No. 23-550

IN THE

Supreme Court of the United States

LAURA BARBOUR BOWLES, AS EXECUTOR OF THE ESTATE OF EVA PALMER,

Petitioner and
Conditional Cross-Respondent,

v.

Liberty University, Inc.,

Respondent and
Conditional Cross-Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

OPPOSITION BRIEF

Mathew D. Staver
Anita L. Staver
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20002
(202) 289-1776

Horatio G. Mihet
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776

King F. Tower
Counsel of Record
Woods Rogers Vandeventer Black, PLC
Wells Fargo Tower
10 South Jefferson Street
P.O. Box 14125
Roanoke, VA 24038
(540)-983-7600
King.Tower@wrvblaw.com

Leah M. Stiegler
Woods Rogers Vandeventer Black, PLC
901 East Byrd St., Ste. 1550
Richmond, VA 23219
(804) 956-2050

Counsel for Respondent and Conditional Cross-Petitioner

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I. QUESTIONS PRESENTED

1. Whether the Fourth Circuit misapplied a direct evidence theory of age discrimination.

2. Whether the Fourth Circuit erred by considering Liberty's legitimate, non-discriminatory business reason for her non-renewal at the prima facie stage of Petitioner's case.

3. Whether the Fourth Circuit resolved disputes of material fact in favor of Petitioner as the non-moving party.

4. Whether the Constitutional Avoidance Doctrine applies to the ministerial exception.

Corporate Disclosure Statement

Pursuant to Supreme Court Rule 29.6, Liberty University, Inc. states that it has no parent corporations and that no publicly held company owns 10% or more of its stock.

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II. JURISDICTION

The Fourth Circuit entered its opinion and judgment, affirming the district court's grant of summary judgment on the age discrimination claim and vacating the decision on the ministerial exception on July 5, 2023. The Fourth Circuit subsequently denied Petitioner's timely petition for rehearing and rehearing en banc on July 28, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et al.,* provides, in relevant part, that an employer "may not discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1).

2. The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. AMEND. I.

IV. STATEMENT OF THE CASE

Petitioner was an "ink and pen" studio arts professor at Liberty University, Inc. ("Liberty") for over thirty years. (JA 257, 1020-22). Studio arts includes painting, pottery, and ceramics. (JA 915 ¶6). By 2017, digital arts was one of the fastest growing disciplines at Liberty. (JA 916 ¶9). Digital Arts

incorporates graphic design and other skillsets in the areas of production technology, digital illustration, and digital imaging. (JA 915 ¶6). Over time, skills in the digital arts became increasingly valuable, both in their own right and as tools to be used in teaching traditional art courses. (JA 916 ¶10). In June of 2017, studio and digital arts merged under the School of Visual & Performing Arts ("SCVA"). (JA 915-16 ¶¶7-8, 1028-30).

During Petitioner's tenure at Liberty, Department Chair Todd Smith and Dean Scott Hayes repeatedly emphasized to all faculty, including Petitioner, that they needed to be both digitally literate and highly skilled in digital applications like Adobe Suite. (JA 916 ¶11). Chair Smith and Dean Hayes also specifically encouraged Petitioner to develop digital arts skills and improve her technology-related skills. Petitioner did not dispute that student demand was growing, that she lacked these skills, or that she was advised to develop these skills. (JA 917-18 ¶14, 920-22 ¶20-23, 937-49, 1072, 1102-03).

In November of 2017, Dean Hayes recommended Petitioner for non-renewal to the Provost, Scott Hicks. (JA 923 ¶26). Dean Hayes' reasons were two-fold: Petitioner was (1) not qualified to teach digital art courses, which Liberty needed to meet the growing demand for courses in Digital Arts, and (2) she had not demonstrated any ability to teach studio arts courses through the University's online platform, Liberty University Online ("LUO"), which was also experiencing growing student demand. (JA 923 ¶26). Petitioner admitted that she did not teach

any courses other than those in Studio Arts. (JA 923 ¶27, 1031). In fact, Petitioner was the only Studio & Digital Arts faculty member that lacked the requisite cross-over skills. (JA 923-24 ¶ 27, 981-983). Petitioner was also the only Studio & Digital Arts faculty member that had not developed and taught a class on LUO. (JA 923-24 ¶27).

In finalizing their decision, Provost Hicks, Chair Smith, and Dean Hayes discussed whether they would allow Petitioner to characterize her non-renewal as a "retirement" if she asked. (JA 1340-43). They also considered whether they would give her one more year of teaching, but ultimately decided she would "have great difficulty with any changes." (JA 991). In April of 2018, Liberty sent Petitioner a notice of non-renewal. (JA 1346 ¶8). Petitioner claims that she was shocked, mainly because she had been promoted to Full Professor in October of 2016. (JA 1348 JA 1346 ¶821). Petitioner was 79 years old at the time she received her notice of non-renewal. (JA 1346 ¶8).

Despite admitting that she lacked the requisite digital arts skills, Petitioner alleged that Liberty selected her for non-renewal because of her age in violation of the Age Discrimination in Employment Act ("ADEA"). (JA 8-13). Liberty denied Petitioner's allegations. (JA 15-21). The parties filed cross motions for summary judgment on the issue of whether Petitioner was a minister within the meaning of this Court's "ministerial exception" jurisprudence. (JA 24, 253). The District Court denied Liberty's motion, and granted Petitioner's motion, holding that she was not a minister. (JA

1449). Liberty then moved for summary judgment on Petitioner's ADEA claim, and the District Court granted Liberty's motion. (JA 911, 1515).

Petitioner appealed the ADEA matter to the Fourth Circuit, and Liberty cross-appealed the ministerial exception matter. (JA 1517, 1519). The Fourth Circuit vacated the District Court's granting of Petitioner's motion for summary judgment on the ministerial exception, and affirmed the District Court's granting of Liberty's motion for summary judgment on Petitioner's ADEA claim. Pet. for Cert. at 6a.

Petitioner now claims that the Fourth Circuit should have determined that the "retirement" and "difficulty with change" comments amounted to direct evidence of discrimination. These comments -- made *after* Petitioner was selected for non-renewal -- are quite clearly not direct evidence of any motive whatsoever.[1] Petitioner also claims that the Fourth Circuit erred by considering Liberty's legitimate, non-discriminatory business reason for her non-renewal at the prima facie stage of her case. However, because Liberty presented a non-discriminatory reason for its

[1] The fact that University managers discussed the (very humane) possibility of offering an employee of retirement age the opportunity to characterize the involuntary end of her employment as a "retirement" is neither direct nor circumstantial evidence of age animus. Likewise, there is nothing short of speculation to take Dean Hayes' comments about Petitioner's demonstrated personality traits as some type of coded age reference, but at most it would constitute rebuttable circumstantial evidence. In any event, as both the District Court and the Fourth Circuit found, Liberty successfully established its legitimate nondiscriminatory reason for its actions.

non-renewal decision, which Petitioner failed to rebut, it would not affect the outcome of the case for the Court to hold that Petitioner's failure occurred either at the prima facie case stage or the legitimate reason stage. Thirdly, Petitioner raises a catch-all inquiry, asking this Court to assess whether the Fourth Circuit erred by not resolving any materially disputed facts in her favor. The facts Petitioner complains of, though, were not only undisputed, but were largely considered by the Fourth Circuit.

Accordingly, Petitioner now presents this Court with predominantly academic questions other than her fourth question, which involves application of the ministerial exception to her ADEA claim. Although Petitioner questions whether she was a "minister" within the meaning of the exception, the real question is whether the Fourth Circuit could rely on the Constitutional Avoidance Doctrine and allow this issue to evade resolution, even though the purpose of the ministerial exception is to prevent courts from inquiring into the employment decisions of religious institutions.

For these reasons and those stated in Liberty's Conditional Cross-Petition, this Court should deny Petitioner's Petition for Certiorari.

V. REASONS FOR DENYING THE PETITION

a. Question 1: Whether the Fourth Circuit Misapplied a Direct Evidence Theory of Age Discrimination.

i. The Fourth Circuit Applied the Correct Standard, and Got It Right.

Petitioner claims that the Fourth Circuit erred by not finding that upper-management's internal commentary about whether to characterize her non-renewal as a "retirement" and Dean Hayes' comments that she would "have great difficulty with any changes" amounted to direct evidence of age discrimination. Petitioner takes no issue with any legal theory or burden of proof relative to applying a direct evidence theory to a discrimination claim. Rather, Petitioner asks this Court to create a bright-line rule about the gravity of certain statements.

To succeed on an age discrimination claim, "[a] plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the "but-for" cause of the challenged employer decision." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177–78, 129 S. Ct. 2343, 2351 (2009). If a plaintiff produces direct evidence of discrimination, she may prevail without proving all the elements of a prima facie case, which is how a plaintiff would prove discrimination with circumstantial evidence.

Swierkiewicz v. Sorema N. A., 534 U.S. 506, 511, 122 S. Ct. 992, 997, 152 L. Ed. 2d 1 (2002).

As the Fourth Circuit explained, direct evidence in an age discrimination case is evidence "that the employer announced, or admitted, or otherwise unmistakably indicated that age was a determining factor." Pet. for Cert. at 22a (citing *Cline v. Roadway Exp., Inc.*, 689 F.2d 481, 485 (4th Cir. 1982)); *see also Bandy v. City of Salem, Virginia,* 59 F.4th 705, 711 (4th Cir. 2023) ("Direct evidence is 'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.'").

The Fourth Circuit fairly considered the retirement comments and concluded that they did not amount to direct evidence of age discrimination because they were devoid of any specific reference to age and were made during internal deliberations about how to handle Petitioner's non-renewal if she brought up the possibility of retirement. Pet. for Cert. at 25a. The Fourth Circuit refused to conclude that discussions about retirement automatically imply an unlawful consideration of one's age. Pet. for Cert. at 25a-26a. Similarly, the Fourth Circuit found that Petitioner failed to present evidence that the "difficulty with any changes" comment was an unlawful assumption based on Petitioner's age, in contrast to the undisputed evidence that Petitioner failed to develop digital arts skills after her supervisors repeatedly advised her to do so. Pet. for Cert. at 26a-27a.

It was also undisputed that Liberty's officials made these comments only after they decided to not renew her contract due to her failure to develop digital arts skills. Pet. for Cert. at 25a-26a. In sum, the Fourth Circuit correctly determined that, whatever inferences may be drawn from these comments, they were in no way an "unmistakable indication[]" that Liberty was considering Petitioner's age as would be required to characterize them as direct evidence of age discrimination. *See Bellounis v. Middle-E. Broad. Network, Inc.*, No. 1:18-CV-00885, 2019 WL 5654307, at *3 (E.D. Va. Oct. 31, 2019) (stating direct evidence "may include announcements or admissions by the employer, or unmistakable indications that a protected characteristic was a determining factor in the particular employment action").

The Fourth Circuit's analysis was consistent with this Court's characterization of direct evidence as evidence proving an "illegitimate criterion" as stated in *Price Waterhouse*. In *Price Waterhouse v. Hopkins*, this Court characterized direct evidence under Title VII as evidence that "decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision," creating a presumption that the employer's discriminatory animus made a difference in the outcome. 490 U.S. 228, 230, 109 S. Ct. 1775, 1780 (1989).[2] The Fourth Circuit, therefore, committed no error in the standard it used to assess the evidence.

[2] The Supreme Court does not appear to have defined direct evidence or what constitutes direct evidence in a case filed pursuant to the ADEA.

Indeed, Petitioner does not dispute the standard the Fourth Circuit used; rather, Petitioner merely objects to what she believes is a misapplication of the specific facts of her case to a settled standard. As discussed above, the Fourth Circuit correctly determined that this case presents no direct evidence of age discrimination. Thus, granting certiorari in this matter would only serve to have this Court reapply the same standard to the facts only to reach the same outcome.

ii. Any Error by the Fourth Circuit Is Not Outcome Dispositive.

Even if, *arguendo*, this Court granted certiorari and concluded that these allegations constitute direct evidence, it would not change the outcome of this case. Regardless of whether a plaintiff produces direct or circumstantial evidence of age discrimination, she still must prove that "age was the 'but-for' cause of the challenged adverse employment action," (*i.e.,* absent age discrimination, she would not have experienced the challenged adverse action). *Gross*, 557 U.S. at 180, 129 S. Ct. at 2352. "In other words, if there existed other legitimate motivations for the decision, the employee must offer sufficient evidence to show that these factors were not 'the reason' for the employer's decision." *Arthur v. Pet Dairy*, 593 Fed. App. 211, 220 (4th Cir. 2015) (quoting *Gross*, 557 U.S. at 176, 129 S. Ct. 2343). Thus, if Petitioner produced direct evidence of age discrimination, but the decision for her non-renewal would have occurred anyway because she lacked digital arts skills, she cannot meet

her burden of proof. By her own admissions, Petitioner cannot overcome this hurdle.

Petitioner asserts that "the non-renewal decision-making process was still ongoing as of November 2017 when it was then infected with age bias when [Petitioner's] Chair improperly injected the idea of retirement – i.e., age considerations – into the process." Pet. for Cert. at 11. The Fourth Circuit recognized (and Petitioner's own argument admits) that the decision to not renew her contract was already in the works before anyone "considered" her age. Pet. for Cert. at 26a.

The same is true for purposes of the "difficulty with change" comment that Petitioner complains about, and which Petitioner does not dispute was made at some point after the retirement comment. Pet. for Cert. at 13. It is undisputed that Dean Hayes made that comment in response to the Provost's question about whether they should give Petitioner another year to develop digital arts skills before going forward with their non-renewal decision.

By her own admission, Petitioner's age was not a determining factor in the decision to not renew her contract. Indeed, the decision was made and only then was it allegedly "infected" with age bias, so it cannot be said that Liberty placed substantial reliance on Petitioner's age in reaching its decision. The Fourth Circuit correctly—just like the District Court—also recognized that, even if these comments reflected age discrimination, Petitioner was still unable to show that age was the but-for cause of her non-renewal. Pet. for Cert. at 19a. Thus, granting

certiorari to resolve Petitioner's request would be merely academic. Any alleged error by the Fourth Circuit in not finding the comments to constitute direct evidence has no impact on the outcome of Petitioner's case.

iii. There Is No Conflict of Law.

There is no conflict of law to consider in Petitioner's request. Petitioner did not identify any different legal standard among circuit courts for what type of comments constitute direct evidence in an age discrimination case. The Circuit Courts generally consider whether the comments created an inference of age bias and whether, absent that bias, the decision would have occurred. *See, e.g.*, *Scheick v. Tecumseh Pub. Sch.*, 766 F.3d 523, 530 (6th Cir. 2014) (assessing the direct evidence, stating, "[u]nder either articulation, the inquiry includes both a predisposition to discriminate and that the employer acted on that predisposition."); *Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034, 1042 (8th Cir. 2007) (explaining that direct evidence "must be strong enough to show a specific link between the [alleged] discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the employment decision").

To determine whether the comments created an inference of age bias, the Circuit Courts generally consider whether the comments reflected a negative perception about the employee's age and whether the comments were made in the context of the contested employment decision. *See, e.g.*, *Zampierollo-*

Rheinfeldt v. Ingersoll-Rand de Puerto Rico, Inc., 999 F.3d 37, 51 (1st Cir. 2021) (explaining direct evidence as evidence that "consists of statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision"); *Garcia v. Newtown Twp.*, 483 F. App'x 697, 704 (3d Cir. 2012) ("Direct evidence may take the form of a workplace policy that is discriminatory on its face, or statements by decision makers that reflect the alleged animus and bear squarely on the adverse employment decision."); *Geiger v. Tower Auto.*, 579 F.3d 614, 620–21 (6th Cir. 2009) (defining direct evidence as statements with discriminatory animus, made by the decisionmakers and made related to the decision making process itself); *Pitasi v. Gartner Grp., Inc.*, 184 F.3d 709, 714 (7th Cir. 1999) (defining direct evidence as including comments with discriminatory intent related to the employment decision in question).

Petitioner cites two cases only from the Fifth Circuit to support her argument that "courts repeatedly have held" that negative comments about an older employee's inability to adapt to change are classic examples of age bias.[3] Pet. for Cert. 12-13. Even if these cases could be read to conflict Fourth

[3] It is worth noting that such comments are not interchangeable. The context has to matter precisely because such comments are not direct evidence (i.e., because the thing this category of statements has in common is the lack of any direct mention of age). In the instant case, the manager's prediction that Petitioner would not change if given another year was clearly based on his direct personal experience with her repeated failure to make the requested changes, despite repeated admonitions to do so.

Circuit law (which Liberty denies), two cases within the Fifth Circuit do not create a conflict of law worthy of this Court's review.

Indeed, in a Fourth Circuit case decided only five months before Petitioner's, the Fourth Circuit explained that it has historically applied the Fifth Circuit's test from *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374 (5th Cir. 2010), to determine whether derogatory comments create an inference of discrimination.[4] *Bandy*, 59 F.4th at 711 ((citing *Cole v. Fam. Dollar Stores of Md.*, 811 F. App'x 168, 175 (4th Cir. 2020) and reviewing the *Jackson* factors). There is, therefore, no conflict of law between the Fifth Circuit and the Fourth Circuit or any other circuit for that matter. At most, courts have generally applied consistent standards of law only to have varying outcomes resulting from the factual differences in each case.

iv. Resolving Petitioner's Request in Her Favor Would Chill Beneficial Retirement Discussions for Older Workers.

[4] This Court has not developed a test for when comments create an inference of age discrimination. This Court was asked to clarify what may constitute direct evidence under discrimination claims brough under Title VII of the Civil Rights Act and declined to do so. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95–101, 123 S. Ct. 2148, 2151–55, 156 L. Ed. 2d 84 (2003) ("[W]e need not address . . . "What are the appropriate standards for lower courts to follow in making a direct evidence determination in 'mixed-motive' cases under Title VII?").

Petitioner complains that the District Court and the Fourth Circuit "minimized the capacity for comments about 'retirement' to qualify as direct evidence of age discrimination'" because, ultimately, no one asked Petitioner if she wanted to retire. Pet. for Cert. at 11. Petitioner argues that it is "stereotypically ageist" for management to consider whether an employee may want to characterize her separation as a retirement while it is already in the process of separating that employee. Pet. for Cert. at 11. Petitioner's request ignores the reality that, in such circumstances, a worker may want her inevitable termination characterized as a retirement to "save face" and that it has no bearing on the employer's decision to terminate. Granting certiorari to resolve Petitioner's request in her favor would likely have the unintended effect of chilling beneficial retirement discussions for older workers. *Cf. Scheick*, 766 F.3d at 531 (recognizing that reaching this conclusion would require courts to infer that references to retirement are generally just a proxy for age).

b. **Question 2: Whether the Fourth Circuit Erred by Considering Liberty's Non-Discriminatory Reason at the Prima Facie Stage.**

i. The Fourth Circuit Got It Right.

Petitioner claims that the Fourth Circuit erred by considering Liberty's legitimate, non-discriminatory reason when determining whether Petitioner satisfied her burden to make out a prima

facie case of age discrimination. Pet. for Cert. at 18-19. The Fourth Circuit, though, was not required to consider only the evidence that supported Petitioner's argument at the prima facie stage. This is especially true considering the evidence was undisputed.

1. The Fourth Circuit's approach was reasonable and practical.

In *McDonnell Douglas Corp. v. Green*, this Court clarified each party's burden of proof in involving circumstantial evidence cases with a burden-shifting framework that starts with a plaintiff's burden to prove a prima facie case. 411 U.S. 792, 798, 93 S. Ct. 1817, 1822 (1973), *holding modified by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993). To make out a prima face case, a plaintiff must prove that she was meeting her employer's legitimate expectations at the time of the adverse action. *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 513 (4th Cir. 2006), *abrogated in part on other grounds by Gross*, 557 U.S. at 177-80, 129 S. Ct. at 2351-52.

Petitioner relies on the Sixth Circuit's decision in *Cline v. Catholic Diocese of Toledo*, for the proposition that, "when assessing whether a plaintiff has met her employer's legitimate expectations at the prima facie stage of a termination case, a court must examine plaintiff's evidence independent of the nondiscriminatory reason 'produced' by the defense as its reason for terminating plaintiff." Pet. for Cert. at 17 (citing 206 F.3d 651, 660-61 (6th Cir. 2000) (emphasis removed)). The Fourth Circuit's decision

in *Warch* rejects this proposition. 435 F.3d at 515-18. Petitioner argues that "*Warch* is wrong." Pet. for Cert. at 16.

In *Warch*, the Fourth Circuit found "no impermeable barrier" that prevents the employer from countering with evidence defining the legitimate job expectations as well as evidence that the employee was not meeting those expectations at the prima facie stage. *Id.* at 516. Otherwise, the plaintiff's burden at the prima facie stage would turn "into a mere burden of production, making it 'difficult to imagine a case where an employee could not satisfy the 'qualified' or legitimate expectation element as defined in *Cline*.'" *Id.* (quoting *Nizami v. Pfizer Inc.,* 107 F.Supp.2d 791, 801 n. 11 (E.D. Mich. 2000)).

Further, no precedent by this Court suggests that a court must only consider the plaintiff's subjective perspective of her performance at this stage. If that were the case, this Court would have articulated this limitation in *McDonnell Douglas*. Rather, this Court recognized that "the precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.'" *Swierkiewicz.*, 534 U.S. at 512, 122 S. Ct. at 997 (citing *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S. Ct. 2943 (1978)).

The "shifting burdens [of *McDonnell Douglas*] are meant only to aid courts and litigants in arranging the presentation of evidence," not to limit what evidence a court can consider at each stage. *Watson v. Ft. Worth Bank & Trust,* 487 U.S. 977, 986,

108 S. Ct. 2784 (1988). For practical purposes, if an employer's legitimate, non-discriminatory business reason for terminating an employee is that the employee failed to meet its expectations, it would be inefficient to consider only the employee's evidence at the initial stage and the employer's evidence at the next stage. This approach makes even more sense when a court finds the evidence is undisputed as it did here.

2. The Fourth Circuit's reasoning was not actually inconsistent with *Cline*.

In *Cline*, the Sixth Circuit said that the court should consider the employee's "evidence independent of the nondiscriminatory reason" asserted by the employer—not that the court could consider only the evidence that was in the employee's favor at the prima facie stage. If *Cline* were controlling, which it is not, the Fourth Circuit's rationale here was not inconsistent with *Cline*. The record was replete with undisputed evidence by both parties—including Petitioner's own testimony, which would arguably be *her evidence*—that she was told to develop digital arts skills even after her promotion and she still failed to do so by the time Dean Hayes made the non-renewal decision.

Essentially, Petitioner agreed that the evidence showed she failed to develop the requisite skills. She disputed only whether the expectation to develop such skills was legitimate. Pet. for Cert. at 8. Whether an expectation is legitimate, though, is determined by the employer. *See Giles v. Nat'l R.R.*

Passenger Corp., 59 F.4th 696, 704 (4th Cir. 2023) (citing *Evans v. Techs. Apps. & Serv. Co.*, 80 F.3d 954, 960–61 (4th Cir. 1996) (recognizing that, for the legitimate expectations element, "it is the perception of the decision maker which is relevant,' not the self-assessment of the plaintiff")); *DeJarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (citing *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir. 1997) (explaining that the court "does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination")).

Petitioner "cannot create a genuine dispute concerning [her] prima facie case by cherry-picking the record." *Warch*, 435 F.3d at 518. Thus, it cannot be said that the Fourth Circuit erred by considering undisputed evidence about Petitioner's performance at the prima facie stage.

ii. Any Error by the Fourth Circuit Is Not Outcome Dispositive.

Even if the Fourth Circuit erred by prematurely considering Liberty's reasons for not renewing Petitioner's contract, any alleged error has no impact on the outcome of Petitioner's case. If an employee makes out a prima facie case of discrimination, the burden shifts to the employer, who has a burden of production, to rebut the employee's claim by articulating a legitimate, non-discriminatory reason for taking the adverse action against the employee. *McDonnell Douglas Corp.*, 411

U.S. at 802, 93 S. Ct. at 1824. If rebutted, the burden then shifts back to the employee to show that the employer's stated reason was pretext for unlawful discrimination. *Id.* at 804, 93 S. Ct. at 1825. This burden-shifting framework is often applied in ADEA cases, especially at the summary judgment stage. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311, 116 S. Ct. 1307, 1308–10 (1996) ("In assessing claims of age discrimination brought under the ADEA, the Fourth Circuit, like others, has applied some variant of the basic evidentiary framework set forth in *McDonnell Douglas*.").

The burden-shifting framework ultimately resolves any concerns Petitioner has about the timing of when evidence is considered. The employee may counter the employer's "assertion with evidence that demonstrates (or at least creates a question of fact) that the proffered 'expectation' is not, in fact, legitimate at all." *Warch*, 435 F.3d at 517. In fact, an employee asserting an age discrimination claim must, regardless of timing, overcome an employer's asserted reasons. At all relevant times, the plaintiff retains the burden of persuasion to prove that age was the 'but-for' cause of the challenged adverse employment action. *Jones v. Oklahoma City Pub. Sch.*, 617 F.3d 1273, 1278–79 (10th Cir. 2010) (reasoning that *Gross* did not preclude application of the *McDonnell Douglas* burden-shifting framework in circumstantial evidence cases). The plaintiff must therefore demonstrate that "the employer's asserted justification is false." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 2109 (2000).

The timing of when a court considers evidence does not amount to an inconsistency worthy of this Court's review. Petitioner was not harmed in any way because it was ultimately her burden to rebut such evidence. This, the Fourth Circuit found that Petitioner failed to do. Pet. for Cert. at 30a-31a. And, even if the Fourth and Sixth Circuits are considering a different order of the elements of a prima facie case, they are not doing so in a manner that impacts the outcome; thus any perceived conflict is inconsequential. Consequently, granting certiorari would be futile in that the outcome in this case would be the same even if the Fourth Circuit had only considered Liberty's reasons for not renewing her contract after finding Petitioner met her burden at the prima facie case.

iii. Petitioner Should Be Estopped From Pursuing This Under-developed Argument on Appeal.

Based on the procedural history, this case is not an appropriate vehicle for this Court's review of this issue. Petitioner never brought this issue before the District Court even though the District Court did exactly what the Fourth Circuit did by considering Liberty's evidence of whether Petitioner was meeting expectations at the prima facie stage. Pet. for Cert. at 102a-103a. Petitioner also never raised this issue as a District Court error in her appeal to the Fourth Circuit. Indeed, the first time Petitioner raised this issue was in her Motion for Reconsideration to the Fourth Circuit.

This Court denied the plaintiff in *Warch*'s Petition for Certiorari, which sought to directly address the perceived conflict between *Warch* and *Cline*. *Warch v. Ohio Cas. Ins. Co.*, 549 U.S. 812, 127 S. Ct. 53 (2006). In *Warch*, the defendant employer had an opportunity to present its arguments before the Fourth Circuit, and the Fourth Circuit had fair opportunity to review the issue. Other than attempting to develop this issue in the lower courts by an eleventh-hour Motion for Reconsideration, no aspect of Petitioner's argument was fleshed out in any way until now. The record here is simply not well-developed. Neither Liberty, nor the District Court, nor the Fourth Circuit had a fair opportunity to consider the alleged error. Granting certiorari to consider Petitioner's argument now would turn this Court into a court of "first view" and not a "court of review." *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7, 125 S. Ct. 2113, 2120 n.7 (2005) ("[W]e are a court of review, not of first view.").

Further, despite flatly asserting now that "Warch is wrong," Pet. for Cert. at 16, Petitioner conveniently ignores the fact that she cited *Warch* in her Opening Brief to the Fourth Circuit for authority on the elements of a prima facie case of age discrimination. Brief of Appellant/Cross-Appellee, Eva Palmer, Plaintiff- Appellant/Cross-Appellee, v. Liberty University, Inc., Defendant - Appellee/Cross-Appellant., 2022 WL 1202734 (C.A.4), at 46-47, 55). Petitioner should not be able to induce the Fourth Circuit into relying on what she believes is blatantly "wrong" authority. For this reason, Petitioner should also be estopped from pursuing this argument on appeal.

c. Question 3: Whether the Fourth Circuit Resolved Disputes of Material Fact in Favor of Petitioner as the Non-Moving Party.

Petitioner's last request related to her ADEA claim is to have this Court review whether the Fourth Circuit resolved disputes of material fact in her favor as the non-moving party. Petitioner admits this is a "well-settled summary judgment rule." Pet. for Cert. at 19. Thus, at most, Petitioner's objection is to the Fourth Circuit's application of the specific facts of her case to a settled rule of law, which is not a request worth this Court's time.

Nonetheless, the Fourth Circuit did not misapply the rule to the facts. Without further detail, Petitioner lists out four complaints about the record, three of which involved positive aspects of her performance in 2016 around her promotion to Full Professor. Pet. for Cert. at 20. None of these facts, though, were in dispute and they certainly were not ignored.

For example, the Fourth Circuit recognized that "Liberty takes the position that, although [Petitioner] had been promoted to Full Professor in October 2016, she still did not satisfy Liberty's legitimate expectations. . . ." Pet. for Cert. at 28a. The Fourth Circuit went on to review how Petitioner was continuously told to develop such skills and yet failed to do so. Pet. for Cert. 28a-29a. The Fourth Circuit also expressly considered whether Petitioner's 2016

promotion "creates a genuine dispute of fact" as to whether she was performing to expectations, and ultimately decided it did not "wipe[] the slate clean," nor did it address the "undisputed fact that, after her October 2016 promotion . . . [her supervisors] had ongoing concerns about her lackluster technology and digital art skills." Pet. for Cert. at 29a. Thus, not only would granting certiorari to resolve this question serve no precedential value, but it also lacks merit.

d. **Question 4: Whether the Constitutional Avoidance Doctrine Applies to the Ministerial Exception.**

The constitutional avoidance doctrine cannot apply to the ministerial exception, the whole purpose of which is to ensure that courts do not inquire into the employment decisions of religious institutions, like Liberty, and their ministers, such as Petitioner. Liberty incorporates by references the arguments and authorities in its Conditional Cross-Petition in this matter.

VI. CONCLUSION

For the foregoing reasons, Petitioner failed to carry her burden of demonstrating compelling reasons for this Court to grant her Petition for Certiorari. It should therefore be denied.

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Respectfully submitted,

s/ King F. Tower

King F. Tower, Esq.
Counsel of Record
Virginia Bar No. 38767
king.tower@wrvblaw.com
10 South Jefferson Street
Suite 1800
Roanoke, Virginia 24011
Telephone: (540) 983-7541

Leah M. Stiegler, Esq.
Virginia Bar No. 89602
leah.stiegler@wrvblaw.com
901 East Byrd Street
Suite 1550
Richmond, Virginia 23219
Telephone: (804) 956-2058

Counsel for Liberty University, Inc.