NO. 21-_____

# In the Supreme Court of the United States

JOSHUA O. THOMAS,

*Petitioner,*

v.

FARMERS INSURANCE EXCHANGE,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the district court and court of appeals have effectively abrogated this Court's binding precedent for reviewing a motion for summary judgment—whether the evidence, considered in a light most favorable to the non-movant and with all justifiable inferences drawn in his favor, creates a genuine issue of material fact—by applying numerous tests and standards that obfuscate Petitioner's ultimate burden and deprive him of the opportunity to make his case?

## DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Tenth Circuit

No. 20-3076

Joshua O. Thomas, *Plaintiff–Appellant v.*
Farmers Insurance Exchange, *Defendant-Appellee*

Date of Final Order and Judgment: April 14, 2021

Date of Rehearing Denial: May 10, 2021

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United States District Court for the District of Kansas

No. 2:18-cv-02564-DDC

Joshua O. Thomas, *Plaintiff v.*
Farmers Insurance Exchange, *Defendant*

Date of Final Memorandum and Order: March 26, 2020

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**OTHER AUTHORITIES**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua O. Thomas respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, dated April 14, 2021 (App.1a) is not reported. The opinion of the United States District Court for the District of Kansas, dated March 26, 2020 (App.37a), is reported at 448 F.Supp.3d 1174 (D. Kan. 2020).

## JURISDICTION

The Tenth Circuit Court of Appeals issued its order and judgment issued on April 14, 2021. (App.1a). It issued its Order denying Petitioner's timely petition for rehearing on May 10, 2021. (App.91a). The first paragraph of this Court's Order of March 19, 2020 extended the time for filing a petition for certiorari in all cases involving petitions due after that date to 150 days following, as relevant here, the appeals court judgment. While that order was rescinded by this Court's Order of July 19, 2021, that Order left in place the extended deadline for any case in which the

relevant lower court judgment or order was issued prior to the date of this Court's July Order. This petition is due by October 7, 2021. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (hereinafter "Title VII") are reproduced in the Appendix at App.93a.

## STATEMENT OF THE CASE

This case arises out of an action by Petitioner arising under Title VII for sex discrimination in employment and retaliation. (App.11a). Petitioner was employed by Farmers from March 9, 2015 to October 25, 2018, when he was terminated. (App.38a). Petitioner is male but fails to conform to male sex stereotypes. (App.2a).

On April 2, 2018, Petitioner applied internally for an Account Underwriter position (the "AU position"). (App.4a). John Radliff, the hiring manager, interviewed the candidates but did not hire Petitioner for the position. (App.4a-5a). Petitioner reached out to Radliff and asked for feedback on why he was not selected. (App.5a). Radliff requested the meeting be in person. (*Id.*). At the meeting, Radliff stated that he might hire Petitioner in a different set of circumstances if he already has "a bunch of alphas over there." (*Id.*).

He emphasized the fact that Petitioner had not previously interacted with him or reached out to him, and Petitioner's lack of leadership qualities. (*Id.*). These statements show inconsistencies in the reasons given for not hiring Petitioner, as Radliff had no such interactions with the two candidates hired. (App.5a-6a). Moreover, Radliff acknowledged in a deposition that the position was not a leadership position, and Radliff checked the box in his interview notes showing that Petitioner "demonstrated" teamwork and leadership in his interview. (App.41a). Finally, a reasonable factfinder could have inferred that Radliff's request to take the meeting offline showed Radliff's misconduct. On other occasions where Petitioner's managers were engaged in discrimination, they choose to take the conversation offline. (App.152a, 154a-155a, 185a, 192a).

Petitioner provided evidence supporting his understanding of the comment about "alphas" to be a reference to his failure to conform to sex stereotypes. (App.148a-149a, 184a). In response, he complained internally of discrimination on April 25, 2018 in an email and on April 26, 2018 in a meeting with Amy Canton. (App.6a). Canton was HR manager over the Olathe office. (App.6a).

Shortly thereafter, Petitioner's direct supervisor, Jarrod Shelton, placed Petitioner on a Final Warning on May 17, 2019. (App.8a). Being put on this Warning caused Petitioner to lose his tuition reimbursement benefit and prevented him from applying for other positions within the company. (*Id.*).

The Final Warning accused Petitioner of having issues with "accepting and applying feedback to grow," stating that he had "not made improvements in these areas" was "not meeting expectations." (App.8a).

It also claimed that Petitioner's behavior "creates a negative work environment with your peers." (App.9a). The Final Warning was not the standard procedure in Farmers' progressive discipline system but represented a considerable escalation. (App.48a).

Other facts before the district court (and the Tenth Circuit) were inconsistent with these allegations. For example, Petitioner's supervisors repeatedly praised his ability to accept and apply feedback. On March 27, 2018, Shelton praised Petitioner for asking a question about how he could improve his performance, saying "[t]his is the type of attitude that I appreciate and will make you more successful in your role." (App.132a). On March 31, 2018, Shelton told Petitioner "I appreciate how open you are to feedback and I know you're going to do well in this area." (App.4a). On May 1, 2018, Canton sent an email in which, unprompted, she described a "recent 'coaching' experience" she and Shelton had with Petitioner as "a great experience to share because we were able to see quick results in terms of the employee acceptance and ownership." (App.132a). Similarly, the allegation that Petitioner's behavior created a negative work environment was belied by the fact that none of Petitioner's coworkers complained about his behavior. (App.48a).

These inconsistencies, along with other actions by Shelton, give rise to a reasonable inference that he planned to discipline Petitioner and set up a future termination, in retaliation for Petitioner's complaint. Shelton's actions on May 10, 2018, provide particularly strong evidence of his inconsistency regarding Petitioner's conduct. That day, Shelton messaged Petitioner his phone metrics and said "[t]his is fantastic, nice work sir," and told Petitioner he was

"really supporting our team more than you know with phone metrics." (App.44a, n.7). The same day, Shelton sent an email saying he could no longer coach Petitioner. (App.45a). Later, Petitioner was assigned a new supervisor, Curt Sims. (App.2a). Shelton helped arrange for Sims to become Petitioner's new supervisor. (App.49a). Even before that happened, Shelton and Sims had private conversations regarding disciplining Petitioner. (*Id.*). These conversations continued until the week of Petitioner's termination, despite Shelton no longer being his supervisor. (*Id.*). On at least one occasion, they intentionally took the conversation off-line where there would be no record. (*Id.*).

Farmers terminated Petitioner's employment on October 25, 2018. (App.13a-14a). Earlier that day, Sims wrote a memorandum purporting to state the reasons for the termination. (*Id.*). As with the final written warning, there were multiple inconsistencies in the reasons Farmer's gave for the termination. For example, the day before the termination, Sims and another manager met with Petitioner to discuss a phone call from a few days earlier. (App.12a). At the end of that meeting, Sims told Petitioner that he should use the guidance he received in the meeting going forward. (*Id.*). Yet none of the purported misconduct in the memorandum happened after that meeting. (App.13a). The reasons Farmer's gave also lacked credibility. Regarding the October 22, 2018 call, Petitioner was criticized for failing to contact Sims after the agent hung up, but Sims admitted in his deposition that Petitioner's offer of a supervisor callback was sufficient, and he did not need to escalate the call where the agent did not ask him to have a

supervisor call back. (App.167a-173a). Petitioner was also criticized for following Farmers' policy when it came to backdating discounts. (App.168a).

Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission on May 21, 2018. (App.10a). Petitioner filed this action against Farmers on October 19, 2018. (App.11a). There was evidence from which it could be inferred that Canton would have received a copy of the Complaint shortly thereafter. (*Id.*). On October 24 or 25, 2018, Petitioner saw Canton walk to the location where Sims' desk was, something she almost never did. (App.12a). A jury could infer that Canton instructed Sims to terminate Petitioner in retaliation for his having filed his lawsuit against Farmers.

Farmers filed a Motion for Summary Judgment on all counts. (App.14a). On March 26, 2020, the district court entered its Memorandum and Order granting Farmers' Motion for Summary Judgment. (App.90a). The clerk of the District Court entered a judgment, and Petitioner filed a timely appeal. (App.16a). On April 14, 2021, the Court of Appeals entered its Order and Judgment affirming the District Court's opinion. (App.1a).

## REASONS FOR GRANTING THE PETITION

### I. WHILE PURPORTING TO APPLY THIS COURT'S SUMMARY JUDGMENT STANDARD IN CIVIL RIGHTS CASES, THE MULTITUDE OF TESTS USED BY THE TENTH CIRCUIT EFFECTIVELY ABROGATES THAT STANDARD

A district court may grant summary judgment when a party "shows that there is no genuine dispute as to any material fact and the [party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This Court has emphasized "the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Thus, "a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Id.* at 657 (quoting *Anderson*, 477 U.S., at 249). While this Court is not equipped to correct every error by a lower federal court, it has intervened to correct "a clear misapprehension of summary judgment standards in light of our precedents." *Id.* at 659.

Such a clear misapprehension is occurring in most federal courts, although it is obscured by a facial adherence to the standard. Both the Tenth Circuit and the District of Kansas recognized the proper summary judgment standard. (App.16a-17a) (citing *Jordan v. Maxim Healthcare Servs., Inc.*, 950 F.3d 724, 730 (10th Cir. 2020)); (App.54a) (citing, *e.g.*, *Nahno-*

*Lopez v. Houser*, 625 F.3d 1279, 1283 (10th Cir. 2010)). Yet merely repeating the standard does not indicate adherence to it. The Fifth Circuit did the same in *Tolan*. *Tolan v. Cotton*, 713 F.3d 299, 304 (5th Cir. 2013) (citing *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 454 (5th Cir. 2005)). In *Tolan*, the Fifth Circuit appears to have somewhat abruptly strayed from the proper application of this Court's precedent. By contrast, the Tenth Circuit's departure (along with that of several others) seems the outcome of a gradual, well-meaning process, arising from an attempt to follow this Court's precedent, but which has resulted in it doing the opposite.

The cause of the Tenth Circuits failure to properly apply this Court's binding precedent appears to be its use of a multitude of different tests and standards for considering different types of evidence when ruling on a motion for summary judgment in an employment discrimination case. The use of these tests leads the court to divide the non-movant's evidence into separate parts, which are then considered individually, rather than looking at the evidence in its totality (and making any inference supported thereby). The first such standard that is consistently applied is the burden shifting framework set out by this Court in *McDonnell Douglas*. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See* (App.17a); *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 969 (10th Cir. 2017). *McDonnell Douglas* set forth a three-step process: first, a plaintiff establishes a prima facie case; second, a defendant must articulate a legitimate, non-discriminatory reason for its conduct; finally, the plaintiff provides evidence showing that the stated reason was a pretext. *Id.* 411 U.S., at 802-05.

In applying the *McDonnell Douglas* standard, the Tenth Circuit has promulgated a multitude of tests and standards for considering evidence, especially evidence of pretext. *See*, *e.g.*, *DePaula*, 859 F.3d, at 970-71 (because courts are not to second guess an employer's business judgment, evidence that the employer "was mistaken or used poor business judgment" or otherwise "should not have made the decision . . . is not sufficient to show that the employer's explanation is unworthy of credibility"); *Bird v. West Valley City*, 832 F.3d 1188, 1204 (10th Cir. 2016) (the timing of an adverse action is evidence of pretext, but cannot, by itself, establish pretext); *Fassbender v. Correct Care Solutions, LLC*, 890 F.3d 875, 889 (10th Cir. 2018) (when an employer's failure to follow its own procedure can be evidence of pretext); *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1120 (10th Cir. 2007) (where an employer's progressive discipline system was not mandatory, the failure to use progressive discipline is not evidence of pretext); *Green v. New Mexico*, 420 F.3d 1189, 1194 (10th Cir. 2005) (whether employees are "similarly situated" so that different treatment can support a finding of pretext). The application of all these standards, causes the Tenth Circuit to abandon *Tolan*'s "axiom" of summary judgment in two ways.

First, some of the individual standards appear to categorically disqualify evidence that could be relevant to the issue of pretext. For example, the holding that, where an employer's system of progressive discipline is not mandatory, "failure to implement progressive discipline is <u>not evidence</u> of pretext." *Timmerman*, 483 F.3d at 1120 (emphasis added). While a failure to follow a progressive disciplinary system may be

far less persuasive evidence of pretext when the system is discretionary rather than mandatory, it is still evidence of pretext. This Court has held that such a per se exclusion of evidence is impermissible. *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008). The Tenth Circuit does the same with its standard in *DePaula* (or at least its application to this and other cases). The holding is based on sound principles. Title VII prohibits intentional discrimination, so the relevant question is not "whether the employer's reasons 'were wise, fair or correct,'" but "whether the employer 'honestly believed those reasons and acted in good faith upon those beliefs.'" *DePaula*, 859 F.3d, at 971 (quoting *Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1169-70 (10th Cir. 2007)). However, evidence from which a factfinder could conclude that a defendant's proffered reason true, even if it is unwise, unfair, or incorrect, may also support the conclusion that such a reason is pretext. For example, in Petitioner's Final Written Warning, Farmers stated that his behavior "creates a negative work environment with your peers." (App.9a). Petitioner argued that this allegation was belied by Farmers' admission that none of his coworkers complained about his behavior. (App.30a). In rejecting the argument, the Tenth Circuit opined that Petitioner "merely speculates that the absence of employee complaints demonstrates Mr. Shelton did not believe [Petitioner] was creating a negative work environment," as Shelton could have independently determined that fact, and Petitioner "offers no evidence suggesting Mr. Shelton did not sincerely hold that belief." (App.30a). Yet the lack of complaints is evidence that Shelton did not sincerely hold those beliefs. While this is not the only conclu-

sion a jury could draw from that evidence, it is one conclusion, and if the evidence were looked at "in the light most favorable to" Petitioner, it would support a finding of pretext. *Tolan*, 572 U.S., at 657. By instead holding that such evidence does not support a finding of pretext, the Tenth Circuit has effectively abrogated this Court's holdings in *Tolan* and *Anderson*.

The second way in which the Tenth Circuit's application of its various tests leads it not to follow this Court's binding precedent is by breaking up its analysis into individual pieces of evidence, which are independently examined and held not to support a finding of pretext. This overlooks the possibility that, even where no single piece of evidence could alone create a genuine issue of material fact, the evidence as a whole can do so.

This case provides a good illustration of how this occurs. For example, in analyzing Petitioner's arguments that Farmer's given reasons for failing to hire him for the AU position were pretext, the Tenth Circuit separated its analysis into two parts (inconsistencies in the reasons given for the decision, and Radliff's request for an in-person meeting), then considered the evidence for each separately (and separately from all the other evidence Petitioner presented). (App.24a-26a). It then dismissed Petitioner's argument—that Radliff's request for an in-person meeting supports the inference that the reasons given are pretextual—because such an inference would be "a guess or mere possibility" and therefore is "unreasonable" (*i.e.* not a "reasonable inference"). (App.25a) (citing *Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1334 (10th Cir. 2017)). The opinion states that

the jury would have to take "two speculative leaps" to make such an inference—that Radliff wanted to meet in person to avoid a written record and wanted to avoid a written record because he knew his reasons were improper—and "no evidence suggests either conclusion would be more than a guess." (App.25a). In fact, Petitioner provided evidence supporting both conclusions. There was a pattern of supervisor going off the record before taking adverse actions against him, which the Court of Appeals failed to recognize. (App.152a, 154a-155a, 185a, 192a). The Tenth Circuit ignored that evidence, seemingly because it was more directly applicable to Petitioner's other claims.

This Court's clear precedent provides Petitioner the benefit of "all justifiable inferences." *Anderson*, 477 U.S., at 255 (emphasis added). By dividing evidence into separate pools in order to apply various tests and standards, the Tenth Circuit and its district courts are no longer providing such inferences. The effect of this change is to abrogate this Court's binding precedent, which no lower court may do.

Nor was that the only instance in which the Tenth Circuit analyzed the evidence separately to improperly dismiss Petitioner's arguments. In ruling on the argument that Farmers' reasons for giving him a final written warning were pretextual, the Tenth Circuit noted that a factfinder could not "reasonably infer only from the timing and the severity of punishment that Mr. Shelton's reasons were pretextual." (App.30a) (emphasis added). Yet Petitioner consistently argued that the evidence together, not any single piece of evidence, is what supported a genuine issue of material fact on the question of pretext. Indeed, in his brief before the Tenth Circuit, one of

Petitioner's most important arguments was that in ruling that the evidence he presented did not create a pretext, the district court looked at each piece of evidence supporting pretext separately. (App.129a) (citing *Smothers v. Solvay Chems., Inc.*, 740 F.3d 530 (10th Cir. 2014)). In its opinion, the Tenth Circuit recognized that Petitioner had made those arguments. (App.25a). However, the opinion then repeats the erroneous analysis of the district court, addressing and discounting each piece of evidence individually, rather than considering them in the context of all the other evidence. (App.25a-26a, 28a-31a).

This is not the only instance in which the Tenth Circuit has engaged in this erroneous reasoning. *See*, *e.g.*, *DePaula*, 859 F.3d. at 974-77. Even in *Smothers*, although ultimate holding that there was sufficient evidence to create a triable issue of fact, the Tenth Circuit only did so by analyzing the individual categories of evidence separately, and separately concluding each constituted evidence of pretext. *Smothers*, 740 F.3d at 540-44. Nor is the Tenth Circuit the only one to make such an error. *See*, *e.g.*, *Edwards v. Hiland Roberts Dairy Co.*, 860 F.3d 1121, 1126-27 (8th Cir. 2017).

Some Circuits have recognized how this separate analysis of different categories of fact leads to erroneously abrogating binding precent. The Seventh Circuit expressly held that when considering a motion for summary judgment in a Title VII case, the evidence "must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself." *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (7th Cir. 2016). It recognized that its own precedent had been inconsistent and overruled a

number of cases in which tests that were meant as a mere framework for the broader summary judgment analysis had been applied as substantive legal standards. *Id.* at 764-66 (overruling in part, *e.g.*, *Andrews v. CBOCS West, Inc.*, 743 F.3d 230, 234 (7th Cir. 2014); *Chaib v. Indiana*, 744 F.3d 974, 981 (7th Cir. 2014)). In *Ortiz*, when analyzing a motion for summary judgment, the district court separately considered the "direct" and "indirect" evidence of discrimination and found that neither was sufficient to meet the plaintiff's burden. *Id.*, 834 F.3d at 763. The Seventh Circuit expressly rejected this approach, saying "[e]vidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself — or whether just the 'direct' evidence does so, or the 'indirect' evidence." *Id.* at 765. At least one other circuit has adopted this approach from *Ortiz*. *See Gohl v. Livonia Public Schools School Dist.*, 836 F.3d 672, 683 (6th Cir. 2016).

## II. THE QUESTION PRESENTED IS IMPORTANT, AND THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT AND CORRECT DECISIONS WHICH HAVE SILENTLY ABROGATED THIS COURT'S BINDING PRECEDENT

The issue presented here—whether a district court considering a motion for summary judgment in an employment discrimination case—is of great legal significance. This Court has long recognized that it is important for plaintiffs in such cases to be able to obtain relief, even when there is no "smoking gun" demonstrating discrimination outright, as "it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." *McDonnel-Douglas Corp.*, 411 U.S. at 801. Yet summary judgment has long been

a barrier for obtaining such relief. A 2008 study by the federal Judicial Center called "the prominent role of summary judgment" in employment discrimination cases "striking," noting that in such cases, summary judgment motions by defendants "are more common . . . are more likely to be granted . . . and more likely to terminate the litigation." *Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Baylson*, 3 (Aug. 13, 2008), *available at* https://www.fjc.gov/sites/default/files/2012/SuJuLRS2.pdf (last visited Jul. 28, 2021). The failure by some Circuits to consider evidence of discrimination or pretext as a whole makes the promise of *McDonnell Douglas* a dead letter for many of those whom Title VII is meant to protect.

Nor are such cases rare. During the twelve-month period ending September 30, 2020, 11,174 employment discrimination cases were filed in United States courts, making it one of the largest individual categories of civil cases. *Table 4.4. U.S. District Courts—Civil Cases Filed, by Nature of Suit*, U.S. Courts, 2 (Sept. 2010), available at https://www.uscourts.gov/statistics/table/44/judicial-facts-and-figures/2020/09/30. And in 2020 alone, the EEOC received more than 67,000 charges of discrimination. EEOC, Charge Statistics–FY 1997 through FY 2020, available at *https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020*. Given the large number of cases and the regularity with which summary judgment is invoked, it is of great importance that the Court address this issue.

## CONCLUSION

For the reasons set forth herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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