No. 21-_____

In The
Supreme Court of the United States

MARY E. CANNING,

Petitioner,

v.

CREIGHTON UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

REBECCA R. MESSALL
Counsel of Record
MESSALL LAW FIRM, LLC
7887 E. Belleview Ave.,
Suite 1100
Englewood, CO 80111
303.228.1685
rm@lawmessall.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the Eighth Circuit improperly borrowed part of the standard in FRCP 50 to review a summary judgment under FRCP 56, where the panel's failure to adhere to the standard of "disputes of material fact" deprived Petitioner of a jury's consideration of the employer's lack of credence regarding discrimination and retaliation, thereby conflicting with panels in the Second and Third Circuits and this Court's rulings in *Tolan*,[1] *Reeves*[2] and *St. Mary's Honor Center*.[3]

---

[1] *Tolan v. Cotton*, 572 U.S. 650 (2014) (*per curiam*).

[2] *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000).

[3] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

PARTIES TO THE PROCEEDINGS

Petitioner is Plaintiff Mary E. Canning.

Respondent is Defendant Creighton University.

CORPORATE DISCLOSURE

Not applicable

LIST OF ALL RELATED CASES

1. United States Court of Appeals for the Eighth Circuit, *Canning v. Creighton University*, No. 19-3286

Judgment and opinion, April 21, 2021

2. United States District for the District of Nebraska, *Canning v. Creighton University*, No. 4:18-cv-03023-JMG

Judgment and memorandum, Sept. 25, 2019

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

REPORTS OF DECISIONS BELOW

Canning v. Creighton University, 995 F.3d 603 (8th Cir. 2021).

Canning v. Creighton University, 2019 WL 4671180 (D. Neb. Sept. 25, 2019).

JURISDICTION

Eighth Circuit's order, entered April 21, 2021.

Pursuant to this Court's orders March 19, 2020, and July 19, 2021, this Petition is filed within 150 days after the date of the Eighth Circuit's order.

The statute conferring this Court's jurisdiction is 28 U.S.C. § 1254(1).

Notifications are not required under Sup. Ct. R. 29.4.

RELATED CONSTITUTIONAL PROVISION

Seventh Amendment:

Trial by Jury in Civil Cases.

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

RELATED STATUTES AND RULES

29 U.S.C. § 623(a)(1) provides in part:

> It shall be unlawful for an employer . . . to fail to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age.

42 U.S.C. § 12102 provides in part:

> As used in this chapter:
>
> (1) Disability
>
> The term disability means, with respect to an individual:
>
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment (described in paragraph (3)).
>
> (2) [omitted]
>
> (3) Regarded as having such an impairment
>
> For purposes of paragraph (1)(c)
>
> (A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment

whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(c) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

42 U.S.C. § 12203 provides in part:

(a) No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this chapter.

Fed.R.Civ.P. 50 provides in part:

(a) Judgment as a matter of law

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

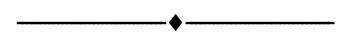
(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

> (2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

Fed.R.Civ.P. 56 provides in part:

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



STATEMENT OF THE CASE

I. Issue and basis for federal jurisdiction in the district court.

In the district court, jurisdiction existed under 28 U.S.C. § 1331 (federal questions). Petitioner, Dr. Canning, brought an age discrimination in employment claim under 29 U.S.C. § 623(a)(1), a "regarded as disabled" claim under 42 U.S.C. § 12102(1)(C), and a retaliation claim under 42 U.S.C. § 12203(a).

II. Facts material to the question presented.

Because the district court entered summary judgment, what follows are the facts[4] as viewed in the light most favorable to Petitioner, "taken from the record evidence and the opinions below."[5]

Petitioner, at age 57, was the oldest medical resident in a program of 25-to-30-year-olds at Creighton Hospital and the VA Hospital.[6] She was admitted to the program by passing all required examinations[7] and by recommendations from three prominent physicians at Drexel.[8] She was recruited by then-program director, Dr. Wichman.[9] Her contract required training under different physicians, many with decades in medical practice and as professors, such as Drs. Green,[10]

---

[4] The record below was sealed and contained in a joint appendix (not filed with this Petition) and is referred to herein by the page, line, paragraph and witness/document identifier in the joint appendix.

[5] *Tolan*, 572 U.S. at 651 (2014) (*per curiam*).

[6] 381/8-17(Grif).

[7] Residents took not-for-credit practice exams. The district court incorrectly insinuated, App. at 26, 33, that Petitioner had not passed requisite, for-credit, examinations. On the contrary, the July exams in 2015 and 2016 **were practice-only** in "preparation for the board exams that occur at the time of graduation three years forward." 63/180:14-25(plf).

[8] 32/10:24(plf).

[9] 325/16(Wich).

[10] 412(ltr). Dr. Green was an internal medicine physician.

Griffin,[11] Fixley,[12] Manhart,[13] Townley,[14] and Silberstein,[15] from whom she earned favorable evaluations and/or favorable letters[16] during Petitioner's tenure. Other training physicians were less experienced, such as Drs. Lambrecht[17] and Cichowski.[18] Residents were evaluated by an assigned physician for rotations of four or five weeks,[19] and received 6-month reviews aggregating the performance evaluations for that period.[20]

Beginning in July, 2015, Petitioner's first four months of training rotations were all at the VA Hospital.[21] Soon after she began work, another resident mistreated one of her patients. Petitioner reported

---

[11] 365/6-8(Grif). Dr. Griffin practiced internal medicine and joined the Creighton faculty in 1988.

[12] 395/8-25(Fix). Dr. Fixley, hired in 2000, was a hospitalist and internal medicine physician.

[13] 384/19-22(Manh). Dr. Manhart was hired in 2004.

[14] 39/45:12-14(plf).

[15] 410(ltr Silberstein).

[16] 429(ltr by Manhart); 430(ltr by Fixley); 431(ltr by Griffin).

[17] 328/20-22(Wich). Dr. Lambrecht was a "newer" faculty.

[18] 137¶3(Cich); 329/10-25(Wich). Dr. Cichowski, hired only 3 years before Dr. Canning began her residency, was only appointed in February of 2016 as future program director, and overlapped with Wichman's tenure until taking her place in July of 2016.

[19] 139¶8(Cich).

[20] 39/46:16-17(plf).

[21] 40/52:12-15(plf).

it.[22] The resident was fired.[23] She also reported that his friend, a third-year, supervisory-resident,[24] began bullying her, but no action was taken.[25] Nevertheless, she received five satisfactory performance evaluations for her first four-month period.[26] One of her VA faculty physicians, Green, evaluated Petitioner as a "reliable team player" who managed "one of the most complex outpatient ambulatory panels" and who was able to recognize her patients' "unique needs and abilities on several levels. . . ."[27]

Petitioner was transferred to Creighton University Hospital beginning November 1, 2015. All residents other than Petitioner completed a three-week-long, intensive training to operate the hospital's new computer software program.[28] She was left out and had to learn it on the job. She informed the head of the oversight group, DeVrieze, and then-program director, Wichman, that Respondent's failure to provide

---

[22] 88(ltr plf).

[23] 486¶5(plf).

[24] 88(ltr).

[25] 486¶6-7(plf).

[26] The panel opinion excerpted, App. at 2, a line from the amended complaint. Insofar as the appeal involved summary judgment, the panel's initial premise for its opinion, **stemming from a single line in a pleading**, was error by failing to recognize Petitioner's extensive favorable evidence recited herein.

[27] 412(Grn).

[28] 486¶9(plf); 40/52:12-25(plf).

Petitioner with proper training on the software was impairing her performance.[29]

During November, she spent some of her time at the VA. Her faculty physician, Griffin, with more than 30 years' experience teaching residents, said she performed "similar to the other residents."[30] He said, "From my recollection, she did a decent job, an average intern's job for that month."[31] However, for the month of November at Creighton Hospital, deprived of the software training, she was given a "fair/poor" rating by a newer faculty member, Lambrecht.[32]

In November and December, the same resident that bullied her launched a rumor that she had dementia.[33] He spread it to "multiple doctors,"[34] including Lambrecht, who spread it to DeVrieze and his oversight group.[35] Dementia is an age-related slur.[36] Memory deficits and confusion are commonly associated with dementia.[37] Petitioner had complained about the bullying resident and asked not to be put on a

---

[29] 42/61:13-18(plf).

[30] 370/16-17; 367/2-3(Grif).

[31] 367/2-3(Grif).

[32] 76; 328/20-22(Wich); 487¶12(plf).

[33] 486¶7(plf).

[34] *Id*.

[35] 348/17-25 through 349/21; 351/16-18; 353/14-25(DeV).

[36] 72/234:21-25 through 235:1(plf).

[37] 73/237:2-4(plf).

project under him.[38] Her request was ignored.[39] Later, based on the advice of her then-faculty mentor, Townley, Petitioner filed a grievance because the resident's harassment affected her job performance while she was under his supervision for six weeks in November and December of 2015.[40]

In mid-December, 2015, Townley awarded Petitioner a favorable 6-month evaluation,[41] despite the November rating by Lambrecht. And for the later part of the month of December, 2015, she earned a favorable evaluation from her rotation under Abu Hazeem.[42]

At nearly the same time that Townley was giving Petitioner a favorable aggregate review, however, the oversight group, soon after depriving Petitioner of software training, made a "highly unusual" requirement that she repeat her first year.[43] She was not informed until January 22, 2016. She was made the first-ever resident to be referred to an in-house psychologist, purportedly to assess her learning style.[44] Notably, for the month of January, she successfully completed rotations under the eminent Dr. Peter Silberstein, Chief of Hematology and Oncology.[45] In a letter of support, he said

---

[38] 88(ltr); 486¶7(plf).

[39] 486¶8(plf).

[40] 58/145:15-17(plf).

[41] 487¶11(plf).

[42] 487¶12(plf).

[43] 327/4-6(Wich); 354/14-22(DeV); 78-79(ltr dtd 1/22/16).

[44] 80(Ander email); 488¶13(plf).

[45] 488¶14(plf).

about Petitioner: "I have also enclosed the scores of the other resident (a second year who did it on the same month as her). Dr. Canning showed both greater improvement as well as overall better scores than the other resident."[46]

In February, 2016, DeVrieze humiliated Petitioner in front of other residents for her answer to a question. He became infuriated,[47] yelling at her in front of the team. The same day, meeting with her and Cichowski, he insulted Petitioner, saying: "Do you have memory problems? Lambrecht mentioned it. Have you met with [the psychologist] yet?"[48] DeVrieze's oversight group obtained a memo allegedly written by the psychologist, who had met with Petitioner for merely ten minutes.[49] He had said to Petitioner, "You don't understand what they are doing to you."[50] The oversight group summarily suspended Petitioner from the remainder of her first-year contract, and terminated her second-year contract.[51]

Petitioner filed a complaint regarding the resident who bullied her and also hired a lawyer.[52] Soon after her lawyer sent a letter to Cichowski, the

---

[46] 410(Silb).

[47] 488¶14(plf).

[48] 488-89¶15(plf).

[49] 47/91:20(plf).

[50] 489¶16(plf).

[51] 83(ltr).

[52] 88(ltr plf); 463-466(ltr Pohr).

in-house psychologist killed himself.[53] In response to her lawyer's letter, which tendered a voluntarily-obtained, formal psychological report by a reputable neuro-psychologist,[54] Respondent required her to be examined by its own psychological examiner as a pre-condition to completing her first-year.[55] She completed the exam, according to the report dated June 7.[56] Nevertheless, Respondent then imposed, without Petitioner's knowledge, a performance improvement plan, or a verbal "PIP,"[57] in advance of her July 1, 2016, start date.

After readmission, Petitioner's faculty evaluations were favorable,[58] other than from the DeVrieze group, despite the fact that she was shunned for more than two months by her replacement mentor, Cichowski, who was also the replacement program director.[59] In mid-September, the DeVrieze group, through Cichowski, escalated its personnel actions by placing

---

[53] 490/22(plf).

[54] 483(ltr Pohr).

[55] 490¶23(plf).

[56] 413(report Call). Even though Wichman, as former program director, expressed concern regarding a conclusion in the report, 38/18-25 through 339/1-4, the panel ruled that Respondent did not "regard" Petitioner as disabled because, in the panel's view, medical residency requires greater than average "cognitive functioning." App. at 15, n.5. **This conclusion is not part of the testimony in the record.** Moreover, it does not negate Respondent's false accusations of age-related deficiencies and perceived disability.

[57] 286/6-24(Cich).

[58] 467-71(eval); 491¶27(plf); 373/10-15(Grif).

[59] 491¶26(plf).

her "under review," supposedly for violating the terms of the same PIP that the group had never disclosed to her.[60] Moreover, she was awarded, during that same period of time, favorable evaluations for September by Drs. Griffin and Fixley.[61] Manhart also testified she would have given Petitioner credit for rotations in July and November of 2016.[62]

In December of 2016, Respondent further escalated its adverse actions with a "one strike and you're out" probation status without informing her of any failure to meet the "under review" requirements.[63]

In early January of 2017, Respondent terminated Petitioner after she made a common error for which no other residents had ever been terminated, as Cichowski herself admitted,[64] and as testified by two other long-time, experienced faculty members, Griffin and Fixley.[65] The record shows that Petitioner was performing well under faculty members who were not associated with DeVrieze and Cichowski, including Griffin, Fixley, Manhart, Andukuri and Birch.

Respondent's mendacity was also shown by deviations from its standard policies and procedures.[66] Specifically, the oversight group made decisions

---

[60] 129-31(ltr).

[61] 491¶27(plf).

[62] 392/7-9(Manh); 221¶125(SOF).

[63] 493¶35(plf).

[64] 303/22 through 304/1(Cich).

[65] 377/4-25(Grif); 401/23-25 through 402/1-8(Fix).

[66] *See* n.120, *infra*.

without conferring with Petitioner's attending faculty physicians,[67] failed to acknowledge her favorable evaluations and faculty recommendation letters,[68] took unheard of actions to require her to repeat her first year,[69] used false pretenses for her to see an in-house psychologist,[70] and required two extensive neurocognitive examinations a condition for re-admission.[71] Significantly, the oversight group was misled as to the nature of Petitioner's error and the fact that Respondent's policy to require direct supervision was not followed on Petitioner's Christmas Eve shift.[72]

Additional deviations from policies and procedures occurred when DeVrieze's group, through Cichowski, not only failed to inform Petitioner that she was subject to a PIP, but also shunned her for more than two months upon her readmission,[73] and failed to obtain Petitioner's signatures to confirm the content of the "under review" meetings.[74] In addition, Cichowski imposed "probation" without informing Petitioner of any violations of the "under review" requirements,[75] and then terminated Petitioner while failing to interview her, investigate the facts surrounding the shift in

---

[67] 347/21-23; 350/6-14(DeV); 566/11:16-25(Andu); 402/10-14; 404/1-9(Fix).

[68] 566/11:16-25(Andu).

[69] 324/5-9(Wich).

[70] 285/6-9(Cich); 354/14-22(DeV); 488¶13(plf).

[71] 482(ltr Jans).

[72] 494¶39-40(plf).

[73] 491¶26(plf).

[74] 291/8 through 292/9(Cich).

[75] 492¶30; 495¶34(plf).

dispute,[76] or even to consult with Petitioner's then-current faculty physician, who gave her a favorable evaluation for the December rotation[77] immediately prior to when the termination occurred.

In addition, Creighton falsely accused Dr. Canning of dementia,[78] confusion,[79] confabulation,[80] cognitive impairment,[81] lack of mental capacity,[82] lack of basic medical understanding,[83] and impairment of abstract reasoning,[84] despite her passing an independent psychological exam as well as Respondent's required psychological exam. Even after she was re-admitted to complete her first year, DeVrieze continued his hostility toward Petitioner and limited the faculty for whom she was allowed to work.[85] She was denied a rotation in the intensive care unit.[86] And despite her abundant record of favorable evaluations showing she possessed adequate medical knowledge, the testimony of Griffin, Fixley and even Cichowski showed that she was

---

[76] 308/14-24; 309/11-18(Cich).

[77] 493¶37(plf).

[78] 413(report Call).

[79] 53/121:15 through 122/18; 55/130:4-6, 12; 72/235:4-7; 73/237:2-4(plf).

[80] 409(note).

[81] 84(ltr Pohr); 82(email); 482(ltr Jans).

[82] 54/125:1-20; 54/128:7-13; 55/129:2(plf).

[83] 53/121:15 through 122:18(plf).

[84] 415(report Call).

[85] 492¶29(plf).

[86] 55/129:2(plf).

terminated after making a common error for which no other residents had previously been terminated.

REASONS FOR GRANTING THE WRIT

I. Introduction

The panel's decision sharply conflicts with this Court's rulings in *Tolan*,[87] *Reeves*,[88] and *St. Mary's Honor Center*.[89] Moreover, it exacerbates already irreconcilable conflicts in various circuit and district courts on the proper standard to be applied on motions for summary judgment in discrimination cases. This Petition is not simply asserting "erroneous factual findings or the misapplication of a properly stated rule of law."[90] Rather, the panel has stated in this case, as have other circuits and district courts in previous cases, an incorrect rule of law for summary judgment motions. Moreover, the error in misusing the parameters of FRCP Rules 56 and 50 is of such constitutional magnitude that it implicates any litigant's Seventh Amendment right to a jury trial in civil cases.[91]

---

[87] *Supra*, n.1.

[88] *Supra*, n.2.

[89] *Supra*, n.3.

[90] *See Tolan*, 572 U.S. at 559 (Alito, J., concurring); *see also Salazar-Limon v. City of Houston, Texas*, 137 S. Ct. 1277 (2017) (Alito, J., and Thomas, J., concurring).

[91] Craig M. Reiser, *The Unconstitutional Application of Summary Judgment in Factually Intensive Inquiries*, 12 U. Pa. J. Const. L. 195, 204-05, n.59 (Oct. 2009), *citing City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999).

Rule 50, used for jury trial motions and trial motions to the bench for directed verdict,[92] wisely requires "two-level protection" to ensure that a seated jury is allowed to perform its fact-finding role.[93] Rule 56, used for summary judgment motions, guards the Seventh Amendment right by a strict requirement for the absence of any "genuine disputes of material fact."[94] Yet, when Rule 50's "reasonable jury" language is improperly smuggled into a decision at the pretext stage of a Rule 56 motion, courts not only abandon the nonmovant's "two-level protection" that a correctly-timed Rule 50 trial motion would provide,[95] but they also abandon Rule's 56's required absence of any "genuine dispute of material fact." The result of such egregious error is that a jury is never allowed to "disbelieve" the employer's evidence that its action was nondiscriminatory, despite the axiom that a jury decides

---

[92] The former phrase "directed verdict" is used throughout to also mean judgment notwithstanding the verdict (a/k/a j.n.o.v.). Conceptually, for the case at bar, the word "verdict" in the former phraseology helps distinguish pre-trial motions from trial and post-trial motions for "judgment as a matter of law," the nomenclature used for both Rule 56 and Rule 50 motions since 1991. *See* Arthur Miller, 9B Fed. Prac. & Proc. Civ. § 2521, *Judgment as Matter of Law in a Jury Trial: History and Purpose of the Rule* (Thomson Reuters, 3d ed., 2021).

[93] *See Reeves*, 530 U.S. at 148.

[94] *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 (1970).

[95] Under Rule 56, a judge decides which facts are material and disputed, based on a cold record. In contrast, a Rule 50 motion for directed verdict is made at a live trial after the judge and jury have likely heard both sides or at least the plaintiff's evidence.

an employer's intent.[96] Credibility determinations belong to the jury.[97] The jury's disbelief of the employer is a "form of circumstantial evidence that is probative of intentional discrimination. . . ."[98] This rule was enunciated prior to *Reeves* in the earlier Eighth Circuit case, *St. Mary's Honor Center v. Hicks*:[99]

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required*[.]'[100]

---

[96] *See* Theresa M. Beiner, *The Trouble with Torgerson: The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 Nev. L. J. 673 (2014) ("With the exception of disparate impact cases, all employment discrimination cases require a plaintiff to show the state of mind of the defendant-employer, or of one or more of its employees. In addition, because actors so rarely voice their discriminatory preference aloud, employment discrimination plaintiffs often rely on inferences from circumstantial evidence. Making inferences is a traditional jury function that courts have held is not well-suited for summary judgment.").

[97] *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985).

[98] *Reeves*, 530 U.S. at 147.

[99] *Supra*, n.3.

[100] *Id*., at 511 (citation omitted, italics in the original).

The case at bar involves a credibility clash of long-tenured, highly experienced physicians versus newer, less experienced physicians as to both Petitioner's performance and the error for which she was allegedly fired. This clash casts grave suspicion upon the truthfulness of Respondent's explanation for how it treated Petitioner. The lower courts' legal error was at the Rule 56 pretext stage, when they incorrectly required Petitioner to "establish," or essentially, to "prove by preponderance of evidence" the employer's discriminatory intent, as if at a trial, rather than, in response to a Rule 56 motion for summary judgment,[101] to show only a genuine dispute of material fact so as to require a jury to be seated.[102] The lower courts totally ignored the rule that a jury must be permitted the chance to find that Respondent's younger, less experienced, physicians lack credibility, and from that, along with the

[101] The pretext stage in a Rule 56 motion for summary judgment refers to the point after both plaintiff and employer have met their respective burdens to produce *prima facie* evidence of discrimination (on one hand) and evidence of nondiscriminatory intent (on the other). Once this conflict exists (as it does in this case), the seating of a jury is necessary to resolve the conflict by scrutinizing the truthfulness of the employer's explanation, since credibility and the drawing of inferences are uniquely within the sphere of the fact finder. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also* Justice Brennan's dissent, *id.*, at 266, criticizing language in the majority opinion as akin to the directed verdict standard.

[102] For another example, *see Wittenburg v. American Expr. Fin. Adv., Inc.*, 464 F.3d 831, 841 (8th Cir. 2006) (holding that, at the pretext stage of summary judgment: "Wittenburg has **failed to prove** pretext in her age discrimination claim," after withdrawing and replacing original opinion) (emphasis added), *cert. denied*, 551 U.S. 1113 (2007).

elements of Petitioner's *prima facie* case, discriminatory intent could be found.

Notably, this Petition concerns a Rule 56 motion, as opposed to the Rule 50 standard considered in *Reeves*. But for comparison's sake, in a directed verdict context, to prevent an already seated jury from deciding the employer's intent under Rule 50, this Court spelled out a necessary two-level protection, that: (1) the record must have "**conclusively** revealed some other, nondiscriminatory reason for the employer's decision," or (2) the plaintiff's evidence was weak [in showing] that the employer's explanation was untrue **and** there was "**abundant and uncontroverted independent** evidence that no discrimination had occurred."[103]

The second level of *Reeves'* two-level protection requires four specific elements: "independent," "uncontroverted" and "abundant" evidence of non-discrimination, plus the plaintiff's "weak" evidence of discrimination.[104] The first level requires "conclusive" evidence of non-discrimination. Not only does the second level have an onerous set of elements to prove, but the first level's "conclusive" element seems nearly impossible to achieve, since a jury is entitled to "disbelieve" the employer's witnesses. In the case at bar, both lower courts incorrectly invoked Rule 50's "no reasonable jury" standard—but then left off *Reeves'* crucial and indispensable two-level protection, while also

---

[103] *Reeves*, 530 U.S. at 148 (emphasis added).

[104] *Id.*

failing to test the record for "no genuine dispute of material fact," the correct standard to have used under Rule 56. The lowers courts, instead, simply gave awkward note of the rule's existence.[105]

II. The lower courts' rulings

The district court made, and the panel upheld, the type of conclusory findings[106] that this court specifically rejected in *Reeves*, which was, notably, a Rule 50 case involving a jury verdict, whereas the case at bar involved a Rule 56 motion for summary judgment. Nevertheless, the district court invoked Rule 50 language, which was wrong both in terms of the summary judgment context and also in terms of improperly invoking Rule 50's "reasonable juror" language without *Reeves'* two-level protection against directed verdicts. As a result, the district court abandoned the Rule 56 standard that required both the absence of disputed facts and a view of the record in a light most favorable to Petitioner, and in using the wrong standard, the district court thus foreclosed a jury from hearing Petitioner's *prima facie* case at all, deprived her of the right to cross-examine Respondent's witnesses, and deprived her of pivotal circumstantial evidence to which she was entitled in the form of a jury's "disbelief" of the employer's case.

To determine how a "reasonable jury" would hypothetically decide the employer's intent, the district

---

[105] App. at 6 and 23.

[106] *See, e.g.*, n.107-08, *infra*.

court projected its own view of the weight and credibility of the evidence onto a non-existent jury, using subjective terms such as "no rational fact finder could conclude,"[107] and "no rational juror could conclude."[108] If the instant motion had **not** been for summary judgment, but rather had been a Rule 50 trial motion for directed verdict, the case could not have been seized from a jury based on a simplistic "reasonable juror" standard without *Reeves'* two-level protection.

The district court also rejected Petitioner's retaliation claim by projecting upon a non-existent jury the weight and credibility of the court's own assessment of the evidence of causation. By this subjective exercise, the court ruled that "no rational juror could conclude" that Petitioner's protected activity resulted in Respondent's adverse actions,[109] and it altogether failed to recognize that a jury is entitled to disbelieve the employer.

On appeal, the panel cited *Reeves* in rejecting Petitioner's argument that a jury is entitled to disbelieve the employer's story.[110] Acknowledging both the existence of a *prima facie* case and a non-discriminatory reason for termination,[111] the panel curiously held that a factual dispute about intent is **not enough under**

---

[107] App. at 42 and 46.

[108] *Id.*, at 48.

[109] *Id.*

[110] App. at 11.

[111] App. at 8 ("[W]e assume she has met her *prima facie* case.").

Rule 56. Specifically, the panel required Petitioner to overcome yet another hurdle, stated as, "**sufficient evidence for a reasonable trier of fact** to infer discrimination."[112] This language is nearly the same as the directed verdict language in Rule 50(a)(1).[113] Not surprisingly, the panel did not acknowledge Rule 50 as the source of its language, nor the absence of *Reeves'* "two-level protection" for Petitioner's Seventh Amendment right, nor Petitioner's right to cross-examine adverse witnesses at trial so that the jury could disbelieve the employer's explanation. Moreover, the panel's "sufficient evidence" language omits Rule 50's modifying word, "legally." Legally sufficient evidence at trial, for a plaintiff, would be a preponderance of the evidence. It seems obviously improper to require a plaintiff to submit a preponderance of evidence at the pretext stage of a Rule 56 motion simply to defeat summary judgment.

Again, Rule 50 language was incorrectly invoked in the case at bar. And for the reasons summarized below, the summary judgment record did not pass Rule 50's first-level protection because the evidence did not reveal, "conclusively," that Respondent lacked discriminatory intent. Nor could it have, again, because a **jury** is entitled to disbelieve Respondent's story. Likewise,

---

[112] App. at 10, *citing* a pre-*Reeves* case, *Mathews v. Trilogy Communications, Inc*., 143 F.3d 1160, 1165 (8th Cir. 1998).

[113] *See* p. 3, *supra*: "If a party has been **fully** heard on an issue **during a jury trial** and the court finds that a **reasonable jury** would not have a **legally** sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party. . . ." (emphasis added).

at the second of *Reeves'* two-level protection standard, the evidence failed to show "abundant, uncontroverted, independent evidence" of non-discrimination. Specifically, Respondent's evidence of non-discrimination failed to meet three of *Reeves'* four elements required for directed verdict because evidence of non-discrimination was not "independent." Rather, it was entirely from Respondent's interested witnesses. Moreover, it was not "uncontroverted." Rather, the evidence of nondiscrimination was hotly disputed by testimony of senior, more experienced faculty and by Petitioner's testimony.

In addition, Petitioner's evidence of age discrimination and retaliation was very strong. It included Respondent's failure to provide Petitioner with software training despite providing it to all other, significantly younger, residents. Other evidence of discriminatory intent was the DeVrieze group's demand that Petitioner repeat her first year. The decision itself was "highly unusual," but also, its timing was suspicious. It occurred at a time when, on one hand, her faculty mentor was giving her a favorable 6-month review and, on the other hand, the third-year "bullying" resident was falsely rumoring "dementia" to "multiple doctors" and to DeVrieze's group. More evidence of discriminatory intent was the DeVrieze group's act of giving information to the in-house psychologist,[114] who then allegedly penned a memo, not long before he killed himself, about "dementia" and "confabulating to cover

[114] 256/23.

a neurocognitive deficit."[115] In addition, he had said to Petitioner, "You don't understand what they are doing to you."[116] A jury could take the remark as his knowledge that the referral to him was pretextual.

The record also shows the DeVrieze group's discriminatory intent by its additional referral of Petitioner to a psychiatrist for "problems" allegedly "related to dementia,"[117] and demanding that she pass a formal psych exam never required of other residents. Other direct evidence was DeVrieze's rebuke of Petitioner about "memory problems." The letter by Respondent's counsel defending the DeVrieze group was also direct evidence of discrimination when the attorney baselessly stated that Petitioner had "cognitive and memory impairments which currently impair her clinical functioning."[118]

---

[115] 409(note).

[116] 489¶16(plf).

[117] 413(Call).

[118] 482(Jansen ltr).

The employer's mendacity[119] and numerous deviations from its standard procedures,[120] described above, were further evidence of discrimination.

Retaliation for Petitioner's filing a complaint and hiring an attorney began no later than July 1, 2016, when Respondent imposed the unheard of "secret PIP." The retaliation continued when the faculty mentor, Cichowski, shunned Petitioner from July through September. Respondent displayed continued retaliation by escalating its actions against Petitioner through its "under-review" action against Petitioner for allegedly violating the undisclosed PIP, followed by probation with a "one strike and you're out" warning. The retaliation culminated in terminating Petitioner over a common error for which no other residents are terminated.

In summary, as the oldest person in the residency program, Petitioner was the object of ongoing age-based insults, mainly from DeVrieze-connected individuals with authority to discipline and fire her. They accused her of age-based deficiencies, then claimed

---

[119] "[W]hen an employer's response is factually wrong in a self-serving way on a material fact, the choice between treating it as an honest mistake or a deliberate falsehood is ordinarily a choice for a jury at trial, not for summary judgment." 3 Empl. Discrim. Coord., Analysis of Federal Law, § 137:32, "Attacking Employer's Credibility" (Thomson Reuters 2019), *citing Lane v. Riverview Hospital*, 2016 WL 4492397 (7th Cir. 2016).

[120] "The First Circuit has held that evidence that the employer deviated from its standard procedure or policies . . . may be relevant to the pretext inquiry. . . ." *Id*., *citing Rodriguez-Cardi v. MMM Holdings, Inc.*, 936 F.3d 40 (1st Cir. 2019).

that the group of younger residents, not subjected to such falsehoods, was not a comparator for discrimination purposes.

In the case at bar, the panel ruled that Petitioner's proof "falls short of showing this requirement [of pretext]"[121] despite the fact that the record shows numerous on-going, age-based slurs, employer mendacity, more favorable treatment of younger residents, and the employer's numerous deviations from standard procedures. On these facts, Petitioner was entitled to seat a jury for the purpose of "disbelieving" Respondent's explanation. A jury can disbelieve an employer based on cross examination answers, demeanor, inconsistencies and a commonsense understanding that employers have the upper hand in producing an "abundance" of self-serving documentation for discriminatory terminations, particularly for employees who hire counsel.

III. Panels in the Seventh and Fifth Circuits also have deprived plaintiffs of a jury's right to disbelieve employers by substituting Rule 50's "reasonable factfinder" for Rule 56's "genuine disputes of material fact" standard.

One legal commentator recently lamented that courts are "often unwilling to give proper credence to evidence offered by employees attempting to prove

---

[121] App. at 9.

pretext at the summary judgment stage."[122] A previous legal commentator observed: "Many commentators complain that lower courts too readily grant summary judgment, particularly in favor of defendants and against plaintiffs, and more particularly in civil rights cases."[123] An even earlier observer said that the greatest impact of a changing landscape in federal pretrial practice is "the dismissal of civil rights and employment discrimination cases from federal courts in disproportionate numbers."[124] Writers generally decry a "pre-trial disposal of the vast majority of employment discrimination claims."[125]

Not surprisingly, employers seem to prevail when the Rule 50 directed verdict rule is improperly used in Rule 56 summary judgment cases coupled with a failure to apply Rule 50's "two-level protection." Thus, a jury is improperly foreclosed from the opportunity to disbelieve an employer's credibility.[126]

---

[122] Randall John Bunnell, *Summary Judgment Principles in Light of Tolan v. Cotton: Employment Discrimination Implication in the Fifth Circuit*, 63 Loy. L. Rev. 77 (Spring 2017).

[123] Howard M. Wasserman, *Mixed Signals on Summary Judgment*, 2014 Mich. St. L. Rev. 1331 (Thomson Reuters 2021).

[124] Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. Pa. L. Rev. 517 (2010) (Thomson Reuters 2021).

[125] Bunnell at 78.

[126] For discussion of summary judgment recast into the mold of a motion for a directed verdict, *see* Samuel Issacharoff and George Loewenstein, *Second Thoughts about Summary Judgment*, 100 Yale L. J. 73, 85-86 (1990).

For example, when a Seventh Circuit panel held for an employer on summary judgment, the opinion did not acknowledge the plaintiff's right to seek a jury's disbelief of the employer's story. Instead, without Rule 50's two-level protection, the court also incorrectly used the language for a directed verdict, in a Rule 56 case, stating: "The applicable standard at summary judgment is whether the **evidence would permit a reasonable factfinder to conclude** that racial discrimination caused the adverse employment action—here, a failure to promote."[127] The court took as true the employer's non-discriminatory reason for failing to promote the plaintiff.[128] The court simply negated the plaintiff's evidence of intentional discrimination, pronouncing it unconvincing to a "reasonable factfinder." On the contrary, a jury might have simply disbelieved the employer's witnesses. But the court did not factor-in the possibility of "employer lack of credence" as requiring a jury. The plaintiff had showed that he was held to a different interview standard,[129] that his better performance reviews were ignored,[130] and that the employer had a history of not promoting minorities into certain positions. Any jury might have disbelieved the veracity of the employer's explanation. But the court foreclosed such "right to disbelieve" by using, in

---

[127] *Barnes v. Bd. of Tr'ees of the Univ. of Illinois*, 946 F.3d 384, 389 (7th Cir. 2020), *citing Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016) (emphasis added).

[128] 946 F.3d at 389.

[129] *Id.*, at 390.

[130] *Id.*, at 387-88.

a Rule 56 motion, the altered Rule 50 standard for directed verdict.

Similarly, on summary judgment, a Fifth Circuit panel rejected discrimination claims based on the altered Rule 50 standard, *i.e.*, without its two-level protection. The employer's excuse for discrimination was "reduction in force." Rather than a failure to show Rule 56's "genuine disputes of material fact," the plaintiff supposedly failed to "present sufficient evidence" from which a "rational factfinder" could infer pretext.[131] To its credit, the panel, on re-hearing, noted the language of "no genuine disputes" in parts of the opinion. But it actually upheld summary judgment based on the altered Rule 50 directed verdict language without its two-level protection. The employer's witnesses might have contradicted themselves on cross-exam. They might have had furtive looks. However, the plaintiff was not afforded the right to a jury's possible disbelief of the employer's "reduction in force," nor was the right recognized in the opinion. The court altogether foreclosed a jury from disbelieving the employer by using the wrong standard of review for a Rule 56 case.

---

[131] *Harville v. City of Houston, Mississippi*, 945 F.3d 870, 877 (5th Cir. 2019).

D. Panels in the Second and Third Circuits have upheld the Rule 56 standard for summary judgments, unlike panels in the Eighth, Seventh and Fifth Circuits

The Second Circuit recently held: "Summary judgment dismissing a claim 'is inappropriate when the admissible materials in the record make it arguable that the claim has merit.' [citation omitted]. In determining whether there are genuine issues of material fact to be tried, 'the district court may not properly consider the record in piecemeal fashion, trusting innocent explanations for individual strands of evidence; rather, it must 'review all the evidence in the record.'"[132]

Similarly, the Second Circuit earlier reversed an employer's summary judgment based on improperly excluded remarks that the employee did not "fit in." Even though the employer offered legitimate nondiscriminatory reasons not to promote him,[133] the meaning of remarks, when "too close to call," should be a fact question for a jury to resolve.[134]

The Third Circuit reversed an employer's summary judgment due to the disputed material fact of whether she was terminated or resigned.[135] The

---

[132] *Davis-Garett v. Urban Outfitters, Inc.*, 921 F.3d 30, 45 (2d Cir. 2019), *citing Reeves*, *supra*.

[133] *Abrams v. Dept. of Public Safety*, 764 F.3d 244, 253-54 (2d Cir. 2014).

[134] *Id*.

[135] *Burton v. Teleflex, Inc.*, 707 F.3d 417 (3d Cir. 2013).

district court failed to credit testimony by plaintiff and other employees and made improper credibility determinations.[136] Notably, the appellate court held that a plaintiff is not required to show evidence of discriminatory *animus* to show pretext. "[I]f a plaintiff has come forward with sufficient evidence to allow a finder of fact **to discredit the employer's proffered justification, she need not present additional evidence** of discrimination beyond her *prima facie* case to survive summary judgment."[137]

E. Internal splits exist among panels in the same circuit

Internally, and case-by-case within the circuits, Rule 56 summary judgments have met with varying standards and their conflicting results. For example, a Third Circuit panel simply took the employer's explanation as true and then invoked, after the plaintiff had proved his *prima facie* case, a "no reasonable jury" standard. He was denied his right to have an actual jury disbelieve the employer's explanation.[138] The opinion did not acknowledge such a right exists.

Recently the Fifth Circuit acknowledged a plaintiff's *prima facie* case and the employer's nondiscriminatory explanation. However, as did the Eighth Circuit in the case at bar, the court required the plaintiff to "show" the employer's story was false, rather

---

[136] *Id.*, at 421.

[137] *Id.*, at 427 (emphasis added).

[138] *Smith v. City of Allentown*, 589 F.3d 684 (3d Cir. 2009).

than allow a jury to disbelieve the employer after cross examination.[139] Again, the court did not acknowledge the plaintiff's right to a jury for purposes of finding the employer's lack of credibility.

On the other hand, in an earlier Fifth Circuit case, a plaintiff prevailed on summary judgment by the court's proper regard for testimony disputing the employer's story. "A nonmovant's statement may not be rejected merely because it is not supported by the movant's or its representative's divergent statements."[140] To hold otherwise, "would render an employee's protection against discrimination meaningless."[141] The court admonished: "Where, as here, a motion for summary judgment is premised almost entirely on the basis of depositions, declarations and affidavits, a court must resist the urge to resolve the dispute—especially when, as here, it does not even have the complete depositions. Instead, the finder of fact should resolve the dispute at trial."[142]

CONCLUSION

At least since *Reeves*, scholars have bemoaned a seeming federal court reluctance to allow employment

---

[139] *Benjamin v. Felder Services, L.L.C.*, 753 Fed. Appx. 298 (5th Cir. 2018) (not selected for publication), *cert. denied*, 139 S. Ct. 1622 (2019).

[140] *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 245 (5th Cir. 2016).

[141] *Id.*

[142] *Id*.

discrimination claims to go to trial.[143] The problem seems to be, at least in part, that in Rule 56 motions for summary judgment, courts incorrectly borrowed part of *Reeves'* language regarding Rule 50 motions for directed verdict, and then compounded the error by failing to require *Reeves'* "two-level protection" for the Seventh Amendment right to a jury. In addition to the cases and articles cited above, decades of cases and scholarly articles support those who ask this Court to resolve these conflicts and inconsistencies among and within circuits in employment cases.

WHEREFORE, Petitioner prays that the Court will enter an order granting writ of *certiorari* to the Eighth Circuit and grant such other and further relief that the Court deems just and proper.

Respectfully submitted,

REBECCA R. MESSALL
Counsel of Record
MESSALL LAW FIRM, LLC
7887 E. Belleview Ave.,
Suite 1100
Englewood, CO 80111
303.228.1685
rm@lawmessall.com

Counsel for Petitioner

---

[143] Hon. Bernice B. Donald, J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. Sch. L. Rev. 749 (2012-13).