NO. 21-214

# In The
# Supreme Court of the United States

Shantubhai N. Shah, Pro Se,
*Petitioner*

v.

Meier Enterprises, Inc.,
*Respondent*

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

## REPLY BRIEF FOR PETITIONER

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USPS Mailed: October 22, 2021

(Reprinted in Booklet Form)

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### I. Respondent's Counterstatement Question 1 is a misrepresentation.

In addressing whether the Respondent's allegedly legitimate reasons for firing Petitioner might have been a Respondent's pretext for discrimination against Petitioner, the Ninth Circuit in conjunction with the District Court Summary Judgment in conclusion, invoked the "same-actor" inference rule, cited in *Bradley v. Harcourt Brace & Co.*[1], drawn from the Fourth Circuit's reasoning in Proud v. Stone.[2]

> "[W]here the same actor is responsible for both the hiring and firing of a (Title VII) discrimination plaintiff, and both actions occur within a short period of time, a **strong inference** arises that there was no discriminatory motive." *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).[3] (Emphasis added).

In *Coghlan* the Ninth Circuit determined that this so-called "**same actor**" inference makes an **employee's burden** in overcoming an employer's

[1] 104 F.3d 267 (9th Cir. 1995).
[2] 945 F.2d 796 (4th Cir. 1991).
[3] *Shah v. Meier Enterprises, Inc.*; No. 18-35962 (9th Circ. 2021) (Appendix 1 & 2)

summary judgment "especially steep." The Court also expanded the rule beyond mere "hiring and ... firing" to cases where the employee is not actually fired but merely offered a less desirable job assignment, as in instant case though Petitioner was a highly educated, state certified engineer, qualified, fifty-years experienced candidate, and highly recommended by three engineering references from his coworkers furnished to Volts, an employee search agency hired by Respondent, was not offered the position interviewed for and was appointed to a lower position, validity of which shall not be a summary judgment function, but a jury decision. (Emphasis added).

As follows, the documents produced by Respondent show otherwise than that alleged pretext narrated in Respondent's Brief in Opposition:

1) There exists no document that shows the younger and less experienced Caucasian Mr. Waterman selected for the Electrical Group Manager having the alleged L&I or the Electrical Department Manger experience, a fiction and a misrepresentation to District Court and Appeals Court, who was offered a higher salary and bonus, that was not offered to Respondent. (Prima facia charge of discrimination against Respondent).

2) Respondent's every department managers (Civil, Mechanical, Structural, Architectural, Accounting, and Human Resources) were all Caucasians, strong inference showing there was an animus against hiring minorities to lead the departments, wherein Petitioner's

lengthy experience to lead department was ignored allegedly for a lack of Washington State L&I experience, not any different than Petitioner had dealt for several years with in Oregon Authorities Having Jurisdiction (AHJ), for multi-million dollar budget building plans approval. (First Rebuttal to pretext).

3) Petitioner or Volts was not advised, discussed with, or disclosed the L&I experience requirement for hiring for an Electrical Department Manager. (Second Rebuttal to pretext).

4) Why was Petitioner given the L&I review if he allegedly did not have L&I experience to begin with and was asked to review remotely the work of Mr. Doug Farris, Electrical Designer who in fact was directly supervised by Mr. Anderson as a CEO and Electrical Department Manager, not an electrical engineer, before Waterman was hired, who had his office just across Farris desk and rushed the project out to meet the deadline, without a Quality review by Ms. Pam Arneson also an electrical engineer worked with Farris, next to Farris desk, both supervised by Mr. Anderson? (Third Rebuttal)

5) Farris was not terminated for his errors after the L&I Review, as in "Cat's Paw" [4] rule, here Petitioner's direct supervisor Anderson's bias and retaliation resulted in

[4] *Staub V. Proctor Hospital*
(U.S. Sup. Ct. No. 09–400, March 1, 2011)

Respondent's adverse decision. Petitioner after making complain about Mr. Farris's work was terminated. Mr. Anderson retaliated against Petitioner upon his complaint, exhibited a lack of leadership, not taking the responsibility for his own failure to supervise and not assign L&I review for quality control check to Ms. Anerson, required by Respondent's quality assurance guidelines, and prunsihed Petitioner who was remotely placed in Respondent's Vancouver, WA field office located 217 miles away from Mr. Farris employed at Respondent's Kenwick, WA headquarters office, where Respondent was initially interviewed for an Electrical Department Manager vacancy. (Fourth Rebuttal to pretext).

6) Respondent saved $18,500 Petitioner placement fee to Vault by Petitioner's replacement with Waterman, referred by a client, to pay for Waterman's higher wages and bonus offered to him. Respondent did not fill the Vancouver office Sr. Electrical Engineer/Project Manager vacancy created after Petitioner's discharge, closing the field office later. (Fifth Rebuttal).

7) While all new employees were given a three-month review of their work, Petitioner was discharged without a review, after Waterman was hired and assigned Petitioner's projects. Respondent could not afford more than one electrical engineer position since the work was limited to one person. Petitioner was given an inferior treatment. (Sixth Rebuttal to pretext).

8) There was no record of alleged meetings produced where Petitioner's work was discussed, though there was a discussion of Vancouver office not having adequate projects to sustain and was closed in a few months after Petitioner's Project Manager assignment was transferred to Waterman. (Seventh Rebuttal to pretext)

These are the jury functions to short out to be believed, not a subject for Summary Judgement. The "strong same-actor inference" is like an ever-evolving Covid 19 Delta virus in the jurisprudence world, harmful to Title VII discrimination plaintiffs, needs an effective vaccine shot to stop its further nefarious spread among some circuits, making a psychological harm to discrimination plaintiffs, an enormous burden to overcome. Under this court's exercise of supervisory power, the same-actor inference not codified by the Congress in Title VII language, could be restricted.

## II. Respondent's Counterstatement Question 2, is a misrepresentation.

Question 2 presented by Petitioner in the Petition for Writ of Certiorari is proper, Considering Governing Review on Writ of Certirari, under the Rule 10 (a) "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; **has decided an important federal question in a way that conflicts with a decision by a state court of last resort;** or has so far departed from the accepted and usual course of judicial proceedings, or **sanctioned such a departure by a lower**

**court, as to call for an exercise of this Court's supervisory power.**" (Emphasis added).

In the instant case the Ninth Circuit in conjunction with the District Court has decided an Oregon law question of first impression regarding the effective service to a defendant by USPS mail, in conflict with past decisions by the Oregon Supreme Court "is not clear." In fact, ORCP 7 for Service is confusing or complex for a Pro Se.

> In Ninth Circuit Memorandum, Judge, O'Scannlain, J., dissenting, "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." [5]

In the instant case Respondent was served with Petitioner's first class and a certified mail with restricted delivery USPS mail as required by Oregon law. Respondent engaged an attorney who acknowledged a receipt of Petitioner's service with a summons and a copy of Civil Complaint filed in Washington County Circuit Court, but did not appear within 30 days as required in summons under Oregon law.

Putting aside the district court's undue emphasis on the return receipt, Petitioner selected method of service was 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. Petitioner chose a form of mail that both provided him with confirmation of USPS electronic delivery and required that delivery be made on the addressee or the registered agent and was acknowledged, replacing the need of return receipt. Petitioner's USPS tracking confirmed that the Complaint and Summons were delivered at the Respondent's corporate office, where, having visited the office three times, Petitioner knew that Mr. Geiver, Respondent's acting CEO worked. Finally, Respondent's counsel acknowledged the receipt of the Complaint and Summons on December 21, 2016, when he wrote Petitioner, expressing its intent not to answer the Complaint. 1-ER-27.

[5] *Shah v. Meier Enterprises, Inc.*, No. 18-35962 (9th Cir. 2021) (Appendix 2)

Despite Respondent's arguments to the contrary, Petitioner does not argue that Meier's actual notice of the Complaint and Summons is dispositive in this case. Nor could he. For this same reason Respondent's argument that the Complaint and Summons were left at the front desk/reception area rather than hand delivered is likewise irrelevant *Menken* 45 P.3d at 987 (Or. Ct. App. 2002) ("That is, regardless of whether the defendant ever actually received notice, were the plaintiff's efforts to effect service reasonably calculated, under the totality of the circumstances then known to the plaintiff, to apprise the defendant of the pendency of the action?"). However, as Respondent acknowledges, acknowledgment of delivery is a fact taken into consideration by Oregon courts. *Edwards v. Edwards*, 801 P.2d at 786 (Or. 1980). Accordingly, to the extent that Respondent confirmed its receipt of the suit, its notice is relevant to the question of Service.

Finally, Petitioner's argument that removal statutes should be strictly construed in favor of remand does not equate to the contention that the trial court lacked the ability to conclude that mailing was not proper service because it had previously been addressed by the Oregon Supreme Court. The district court acknowledged, there is a presumption against removal and any doubt about the right of removal requires resolution in favor of remand. 1-ER-26-27 (Citing *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cric. 2009)). Whether Respondent's service in this case was proper under Oregon law was a close call. The district court should have erred in favor of remand.

Alternatively, the Oregon Supreme Court should

have been a proper venue to interpret the Oregon law for a certified question of effective service with the complexity in the instant case, as the descending Judge, O'Scannlain, J. suggested in the Ninth Circuit Memorandum.

> "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." [6]

Under this court's exercise of supervisory power, Ninth Circuit could certify a question to the Oregon Supreme Court:

"Whether the Respondent's acknowledgement letter of receipt of summons with a copy of complaint filed with the Washington Couty Circuit Court of Oregon, serves the Notice to appear in the court within 30-days of Notice."

## CONCLUSION

For the reasons articulated hereinabove, Petitioner respectfully requests the Court: to reject Respondent's Counterstatement Questions

[6] *Shah v. Meier Enterprises, Inc.*, No. 18-35962 (9th Cir. 2021) (Appendix 2)

misrepresentation, restrict the use of common-actor discrimination inference as in 7th circuit [7] and reverse the Portland District Court summary judgment, and/or certify above stated question of first impression to the Oregon Supreme Court.

October 22, 2021

Respectfully submitted,
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[7] *McKinney v. Office of Sheriff of Whitney County*, 866 F. 3d 803, 814 -15 (7th Circ. 2017)