No. 21-214

IN THE

Supreme Court of the United States

SHANTUBHAI N. SHAH,

Petitioner,

v.

MEIER ENTERPRISES, INC.,

Respondent.

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

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does this appeal present a question that would trigger the conflict petitioner perceives among the circuits in the application of the same actor inference when the Ninth Circuit held that petitioner did not show a genuine dispute about discrimination or pretext, and did not stake its decision on the same actor inference?

2. Did the Ninth Circuit properly apply state law and determine removal to federal court was timely because an early mailing of the complaint and summons did not constitute adequate service?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Meier Enterprises, Inc. discloses that it has no parent corporation and no publicly owned company owns 10% or more of its stock.

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INTRODUCTION

Petitioner's characterization of the questions presented does not capture the decision below. Specifically, he characterizes the Ninth Circuit as having decided summary judgment based on the same actor inference in a manner that conflicts with the application by other circuits. Yet while the Ninth Circuit referenced same actor inference, it decided the case on other grounds, finding petitioner-plaintiff failed to present a prima facie case of discrimination and failed to offer evidence to rebut the legitimate reasons for his termination. This case does not provide a good vehicle to address any perceived conflict in the application of the same actor inference.

Petitioner briefly raises a second question of whether the federal courts should make decisions applying state law, remand those to state court, or certify such questions to the state's highest court. This heavily factual issue was decided by the federal courts applying Oregon law, and petitioner does not outline any reason why it should be reviewed. The Court should deny petitioner's request for certiorari.

COUNTER STATEMENT OF THE CASE

Respondent disagrees with how petitioner has chosen to describe the factual background of this matter, noting that several facts petitioner identifies are not supported by evidence. In addition, petitioner has submitted several items in the Appendix that were not part of the record before the Ninth Circuit,

including App. 58a - 64a, 70a - 71a, 73a, 80a, 83a. The district court accurately summarized the facts based on testimony and evidence submitted at summary judgment. The following excerpts from that summary set out the relevant evidence:

> 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.
> ***
> Meier Enterprises is a privately-held Washington Corporation with its principal place of business in Kennewick, Washington.
> ***
> Meier uses several different avenues to find qualified candidates, including Volt Workforce Solutions, which was how Defendants were put in contact with Plaintiff. Meier was seeking to fill both an Electrical Group Manager position and a Senior Electrical Engineer/Project Manager position.
> ***
> Meier did not consider Plaintiff for the Group Manager position after the initial interview because he lacked Washington Labor and Industries ("L&l") familiarity and experience and because he and his work were unknown to Ddefendants. Instead, Meier asked Plaintiff to continue the interview process for the Senior Electrical Engineer/Project Manager position in the Vancouver, Washington office.
> ***

Meier offered Plaintiff the Senior Electrical Engineer/Project Manager position on March 22, 2016 and Plaintiff began work that same day. 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.
***

Meier received Kelly Waterman's resume on April 6, 2016, for the Electrical Group Manager position. Waterman is younger than Plaintiff and is Caucasian. Waterman had experience with Washington L&I and knew the local L&I reviewer. Waterman and his work were also known to Meier's clients and he had demonstrated an ability to successfully manage difficult projects. Meier sent an offer letter to Waterman on April 26, 2016.
***

In the meantime, Anderson was serving as the Interim Group Manager and was managing the administrative functions of the Electrical Group. He assigned Plaintiff as the professional electrical engineer for the Pasco High School project. Plaintiff was responsible for the original electrical design package sent to L&I for state required review. The submittal was twice rejected. 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. Plaintiff emailed Pam Arneson regarding the reviewer's comments and responded by email to Anderson that he would be

out of town until Monday. Anderson raised additional issues with Plaintiffs 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." 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." Defendants found it necessary to hire an outside consultant to correct and carry on the work that Plaintiff had been assigned.

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

> I have major concerns about projects designed by Doug without my directions or supervision and it takes lot [sic] 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.
>
> I would be doing injustice both to Meier and its clients by stamping drawings of projects designed without my directions or supervision.

In response, Anderson advised Plaintiff by email that he had been hired to direct and review the work of the engineers and designers. 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." 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.

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. 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. 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. One of Plaintiff's colleagues also raised issues with Plaintiff's thoroughness and level of contribution. These concerns were communicated to Plaintiff on May 3, 2006. 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. Plaintiff was not given a formal warning to improve his work because he was in his probationary period.

> Under its agreement with Volt, Meier would incur an $18,500 recruiter fee if Plaintiff stayed with Meier more than 60 days. The last day to terminate Plaintiff's employment without incurring the fee was May 9, 2016. 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.
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> ***
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> Waterman began working for Meier on May 31, 2016, as the Group Manager in Meier's Kennewick office. In September 2016, Meier's Vancouver office was closed down and Plaintiff's position was never filled.
>
> (App. 2a - 7a) (internal citations omitted).

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT PRESENT THE QUESTION PRESENTED ABOUT THE SAME ACTOR INFERENCE

Petitioner seeks review of the Ninth Circuit's affirmance of summary judgment, which dismissed his claims for age and race discrimination. He contends a conflict exists across circuits in the application of the same actor inference and the application by the Ninth Circuit was in error. However, the decision below did not turn on the same actor inference and, even if the perceived conflict between circuits exists, the facts of this case do not fall into the area of conflict. This case does not warrant review for the reasons outlined below.

First, the decision by the Ninth Circuit below did not turn on the same actor inference as plaintiff suggests. While that inference was referenced, the Ninth Circuit found foremost that plaintiff failed to produce evidence that created a genuine factual dispute on his prima facie claims of race or age discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Ninth Circuit held that plaintiff did not create a genuine issue of material fact because a jury could not find on the evidence presented a) that the given reasons for not hiring him into the Group Manager position were pretext; b) that similarly-situated individuals were treated more favorably; or c) that the proffered reasons for termination were not the real reasons. *Shah v. Meier Enterprises, Inc. et al.*, No. 18-35962 (App. 27a). Only after making these factual determinations did the Ninth Circuit state that "moreover" a strong inference of no discrimination arises when the same actor hires and fires a plaintiff in a short time period. *Id.* (App. 27a-28a). This further observation about the same actor inference appears to be dicta. At the least, it was only an additional reason for granting summary judgment. In his brief, plaintiff appears to recognize this and asks the Court to also find that he did show pretext. The Ninth Circuit held plaintiff failed to produce evidence on at least three other elements necessary to his claims, so even if this Court rejected the Ninth Circuit's reliance on the same actor inference, the grant of summary judgment would stand.

Second, no clear conflict between the circuits exists in the application of the same actor inference, at least not to the extent plaintiff perceives it. The

same actor inference is not a federal law but rather a rule or theory rooted in the premise that if an actor had discriminatory animus, that actor would be unlikely to hire someone of the protected class in the first instance. Thus, if that person hired and fired an individual in a short period, it was unlikely discrimination motivated the firing. Plaintiff's argument cites and borrow heavily from a law review article. Plaintiff suggests the Seventh Circuit, which he views as most opposite the Ninth Circuit, has rejected use of the same actor inference at summary judgment. This is not quite accurate. While the Seventh Circuit has noted that the same actor inference does not create a presumption and should not be used as conclusive or to defeat an inference of discrimination created by other circumstantial evidence, it has not rejected the application at summary judgment. *Blasdel v. Northwestern University*, 687 F.3d 813, 820 (7th Cir. 2012); *Petts v. Rockledge Furniture LLC*, 534 F.3d 715, 724 (7th Cir. 2008); *Filar v. Board of Education of City of Chicago*, 526 F.3d 1054, 1065 n. 4 (7th Cir. 2008). Contrary to petitioner's argument, the Seventh Circuit has approved the application of a non-dispositive inference based on the same actor at summary judgment. *Harris v. Warrick County Sheriff's Dept.*, 666 F.3d 444, 449 (7th Cir. 2012). In the cases cited by plaintiff where the Seventh Circuit rejected the same actor inference at summary judgment, it did so because the plaintiff had otherwise produced evidence of discrimination. The Seventh Circuit would not use the same actor inference to rebut an otherwise genuine dispute over discriminatory intent. *Perez v. Thorntons, Inc.*, 731 F.3d 699, 708-09 (7th Cir. 2013).

The Ninth Circuit also does not hold the same actor inference is dispositive or creates a mandatory presumption. *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1098 (9th Cir. 2005). It does apply a "strong inference" of no discrimination when the same actor acts within a short time. *Id.*; *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270–71 (9th Cir. 1996). All circuits apply the same actor inference to some degree; there is not an intractable split requiring a determination from this Court.

Third and more importantly, plaintiff's case does not present a factual scenario that falls into the area of perceived conflict, or where the circuits might apply the same actor inference differently. Here, the Ninth Circuit did not cite a failure to rebut the strong inference of the same actor as the reason it dismissed plaintiff's claims on summary judgment or even identify it as dispositive. Rather, it held plaintiff did not produce evidence of a prima facie case or evidence sufficient to overcome the non-discriminatory reasons for his hire and termination. The facts here are similar to factual scenarios in cases such as *Harris*, where the Seventh Circuit approved the same actor inference on summary judgment as a shorthand for lack of evidence of discrimination. *Harris*, 666 F.3d at 449. To the extent the various circuits may apply the same actor inference differently, that potential conflict is not triggered by the facts of this case. As a result, this case does not provide a good vehicle for addressing that conflict.

Finally, the decision below was correct. Meier Enterprises hired plaintiff through a recruiter as a Senior Engineer/Project Manager in March 2016. While it also had a Group Manager position open, plaintiff lacked experience with Washington L&I review; Meier Enterprises later hired an individual with that experience for that Group Manager role. Meanwhile, multiple concerns arose about plaintiff's performance and plaintiff took days off on two occasions when critical projects were underway without following company policy and seeking approval. Meier Enterprises terminated plaintiff on May 9, 2016 due to these performance issues, the last day to avoid a $18,500 placement fee. Plaintiff admitted no one made any reference to his age or race. He did not present direct or indirect evidence of discrimination or any evidence to dispute the concerns raised about his performance and failure to follow policy. Instead, he perceived those issues as unimportant. He similarly had strong opinions about the importance of L&I experience for the Group Manager position, but did not dispute he lacked that experience. The Ninth Circuit, and the trial court before it, appropriately found an absence of any genuine dispute and dismissed plaintiff's claims.

Petitioner seeks a new assessment of the facts of his case, and his attempt to couch this as a conflict between the circuits regarding the same actor inference should be disregarded. The Ninth Circuit affirmed summary judgment on other grounds, a decision that was not in error. It did not decide plaintiff's case based on the same actor inference, and plaintiff did not even challenge the legality of the inference below as he does now in his petition.

Respondent requests the Court deny the petition for review.

II. THE QUESTION PERTAINING TO SERVICE DOES NOT PRESENT A DECISION WORTHY FOR REVIEW

Petitioner briefly outlines a second question, asking the Court to consider whether the federal court should decide an issue of state law, certify questions to the state court or remand a case to the state court. However, petitioner outlines no reason why this matter is appropriate for review. Indeed, the question presented does not involve an issue of federal law or a conflict among federal courts. It does not touch on any of the areas of consideration that are outlined in Rule 10.

To the extent petitioner characterizes the Ninth Circuit as lacking authority to determine if his November 23, 2016 mailing constituted service, he is incorrect. The Ninth Circuit correctly applied state law to address the issue of service as federal courts routinely do under diversity jurisdiction. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938). True, Judge O'Scannlain preferred to certify the question to the Oregon Supreme Court, but the majority did not think that step was required.

On the merits, the Ninth Circuit majority did not err. Plaintiff initially only mailed a copy of the complaint and an improperly signed summons via restricted delivery to Meier Enterprises' Kennewick, Washington office on November 23, 2016. (He later

properly served defendant's registered agent, and defendant timely removed to federal court.) (App. 24a). Addressing that earlier mailing, the Ninth Circuit majority held the method utilized was not reasonably calculated to provide notice under Oregon Rule of Civil Procedure § 7D(1) and the test outlined by the Oregon Supreme Court in *Baker v. Foy*, 797 P.2d 349 (Or. 1990). Whether a method other than those expressly defined by rule is "reasonably calculated" to give notice is a factual question based on the totality of the facts. *Id*. at 352. As the Ninth Circuit concluded here, the mailing, although restricted, did not guarantee it was given to the addressee or someone with the level of authority to accept and handle legal summons for Meier Enterprises. The tracking information simply noted it was left at the front desk, providing no signature and no assurance of who received it or even if it was handed to a person rather than left in a mail receptacle. (App. 25a-26a). Based on these facts, the Ninth Circuit correctly held that the November 23, 2016 mailing did not constitute service under Oregon law.

Because the issue of service concerns a state law, this Court cannot render a controlling decision about the interpretation of that law. It would only be providing a decision on plaintiff's particular case based on the facts presented. This issue does not warrant review.

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CONCLUSION

For the reasons outlined herein, respondent respectfully asks the Court to deny the petition for writ.

Respectfully submitted,

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