No. 21-434

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

REPLY TO BRIEF IN OPPOSITION

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

TABLE OF CONTENTS

Page

I. PETITIONER'S REPLY TO COUNTERSTATEMENT OF THE CASE 1

Veracity is for a Jury to Decide, not a Court 1

II. REPLY TO ARGUMENT 3

The Panel Misapplied Rule 50 in a Rule 56 Proceeding 3

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Reeves v. Sanderson Plumb'g Prod., Inc., 530 U.S. 133 (2000) 3, 5

Tolan v. Cotton, 134 S. Ct. 1861 (2014) 1

RULES

Fed. R. Civ. P. 50 ..... 1, 3, 4

Fed. R. Civ. P. 56 ..... 1, 3, 4

I. PETITIONER'S REPLY TO COUNTERSTATEMENT OF THE CASE

Veracity is for a Jury to Decide, not a Court.

Every employer tries to offer a non-discriminatory reason for its adverse action. However, contrary to Creighton's argument, simply stating its reason, *ipse dixit*, is not a golden ticket to an employer's grant of summary judgment. An employer's veracity is determined by a jury, not by a judge, so as to satisfy the Seventh Amendment. On summary judgment under Rule 56, trial judges must not be upheld in denying jury trials for pretext claims by employing a Rule 50 standard that is both ill-timed and lacks the necessary two-fold level of protection. A jury, after hearing cross-examination at trial, determines the veracity of an employer's defense, not a court prior to trial.[1]

The *Petition* correctly presents the facts in the light most favorable to Dr. Canning, "taken from the record evidence and the opinions below."[2] Contrary to the *Response's* suggestion, "no automatic credence" attaches to Creighton's explanation for its adverse actions. Rather, Dr. Canning's claims require a jury to consider Creighton's veracity after first hearing the cross-examination.

The record indeed shows that Creighton terminated Dr. Canning over conduct for which no other

---

[1] Unless a court is sitting as the trier of fact, which was not the situation here.

[2] *Tolan v. Cotton*, 134 S. Ct. 1861 (2014) (*per curiam*).

residents have ever been punished, "as Cichowski herself admitted, and as testified by two other long-time, experienced faculty members, Griffin and Fixley."[3] Griffin testified that he sees the same type of omission as Petitioner's "a couple of times a month,"[4] a "common" error when viewed in the light most favorable to Petitioner.

The reason no "similarly situated resident" exists is because the error disputed here is so common, according to Griffin's 30 years of experience,[5] that it is not reported or subjected to disciplinary action.[6] In fact, the error is so common that Creighton holds pharmacists' lectures on that exact type of error.[7] Accordingly, Creighton is wrong[8] to represent that such testimony is not part of the *Petition* or the record.

Extensive evidence exists in the record from which a jury is allowed to decide whether or not Creighton is dissembling about its adverse treatment of Dr. Canning. Creighton continually insulted Dr. Canning with false accusations of aged-based cognitive deficiencies, before and after she hired counsel. Creighton withheld software training, subjected her to mental exams, one

---

[3] *Petition* at 30-31, *citing* 303/22 thru 304/1(Cich); 377/4-13(Grif); 219¶110(SOF); 401/23-25 thru 402/1-8(Fix).

[4] 377/9-13(9-13)(Grif); 219¶110(SOF).

[5] 377/20-25(Grif).

[6] Rather than recognize that Griffin's and Fixley's testimony goes to the "weight" of the evidence, the panel wrongly excluded their testimony that the disputed error was not a fireable offense.

[7] 70/221:3-11(plf).

[8] *Response* at 6.

under a false pretext and without her knowledge or medical consent. It also deviated from standard written resident policies and procedures, escalated its disciplinary actions against Dr. Canning without proper written notice and against policy, limited training rotations to pre-selected faculty, misrepresented facts to the review committee, violated internal policies, and fired her over a common error that does not even warrant discipline for any other resident. Importantly, Dr. Canning was shunned upon her return by Cichowski, acting both as program director and as Canning's personal faculty mentor. A jury is allowed to reject Creighton's explanation and is permitted to "infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."[9]

II. REPLY TO ARGUMENT

The Panel Misapplied Rule 50 in a Rule 56 Proceeding.

Both the panel and Creighton fail to acknowledge *Reeves'* two-level protection against directed verdicts under Rule 50 in the context of jury trials. The *Response* simply parrots the panel's error by which it extracted only a portion of the Rule 50 test for directed verdict. Both the panel and Creighton then compound the error by applying an incomplete Rule 50 analysis

---

[9] *Reeves v. Sanderson Plumb'g Prod., Inc.*, 530 U.S. 133, 147 (2000).

and standard in a Rule 56 summary judgment proceeding.

The *Response* falsely argues that the reason for Dr. Canning's discharge is not disputed. On the contrary, the record is replete with evidence showing the proffered reason was pretextual by reason of Creighton's vicious, unrelenting, flagrantly biased and retaliatory treatment of Dr. Canning. A jury's disbelief of Creighton's reason for termination, "together with the elements of the prima facie case, will suffice to show intentional discrimination to the jury."[10]

The *Response* asserts a false equivalence between Rule 50 and Rule 56, serving actually to highlight the long history of confusion between the improper use of language from Rule 50 (but without its important two-level protection) in Rule 56 proceedings. The *Response* also highlights the fact that a judicial decision should not have decided the ultimate disputed questions of discrimination *vel non*, which are by right matters for a jury to decide.[11] The district court and the panel improperly accepted Creighton's articulated business reasons as being true, without regard to a jury's right to disbelieve the proffered reason in light of the right to conduct cross-examination and to present Dr. Canning's abundant, controverting evidence of discrimination and retaliation.

---

[10] *Id.*

[11] *Id.*

If left to stand, the panel's error will conflict with this Court's own ruling in *Reeves*. The right to a jury trial in discrimination cases will also be severely infringed.

Contrary to the *Response's* contention, the *Petition* did not "manufacture" a conflict among the circuit courts, which have in fact been inconsistent in their recognition of the fact that a jury is entitled to disbelieve an employer's story. Rather, the *Response* ignores scholarly concern that has existed for years regarding an overabundance of summary dispositions for employers. One obvious basis for improper summary judgments is what happened in the case at bar. Namely, courts fail to allow a jury to determine the employer's credence, or lack of it, after both sides have met their respective burdens of proof at the pretext stage of summary judgment motions.

CONCLUSION

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