No. 23-836

IN THE

Supreme Court of the United States

SAMER ALI-HASAN, M.D.,

Petitioner,

v.

ST. PETER'S HEALTH PARTNERS MEDICAL ASSOCIATES, P.C., *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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CASES:

The opposition brief does not raise any issues relevant to the grounds upon which Dr. Ali-Hasan petitioned for a writ of certiorari.

First, respondents argue that they had valid reasons to terminate Dr. Ali-Hasan's employment. However, his employment was not terminated for any of these reasons, which were raised only during litigation and are manifestly untrue in any event.

Second, the opposition argues that the *McDonnell-Douglas* test is the *sine qua non* for proving cases of gender-based discrimination. However, that test is only one way to prove discrimination by circumstantial evidence. More importantly, Petitioner is not seeking to prove gender-based discrimination at all. Petitioner has never contended he was discriminated against because males were disfavored in comparison to females. Dr. Ali-Hasan petitions for a writ of certiorari because he was the victim of a completely unfounded claim of sex discrimination, and this Court's decision in *Bostock* held that Title VII prohibits that very type of discrimination based on sex. Respondents dance around that aspect of the petition.

I. PETITIONER WAS NOT TERMINATED FOR THE REASONS CITED BY RESPONDENT, WHICH ARE DEMONSTRABLY UNTRUE.

Naturally respondents try to make this case about a factual dispute, because a petition for a writ of certiorari based on facts rather than a seminal legal issue will be unsuccessful. That effort, however, must fail.

The petition anticipated and addressed the vast majority of the factual bases for respondents' arguments which are disingenuous, totally lacking in merit, and designed to obscure the fact that petitioner was explicitly fired because he was falsely accused of sex discrimination.

- Petitioner's medical record was spotless. [Petition, pp. 4-7]

- Dr. Ali-Hasan was never counseled concerning any behavioral issues. [Id. pp. 5, 17]

- Craig Knack, a lower level hospital administrator, complained on one occasion about Dr. Ali-Hasan "invading his personal space" years before he was fired but that complaint was dismissed as lacking merit. Dr. Phillip, head of the Joint Operating Committee that ran the cardiology practice, stated it was "nothing out of the ordinary." [PA-217, 266, 275]. Other physicians with profound behavioral issues were not disciplined. [Petition, pp. 15-16]

- In one instance, a couple of doctors disagreed with Dr. Ali-Hasan's handling of a few cases which were reviewed by other interventional cardiologists who found nothing but a routine disagreement between physicians as to the treatment to be used. There was no finding of any medical deficiency. [PA-216, 274]

- In an apparent oversight, Dr. Ali-Hasan was hired without being board certified. His lack of board certification was reviewed by the Executive Committee, but no action was taken. Dr. Ali-Hasan was advised that he should take the test. He signed up for it but was fired because of the anonymous complaint before the examination, which he passed. This is consistent with his contract which requires notice and an opportunity to cure lack of board certification. [Petition, p. 16 fn., 4] Other physicians were allowed to remain employed without board certification. [PA-212-213, 275-276]

There is one point raised by the defense that was not addressed in the petition. Respondents contend that Dr. Ali-Hasan was admitted to partnership in a "split decision." [PA-188]. But there are no minutes in the record stating what the vote was or what issues might have been raised at that time. Further, he was admitted to partnership, which is all that matters, long before his termination. Not all partners in any enterprise, medical, legal, or otherwise, are admitted by unanimous vote, and sometimes the dissenters are motivated by purely political or personal considerations that have nothing to do with the merits of the prospective partner's candidacy.

Thus, respondents' hearsay allegation is devoid of substantive content and reveals the very slender reeds upon which their belated claims of alternative grounds to terminate Dr. Ali-Hasan were based. None of the grounds discussed above were raised as reasons for terminating his employment. Rather, the head of Human Resources explicitly told Dr. Ali-Hasan he was fired for mistreating

women, which she labelled sex discrimination, an allegation she repeated to the Executive Committee. [Petition, pp. 6-7, 15-16] The investigation did not support that allegation, which is why the District Court stated: "Viewing the evidence in the light most favorable to [Petitioner], a jury could reasonably find that his employment was terminated in response to allegations of sexual misconduct, following an irregular investigative process." [Id., p. 3; see also id. pp. 11-14 (defects in investigation)]. [1]

II. THE LOWER COURTS ARE SPLIT AS TO WHAT CONSTITUTES DISCRIMINATION BASED ON SEX.

The Eleventh Circuit recently reaffirmed and explained the analysis it used in *Tynes v. Fla. Dep't of Juvenile Justice*, 2023 U.S.App. LEXIS 32836 (11th Cir. 2023), where it rejected the view of McDonnell Douglas advanced by respondents. The Eleventh Circuit explained how discrimination is proven:

> The McDonnell Douglas framework is one "tool" that helps an employee prove retaliation with circumstantial evidence. It offers "a sensible, orderly way to evaluate the evidence" and helps the employee to "raise[] an inference" of unlawful conduct. But the framework is not "an inflexible rule." For decades we have explained

1. Petitioner believes the anonymous complaint was fabricated to procure his termination in part because there was no other basis to terminate his employment. Although the anonymous complaint did not explicitly raise the question of sex discrimination, that is how Human Resources interpreted it and that is what the investigation focused on. None of the allegations in the anonymous complaint were confirmed. [Petition, pp. 10-14]

> that the McDonnell Douglas framework "is not the exclusive means" by which an employee can prove discrimination with circumstantial evidence. . . .
>
> Without relying on the McDonnell Douglas framework, an employee may prove retaliation with any circumstantial evidence that creates a reasonable inference of retaliatory intent. Some of our precedents refer to this evidentiary [*1311] approach as the "convincing-mosaic framework." But a "convincing mosaic" is a metaphor, not a legal test and not a framework. See Ortiz v. Werner Enters., Inc., 834 F.3d 760, 764-65 (7th Cir. 2016). The legal standard—and the question for the court at summary judgment—is only whether the evidence permits a reasonable factfinder to find that the employer retaliated against the employee. That legal standard applies no matter how an employee presents her circumstantial evidence.

Berry v. Crestwood Healthcare LP, 84 F.4th 1300, 1310-1311 (11th Cir. 2023) (citations omitted). *Accord*, *Mann v Koch Foods of Ashland LLC*, 2024 US Dist LEXIS 20562, at *6-7 [ND Ala Feb. 6, 2024 ("recently, the Eleventh Circuit has signaled a departure from McDonnell Douglas toward a more basic, Rule 56-based inquiry: Has the Plaintiff submitted enough evidence to allow a reasonable juror to find that the Defendant employer acted against Plaintiff because of her race?"). And of course, discrimination may be proven by direct evidence without resort to circumstantial evidence or any burden-shifting formula. *Carter v. Pathfinder Energy Servs.*, 662 F.3d 1134, 1150 (10th Cir. 2011).

Here Petitioner was explicitly told by the head of Human Resources that he was being terminated for treating women badly. The head of Human Resources referred to this explicitly and directly as sex discrimination. That is direct evidence as to why petitioner was terminated – because of sex.

Thus, the petition squarely raises the question whether, under *Bostock*, an employee who is terminated based on a false allegation of sex discrimination has a cause of action for violation of Title VII. Allegations of sex discrimination are not to be used by clever bureaucrats as a weapon in the workplace to terminate any employee that someone simply doesn't like.

Respondents deny there is a conflict in the Circuits because, contrary to *Bostock*, they try to twist every case into being based on gender. The battle lines were very clearly drawn in *Doe v. Oberlin College*, 963 F.3d 580 (6th Cir. 2020). The majority held that petitioner, who was accused of sexual misconduct, could maintain a claim of sex discrimination because the accusation was unfairly investigated. The dissent held that, for there to be a claim of sex discrimination, there needed to be evidence that the unfairness in the investigation was related to gender. The majority saw no need for any gender-based evidence because the petitioner was explicitly disciplined because of an unfounded claim of misconduct related to sex, just as Dr. Ali-Hasan was terminated from employment because of an unfounded claim of, in the words of the Head of Human Resources, sex discrimination.

Thus, the case law cited by petitioner is fully applicable and cannot be interpreted in the manner suggested by

respondents. Indeed, respondents' effort to misconstrue the decisions of the Circuit Courts demonstrates why the petition should be granted. Petitioner stands on his analysis of the case law cited in his principal brief.

CONCLUSION

For the foregoing reasons, the petition for a writ of should be granted.

Respectfully submitted,

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