03.

[139] *Id.*

[140] *Id.* at 807.

Once the plaintiff has offered evidence of the defendant's discriminatory acts, other circuit courts will allow the defendant to introduce the common actor inference to weigh against the plaintiff's evidence.[141] In *Proud v. Stone*, the Fourth Circuit stated the fact that the same supervisor hired and fired an employee "creates a strong inference that the employer's stated reason for acting against the employee is not pretextual."[142] The Fourth Circuit recognized the strong impact this inference has on a plaintiff's case, and stated "[t]he plaintiff still has the opportunity to present countervailing evidence of pretext, but in most cases involving this situation, such evidence will not be forthcoming. In short, employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing."[143]

The Fourth Circuit's approach is very favorable to defendants, and assists defendant-employers in defeating Title VII discrimination claims before those claims ever reach an ultimate trier of fact. This scenario occurred in the Indiana district court's decision, where McKinney's complaint was defeated at the summary judgment stage based in part on the Sheriff invoking the common actor inference.[144] However, as the Seventh Circuit demonstrated in its opinion, there are simply too many flaws in the common actor inference to accord it so much power at the pleadings or summary judgment stage.[145]

The Seventh Circuit's awareness of how the common actor inference can result in illogical conclusions or too strong of an advantage for employers led the court to limit the use of the inference

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[141] *See* Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991); 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).

[142] *Proud*, 945 F.2d at 798.

[143] *Id.*

[144] McKinney v. Sheriff of Whitley County, 866 F.3d 803, 805 (7th Cir. 2017).

[145] *Id.* at 815.

to only the trial stage of litigation.[146] The court stated that "the common actor inference is a reasonable inference that may be argued to the jury, but it is not a conclusive presumption that applies as a matter of law."[147] The court continued that the defendant may argue the inference to the jury, who may then "weigh it for what it is worth."[148] The court acknowledged the flaws of the inference when it is applied as a matter of law at the pleadings or summary judgment stages, stating "[i]t is misleading to suggest (as some cases do) that the inference creates a 'presumption' of nondiscrimination, as that would imply that the employee must meet it or lose his case."[149] Thus in the Seventh Circuit, any employer who wishes to use the common actor inference as a way to overcome a Title VII discrimination claim may only do so when arguing to the ultimate trier of fact.[150]

CONCLUSION

The Seventh Circuit presented the most logical use of the common actor inference, if it is to be used at all. As this comment has demonstrated, Congress created Title VII to protect certain American workers from discriminatory employment actions. The subsequent judicial interpretations of Title VII created the very rigorous *McDonnell Douglas* framework that specifies exactly what a plaintiff must allege, and eventually prove, in order to succeed on a claim. The text of Title VII and the *McDonnell Douglas* framework already provide defendants with a number of protections against frivolous claims. Plaintiffs must plead a prima facie case of discrimination before defendants even need to respond to charges of discrimination. Defendants then have an opportunity to articulate legitimate, nondiscriminatory reasons for their employment action. Plaintiffs then

[146] *Id.* at 814.

[147] *Id.*

[148] *Id.* at 815.

[149] *Id.* at 814 (quoting Herrnreiter v. Chicago Housing Authority, 315 F.3d 742, 747 (7th Cir. 2002)).

[150] *Id.* at 815.

must produce actual evidence of discrimination to show that the defendant's reasons are merely pretextual. These steps help ensure that only serious and credible Title VII claims can even advance to the summary judgment or trial stage.

The inclusion of the common actor inference in pleadings and summary judgment is an example of how a powerful yet ultimately flawed judicially-created inference places a significant burden on Title VII plaintiffs. The Fourth Circuit, and those other circuits who have followed the Fourth Circuit's lead, have acknowledged that the common actor inference is a nearly fatal blow to a plaintiff's claim. A plaintiff who has met the prima facie elements of Title VII discrimination and demonstrated discrimination through evidence should be able to advance to a trial without having to overcome a defendant-friendly inference that the Seventh Circuit so easily critiqued.

While the common actor inference can be logical when applied to the right scenario, it contains too many easily-identifiable flaws that tip the scales towards a defendant. Therefore, the inference should not be considered before reaching the ultimate trier of fact. At the trial stage, the ultimate trier of fact will have the chance to survey all of the evidence presented, including the common actor inference, and will be able to weigh the evidence as the he or she sees fit. Applying the common actor inference before the trial robs the plaintiff of the chance to argue all of its evidence, and ultimately can lead to judgment for the defendant for less than solid reasons.

U.S. Circuit Courts should follow the Seventh Circuit's lead and limit the application of the common actor inference only to the trial stage. *McKinney*'s guidance on the common actor inference will achieve Congress' goal of protecting Americans from discrimination based on their race, sex, religion, color, or national origin, while also protecting defendants from frivolous claims by plaintiffs. The framework for a Title VII claim is well-established and fair, and protects both plaintiffs and defendants equally with a rigid burden-shifting test. The common actor inference disrupts this framework by shifting the scales too far toward the defendant, and as a result it

should be limited in accordance with the Seventh Circuit's decision in *McKinney*.