24-6710

NO. _____

ORIGINAL

In The

Supreme Court of the United States

ROBERT KLEIN

Petitioner pro se

v.

BROOKHAVEN HEALTH CARE FACILITY

The McGuire Group

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ROBERT KLEIN
Petitioner pro se
PO Box 1512
535 Brittany Road
Westcliffe, Colorado 81252
Phone: (631) 921-2654
Email: midmug3266@gmail.com
19 February 2025

QUESTIONS PRESENTED
(Rule 14)

1. Whether the guarantee that the Constitution of the United States under the Seventh Amendment still entitles a U.S. citizen his Right to a jury trial considering plaintiff requested/demanded a jury trial at the filing of the complaint stage, throughout numerous filings in both the District Court and the COA ? Petitioner has been deprived his Right to a trial by jury.

"***The Seventh Amendment preserves the right of a jury for civil cases in federal court***".

2. Whether **29 U.S.C. 626(c)(2)** still provides that in a civil action, ***"a person shall be entitled to a trial by jury ..... as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action" ? Lorillard v. Pons, 434 U.S. 575 (1978).***

Petitioner has been deprived his Right to a trial by jury.

3. Does the slogan **"EQUAL JUSTICE UNDER LAW"** apply to pro se litigants wishing to seek justice although law is complicated, mostly beyond reach, beyond comprehension, not easy to navigate, confusing at best, especially for only an ordinary underprivileged citizen with only a high school diploma and without any legal training?

4. Whether the Constitution Due Process Clause under the Fourteenth Amendment has been revised to NOT allow a pro se litigant to have that protection?

5. Whether the Federal Rules of Civil Procedure (FRCP) only apply when the

Courts deem them to apply and not to a pro se plaintiff?

6. Whether the United States Codes and Codes of Federal Regulations and Other regulations have been abolished in the fair process in civil cases and no longer hold water?

7. Whether Supreme Court jurisprudence/opinions still holds true and is to be followed by the lower Courts but are in non-compliance, in conflict, and in total disobedience and disregard of This Courts wisdom through their decisions?

8. Whether "whistleblower" protection still has a place in society within nursing homes when the elderly residents are abused, neglected, put in substantial specific dangers to include life threatening dangers and Medicare fraud and discrimination is abound? **(NYLL 740)**

9. Does not a Vietnam Veteran have the protection under VEVRAA **(41 CFR Part 60-300)** ?

10. Whether the ADEA **29 U.S.C. 621-634** process followed is now neglected in the filing of Complaints on neglect, abuse, fraud, discrimination and life threatening dangers to the public including nursing home elderly residents and military veterans?

11. Why material facts and matters of law that were presented by plaintiff have taken a back seat to questions in dispute that are required to be presented to a jury and Supreme Court and circuit courts decisions and opinions are no longer followed and abided by? (The Courts preach their wisdom but don't adhere to them and they

have gone for naught)

12. Whether documents that were requested from defendant during Discovery, Ordered to be produced and some were considered a Motion to Compel by the Court do not have to be produced and Orders do not have to be satisfied and only excuses and refusals were given by defendants?

LIST OF PARTIES

The petitioner is Robert Klein pro se.

The respondent is Brookhaven Health Care Facility (BHCF)
The McGuire Group (TMG)

LIST OF PROCEEDINGS

a. United States Court of Appeals, Second Circuit- Case No: 23-7771,
Robert Klein v. Brookhaven Health Care Facility- The McGuire Group

Dkt 43.1 Summary Order entered dtd 11 Dec 2014

Dkt 46.1 Order- En Banc Petition Denied dtd 14 Jan 2025

Dkt 47.1 Mandate on Summary Order entered dtd 21 Jan 2025

b. U.S. District Court, Eastern District of New York- Case No: 2:17 cv 0481
Robert Klein v. Brookhaven Health Care Facility- The McGuire Group

Doc 92 Order Granting Def. Summary Judgment- dtd 11 Oct 2023

Doc 95 Mandate on Summary Order entered dtd 21 Jan 2025

TABLE OF CONTENTS

APPENDIX A (Court of Appeals- Second Circuit Orders/Decisions)

Dkt. 43.1- Summary Order- 11 Dec 2024

Dkt 46.1- Order- En Banc Petition Denied- 14 Jan 2025

Dkt 47.1- Mandate Summary Order- 21 Jan 2025

APPENDIX B (Dist. Ct. Eastern Division of N.Y. Orders/Decisions- 2:17 cv 0481)

Doc 92- Judgment- 11 Oct 2023

Doc 95- Summary Order Mandate- 21 Jan 2025

APPENDIX C (Appellants Briefs to COA):

Dkt 33.1- Reply Brief of Appellant- 16 May 2024

Dkt 45.1- Petition Request for Panel Rehearing En Banc- 26 Dec 2024

APPENDIX D (Dist. Ct. Orders to Produce and R & R)

Doc 22- Report and Recommendation- 11 Mar 2019

Doc 64- Order for Def. to Produce- Motion to Compel and denied in part- 2 Mar 2022

Doc 67- Order for Def. to Produce- Denied- 12 Apr 2022

TABLE OF AUTHORITIES

STATUTES

Pages

CODES OF FEDERAL REGULATIONS

MISC. REGULATIONS

FEDERAL RULES OF CIVIL PROCEDURES

MISCELLANEOUS

PETITION FOR WRIT OF CERTIORARI

This case presents this Court with the opportunity to continue providing coherence, obedience and clarity to the statutory framework that is applicable within federal discrimination and retaliation claims. This Court's wisdom through their citing's and through what Congress has employed in their meaning in the legislative purpose must be carried out in the fairness to all citizens bringing notable claims to the surface. ***Engine Mfrs. Assn. v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004)*** (internal quotation marks omitted) accord ***Gross v. FBL Fin. Servs., Inc., 557 U.S. 168, 175 (2009).*** Employee's rights must not be cast aside due to their lack of knowledge of the law or process. ***"A pro se complaint, however inartfully pleaded, must be held to less stringent standards that from formal pleadings drafted by lawyers."*** *Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976).* ***The Court must therefore "read the pleadings of a pro se plaintiff liberally and interpret them "to raise the strongest arguments that they suggest."*** *McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999). (quoting Burgos v. Hopkins, 14 F.3d 878, 890 (2d Cir. 1994).*

Constitutional Amendments, U.S. Codes, Federal Rules of Civil Procedures and the Due Process itself have been abused by the second circuit and they have not interpreted the real meaning of them jeopardizing a citizen' rights, burdening him and keeping elderly resident citizens in harm's way in a nursing home.

Employees filing claims under the ADEA face inexplicably different standards of proof depending on where they file. Law interpretations are different throughout the different circuits but seem to be more so here in the second circuit.

Discrimination is still present in the workplace and seems to be carried over to cases wishing to correct employment discrimination in the filings in the respective court jurisdiction and through the appeal process.

The EEOC Guidance on Retaliation has different standards than what the second circuit has pronounced in their decision in this particular case.

State Laws as well are construed differently here at the second circuit and precedence of both the Supreme Court and other circuit courts including their own seem to be in conflict while not providing fairness to a pro se litigant whom has filed all his filings on time and within the standards set by the process.

The conduct of the second circuit has violated the standards set forth by both the Federal Rules of Civil Proceedings and This Court in their erroneous errors that shall cause harm if not corrected and are in conflict.

In Petitioner's case, the en banc panel rehearing petition request was denied in the second circuit and did not consider that the RECORD as a whole as it was not intact in the process and was overlooked and burdened the petitioner in Due Process. The second circuit did not rely on their own decisions as the RECORD cannot be in piecemeal fashion and they overlooked that aspect as well.

The second circuit overlooked the standards set forth from This Court on the requirements needed to defend the claims of petitioner and have him receive a fair trial by jury. This Court has laid out what is the process and was followed to the T by the petitioner but still the second circuit abused its discretion in not adhering to the Supreme Courts wisdom on numerous accounts and is in conflict.

If This Court does not set the lower Courts straight on the following of their jurisprudence, employees will be dissuaded and reluctant to come forth and voice concerns of discrimination and whistleblowing.

Employees in the workplace face different burdens of proof depending on where they work. This shall affect factors on how they present and come forth and might affect their rights.

An employee should be able to establish an "age" and "retaliation" claim under 29 U.S.C. 621-634 where a prohibited consideration was a factor or motivation factor in the contested personnel employment action. Nevertheless the second circuit has not applied the ***McDonnell Douglas*** test or other Supreme Court guidelines set forth in their decisions, nor let a jury decide and be presented the facts.

It seems the COA decision was so prejudicial that it was in total conflict with This Courts opinions and wisdom.

Petitioner Robert Klein respectfully prays that this Court grant a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Second Circuit entered on 11 December 2024 in their Summary Order (Dkt 43.1),

Jan 2025 and

llowed.

ed the court in

33.1, 45.1. Also

eted as vested

).

me Court

& R Document

ased

rder to have this

43

OPINIONS AND ORDERS BELOW

Opinions and Orders of the Court of Appeals is set out under:

Dkt 43.1 Summary Order and Judgment dtd 11 Dec 2024

Dkt 46.1 Order- En Banc Petition Denied dtd 14 Jan 2025

Dkt 47.1 Mandate on the Summary Order dtd 21 Jan 2025

The District Court Opinions and Orders are set out in under:

Document 22 Report and Recommendation dtd 11 Mar 2019

Document 24 Order to Amend Doc 22 dtd 12 Mar 2019

Document 28 Memorandum and Order dtd 31 Mar 2019

Document 64 Order for Defendants to Produce and deny in part. dtd 2 Mar 2022

Document 67 Order Denying Plaintiff Discovery Request dtd 12 Apr 2022

Document 71 Order Pl Motion to Compel is Denied- Doc 69-70 dtd 24 May 2022

Document 91 Memorandum & Order Adopting R & R dtd 11 Oct 2023

Document 92 Order Granting Def Sum Judgment Motion dtd 11 October 2023

Document 95 Mandate Granting Def Sum Judgment via the COA dtd 21 Jan 2025

JURISDICTION

A timely petition en banc for rehearing was filed on 26 December 2024, Dkt. 45.1.

The petition for rehearing en banc was denied on 14 January 2025, Dkt 46.1.

The decision of the court of appeals was entered on 21 January 2025- Dkt 47.1.

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution under the **Seventh Amendment** in that a trial by jury is entitled in a civil case in federal court and is a Right. A trial was demanded and noticed in numerous filings and in the appeal process documentation.

The Constitution under the **Fourteen Amendment** alluding to Due Process was not in sight within the second circuit. The court refused to obey the Due Process Clause in numerous areas.

The Age Discrimination in Employment Act of 1967 (ADEA), **29 U.S.C. 621-634** provides in pertinent part, "All personnel actions affecting employees or applicants for employment who are at least 40 years old of age ... shall be made free from discrimination based on age". This includes retaliation within the workplace as well.

Whistleblower **(NYLL 740)** provides protection whether the claims were found to be in conjunction with the statute or not as long as they were brought forth in a good faith reasonable belief reason to be in a violation of law, policy or rule.

FRCP 26 and **FRCP 56(d)** have been ignored by the second circuit. In that these provisions have not been complied with and the second circuit overlooked the standards that were to be performed. Disclosure was not forthright or produced.

STATEMENT OF THE CASE

This case presents questions of fundamental importance to the resolution of the ADEA and the Whistleblower laws as well as Constitutional Laws.

The questions presented in this petition is whether the Courts decisions in ***University of Texas Southwestern Medical Center v. Nassar 570 U.S. 338 (2013); Gross v. FBL Financial Services, Inc. 557 U.S. 167 (2009); McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973); McDonald v. Sante Fe Trail Transp. Co. 427 U.S. 273 (1976); Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986); Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133 (2000); Matsushita Electric Industrial Co. v. Zenith Radio Corp. 475 U.S. 133 (2000); Burlington Northern & Santa Fe Railroad Co. v. White 548 U.S. 537 (2006); Snyder v. Massachusetts 291 U.S. 97 (1934); Bolling v. Sharpe 347 U.S. 497 (1954); Lawrence v. Texas 539 U.S. 598 (2003)***, and

others all interpreting statutory language applicable to employment discrimination what the courts are to consider in determining what material facts and matters of law factors are, the basis for considering the claims brought forth, and the procedures in the Due Process Clause of the Constitution in the **Fourteenth Amendment** and within the **Seventh Amendment** to entitle a trial by jury. Petitioner opposed practices by the **29 U.S.C. 621-634** or their subchapters alluding to complaints of violations of laws and or policies in good faith and a reasonable belief. Petitioner should not be punished any more than necessary when Congress has entitled a litigant to have a trial by jury and one which petitioner demanded from the get-go (D.C. Doc 1, 1.1)

Age was the "but for" reason the employer decided to act when violations through complaints came forward that were against policy, rules, and laws. Retaliation was also present (motivating factor) when nursing home abuse, neglect, Medicare fraud, substantial specific dangers came to the attention of supervisors to include the administrator and corporate headquarters within days/weeks of the involuntary termination of petitioner. Age and Protected Activity was the culprit in plaintiffs involuntary terminating through discrimination against The Constitution, U.S. Codes, regulations, employee handbook policies/guidelines (Doc 80-3) and through the citing's of numerous courts to include This Court.

A. LEGAL BACKGROUNG

The **29 U.S.C. 623(a)(1)** requires that "a plaintiff must prove that age was the "but for" cause for the employer's adverse decision. Other factors have noticeable weight in determining adverse actions as well, all to which was met within this case. There are different ways of proving this through Supreme Court and circuit court decisions all of which have been concisely carried out through plaintiff's filings. Circumstantial evidence along with bits and pieces has put the claims over the top to have met the pretext and prima facie requirements entitling a trial by jury (Doc 22 pg. 15). The District Court dismissed defendant's motion to dismiss (Doc 24) and agreed with the R & R that there was a prima facia, pretxual and discriminatory intent of the defendant's part.

Littlejohn v. City of New York, 795 F.3d 297, 310-311 (2d Cir. 2015) Id; A plaintiff may also allege discrimination "by creating a mosaic of intentional discrimination by identifying bits and pieces of evidence that together give rise to an inference of discrimination". Adlah v. Em. Ambulance Servs., No. 17-CV-4688, 2018 WL 3093972, at 6 (EDNY June 2018) quoting Vega v. Hempstead Union Fee School Dist., 801 F.3d 72 at 87. (2d Cir. 2015).

With regard to private sector employees discrimination claims, **623(a)**, provides the following language:

It shall be unlawful for an employer---

(1) To fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

(2) It shall be an unlawful employment practice to discriminate against any of his employees because he has opposed any practice made unlawful by this chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Like the statutory language regarding federal ADEA claims, the standard language prescribing the standard of causation applicable to employees in retaliation cases differs from Supreme Court standards and the second circuit standards.

The **NYLL 740**- whistleblower statute section relates to retaliation in the following language:

Provides that "an employer shall not take any retaliatory personnel action against an employee because such employee .... Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety".

B. FACTUAL BACKGROUND

Petitioner was an employee in the maintenance department from Sep 2009 to 7 Sep 2016 when he was terminated unlawfully and involuntarily. Petitioner also performed health care services. Petitioner complained constantly and continuously up until his termination verbally and with written Complaints to supervisors, corporate headquarters and outside entities as well after noticing the administrator supervisor first. These Complaints consisted of elderly residents and elderly veteran abuse, neglect and substantial specific dangers to the employees, residents and public. Numerous violations of policy, Residents Rights **(42 CFR 483), NFPA 99 Health Care Facilities Code, NFPA 101 Life Safety Code** violations and others were reported to supervisors and the administrator and sat vacant on the administrator's desk keeping the public in harm's way for years.

Complaints about the administrator's son and the administrator herself committing Medicare fraud and violations against policies were also submitted. These complaints were addressed to the Human Resource (HR) department head supervisor, administrator, supervisors and to Corporate Headquarters.

Within days and weeks of these complaints is when the petitioner was unlawfully terminated. There was never an investigation and the termination took place after a 6 minute interview with plaintiff without notice and no investigation followed,

even after the plaintiff denied the allegations of hearsay only. Plaintiff's position remained open after discharge.

If the alleged harasser does not deny the accusations, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action. ***EEOC-CVG-1999-2.***

If an employee resigns of his own free will, even as a result of the employers action, that employee will not be held to have been constructively discharged. ***Jefferies v. Kanas, 147 F.3d 1220, 1233 (10th Cir. 1998)*** abrogated on other grounds by ***Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).***

"If a plaintiff was in a protective class was discharged and his position remained open after discharge raises an inference of discrimination as well because it eliminates the two most common legitimate, justifications for discharge." 1. Lack of Qualifications; 2. Elimination of the Position. ***Perry v. Woodward, supra., 199 F.3d at 1140 (10th Cir. 1999).***

C. PROCEEDINGS BELOW

Petitioner Robert Klein commenced this action in the Eastern District of New York on 17 Aug 2017 under Doc 1, after first receiving a "Right to Sue Letter" (dtd 22 May 2017) from the NYSDHR and going through the EEOC/NYSDHR process with a federal charge No. 16GB700281 dtd 6 Oct 2016. **(EEOC-NVTA- 2016-5: enforcement)**

It is not uncommon for agencies to dismiss meritorious complaints for lack of probable cause. As Justice Blackmun noted in his dissenting opinion in Kremer, "inadequate staffing of state agencies can lead to a 'tendency to dismiss too many complaints for alleged lack of probable cause." ***Kremer v. Chemical Constr. Corp., 456 U.S. 461, 507 (1982).***

Plaintiff was the oldest (65) employee and if he wasn't this termination that wasn't an "at will" termination would not have happened. The reason given by the employer was a fabrication and distortion as a cover up.

The second circuit has cited the plaintiff's status as the oldest employee in the relevant group as a factor supporting the plaintiff's ultimate burden of proving discrimination. Levin v. Analysis & Technology, Inc., 960 F.2d at 317 (2d Cir. 1992).

The condition that a plaintiff's age must be the 'but for' cause of the adverse employment action is no equivalent to a requirement that age was the employers only consideration, but rather that the adverse employment action would not have occurred without it. Delaney v. Bank of America Corp., 766 F.3d 163, 169 (2d Cir. 2014) (citing Gross, 557 U.S. at 175-77, 129 S.Ct. 2343).

Petitioner alleged age discrimination of the ADEA, retaliation of the ADEA, and NYLL 740 Whistleblower Statute for retaliation of submitting complaints of abuse, neglect, resident's rights violations and Medicare fraud.

Our courts have consistently held that fraud vitiates whatever it touches. Morris v. House, 32 Tex. 492 (1870).

Petitioner received retaliation because of his protected activity, all within days/weeks of the complaints and protected activity being noticed of the termination that followed.

Time periods of one day, one week, two weeks, and even up to fifteen months have been held sufficient to infer causation and thereby put the defendant to his burden to respond. Johnson v. City of Fort Wayne, Ind., 91 F.3d 922 (7th Cir. 1996).

No "bright line" defines the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and allegedly retaliatory action. Gorman-Bakos, 252 F.3d at 544 (2d Cir. 2001).

A plaintiff need not proof the merits of the underlying discrimination complaint, but only that he was acting under good faith, reasonable belief that a violation existed. Quoting ***Summer v. United States Postal Service, 899 F.2d 203, 209 (2d Cir. 1990).***

Petitioner was terminated involuntary for being on an alleged work speed company phone during working hours on an alleged unauthorized site and only "hearsay" allegations by the alleged accuser. Two junior employees admitted being on the same alleged unauthorized sites during the same alleged times and dates and these employees were never disciplined, just the old goat petitioner.

In Maresco, The Second Circuit held that, in reduction-in-force case, the fact that the employer discharged two out of the three oldest employees but none of the twenty younger employees raises an inference of discrimination sufficient not only to establish a prima facie case but to survive summary judgment as well. Maresco v. Evans Chemical, 964 F.2d 106 (2d Cir. 1992). See ***id at 113-14, Montana v. First Federal Sav. Loan of Rochester, 869 F.2d at 105 (2d Cir. 1989).***

There are NO statements from the accuser or any employee interviewed. There are NO documents or records of any process alleged to have taken place. There was NEVER an investigation or a cursory one at best. Plaintiff denied any involvement and was involuntary terminated, as he was nowhere in sight of the alleged violation.

Rejection of the employers proffered reason permits the factfinder to infer discrimination. (citing St Mary's Honor Ctr. supra, U.S. at n. 4, 113 S.Ct. at 2749 n. 4)(St Mary's v. Hicks, 509 U.S. 502 (1993).

No investigation followed the interview that lasted only 6 minutes that terminated petitioner. There were over 40 security cameras not reviewed. Documents were requested and Ordered but never produced. (Doc 56; Doc 85-31).

The employer's avenue of complaint about her co-employee was not reasonable. Among the evidence supporting the jury's finding was a lack of adequate time for investigation of the claim by the employer, the rapid closing of the investigation by the employer's investigator, and the fact that plaintiff did not know she would be interviewed about the incident before arriving at the interview with the investigator. *Reed v. A.W. Lawrence & Co., Inc., 95 F.3d 1180-81 n. 14 (2d Cir. 1996).*

An employer has the affirmative duty to investigate. *Burlington Ind., Inc., v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed. 2d 633 (1998).*

An employer may loose the opportunity to prevail on these affirmative defenses by failing to investigate. *Faragher v. City of Boca Raton, 534 U.S. 775, 807-08 (1998).*

Beyond interviews, it is also important to gather any information that may corroborate or negate the complaint .... This could include security camera systems that also could provide evidence. *Ellerth and Faragher.*

There was a video tape that provided a contradictory version of events. *Scott v. Harris, 550 U.S. 372 (2007).*

After a period of Discovery, the District Court Ordered some documents to be produced and issued a Motion to Compel to defendants that were NEVER satisfied, only excuses were given by defendants.

On appeal, Petitioner argued that the district court erred in granting summary judgment in several aspects. First, the district court erred in deciding there were no disputed issues of material fact presenting a triable issue on age, retaliation and whistleblower. The district court failed to apply the ***McDonnell Douglas*** analysis that ignored circumstantial evidence of retaliatory intent and pretext. Second, the district court failed to permit the Petitioner to prove discrimination and retaliation claims under the motivating-factor test and through Supreme Court jurisprudence. Third, the district court erred because the evidence was sufficient to raise a jury

question of whether discrimination, retaliation, or both was a "motivating factor". Fourth, the district court erred in dismissing numerous due process claims.

ARGUMENT

This seems to be the first case that hasn't been appealed from a jury trial or even a trial which is unusual in itself. The Court of Appeals for the second circuit has entered a decision in conflict and totally out of context with This Supreme Court, other circuit courts and most importantly with the Constitution within the Seventh and Fourteenth Amendments. The COA has departed from the acceptable and usual course of judicial proceedings.

The District Court has decided an important federal question that conflicts with this Court as well as their own circuit courts decisions.

This Court should settle the reluctance and total disregard of their wisdom within their decisions and the due process of the law that present decisions are in conflict.

The District Court denied defendants two (2) motions to dismiss and granted plaintiffs filings that he met the requirements to proceed on age discrimination, retaliation and whistleblowing (Doc 24).

Petitioner respectfully requests This Court review District Court Document 85, 85-1 thru 85-51: COA Dkt 19.1, Dkt 33.1, Dkt 45.1 to get the full scoop on the case details and then ask yourself why this case has not gone in front of a jury as

as entitled and guaranteed. All these Documents contain official Discovery and are the hardcore evidence plaintiff established a reason to have a trial by jury.

The following coincides with the Questions Presented:

1. Plaintiff requested and demanded a jury trial at the onset of the case in Doc 1 & 1.1 filed on 17 Aug 2017 and was noticed in filed documents (Doc 13, 17, 26, 73, 78, 85, 89)(COA Dkt 19.1, 33.1, 45.1). ***The Seventh Amendment to the Constitution*** clearly states "***preserves the right of a jury for civil cases in federal court". The United States Constitution guarantees the right to trial by jury". (15 Dec 1791).*** Petitioner has clearly been deprived of this Right he is entitled too. This is total disobedience and disregard to this country's most precious oldest document.

2. A trial by jury is the requirement addressed in a U.S. Code statute that has not been considered by either the District Court or the Court of Appeals. It's hard to figure out what the second circuit considered in its decision?

In any action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action". 29 U.S. Code 626(c)(2). Lorillard v. Pons, 434 U.S. 575 (1978).

3. "Equal Justice Under Law." Poor or disadvantage citizens are deprived.

A district court has abused its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or if its decision cannot be located within the range of permissible decisions'. United States v. Cuti, 720 F.3d 453 (2d Cir. 2013).

District court makes error of law. *Koon v. United States, 518 U.S. 81, 100 (1996).*

Misinterpretation and violation of Constitutional Rights. The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous conclusions. Both the District Court and COA did just that.

"Trial by jury is more than an instrument of justice and more than one wheel of the Constitution: it is the lamp that freedom lives". *Duncan v. Louisiana, 391 U.S. 145 at 156 (1967).*

Credibility determinations, the weighing of the evidence, and drawing of legitimate inferences from the facts are jury functions, not those of a judge. Anderson v. Liberty Lobby, Inc., 477 U.S. at 242, 249, 255 (1986).

We reverse the decision on the ground that the district court had failed to consider de novo, as it was required to do under 28 U.S.C. 636(b)(1), the portions of the magistrate judge's report and recommendation to which Velez had specifically objected. *Veldez-Padro v. Thermo King de P.R., Inc., 465 F.3d 31, 32-33 (1st Cir. 2006).* Of the Second Circuit, siting by designation.

"The concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling v. Sharpe, 347 U.S. 497 (1954).*

"Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests ." Lawrence v. Texas, 539 U.S. 558 (2003).

"For the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to another person of another color, race, religion, gender, ethnicity or national origin, or age." "... Equality may require acknowledgment on inequality in University admission standards, but it has no place in the application of laws by independent unbiased judges in Federal and State Courts of law applying United States jurisprudence...." *Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023).*

Plaintiff DID object to the R & R and the district court did NOT do de novo review as was admitted in her decision. (Doc 89- objection)(Doc 91 pg. 15- footnote 5).

4. Due Process was not in site in this whole process. This is guaranteed.

In part- ***Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Fourteenth Amendment of the Constitution (9 Jul 1868).***

The Deposition Record taken by the defendants (Doc 80-2) was not produced as a whole. There were 274 pages and only 91 pages were filed by defendants. There is no way either the District Court or the Court of Appeals did a de novo review and could refer to the deposition even when plaintiff referred to it. There were also bookoo discovery disclosure documents requested and Ordered but never produced.

"Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000).

5. The FRCP's during the process including Discovery disclosure were not adhered to. Discovery that was required to be produced, some Ordered to be produced and a Motion to Compel to defendants to produce were not. Only excuses and refusal were given by defendants (Doc 85-50). Both **FRCP 26(b)**- Discovery and **FRCP 56(d)**- when facts are unavailable to the non-movant.

This is Due Process in violation. Documents requested and or Ordered (Doc 54 para. 1-3, 6; Doc 55, 56, 63, 64, 65, 67, 69, 85-22, 85-28, 85-30, 85-31, 85-32, 85-33, 85-48, 85-50, 89 pg. 5, 6, 8, 9).

"Relevance "under the Rule" has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any issue that is or may be in the case." **FRCP 26(b).** ***Oppenheimer Fund, Inc., v. Sanders, 437 U.S. 340, 351 (1978).***

The broad scope of discovery delimited by Federal Rules of Civil Procedure is designed to achieve disclosure of all evidence relevant to the merits of the controversy. *Thomas E. Hoar, Inc., v. Sara Lee Corp., 882 F.2d 682, 687 (2d Cir. 1989).*

The district court abused its discretion when it denied Moll's motion to compel documents related ..... and, *therefore, {we} order the district court to compel production of such documents. Accordingly, we VACATE the judgment of the district court insofar as it granted in part ... motion for summary judgment.* *Moll v. Telesector Resources Group, Inc., Dkt. 20-3599 (2d Cir. 28 Feb 2024).*

6. Numerous U.S. Codes, Codes of Federal Regulations and other regulations and policy's in violation during this case.

28 U.S.C. 636- failed to de novo review- (RECORD was not a whole)

29 U.S.C. 621-634- ADEA Discrimination

29 U.S.C. 626(c)(2)- Entitled to trial by jury

31 U.S.C. 3729(1)- False Claims Fraud

38 U.S.C. 4212(3)(A)- Veterans Employment- Facility gets funded by Medicare

42 U.S.C. 1395i- Requirements for Skilled Nursing Facilities

42 U.S.C. 1983- Civil Action for Deprivation of Rights

29 C.F.R. 1625- Age Discrimination ADEA

41 C.F.R. part 60-300- VEVRAA

42 C.F.R. 483- Code of Federal regulations- Long Term Care

EEOC- CVG- 1999-2 Enforcement Guidance in the Workplace

NFPA 99 and 101- Health Care Facilities Code/Life Safety Code

Thus, The Court has referred to "conditions {that} constituted an unsafe and dangerous working place." *Lavender v. Kurn, 327 U.S. 645, 653 (1946).* *It is not*

within the province of the appellate court to weigh conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from that reached by the jury. P. 327 U.S. 652.

7. U.S. Supreme Court decisions have not been adhered too by the second circuit and the Supreme Court addresses employee's day in court.

Under the McDonnell Douglas framework approach: direct evidence of discriminatory intent is also scarce or nonexistent. Specific intent will only rarely be demonstrated by "smoking gun" proof. Direct evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide it. Most employment discrimination cases direct evidence of the employer's motivation is unavailable or difficult to acquire. The McDonnell Douglas procedure attempts to compensate for this lack of evidence to ensure that the employee has his or her day in court. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

623 & 631 of the ADEA: The Court noted that the language of these statutes does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protection class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he lost out 'because of his age'. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 at 309-310 (1973).

The district court errored by requiring plaintiff to make its proof by clear and convincing evidence. Pp 237-258. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 258 101 S.Ct. 1096 (1981).

Rejection of employer's proffered reasons permit the factfinder to infer discrimination. St. Mary's Honor Ctr., supra. U.S. at n. 4, 113 S.Ct. at 2749 N.4; St Mary's 509 U.S. 502 (1993).

The District Court misinterpreted the law ..... and this error was prejudicial, rather than harmless. It was the jury's function to weigh the evidence and inferences to be drawn therefrom, and to come to an ultimate conclusion of the facts. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, 82

S.Ct. (1962). Judgment is vacated and the case is remanded for a new trial. Pp 370 U.S. 691-710.

Plaintiff did deny the employers reasoning for termination and was involuntary terminated on 7 Sep 2016. Defendants have filed false and misleading affidavits.

8. Whistleblower **(NYLL 740)** claims that had violation of laws attached to them were produced to defendants and they admitted they were noticed (Doc 31 para 16, 22, 26, 28 and other documents including affidavits).

N.Y. Labor Law 740 "requires proof of an actual violation of law to sustain a cause of action." Bordell v. General Electric Co., 88 N.Y. 2d 869, 871, 644 N.Y.SW. 2d 912, 913 (N.Y. 1996).

"A good faith, reasonable belief that a violation occurred is sufficient." Deshpande v. TJH Med. Servs., P.C. 52 A.D. 3d 648, 650 861 N.Y.S. 2d 697 (2d Dep't 2008); see *Bordell, 88 N.Y. 2d at 871.*

"Injustice anywhere is a threat to justice everywhere; The time is always right to do what is right; Our lives begin to end the day we become silent about things that matter; Never, never be afraid to do what's right, especially if the well-being of a person or animal is at stake. Society's punishments are small compared to the wounds we inflict on our soul when we look the other way". Martin Luther King.

Plaintiff receives protection even if he was not entitled to the reasonable accommodation, as long as he made his request in good faith. Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224, 234 (2d Cir. 2000).

9. A Vietnam Veteran has rights and protection under the VEVRAA (Dept. of Labor) *(41 CFR part 60-300).* When the plaintiff was hired in Sep 2009 upon his interview for employment his military service was discussed and a factor for hiring.

BHCF- Facility is funded by Medicare which is a federally funded program and has a nondiscrimination obligation to employees hired.

(a) Purpose: The purpose of the regulation in this part is to set forth standards for compliance with the Vietnam era Veterans Readjustment Assistance Act of 1974 as amended 38 U.S.C. 4212, (VEVRAA) which prohibits discrimination against protected veterans.

10. Age discrimination- ADEA, retaliation ADEA does not have to be the underlining reason for the adverse employment action. Numerous opposition to employers activities were complained right up until plaintiffs involuntary termination on protected activity. (NYSDHR- Appendix A, Doc 26.1)(Doc 80-2 pgs.- 159, 198, 200, 223-225).

Judge Ginsburg and Tatel recently explained for the D.C. Circuit sitting en banc, "once it has been established that an employer has discriminated against an employee with respect to the employees 'terms, conditions, or privileges of employment' because a protected characteristic, the analysis is complete." Chambers v. District of Columbia, 35 F.4th 870, 874-875 (D.C. Cir. 2022) (en banc).

In order to show age discrimination, plaintiff need not prove that age is the sole determinative factor in the defendant's employment decision. See *Robinson v. Overseas Military Sales Corp., 21 F.3d at 502, 508 (2d Cir. 1994).*

Because the record contains evidence to support conflicting accounts, the question is one for the jury. See *Jones v. Parmley, 465 F.3d 46, 64 (2d Cir. 2006).*

"The emphasis of both the language and the legislative history of the statute is on elimination discrimination in employment." Trans World Airlines ,Inc. v. Hardison, 433 U.S. 63 at 71 (1977) (emphasis added).

An employer's disparate treatment of employees in response to behavior that legitimately offend the employer can provide evidence of discriminatory animus. See *McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 283 (1976).*

When an employee communicates to her employer a belief that the employer has engaged in ... a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271 at 276 (2009).*

11. The courts must not decide cases based on the paperwork shuffle when material facts and matters of law are at stake and in view. The defendant's statements and approach is unworthy of credence and only a jury can weigh the evidence.

The district court must not "resolve factual disputes by weighing conflicting evidence ... since it is the province of the jury to assess the probative value of the evidence." *Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980).*

The record is similarly replete with genuine issues of material fact that go to the heart of the pretext issue. The district court erred in analyzing pretext not only by failing to account those disputes but also by incorrectly applying the same-actor inference, *Supreme Court abrogated in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).*

Retaliation expansively reaches any action that is "material adverse" meaning any action that might well deter a reasonable person from engaging in protective activity. *Burlington Northern & Sante Fe railway Co. v. White, 548 U.S. 53 (2006).*

Evidence of a discriminatory motive can be established by demonstrating that the reason given for a particular action was pretexual. *Reeves, 530 U.S. 133. Tex. Dept. of Commty. Afairs v. Burdine, supra, 450 U.S. 248 at 258, 101 S.Ct. at 1096 (1981).*

Rational jurors may disagree as to whether these incidents would negatively alter the working conditions of a reasonable employee; but "the potential for ... disagreement renders summary judgment inappropriate." *Fitzgerald v. Henderson, 251 F.3d at 360 (2d Cir. 2001)* (internal quotation marks omitted).

12. Discovery disclosure documents that were required to be provided, some Ordered, some with a motion to compel, but most NEVER produced, only excuses and refusal were given by defendants. It's a mystery how both the District Court and Court of Appeals gave a decision on the case without properly alluding to the Record as a whole. De novo review was not done and could not be done properly.

Moll IV, 2020 WI 5593845 (2d Cir 2020): We conclude that the court in Moll IV did not adhere to the summary judgment principles that a court, in ruling on such motion, is required to consider the record as a whole, is required to view the record in the most favorable to the party against whom judgment as a matter of law is sought, and is required to disregard all evidence favorable to the moving party that a jury would be entitled to disbelieve.

A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

We conclude that the truth of the matter concerning Moll's assignment to the M & T bank account is a genuine issue to be resolved by the jury. So, too, is the significance of the fact in determining Verizon's reason for terminating Moll's employment. Moll v. Telesector 20-3599 (2d Cir. 2024).

A rational jury could look for and, importantly, could find in other evidence an explanation that supports Moll's claims of discriminatory or retaliatory motivation. Moll v. Telesector.

Moll: At the summary judgment stage, a plaintiff can meet the "minimal" burden to show circumstances sufficient to raise an inference of discrimination by showing that her employer treated {her} less favorably that similarly situated employee outside {her} protected group. Whether that person is "similarly situated" is a fact question normally left to the jury. Graham v. Long Island R.R., 230 F.3d 34, 38-39 (2d Cir.2000).
Here, Moll raised such a triable issue that pointing to Greg Shelton, her male coworker with apparently similar qualifications who was not let go in the RIF. Claims were vacated and remanded for trial.

Moll: Rather the court must "review the record as a whole." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150 (2000).

Moll: In determining whether genuine issues of facts exist, "the district court may not properly consider the record in piecemeal fashion, trusting innocent explanations for individual strands of evidence." Davis-Garett v. Urban Outfitters, Inc., 921 F.3d 30, 45 (2d Cir. 2019).

Moll: Moreover, The Court "may not make credibility determinations or weigh the evidence. Kaytor v. Electric Boat Corp., 609 F.3d at 545 (2d Cir. 2010) (quoting Reeves, 530 U.S. at 150). *Credibility determinations, the weighing of the evidence, and drawing of legitimate inferences from the facts are jury functions, not those of a judge." Davis-Garett, 921 F.3d at 46;* see, e.g., *Moll III, 760 F.3d at 206 (2d Cir. 2014/2024).*

There was, however, sufficient evidence to go to the jury, and it is the jury which "weighs contradictory evidence and inferences" and draws "the ultimate conclusion as to the facts." Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, at 35 (1944).

This Court should refer to Appendix's C and D for a better understanding and disobedience of the second circuit courts and their perspective of the requirements not in lieu of This Court decisions, their own or other circuits decisions.

REASONS FOR GRANTING THE WRIT

At the current time, employees filing discrimination claims under the ADEA face different standards of proof. Different standards of proof are now contained in NYLL 740 as well. In the Petitioners case, the second circuit Court of Appeals did not consider the requirements set forth in numerous decisions from This Court, their own circuit and numerous other circuit courts. Now bringing about textual differences and how the circuit courts decide the provisions. Congress made applicable through the U.S. Codes the language involved yet the second circuit has

a different perspective on the meaning. Employees have a more difficult burden of proof, their employer does not have to prove a same decision defense and the employees have lost potential injunctive rights and they are now dissuaded to bring claims of discrimination or abuse, neglect, dangers or fraud to the surface any longer, especially involving the elderly residents in nursing homes.

Giving the sweeping language, both the EEOC and Congress have determined that an employee should be able to establish a discrimination claim and that a trial by jury should prevail when material facts are in question. It seems this second circuit has side stepped the issues and it is easier to end the case in the paperwork shuffle than to have a jury decide the irregularities, contradictions, material facts and hearsay allegations. This is a problem that will never be resolved if This Court doesn't get its feet wet and intervene, especially when Constitutional Rights are at stake. This case is more than ripe for a jury trial.

There are many matters of law that need to be addressed and are in conflict. "Statutory construction must begin with language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose". ***Engine Mfrs., 541 U.S. at 252 (internal quotation marks omitted). Accord Gross, 557 U.S. at 175.***

The same logic should apply equally to employment discrimination statutes.

This Court has an obligation to step in and address the issue where the lower courts have refused to comply with the Supreme Court decisions and Constitutional Amendments.

CONCLUSION

For the foregoing reasons, This Court should grant this petition and issue a writ of certiorari to review the opinion of the Second Circuit Court of Appeals. At the same time This Court should have this case be remanded and have a Trial by Jury to where the Seventh and Fourteenth Amendment to the Constitution and 29 U.S. 626 entitles this case to be heard and decided. There are bookoo matters of law, controversies, contradictions, inconsistences, incoherence's, weaknesses, implausibility's and false affidavits on defendants part that need to be addressed and are in conflict, all being pretext.

Petitioner prays this Court in the fairness of Justice issues the writ.

Respectfully submitted; 19 February 2025

Robert Klein
Petitioner pro se

PO Box 1512
535 Brittany Road
Westcliffe, Colorado 81252
Phone: 631-921-2654
Email: midmug3266@gmail.com