23-5603

ORIGINAL

Docket No. 23-

In the United States Supreme Court

Gilbert Edwin,

Petitioner,

v.

Clean Harbors Environmental Services Incorporated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

This appeal presents this Court with an opportunity to resolve an conflict in the Circuits concerning the construction of Fed.R.Civ.P. 54(b), namely whether the law of the case doctrine precludes a successor judge's reconsideration of prior interlocutory orders absent some altered circumstance making the basis of that decision inapplicable, and whether, as held by the Seventh Circuit in contrast to other Circuits, it is an abuse of discretion for a district judge to grant a motion for a Rule 54(b) order when the motion is filed more than thirty days after the entry of the adjudication to which it relates.

The case also presents the issue of whether there questions of fact as to whether the Respondent discriminated against Petitioner because of his race, fostered a hostile work environment, retaliated against him both for his reporting of the racial harassment and also for taking workers' compensation.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no related cases.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Court of Appeals is not officially reported and may be found in the Appendix. The opinions of the district court are not officially reported and may also be found in the Appendix.

JURISDICTION

The Court of Appeals issued its decision on June 16, 2023. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254.

STATUTORY AND RULES INVOLVED

Federal Rule of Civil Procedure 54(b):

". . . [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims nd all the parties' rights and liabilities."

STATEMENT OF THE CASE

Petitioner, Gilbert Edwin, an African-American male began working with Clean Harbors, a provider of environmental and industrial services, in September of 2015. Following a ob injury in August of 2017, he was placed on LOA on the injury which required surgery. Petitioner applied a short-term disability in September 25, 2017. Later he applied for

long term disability and was approved in December of 2017.

Petitioner filed a workers' compensation claim in October and a charge for race discrimination with the Equal Employment Opportunity Commission (EEOC) on December 13, 2017. On December 21, 2017 both Petitioner and Respondent received a right to sue notice via U.S Postal Mail. On September 12, 2018, Petitioner filed a Retaliation case with the EEOC, and received a Right to Sue notice on September 20, 2018. Petitioner was uncleared to return on LOA and had not received any finical assistance for four months. He shared this with his private doctor, that suggested that he seek accommodation from Respondent, which Petitioner was advised by Clean Harbors that he can only be cleared to return by their doctor BHP. Petitioner was contacted by new Manager Michael Strain, whom he had never met, requesting he come into the office.

Petitioner had no trust in the company prior to filing a case with the EEOC, so as a precaution he introduced himself to Mr. Strain and told him that he is suffering from a work injury and immediately self-disclosed his use of marijuana to deal with pain from his injury. Manager Strain excused himself came back fifteen minutes later with paper work to take a physical and drug test at Respondent's doctor BHP.

After Petitioner was cleared to return to work in January 2018, Clean Harbors notified him that he needed to schedule a drug test in accordance with company policy. At that time, he told Clean Harbors that he had smoked marijuana and tested positive for it on January 16, 2018. Petitioner was fired seven days later for violating Clean Harbors's Alcohol and Drug Policy. Petitioner requested that his termination be reconsidered, stating that he smoked marijuana for medical purposes. However, following further investigation, Clean Harbors upheld the firing.

Petitioner then filed five claims against Clean Harbors: (1) a hostile work environment claim, (2) disparate treatment claim, and (3) retaliation claim under Title VII, all based on racial discrimination, (4) a state law retaliation claim under Louisiana's Whistleblower statute, La. R.S. 23:967, and (5) a state law retaliation claim under La. R.S. 23:1361, alleging that Clean Harbors alleging that Clean Harbors retaliated against him for taking workers' compensation.

Following discovery, Clean Harbors made a motion for summary judgment. The district court (Judge Juneau) granted the motion in part and denied the motion in part. With respect to Disparate Treatment Claims, the Court found that the plaintiff could not demonstrate a genuine issue of material fact as to whether he was treated less favorably than other similarly situated employees outside the protected group. Plaintiff also asserted disparate treatment, but the Court found that Plaintiff never applied for a driving position. The claim under for retaliation under La. R.S. §23:967 was dismissed for failure to specify the state law violated.

The hostile work environment claim was dismissed as untimely, the Court finding that "[a]n individual claiming discrimination in violation of Title VII must file a charge of discrimination with the EEOC within 300 days 'after the alleged unlawful employment practice occurred.'" The retaliation for seeking workers' compensation was rejected as untimely and failure to state a laim.

The Court found, however, that the retaliation claim under Title VII, predicated upon the plaintiff's complaint to the EEOC, survived, because "a reasonable jury could find that Clean Harbors chose to terminate Mr. Edwin because he had filed a claim with the EEOC."

Clean Harbors then made a motion for reconsideration requesting that the Court dismiss Edwin's Title VII retaliation claim. ROA.3234. In its motion, Clean Harbors contended that it

had not received the notice of the EEOC charge prior to the determination due to an error in an email address. It also contended that the dismissal conformed to company policy. It argued, for the first time, that it was policy to fire any employees in safety sensitive positions who failed a drug screening.

In opposition, Petitioner noted:

> EEOC Edwin call[ed] HR Director Barbra Lynn Ward (CH1200) reveal that the phone to Ward lasted one hour and three minutes. During this phone call Edwin claims that he participated protected activity by informing HR Director Ward of him moving forward with an EEOC Charge. Edwin July 15th, 2019, deposition (Pg. 206 Q8-A11, Q16-A19, Pg. 207 Q4-A6, Q14-19). Edwin May15,2019, deposition (Pg. 287 Q24-A3, Q4-A7) reveals that Ward was aware of Edwin moving forward with his EEOC complaint. Ward Pg.100 Q12-A14, Q17-20-25Pg.l01, HR Director Ward has never denied Edwin inform her of moving forward with EEOC Claim on Dec 13th, 2017. Despite email error (Exhibit 18 CH0024) which defendant should have been of Edwin's EEOC Charge, Clean Harbors was noticed by EEOC two days later via U.S. Mail.

Furthermore, due to the fact that he was not cleared to work by Respondent's doctor Petitioner was still an inactive employee who could not return to his duties because of his back injury. According to Barbara Ward, Petitioner was terminated because he could not work around industrial equipment with more than the allowed of marijuana in his system. However, that reason does not apply because Gilbert Edwin was not medically cleared to return to his duties working with the heavy industrial equipment for at least 30 more days. ROA: 56,507. Petitioner was never cleared to return to work.

In addition, Petitioner noted that he had self-reported his marijuana use, which was corroborated "during deposition testimony of human resource director Barbara Wards Pg. 138. Q2-A3, Q10-A12, Q17-A2." ROA.3265. In addition, under the policy

> before undertaking disciplinary measures, with an employee who has failed to

> comply with the requirements of clean harborsalcohol and drug policy or standard, clean harbors must take the appropriate steps to determine if the violation of the clean harbors alcohol and drug policy or standard is related to any disability which dean harbors has a legal duty to accommodate, managers must contact their human resources business partners to address all positive alcohol and drug test results or any situation regarding the use of alcohol and or drugs in the workplace. After defendant Clean Harbors received EEOC Notice on Dec 21, 2017, though his termination Edwin has never received a Full Investigation, Defendant has yet to provide any evidence that would confirm or prove that Clean Harbors was acting in compliance with it Policy and Standard, showing they had a "legitimate, non-discriminatory reason" for the adverse action.

The motion was reassigned to Chief Judge S. Maurice Hicks, Jr., who granted it. Judge Hicks agreed that whether Clean Harbors had received notice of the EEOC charge prior to termination was a question of fact. Instead, the Court accepted Clean Harbor's argument, not originally raised in the Motion for Summary Judgment, that it was policy to fire any employees in safety sensitive positions who failed a drug screening. The action was thus dismissed in its entirety.

On appeal, the Fifth Circuit affirmed. Citing *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 337 (5th Cir. 2017), it concluded that there was no error in considering a new argument on appeal. "Rule 54(b) allows parties to seek reconsideration of interlocutory orders and authorizes the district court to 'revise[ ] at any time' 'any order or other decision. . .[that] does not end the action.'" *Id.* at 336 (citing Fed. R. Civ. P. 54(b). It affirmed the grant of summary judgment on all counts, finding that Petitioner failed to raise a question of fact.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT CONCERNING THE APPLICATION OF LAW OF THE CASE TO RECONSIDERATION APPLICATIONS AS WELL AS WHETHER SUCH MOTIONS ARE SUBJECT TO A 30 DAY TIME LIMITATIONS

Courts disagree about whether the law of the case doctrine applies to situations such as this one. Several Circuits have concluded that the law of the case doctrine does not apply to a district court's reconsideration of interlocutory orders. See *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 493 (3d Cir. 2017) (interlocutory orders remain open to trial-court reconsideration and do not constitute law of case); *Filebark v. U.S. Dep't of Trans.*, 555 F.3d 1009, 1013 (D.C. Cir. 2009) ("'[i]nterlocutory orders are not subject to the law of the case doctrine and may always be reconsidered prior to final judgment.'") (quoting *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C.Cir.1997); *Elephant Butte Irr. Dist. of New Mex. v. U.S. Dep't of Interior*, 538 F.3d 1299, 1306 (10th Cir. 2008) (same and so viewing Fed.R.Civ.P 54(b)).

In contrast, other Circuits, such as the Second Circuit, have held that law of the case is applicable. See, e.g. *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003) ("We have limited district court's reconsideration of earlier decisions under Rule 54(b)by treating those decisions as law of the case . . . ."). According to the Second Circuit, the "law of the case . . . gives a district court discretion to revisit earlier rulings in the same case, subject to the caveat that 'where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.'" *Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir. 1964).

Thus, those decisions may not usually be changed unless there is "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent a manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (internal quotation marks omitted). The First Circuit seems to follow this rule as well. See *CPC Int'l, Inc. v. Northbrook Excess and Surplus Ins. Co.*, 46 F.3d 1211, 1215 n.4 (1st Cir. 1995).

To be sure, "law of the case" is only a discretionary rule of practice, but it is based upon sound policy that when an issue is once decided that should be the end of the matter. *United States v. U.S. Smelting Co.*, 339 U.S. 186, 198-199 (1949). Even though the original order was interlocutory, the reasons for the decision did not change. Permitting that order to be altered led to a chaotic situation in which a successor effectively overruled another judge of the same court who had ruled on a pretrial motion. See *Robb v. Sales*, 54 F.R.D. 196, 198 (E.D. Pa. 1971).

The better rule would appear to be that of the First and Second Circuits. "Courts are reluctant to spend scarce judicial resources revisiting a decision that has already been made. Thus, reconsideration of a summary judgment or denial of a summary judgment is considered extraordinary relief, to be granted only in exceptional circumstances. This is true whether the request for reconsideration is made pursuant to Rule 54(b) or under the court's inherent power to reconsider interlocutory orders." 11 Moore's Federal Practice - Civil § 56.124[4] (2022).

Exceptional circumstances "are only those circumstances that are 'clearly out of the ordinary, uncommon, or rare.'" *United States v. Brown*, 368 F.3d 992, 993 (8th Cir. 2004) (quoting *United States v. Koon*, 6 F.3d 561, 563 (9th Cir. 1993)). There were no such exceptional circumstances here.

Moreover, there is a Circuit split concerning time limitations on making such motions. The Seventh Circuit, in *Schaefer v. First Nat'l Bank of Lincolnwood*, 465 F.2d 234, 236 (7th Cir. 1972), held that "as a general rule it is an abuse of discretion for a district judge to grant a motion for a Rule 54(b) order when the motion is filed more than thirty days after the entry of the adjudication to which it relates." This holding was then reaffirmed in *King v. Newbold*, 845 F.3d 866, 868 (7th Cir. 2017) (denying a Rule 54(b) motion because it "was made 13 months after partial summary judgment was granted and more than 30 days after the entry of partial judgment on the pleadings.").

District courts in the Seventh Circuit have continued to follow Schaeffer, especially in cases where the Rule 54(b) request was untimely. See *Officer v. Chase Ins. Life & Annuity Co.*, 500 F. Supp. 2d 1083, 1085 (N.D. Ind. 2007) (and cases cited).

The *Schaefer* decision has been sharply criticized for having established its 30-day rule. In *Bank of New York v. Hoyt,* 108 F.R.D. 184 (D.R.I. 1985) the court stated:

> This court eschews any such inflexible criterion. Rule 54(b), unlike a myriad of other provisions in the civil rules, e.g., Fed. R. Civ. P. 59(b), 59(e), 72(a), 74(a), contains no express temporal restrictions. . . . [T]hough the seasonableness of an effort to obtain Rule 54(b) certification is certainly a factor to be weighed in the mix, it should not be accorded talismanic importance. In the absence of a fixed time limit for taking action, it seems prudent for the court to assess the timeliness of such an initiative on a case-by-case basis.

Id. at 185-86.

The division in the Circuits should be reviewed by this Court.

II. THE FIFTH CIRCUIT DECISION CONFLICTS WITH SECOND CIRCUIT PRECEDENT

A prima facie case of retaliation requires that the plaintiff produce evidence that would be

sufficient to demonstrate that: (1) the plaintiff participated in a protected activity; (2) the defendant had knowledge of the protected activity; (3) the plaintiff suffered an adverse employment action; and (4) there is a "causal connection" between the protected activity and the adverse employment action. See *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 844 (2d Cir. 2013) (quoting *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173 (2d Cir. 2005)).

In *Zann Kwan*, the Second Circuit reversed the grant of summary judgment to the defendant and remanded. Summary judgment was improper because the employee's complaint to a company officer communicated her concerns to the company as a whole, the three-week period from the employee's complaint to her termination was sufficiently short to make a prima facie showing of causation indirectly through temporal proximity, and the employer provided inconsistent and contradictory explanations for the termination.

As the Court explained, retaliation claims must be proved according to traditional principles of but-for causation, and this requires proof that the unlawful retaliation will not occur in the absence of an alleged wrongful action or actions of an employer. A plaintiff's injury can have multiple "but-for" causes, each one of which may be sufficient to support liability. Requiring proof that a prohibited consideration is a "but-for" cause of an adverse action does not equate to a burden to show that such consideration is a "sole" cause. The determination of whether retaliation is the "but-for" cause, rather than just a motivating factor, is particularly poorly suited to disposition by summary judgment, because it requires weighing of the disputed facts, rather than a determination that there is no genuine dispute as to any material fact. A jury should eventually determine whether the plaintiff proves by a preponderance of the evidence that he or she does in fact complain about discrimination and that he or she will not be terminated if

he or she does not complain about discrimination.

Here, Clean Harbors asserted that Plaintiff was terminated for violations of their Alcohol and Drug Policies. However, as the first judge found, "the policy does not mandate termination, and more importantly the policy indicates that employees who proactively report issues with drug use can be considered for assistance 'without fear of reprisal.'" ROA.3218. (Quoting ROA.472). The standards, as the judge observed, afforded substantial discretion in Clean Harbors. Dismissal was not mandated.

Review of the record shows this analysis is correct. An email between Ernest Knight to Ms. Barbara Ward dated January 9th, Tuesday, at 9:43 a.m., which was ignored by the second judge, confirms this:

> "Barb, Gilbert Edwin was released to return to work with restrictions from his personal doctor . He will be bringing in the release today so that we can review the restrictions. He shared with Michael Strain that he had smoked medical marijuana without a prescription while out on his leave. Our plan is to review his restrictions and send him to an AllOne to review his release and do a DNA, and allow him to speak with the MRO if his test requires. Please advise if you'd like us to handle this differently."

ROA.261, ROA.813.

Michael Strain's affidavit conflicts with this version. Accordingly to Strain, Plaintiff told him that he smoked marijuana and had gotten it off the street– although, as noted above, Plaintiff testified under oath that he obtained it legally in Colorado– and then he immediately arranged for termination. ROA.289. Inasmuch as a drug test was administered thereafter, which is asserted as a basis for termination, and the contents of the email, reliance upon the Strain affidavit is plainly unwarranted. At best, there is a question of fact for jury resolution.

Clean Harbors has two polices that should have prevented Gilbert Edwin's termination.

Its standard states that an employee who voluntarily seeks assistance on their own will not be disciplined unless they have failed to comply with alcohol and drug standard. ROA.472.

Although he had been previously been tested on multiple occasions, Plaintiff's previous history yielded no infractions of the drug policy. ROA.920. Clear Harbor concedes that plaintiff made a voluntary disclosure. ROA.448.

The screening section of the standard states that an employee returning to work following a thirty day absence may be subject to a "return from leave" alcohol and drug test. ROA.455. A negative drug screening is required before the will be permitted to return to their duties. ROA.466. Another portion of the standards protects employee whose substance abuse is related to a disability for which Clean Harbors has a duty to accommodate. ROA.473.

It is undisputed that plaintiff was receiving long term disability based on the L5/S1 Extruded disc suffered from his employment. ROA.880. Plaintiff additionally sought a doctor to treat his disability and was recommended to use marijuana for the pain as an alternative to narcotics. ROA.880.The Clean Harbors manual directs employees to inform their supervisor of a medication taken at the direction of their physician. It further extends instructions that any employee with a substance abuse should again inform their direct supervisor. ROA.445. Again, plaintiff made the voluntary disclosure. ROA.289, ROA.448.

The Standard contains a section for self disclosure. ROA.472.The Standard states that the company believes that an alcohol or drug dependency is preventable and a treatable condition and recognizes that an individual may want assistance. ROA.472-ROA.473. This Standard encourages employees to voluntarily come forward to seek assistance of a substance abuse expert, substance abuse professional, and or employee assistance program without fear or

reprisal. ROA.472. Plaintiff abided by both requirements of the drug standard when he informed Micheal Strain of his marijuana use. ROA.448.

In sum, the first judge got it right. Whether the reasons given for the termination were pretextual were for the jury to determine.

III. THE FIFTH CIRCUIT'S DECISION ON THE DISPARATE TREATMENT CLAIM CONFLICTS WITH OTHER CIRCUITS

In the Second Circuit, "A plaintiff may establish a claim of disparate treatment under Title VII either (1) by showing that he has suffered an adverse job action under circumstances giving rise to an inference of discrimination on the basis of race, color, religion, sex, or national origin, or (2) by demonstrating that harassment on one or more of these bases amounted to a hostile work environment." *Feingold v. State of New York*, 366 F.3d 138, 149 (2d Cir. 2004).[1]

In contrast to the Fifth Circuit, other Circuits hold that a "plaintiff's burden on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence." *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994) (citing *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987), cert. denied, 498 U.S. 939 (1990)." "The plaintiff need only offer evidence which 'gives rise to an inference of unlawful discrimination.' 'The amount [of evidence] that must be produced in order to create a prima facie case is "'very little."'" *Id.* (internal citations omitted).

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[1]. This contrasts with the prima facie requirements in the Fifth Circuit where a plaintiff must show that he or she (1) is a member of a protected class, (2) was qualified for the position, (3) suffered an adverse employment action, and (4) the employer continued to seek applicants with the plaintiff's qualifications, the employer selected someone of a different race or sex, or that others similarly situated were treated more favorably than plaintiff. *Washington v. Veneman*, 109 F. App'x 685, 688 (5th Cir. 2004) (citing *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 448 n. 3 (5th Cir. 1996).

Here, the dispute centered on whether the employer continued to seek applicants with the plaintiff's qualifications, and the employer selected someone of a different race or sex, or that others similarly situated were treated more favorably than plaintiff.

Bryce Manuel was a proper comparator, as the district court itself found that the record "does indicate that both men initially shared the same job title." (See ROA.2520.) Bryce Manuel was promoted ahead of plaintiff and, offered $2-$3 more compensation than the individual with more press experience and the individual that trained him, which itself seems to be substantial evidence that "a similarly situated employee outside the protected class was treated more favorably."

Bryce Manuel and Plaintiff were similarly situated for several additional reasons. They were both hired with zero industrial press experience. They both worked the press while labeled as Environmental Technician 1. They both worked the same 12 hour shift. The both have the same duties related to their job titles prior to Bryce's promotion. Therefore, they were similarly situated when they were working the same press, on the same shifts, with the same job title of Environmental Technician 1.

According to Marcel Bienvenue there was racial tension at the Press. ROA.2210-ROA.2211. Darrell Bush stated in his deposition that he witnessed Plaintiff experience racism. ROA.2688. However, once Bryce was promoted the other three minorities were forced to share hours. ROA.2680. Therefore, the evidence is sufficient to show that plaintiff was similarly situated as Bryce Manuel and treated differently only due to race.

Bryce Marcel was not originally hired as a lead press operator contrary to the claims of the Defendant and the following facts support this premise. Until the date of his altercation with

plaintiff, Bryce Manuel was labeled as a fellow Environmental Tech I in the Clean Harbors system. ROA.2190-ROA.2191, ROA.2197. According to Ernest Knight's email, plaintiff could not be disciplined for not following Bryce Manuel's directions because he was not listed as a lead press operator in the Clean Harbors system. ROA.895.

Furthermore, a reasonable juror would not find that Bryce Marcel was the lead press operator at the time of his hiring because prior to his employment with Clean Harbors, Bryce Manuel had no experience on an industrial press.

Summary judgment should have been denied. See *Figueroa v. Pompeo*, 923 F.3d 1078, 1093 (D.C. Cir. 2019) (" the District Court erred in accepting the Department's vague reason.").

IV. THE HOSTILE WORK ENVIRONMENT CLAIM SURVIVES SUMMARY JUDGMENT

To state a claim for hostile work environment under Title VII, a plaintiff must show that the conduct complained of (1) was unwelcome; (2) was based on her membership in a protected class; (3) was sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive work environment; and (4) was imputable to her employer. See *Okoli v. City of Baltimore*, 648 F.3d 216, 220 (4th Cir. 2011).

As the district court noted, ROA.3209, the hostile work environment claim focuses on three incidents followed by Clean Harbors's alleged lack of response: (1) on his first day of work, he was driven to a work site by his supervisor in a truck with a noose hanging in the cab. When he confronted the supervisor in private, the supervisor allegedly told him to drop it and not be difficult; (2) the second incident involved the same supervisor who showed plaintiff a comedy routine that used racist language despite plaintiff asking him to stop the video; (3) the final

incident occurred in November of 2016, where another supervisor allegedly told plaintiff and another African American worker not to steal or return late from lunch break claiming those actions are "what you people do."

Under settled precedent elsewhere, light of the frequent and enduring nature of this conduct, and the conduct itself, a reasonable jury could find that the employe created an objectively hostile work environment due to Petitioner's race. See *James v. Van Blarcum*, 782 F. App'x 83, 85 (2d Cir. 2019) ("[W]hether racial slurs constitute a hostile work environment typically depends upon the quantity, frequency, and severity of those slurs, considered cumulatively in order to obtain a realistic view of the work environment." (alteration in original) (quoting *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997))); *Bonilla v. City of New York*, No. 18-CV-12142, 2019 U.S. Dist. LEXIS 198817, 2019 WL 6050757, *16 (S.D.N. Y. Nov. 15, 2019) ("[Plaintiff's] claim does not rest on an isolated incident or stray remarks, but on a pattern of abusive activity of a quality and quantity that a reasonable employee would find worsened the conditions of his employment." (citing *Dawson v. County of Westchester*, 373 F.3d 265, 274 (2d Cir. 2004))); *Marshall v. Kingsborough Cmty. Coll. of CUNY*, No. 11-CV-2686, 2015 U.S. Dist. LEXIS 134256, 2015 WL 5773748, at *11, (E.D.N. Y. July 27, 2015) (concluding that given the "the inflammatory and clearly gender-based nature" of the department chair's references to plaintiff and "other female employees" in derogatory terms and statements that "women don't belong in the work place" together with the chair's conduct of "weekly 'g[etting] in the face' of female colleagues in a physically intimidating manner," "a reasonable jury could conclude that the weekly or even twice-monthly slurs were sufficient to create a hostile work environment"), report and recommendation adopted in relevant part, 2015 U.S. Dist.

LEXIS 133298, 2015 WL 5774269 (E.D.N.Y. Sept. 30, 2015); *Marino v. EGS Elec. Grp., LLC*, No. 12-CV-518, 2014 U.S. Dist. LEXIS 43131, 2014 WL 1289453, at *9 (D. Conn. Mar. 31, 2014) (denying summary judgment as to hostile work environment claim where "the record show[ed] that [the plaintiff] suffered from severe and pervasive harassment from [a coworker] for over a year"); see also *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 873 (9th Cir. 2001) (holding "that a reasonable man would have found the sustained campaign of [homophobic] taunts, directed at [plaintiff] and designed to humiliate and anger him, sufficiently severe and pervasive to alter the terms and conditions of his employment")

The courts below, however, deemed that the claims were barred by the statute of limitations. This ignored the continuous violation doctrine.

"The continuing violation doctrine, where applicable, provides an 'exception to the normal knew-or-should-have-known accrual date.'" *Gonzalez v. Hasty*, 802 F.3d 212, 220 (2d Cir. 2015) (quoting *Harris v. City of New York*, 186 F.3d 243, 248 (2d Cir. 1999)). The doctrine "applies to claims composed of a series of separate acts that collectively constitute one unlawful practice," *id.*, and functions to "delay the commencement of the statute of limitations period until the last discriminatory act in furtherance of" that broader unlawful practice, *Harris*, 186 F.3d at 248. This doctrine does not apply, however, to "'discrete acts of discrimination or retaliation that occur outside the statutory time period,' even if other [related] acts of discrimination occurred within the statutory time period." *Patterson v. Cnty. of Oneida*, 375 F.3d 206, 220 (2d Cir. 2004) (quoting *AMTRAK v. Morgan*, 536 U.S. 101, 105 (2002)). Rather, the doctrine extends exclusively "to claims that by their nature accrue only after the plaintiff has been subjected to some threshold amount of mistreatment." *Lucente v. Cnty. of Suffolk*, 980 F.3d 284, 309 (2d Cir.

2020).

There has been no severance of the acts because the defendant never took any remedial action. In that circumstance, the action should be timely where termination is the final incident. This is the holding in *Guessous v. Fairview Prop. Invs, LLC*, 828 F.3d 208, 222 (4th Cir. 2016).

The United States Court of Appeals for the Fourth Circuit in *Guessous* examined the issue of "whether non[ ]time[ ]barred discrete acts can be considered part of the series of separate acts that collectively create a hostile work environment, thus rendering a hostile[ ]environment claim timely under the continuing[ ] violation doctrine." 828 F.3d at 223 (internal quotation marks and citations omitted). The Fourth Circuit explained that the Supreme Court recently used a constructive discharge as part of a hostile work environment claim. See *id.* As a result, the *Guessous* court concluded that "so long as the [discrete] act is part of the pattern of discriminatory treatment against the employee, then that act should be sufficient for the purposes of the continuing[ ]violation doctrine, even if the act would otherwise qualify as a discrete act that is independently actionable." *Id.* Therefore, the Fourth Circuit concluded that the plaintiff's termination could suffice as a timely action and the continuing violation doctrine applied. Id. Under the *Guessous* standard, a non time barred discrete act—such as a termination of employment—can be considered an anchor for a pattern of discriminatory treatment under the continuing violation doctrine.[2]

In an email dated December 12, 2017, Ernest Knight noted that plaintiff had called him and reported racist remarks. ROA.484. This document alone shows the questions of fact

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[2]. Admittedly, the rule in the Second Circuit is contra. See *Rodriquez v. Cnty. of Nassau*, 933 F.Supp.2d 458, 462 (E.D.N.Y.2013) ("[T]ermination is a discrete act.").

concerning the continuing racist harassment.

In his deposition, plaintiff showed that he continued to suffer severe and humiliating harassment and the "stress" he had to interact with, which was constant in almost every thing he did. ROA.2461. Consequently the hostile work environment claim should survive summary judgment.

Although the Court of Appeals said that the only timely act raised by Petitioner in the district court was an August 2017 low performance review by his manager, Marcel Bienvenu, and if this event contributed to a hostile work environment, then under Fifth Circuit precedent, the Court may consider all of the prior acts of alleged harassment. "Edwin failed to adequately brief this argument on appeal, however, so it is forfeited. [¶] Even if this issue was adequately briefed on appeal, it would nevertheless fail because Edwin fails to show how the low performance review constituted harassment based on race that contributed to a hostile work environment."

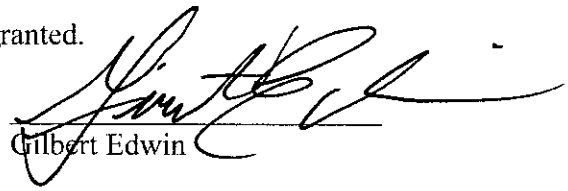
Petitioner's performance review should have been considered, however, because the performance review effected the employees wage increase. ROA:1198, 1245. The Court of Appeals also noted, Petitioner did not discuss the performance review being racially motivated in the EEOC report or in his deposition but said that Bienvenu was not a fair supervisor.

In his deposition Bienvenu stated that Edwin called him racist twice. Petitioner's allegations can still be support his timely claims because if any of his charges are related to the charge filed and requirements of title 7 does not bar employees from using prior acts of discrimination for which no charge was timely filed with equal Employment Opportunity Commission EEOC as background evidence in support of timely title seven claim

CONCLUSION[3]

For the reasons stated, certiorari should be granted.

Dated: September 6, 2023



Gilbert Edwin

[3]. The complaint contained two state law claims. Since they are not federal claims certiorari would not lie. Nonetheless, in the event that certiorari is granted, Petitioner reserves the right to argue that they present jury questions as well.