IN THE SUPREME COURT FOR THE UNITED STATES

KEITH K. MUEGGENBORG,

Appellant (Plaintiff),

v.

NORTEK AIR SOLUTIONS, LLC.,

Appellee (Defendant).

SC_____

Circuit Appeal No. 20-6147
(10th Circuit Court of Appeals)
District Case No. CIV-2019-1008-SLP
(West.Dist.Okla.)

APPELLANT'S APPLICATION TO ENLARGE THE DEADLINE FOR FILING A PETITION FOR CERTIORARI BY SIXTY (60) DAYS

COMES NOW the Appellant, Keith K. Mueggenborg, and pursuant to Supreme Court Rule 13.5, hereby requests an additional sixty (60) days, or until April 14, 2022, to file a Petition for Certiorari, and, in support thereof, shows this Court as follows:

1. The underlying matter arising from an opinion rendered on appeal to the Tenth Circuit of the United States Court of Appeals and the denial of rehearing on such matter. The appeal was from a final order of the United States District Court for the Western District of Oklahoma appealable under 28 U.S.C. § 1291. The underlying question involved the Tenth Circuit's creation and application of the "business judgment doctrine". The "business judgment doctrine" as applied to employment case is a rule construed by Circuit courts and which never been adopted or reviewed by this Court. As applied by the Tenth Circuit, the doctrine is a limitation on this Court's pretext doctrine and appears to conflict with both this Court's jurisprudence and with the other Circuit's application of the doctrine.
2. The date of the original opinion was October 15, 2021. The date of the denial of the request for rehearing and suggestion for rehearing en banc was November 15, 2021.

3. The deadline for filing a Petition for Certiorari pursuant to S.Ct. Rule 13.3 is ninety (90) days from the date of denial of the petition for rehearing. That deadline is February 13, 2022.

4. This application for enlargement of time is timely made more than ten (10) days prior to the deadline for filing the Petition for Certiorari as required by S.Ct.R.13.5.

5. The underlying question arises under the Age Discrimination in Employment Act (ADEA) and this Court possesses jurisdiction to review the judgment of the Tenth Circuit Court of Appeals under Article III, § 2 of the United States Constitution and 28 U.S.C. § 1254(1).

6. Review by writ of certiorari is authorized by S.Ct.R. 10(a) in that the Tenth Circuit reached a decision on a matter unsettled by this Court's jurisprudence and which is in conflict with decisions from other Circuits of the Courts of Appeals and contrary to the precedent of this Court regarding the pretext doctrine in employment discrimination.

7. The enlargement sought is for sixty (60) days which is authorized by S.Ct.R. 13.5.

8. As good cause for the enlargement of time to file the Petition for Certiorari, Petitioner would show that the petition involves difficult questions which are not resolved by decisions of this Court and where the jurisprudence of the various circuits are in conflict. In particular:

   A. The "business judgment doctrine" in the employment discrimination field is a creature of circuit court jurisprudence and this Court has not entered any decisions involving that doctrine.

   B. The "business judgment doctrine" is not uniformly applied among the circuits thus requiring a careful and time-consuming analysis of the variations from circuit to circuit. For instance, some

circuits appear to give business judgment deference to even irrational decisions. ***See Mesnick v. Gen. Elec. Co.***, 950 F.2d 816, 825 (1st Cir. 1991) ("Courts may not sit as super personnel departments, assessing the merits - or even the rationality - of employers' nondiscriminatory business decisions."); ***EEOC v. Flasher Co.***, 986 F.2d 1312, 1318 (10th Cir.1992) ("Title VII does not make . . . irrational employment [decisions] illegal."), and ***Monsanto Chemical Co.***, 770 F.2d 719, 723 n.3 (8th Cir. 1985), ***cert. denied***, 475 U.S. 1050 (1986) ("it is an employer's business prerogative to develop as many arbitrary, ridiculous and irrational rules as it sees fit"). Indeed, in this case the Circuit announced that the "business judgment doctrine" was a limitation on the proof of pretext. In contrast, other Circuits hold that "the reasonableness of a business decision is critical in determining whether the proffered judgment was the employer's actual motivation." ***Wexler v. White's Fine Furniture***, 317 F.3d 564, 577 (6th Cir. 2003). ***See also Dister v. Cont'l Group, Inc.***, 859 F.2d 1108, 1116 (2d Cir. 1988) ("Thus, facts may exist from which a reasonable jury could conclude that the employer's 'business decision' was so lacking in merit as to call into question its genuineness.")

C. Encompassing unreasonable or irrational decisions within the "business judgment doctrine" appears to conflict with the precedent of this Court. ***See Waters v. Churchill***, 511 U.S. 661, 677 (1994) (triers of fact are not limited "only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions"); ***Snyder v.***

Louisiana, 552 U.S. 472, 485 (2008) (per curiam) (***Batson*** case) ("[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination"). ***Cf. Foster v. Chatman***, 578 U.S. 448, 509 (2016) (***Batson*** decision) ("Credibility can be measured by, among other factors. . . how reasonable, or how improbable, the explanations are[.]").

D. A circuit conflict even exists as to the necessity of a business judgment instruction. The First and Fourth Circuits do not require such an instruction, but the Eighth Circuit does. ***See Kelley v. Airborne Freight Corp.***, 140 F.3d 335, 350-51 (1st Cir. 1998); ***Cooper v. Paychex, Inc.***, 163 F.3d 598, *10 (4th Cir. Aug. 31, 1998) (unpublished table decision) ("However, we do not require a trial court to provide a separate business judgment instruction when it otherwise correctly instructs the jury on the law."); ***Stemmons v. Mo. Dep't of Corr.***, 82 F.3d 817, 819 (8th Cir. 1996) ("in an employment discrimination case, a business judgment instruction is 'crucial to a fair presentation of the case'" (quoting ***Walker v. AT & T Techs.***, 995 F.2d 846, 849 (8th Cir. 1993)).

E. Compounding the problem of accurately setting out the nuances of this doctrine is the fact the language used within the same circuit to describe the doctrine is often seemingly inconsistent. Compare, e.g., ***Loeb v. Textron, Inc.***, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) ("The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext . . . .") with ***Mesnick v.***

Gen. Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991) ("Courts may not sit as super personnel departments, assessing the merits - or even the rationality - of employers' nondiscriminatory business decisions.")

9. While Petitioner will address this matter expeditiously, it is simply not feasible to do the volume of research required for this important, first impression issue without the requested enlargement.

WHEREFORE, Petitioner requests a sixty (60) day enlargement from the current deadline of February 13, 2022, until April 14, 2022, to file the Petition for Certiorari in this case.

RESPECTFULLY SUBMITTED THIS 25th DAY OF JANUARY 2022.

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CERTIFICATE OF SERVICE

☒ I hereby certify that on this 25th day of January, 2022, the foregoing instrument was served on opposing counsel via U.S. Mail, postage pre-paid:

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PROOF OF SERVICE

I hereby certify that the following parties have been served with copies of the enclosed "Appellant's Application to Enlarge the Deadline for Filing a Petition for Certiorari by Sixty (60) Days". Service was made via U.S. Mail, first-class, postage pre-paid, and via email at the addresses identified below. Accordingly, all parties required to be served have been served.

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