Case No: 21-6690

In The

Supreme Court of the United States

JOE PYATT,

Petitioner,

v.

AECOM TECHNICAL SERVICES, INC.

Respondent.

On Petition For Writ Of Certiorari

To The United States Court Of Appeals

For The Eleventh Circuit

REPLY BRIEF OF PETITIONER

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A. The Evidence

It is of the utmost importance that the court recognize that the respondent has yet again failed to recognize the evidence that was presented before the district court that proves the prima facie case for discrimination. Nowhere in the respondent's response did he address the deposition by written questions ("DWQ") taken by Mr. Pham nor did he address the audio recordings that explicitly state, by transcript on the record, that Mr. Pyatt was told by Mr. Charpentier that he could not come into the office on the weekends, come in early, nor stay in late by stating "It's a little uncomfortable for everybody. Knowing that you're just working in the office by yourself. Not because it's you it's because it's anybody. . ." "What I mentioned to you, you making people very uncomfortable when someone is here by themselves." *See Appendix 2 to Pet. For Cert.*.

The respondent argued "Pyatt concludes that the district court should have disregarded the only adverse action (his termination), find that he established a prima facie case under McDonnell Douglas, and that establishing a prima facie case entitles him to a trial. Pyatt is wrong." Id at 10. This is in fact, incorrect. The respondent does not want to recognize the blatant adverse action taken by Mr. Charpentier because Mr. Pyatt engaged in a protected activity under Title VII of the Civil Rights Act ("Title VII"), as amended, and the Florida Civil Rights Act ("FCRA") and reported Mr. Worthy's racially motivated behavior in late March/Early April 2018. Mr. Pyatt reported Mr. Worthy's racially motivated behavior to Mr.

Charpentier then called for a performance review to address the allegations made by Mr. Worthy to AECOM management. Mr. Pyatt recorded the conversation held during the performance review on May 7th, 2018 to prove the discrimination that was occurring. During the meeting Mr. Pyatt confronted AECOM management and explicitly told AECOM management that Mr. Worthy was misrepresenting his work. It was at this point that AECOM management reinforced that Mr. Pyatt could enter the office early, late, nor on the weekends. *See Appendix 2 to Pet. For Cert.*.

These acts by AECOM management to restrict Mr. Pyatt's access to the office because he makes people feel uncomfortable are clearly adverse employment actions because he reported Mr. Worthy's racially motivated behavior and was reprimanded because of it. AECOM did not provide a legitimate, non-discriminatory reason for why he was not allowed to enter the office because he makes other employees in the office feel uncomfortable. The eleventh circuit court of appeals has stated [A]n employee must establish an "adverse employment action" by proving that a decision of the employer "impact[ed] the terms, conditions, or privileges of [her] job in a real and demonstrable way." Jefferson v. Sewon Am., Inc. 891 F.3d 911, 920 (11th Cir. 2018). Mr. Pyatt provided evidence to prove that another similarly situated employee, Mr. Pham, was allowed to enter on the weekends, come into the office early, and leave late without reprimand and was not told he made people "feel uncomfortable" (emphasis added). These are the material facts that need to be considered for the proper application of the McDonnell Douglas framework with respect to count 1 for discrimination in the amended complaint.

Let us be clear in this court by providing clarity to a very serious issue that requires delicacy in analyzing the allegations set forth in the amended complaint. The Petitioner *did not allege* that he was fired because he was discriminated against by AECOM based on the factual alleges set forth in the amended complaint with respect to count one for discrimination. Specifically, the petitioner only referenced the termination one time in the factual allegations by stating "Plaintiff was terminated, shortly after reporting incident of harassment to the building management with regards to front desk security guard for raising his voice after being confronted for slouching on a couch while off the clock." *See Record in District Court [D.E. 28] at 4* (emphasis added). Mr. Pyatt obtained 12 hours of audio recordings to prove the discrimination by AECOM management and collected his evidence prior to being fired. Mr. Pyatt obtained counsel in June, 2018, to sue AECOM for what had already occurred prior to being terminated. All the evidence provided by Mr. Pyatt support proving the adverse employment actions against him as it relates to discrimination based on disparate treatment for the incidents he endured from January, 2018 to September, 2018 and not related to being terminated for discrimination. (emphasis added).

It cannot be stressed enough that Mr. Pyatt never alleged that he brought forth these proceedings to argue that he was fired because of discrimination with respect to count 1 of discrimination in the amended complaint. Mr. Pyatt is not required to prove that a similarly situated employee was fired for allegations he never made in the complaint. Mr. Pyatt consistently alleged that he was restricted into coming in

the office because he reported Mr. Worthy's racially motivated behavior. The evidence shows that clearly the lower courts erred in their analysis in applying the McDonnell Douglas framework to the argument he presented. There are a variety of other adverse employment actions that can be proved by the evidence, but for purposes of granting summary judgment, the only evidence needed for this argument is what was provided by Mr. Pyatt showing Mr. Pham being treated more favorably in a similarly situated circumstance. Mr. Pham is indeed a similarly situated employee as Mr. Pyatt shared work with Mr. Pham as well as both of them being supervised by Mr. Charpentier. Thus, Mr. Pham was subject to the same working conditions as Mr. Pyatt by being a full-time employee required to work 40 hours a week. Accordingly, Mr. Pyatt was restricted from entering the office during his first year of employment with AECOM. Mr. Pham clearly states that during his first year of employment with AECOM he entered the office on the weekends. *See Appendix 3 to Pet. for Cert.*. Furthermore, Mr. Pham was allowed to work outside his scheduled work hours during his first year of employment while Mr. Pyatt was not allowed to work outside his scheduled hours during his first year.

Mr. Pham and Mr. Pyatt are similarly situated employees in all aspects. Mr. Pham was never told his access to the office was restricted because he makes people feel uncomfortable. This is the argument that needs to be considered by this court when considering whether the district court should have denied the motion for summary judgement (emphasis added). The respondent never provided a non-discriminatory reason to this argument in the district court nor in the eleventh circuit court of

appeals. The eleventh circuit court of appeals has concurred in this analysis by stating [W]e have deemed it sufficient that the plaintiff and the comparator engaged in the "same or similar" conduct. Lewis v. City of Union City 918 F.3d 1213, 1217 (11th Cir. 2019). In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in. . .the same or similar conduct and are disciplined in different ways. Holifield v. Reno 115 F.3d 1555, 1567 (11th Cir. 1997).

The respondent argues "the Petition should be denied because this Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fairminded judges could find it tilting either way." Id at 14. This could not be any further from the truth as this matter involves a gross departure from the proper analysis of a complaint to take into account what a litigant is actually presenting as an argument. The Petitioner brought forth an argument supported by evidence that was completely ignored by the district court. Since when does a litigant not have a chance to bring forth his own argument in a district court of the United States without being heard? The respondent created his own argument for the petitioner and invited the district court, as well as the circuit court, to error and made the court believe Mr. Pyatt made allegations that he was fired because he was discriminated against with respect to count 1 for discrimination in the amended complaint. Upon inspection, the evidence clearly shows the evidence tilting in one direction and that is in favor of the Petitioner proving a prima facie case for discrimination.

The courts cannot simply ignore a litigant's argument. To do so would violate the constitution's Equal Protection clause under the fourteenth amendment by intentionally misrepresenting Mr. Pyatt's allegations in the complaint and misapplying supreme court precedent in McDonell Douglas to come to an erroneous conclusion about the facts of the case. Justice Scalia commented on this issue by stating [I]t is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular *legal view*. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Republican Party of Minn. v. White 536 U.S. 765, 777 (2002). Indeed, this should be, in fact, a concern for this court to decide on. The mere fact that evidence was not considered for the argument presented by Mr. Pyatt while allowing the respondent to attack an argument Mr. Pyatt never made, to then invite the district court to error and conclude that he needed to provide evidence of a similarly situated employee for being fired is a gross departure from the normal course of judicial proceedings that requires this courts' supervisory power to redress such an injustice.

Respondent argues "Pyatt has not presented any arguments showing that the district court or the Eleventh Circuit entered a decision in conflict with the decision of this Court or another United States court of appeals. No split of authority exists." Id at 14. This is a distortion of the truth as this case is unprecedented with respect to creating an argument that attacks allegations not found in a complaint filed by a

Plaintiff (emphasis added). The fifth circuit court of appeals indirectly weighed in on this same issue by stating that "Accordingly, we recount the facts solely as presented in appellants' complaint." La Porte Const. Co. v. Bayshore Nat. Bank 805 F.2d 1254, 1255 (5th Cir. 1986). The federal circuit stated [W]e recount below only the facts pertinent to the issues on appeal. High Point Design LLC v. Buyer's Direct, Inc. 2014-1464, at *3 (Fed. Cir. 2015). The ninth circuit court of appeals stated [A]s discussed below, we consider the facts as alleged in the complaint. We then apply the law to those alleged facts. Stapley v. Pestalozzi 733 F.3d 804, 809 (9th Cir. 2013).

The Petitioner never stated in the factual allegations of the amended complaint that he was fired because of the discriminatory acts by AECOM management, nor did he make that argument in the district court or on appeal to the eleventh circuit court of appeals. Rather, he stated he was discriminated because AECOM restricted his access to the office as well as other adverse employment actions that affected his conditions of employment with respect to count 1 for discrimination (emphasis added). Furthermore, the petitioner explicitly stated how he was discriminated in the charge for discrimination that was filed with the Equal Employment Opportunity Commission ("EEOC"). Nowhere in the charge for discrimination filed with the EEOC did the petitioner say that he was fired because he was discriminated against by AECOM. *See Record in District Court [D.E. 1] Exhibit E at 12.* (Emphasis added).

II. CONCLUSION

The Petitioner has provided evidence that proved his argument and established a prima facie case for discrimination. It would be a violation of the Equal Protection clause under the fourteenth amendment of the constitution to ignore the Petitioner's argument and the evidence he provided in the district court, as well as the eleventh circuit court of appeals. Under the correct analysis of the factual allegations of the amended complaint, the district court could not have granted summary judgment. The district court's ruling, as well as the eleventh circuits affirmation, is in direct conflict with the ruling of this court under the correct application of the precedent set in McDonnell Douglas Corp. v. Green. Accordingly, the district court cannot allow a defendant to bring an argument and present it as fact when those facts are not alleged in the complaint. This reasoning is erroneous in nature as it allows for the court to conclude that a Petitioner needed to provide evidence for allegations he never made, thus, denying him his right to a fair trial. This is, in fact, a violation of the equal protection clause under the fourteenth amendment of the constitution which invokes the federal question and requires this courts' supervisory power to correct.