

No.

IN THE
Supreme Court of the United States

JOSE M. NON, PETITIONER,

v.

COMCAST, INC. D/B/A COMCAST CABLE
COMMUNICATIONS MANAGEMENT LLC; COMCAST
CABLE COMMUNICATIONS LLC; AND COMCAST
HOLDINGS CORPORATION AND COMCAST CORPORATION

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

PETITION FOR WRIT OF CERTIORARI

DANIEL RAY BACON
Counsel of Record

*Law Offices of Daniel Ray Bacon
234 Van Ness Avenue
San Francisco, CA 94102-4515
bacondr99@gmail.com
(415)864-0907*

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit in *Jose M. Non v. Comcast, Inc. et al.*, Docket No. 15-17259, filed September 29, 2017, and reported at 697 F. App'x 920 (9th Cir. 2017), affirming the District Court's order granting summary judgment to respondents, is set forth in the Appendix hereto (App. 1-5).

The unpublished Order of the United States District Court for the Northern District of California, in *Jose M. Non v. Comcast, Inc. et al.*, Civil Action No. 14-cv-01845-VC, decided and filed October 8, 2015, and reported at 2015 Dist. LEXIS 137894 (N.D. Cal. 10/8/2015), granting summary judgment to respondents, is set forth in the Appendix hereto (App. 6-8).

The unpublished Order of the United States Court of Appeals for the Ninth Circuit in *Jose M. Non v. Comcast, Inc. et al.*, Docket No. 15-17259, filed December 21, 2017, denying petitioner's timely filed petition for panel rehearing, is set forth in the Appendix hereto (App. 9).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit affirming the District Court's order granting summary judgment to respondents was filed September 29, 2017; and its order denying petitioner's timely filed petition for panel rehearing was filed on December 21, 2017 (App. 1;9).

This petition for writ of certiorari is filed within ninety (90) days of the date the court of appeals denied petitioner's timely filed petition for panel rehearing. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV, Section 1:

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.

28 U.S. Code § 1332:**Diversity of citizenship; amount in controversy; costs**

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

(1) citizens of different States....

California Gov. Code §§ 12920;12921(a); 12940(a) & (k); and 12993(a):
[Fair Employment and Housing Act (“FEHA”)]:

Findings and Declarations of Policy

§ 12920. It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for

development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices.

....

§ 12921(a). The opportunity to seek, obtain, and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status is hereby recognized as and declared to be a civil right.

....

Unlawful Practices, Generally

§ 12940. It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: (a) For an employer, because of the race, religious

creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

....

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.....

Miscellaneous

§ 12993. (a) The provisions of this part shall be construed liberally for the accomplishment of the purposes of this part. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation, unless those provisions provide less protection to the enumerated classes of persons covered under this part.

Fed. R. Civ. P. 56(a); (c) and (e)(2):**(a) Motion for Summary Judgment or Partial Summary Judgment.**

A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(c). Serving the Motion; Proceedings.

....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

....

(e)(2). Affidavits; Further Testimony.

....*Opposing Party's Obligation to Respond.*
When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

STATEMENT

Petitioner Jose M. Non (“petitioner” or “Non”) is an immigrant Asian male of Filipino national origin who is over forty (40) years of age. In 1998, he was hired by TCI, the predecessor of respondent Comcast, Inc. (“respondent” or “Comcast”), to work as an Installer trainee for its communication systems business in the San Francisco area. Petitioner performed his job well over the years; he received several promotions and awards as well as every quarterly bonus for which he was eligible during his tenure with Comcast. His annual performance reviews were consistently excellent and on May 31, 2002, he received Comcast’s “Certificate of Achievement” which resulted in his promotion to Advance System Technician.

In this senior position of Advanced Technician, Non engaged in preventative maintenance, troubleshooting, repair, alignment and testing of a wide range of components in Comcast’s technical system. He held this position until June 7, 2013, when Comcast terminated him without cause for allegedly sleeping in his truck while on duty on May 3, 2013, for falsifying his time records for that day, and for lying to Comcast during its investigation of the alleged incident.

On May 3, 2013, Comcast claimed that it had received an anonymous phone call from a “concerned caller” who allegedly told Comcast that he or she saw petitioner asleep in his work vehicle for forty (40) minutes during one of his daytime stops. Comcast never identified this anonymous caller and petitioner therefore never had the opportunity to question or confront this alleged percipient witness who could have been anyone wanting to make such a call “to a company that they hate.” In any event, Non disputed these false

allegations, specifically denying that he had slept in his truck while on duty.

To shore up this anonymous phone call about Non sleeping in his truck, Comcast claimed that its Global Positioning System (“GPS”) substantiated his truck location when the phone call was made and, specifically, that his truck had not moved for over an hour which corresponded to the time period of the caller’s communication. However, Comcast’s GPS report (which it did not show to Non at the time of its investigation) could not support the anonymous caller’s accusation that Non was sleeping in his truck. Moreover, because the GPS report actually shows a variation in the measured location coordinates, it could only confirm the *approximate* location of Non’s truck at the designated times, i.e., on Francisco Boulevard near but not at Sharp Park Golf Course, a location which Non never disputed and one which equally supports his own account he gave Comcast about where he was and what was transpiring at the time.

As Non explained, at the relevant time he and his truck were located on Francisco Boulevard near Sharp Park Road for good reason. As he knew from other Comcast technicians who worked in the area, accessing the internet at Reina Del Mar in Pacifica would be difficult. So after logging into his Reina Del Mar job, he left Brisbane and drove straight to Francisco Boulevard where internet access was far more reliable to work on that issue. But Comcast’s Watchtower program (used for system analyses) was not functioning and had not been functioning even while he was at the office that morning before Non left for work. Thus despite having internet access at his location on Francisco Boulevard, Non was unable to access the Watchtower program in the field. Instead of

wasting time repeatedly attempting to use Watchtower to access the system and getting repeated access failure notices, Non used this time to review and analyze the information he had on his computer for the node on which he needed to work for a customer.

During Comcast's investigation, Non repeated his assertion that he was not sleeping in his vehicle and had never slept during work hours. He never denied where he and his truck were located and he never changed his assertion that he was located on Francisco Boulevard near Sharp Park Road and that Comcast's claim that its GPS report showing his exact whereabouts to be at Sharp Park Golf Course was not reliable. Non requested that Comcast pull his computer records in order to show what he had been doing at the time he was accused of sleeping but Comcast refused to do so; and despite his requests, he was never given his computer hard drive log to examine so that he could prove he had been working on his computer, not sleeping. Nor did Comcast provide a Watchtower analysis which might have corroborated some of the events which transpired.

Comcast further contended that immediately after receiving the anonymous call, a Comcast supervisor (Amir Dorafsha) called Non in the field several times on Non's company-issued cell phone but was unable to reach him. Non testified that his cell phone rang *only once*, a call from Dorafsha, a call which he answered telling Dorafsha he was fine. Thus Non denied that he ever received more than one call from Dorafsha, i.e., the one that he answered, and that his company-issued cell phone which Comcast confiscated after he was terminated, showed *no* missed calls. Comcast during its investigation failed to produce the

cell phone log for Non's phone to support its claim that Dorafsh called Non several times without response.

Despite Non's denials of wrongdoing, his truthful explanation of where he and his truck were and what was transpiring at the time, and the absence of any corroboration from his computer hard drive, his company-issued cell phone or the Watchtower program for Comcast's claim that Non was sleeping in his truck, Comcast accused him of falsifying his time sheet, stealing company time and lying to Comcast during its investigation of the alleged incident. On June 7, 2013, despite years of excellent service, Non was terminated from his employment with Comcast.

Comcast claimed that Non's termination was based solely on the alleged events of May 3, 2013. This incident, however, was just the last in a series disparate disciplinary actions taken against Non starting in 2012 that were unjustified; discipline which was disproportionately harsh compared to discipline imposed against otherwise similarly situated non-Filipino, non-immigrant employees; and discipline which demonstrated an increasingly aggressive pattern of impermissible bias against him:

1. *The January 2012 Suspension for Attending His Son's Air Force Orientation.* On January 20, 2012, Non asked his supervisor for three vacation days beginning on January 25, 2013, to attend his son's Air Force orientation, an important family event. Comcast could have granted him vacation time or, alternatively, given Non's timely request, granted him personal leave under the Traditional Time Off policy of the collective bargaining agreement. It did neither, inexplicably refusing to grant the request in violation of Non's employee and union rights; and it then suspended him and docked his pay when he returned, claiming that he

was a “no show” absent employee. After Non grieved his suspension, he was told it would be changed but Comcast never paid Non for the vacation days and he never received written confirmation that his suspension was removed.

2. *The August 15, 2012 Theft of a Generator From Non’s Truck.* Comcast gave Non a written warning which falsely accused him of failing to take reasonable efforts to secure a generator on his truck while it was being repaired. As a 15-year Advanced Technician, Non made the best judgment under the circumstances to chain or padlock the generator to the truck while it was being repaired rather than—consistent with Comcast’s new policy—place it in a bin which were full of parts and tools and which could be easily unlocked. During the repairs by the third-party repair vendor, Non attempted to retrieve the generator but could not do so because the truck was on a lift and it would have been unsafe to do so. When the truck was returned, Non saw that the generator was missing and he immediately informed his supervisor.

Comcast’s written warning for Non was much harsher than its normal protocol of giving its technicians oral warnings and further coaching for similar infractions. Another employee who had a generator stolen from his truck while it was being repaired received no discipline at all. In addition, contrary to its policy of filing a police report to memorialize generator thefts, it did not do so in Non’s case, believing the vendor’s account that there was no generator on Non’s truck to be stolen. Moreover, it claimed that it did not know what police department to notify. All of this different treatment contrasted sharply with its treatment of other employees who had experienced a theft of a generator from their trucks.

3. *The Burlingame Power Outage on October 22, 2012.* Comcast issued a second written warning and suspension to Non after a 110V power supply instead of a 220V power supply was erroneously installed to remedy a power outage in Burlingame caused by a leaking power supply unit during a heavy rainstorm. The repair took place at night during a drenching rainstorm by Non and his co-worker Richard White, also an Advanced Technician; the tag on the defective unit was unreadable; physically testing the voltage was dangerous because the drenching rain made it impossible to insulate the technician from electrocution; and both Non and White believed that the correct power supply was 110V and both agreed to jury-rig the replacement unit plug to see if that would repair the outage.

As it later became clear, the power supply module required for that particular location was a different module than the one Non and White had installed; and Non was never trained on how to identify or handle this other module. Moreover, while Non was harshly disciplined despite these extenuating circumstances, White—a non-immigrant Hispanic male—who teamed with Non and actually supplied the incorrect power supply model, was neither investigated nor disciplined in any way.

On November 19, 2012, in the aftermath of these disparate disciplinary actions by Comcast, Non gave his union representative a petition signed by nine technicians from his group, including Richard White, complaining of discrimination and unfair treatment by management. He also began to experience panic attacks and came to believe that these false allegations would destroy his career. He sought professional help

for these fears shortly before his termination on June 7, 2013.

On February 22, 2014, after his termination, Non filed this civil action against Comcast in California Superior Court, San Mateo County, alleging violations of California's Fair Employment and Housing Act ("FEHA"), California Gov. Code §§ 12940(a) & (k), when it discriminated against him in the workplace on the basis of his race and national origin. He also alleged a common law claim for wrongful termination in violation of public policy. Comcast answered the complaint denying all liability and pursuant to a stipulation of the parties addressing their complete diversity under 28 U.S. Code § 1332, it removed the action to the federal court for the Northern District of California.

After Non's deposition was taken, the district judge ordered the production of Comcast's records showing the disciplinary history of other technicians and union members relevant to Non's claims of disparate treatment, i.e., that non-immigrant non-Filipino technicians were treated far less harshly than he was treated, receiving at most warnings instead of being terminated like he was for the same offense. Four of these five technicians (three are Hispanic and Mexican while two are Caucasian and born in the United States) were accused of violating the collective bargaining agreement, the same CBA violation of which Non was accused; and another like Non was charged with lying in order to falsely charge time. Yet *none* of them was terminated, only given an oral or written warning for the violation.

On August 15, 2015, Comcast moved for summary judgment on all of Non's claims arguing that it had legitimate, nondiscriminatory reasons for

discharging Non and that he had not shown that its reasons were a pretext for unlawful discrimination. Non opposed the motion with his own proof arguing that Comcast's reasons for terminating him were false and that he was treated far more harshly than otherwise similarly situated non-immigrant non-Filipino employees.

On October 8, 2015, the district court, Chhabria, J., issued an Order granting Comcast's motion for summary judgment (App. 6-8). He ruled that even assuming Non had set forth a *prima facie* case of discrimination under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792(1973), he failed to raise a triable fact issue as to pretext (App. 6). According to the motion judge, under the FEHA, it is the employer's "honest belief" in the stated reasons for firing an employee rather than the objective truth or falsity of the underlying facts which is determinative (*Id.*). Because the facts discovered in the course of Comcast's investigation of the anonymous call on May 3, 2013, "corroborated the caller's account, ...[they] supported Comcast's honest belief that Non committed the misconduct and then lied to cover it up" (App. 6-7).

As for Non's claim of disparate treatment, the district judge found that his evidence was also insufficient to raise a triable issue of pretext (App. 7). Although the five other Comcast technicians violated the same broad policy that Non was accused of violating, their actual misconduct was different than Non's case as none of the five employees "was caught sleeping on the job by a member of the public, and there is no indication that they lied to Comcast throughout their disciplinary investigations" (App. 7). Moreover, some of these technicians had different supervisors with no proof that these respective supervisors knew of

the other's disciplinary decisions or that these decisions were reviewed by the same personnel at Comcast (App. 8).

Non appealed and on September 29, 2017, the court of appeals in a *per curiam* opinion unanimously affirmed the grant of summary judgment to Comcast (App.1-5). As for Non's discrimination claims, it reasoned that he had failed even to prove a *prima facie* case (App. 2-3). That is, in 2012, Non committed two "serious offenses" as defined by the collective bargaining agreement and in 2013, an anonymous call reporting him asleep in his truck precipitated the third "serious offense," any one of which could have formed the basis for his immediate termination under the CBA (App. 3-4). As such, Non failed to raise a triable fact issue about whether he "was performing according to [Comcast's] legitimate expectations," one of the four crucial preconditions for proving his *prima facie* under *McDonnell Douglas* for unlawful discrimination (App. 3;4).

In Non's attorney's separate appeal challenging the motion judge's imposition of sanctions against him, the court of appeals reversed the district judge's order (App. 4-5).

On December 21, 2017, the court of appeals denied Non's timely petition for panel rehearing (App. 9).

REASONS FOR GRANTING THE PETITION**The Egregious Mishandling Of The *McDonnell Douglas* Framework By Both Courts Below Calls Into Question The Utility Of This Burden-Shifting Protocol Henceforth For Deciding The Viability Of An Employee's Workplace Discrimination Claims On Summary Judgment.**

Both courts below severely mishandled the *McDonnell Douglas* framework in entering summary judgment against petitioner on his workplace discrimination claims under California's Fair Employment and Housing Act, denying him the right to have a jury decide the disputed fact questions whether Comcast's reasons for his termination were a pretext for discrimination and whether petitioner's comparators were similarly situated to prove disparate treatment. The district court disbelieved entirely Non's proof that he was not asleep in his truck, siding with Comcast on this issue despite its failure to back up its beliefs with any corroborating evidence; and it then used this disbelief of Non's *prima facie* case to reject Non's proof of disparate treatment.

The court of appeals' mistreatment of the *McDonnell Douglas* framework was even more dramatic. It immediately believed that Comcast's reasons for firing Non were supported and that Non's "serious offense" was a violation of the collective bargaining agreement which entitled Comcast to terminate him. This mistreatment so subverted Non's *prima facie* case that it had no evidentiary force at all, collapsing the *McDonnell Douglas* framework altogether so that Non was deprived even of the benefit

this first stage of the protocol which, in turn, relieved Comcast of the duty to put forward a legitimate, nondiscriminatory reason for its adverse employment action. This judicial overreach deprived Non of his right under the burden-shifting framework to prove even his *prima facie* case, which would have forced Comcast to justify its actions with reasons which, in turn, would have allowed Non to show that Comcast's proffered reasons were a pretext for unlawful discrimination.

This serious mishandling of the *McDonnell Douglas* framework by both courts below calls into question the utility of this protocol to decide the viability of employment discrimination claims on summary judgment. Non's legitimate claims of unfair treatment under the FEHA were never subjected to the dispassionate, unfiltered and "not onerous" requirements of the framework's burden-shifting regime which is supposed to expose each party's proof to a logical, step-by-step assessment toward identifying triable issues of fact for a jury surrounding the question of whether Comcast intentionally discriminated against Non when it fired him. Instead, both the court of appeals and the district judge immediately became factfinders themselves, believing one side rather than the other, ignoring or minimizing probative proof of pretext and disparate treatment and, in the process, giving none of the evidence adduced by Non, the non-movant, the deference due it on summary judgment.

Non therefore asks this Court to reassess the utility of employing the *McDonnell Douglas* protocol when deciding summary judgment motions brought by employers in workplace discrimination cases. In its place, the Court should adopt a more simplified regime which requires the motion judge first to evaluate the plaintiff's direct or indirect proof of discrimination;

second, to evaluate the employer's proof that it did not discriminate, including any explanation for its employment decision; and third, to evaluate the evidence as a whole. Resolving any conflicts in all this evidence in the plaintiff's favor, the motion judge should then decide the ultimate issue of whether the evidence is sufficient to permit a reasonable factfinder to conclude that the employer's decision was more likely than not motivated by a discriminatory reason.

This more simple, direct and fair way of resolving employers' summary judgment motions in employment discrimination cases recognizes that the more cumbersome, burden-shifting *McDonnell Douglas* framework was originally developed for use at trial, not in summary judgment proceedings; and this new regime would return the district judges to the traditional methods they employ in assessing summary judgment motions in other civil actions.

The Problem With The McDonnell Douglas Framework In This Litigation.

Non alleged that Comcast violated the FEHA when it discriminated against him in the workplace on the basis of his race and national origin. California courts routinely employ the *McDonnell Douglas* three-stage burden-shifting approach in order to assess whether summary judgment should be granted on claims under the FEHA for workplace discrimination and disparate treatment. *Guz v. Bechtel National, Inc.*, 8 P.3d 1089, 1113 (Cal. 2000). *Sada v. Robert F. Kennedy Medical Center*, 56 Cal. App.4th 138, 148 (Cal. App. 1997). *Santillan v. USA Waste of Cal., Inc.*, 853 F.3d 1035, 1042 (9th Cir. 2017). This approach "establishe[s] an allocation of the burden of production

and an order for the presentation of proof in...discriminatory treatment cases....” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000) quoting *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 506 (1993).

If Non proves unlawful discrimination by a preponderance of the evidence, he has established his *prima facie* case which creates the presumption that Comcast has unlawfully discriminated, proof which, if believed by a trier of fact and if Comcast is silent in the face of this presumption, would warrant a judgment for Non because no issue of fact remains in the case. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Comcast is then given the opportunity to rebut Non’s *prima facie* case by showing that his firing was accomplished for a legitimate, nondiscriminatory purpose. *Reeves, supra. Burdine, supra. McDonnell Douglas*, 411 U.S. at 802.

Under *McDonnell Douglas*, Non’s initial burden of establishing a *prima facie* case of discrimination or disparate treatment under the FEHA is “not onerous.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989). *Burdine*, 450 U.S. at 253. It focuses on (1) whether Non is a member of a protected class; (2) whether he reasonably performed to Comcast’s expectations;(3) whether Comcast subjected him to an adverse employment action; and (4)some other circumstances which suggest that discrimination on the basis of race or national origin was “a substantial factor motivating” the adverse employment action and/or disparate treatment. *Harris v. City of Santa Monica*, 294 P.3d 49, 61;66 (Cal. 2013). See *Patterson*, 491 U.S. at 186-187. *Burdine*, 450 U.S. at 253. *McDonnell Douglas, supra. See Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000).

Even though a plaintiff's *prima facie* proof will vary depending on different factual situations, *McDonnell Douglas*, 411 U.S. at 802 n.13; *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (the *prima facie* case was “never intended to be rigid, mechanized or ritualistic”); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) (the *prima facie* requirement of *McDonnell Douglas* “was not intended to be an inflexible rule.”), Non made this *prima facie* showing under the FEHA. He concededly is part of a protected group as an immigrant Asian male of Filipino national origin and his discharge is unquestionably an adverse employment action. His 15-year employment history at Comcast establishes that he was an excellent employee and he testified that he was properly performing his duties as an Advanced Technician on May 3, 2013. Last, the basis of his discharge---an anonymous phone call claiming he was sleeping in his truck---was immune from examination and lacked any independent corroboration. Coupled with his showing that he was treated substantially more harshly than other similarly situated employees charged with the same category of offenses under the collective bargaining agreement, Non identified circumstances which suggested that Comcast's discrimination on the basis of race or national origin was a substantial factor motivating his discharge. *Santillan*, 853 F.3d at 1043-1044 n. 8 (employee's self-serving testimony is sufficient to show a *prima facie* workplace discrimination claim if a jury could infer discrimination from it).

Once Non made this *prima facie* showing and Comcast then relied upon its uncorroborated belief that Non was, in fact, sleeping in his truck on May 3, 2013, as a legitimate, nondiscriminatory reason for firing him,

the sole remaining issue became discrimination *vel non* and Non had to show by a preponderance of the evidence that the reasons offered by Comcast were not its true reasons but were a pretext for discrimination. *Reeves*, 530 U.S. at 143 citing *Hicks*, 509 U.S. at 507-508. Helped by the same proof which established his *prima facie* case, Non could establish that he was the victim of intentional discrimination by showing that a discriminatory reason more likely motivated Comcast, *Burdine*, 450 U.S. at 256, or that its presumptively valid reasons for disparate treatment “were in fact a coverup for a ... discriminatory decision.” *McDonnell Douglas*, 411 U.S. at 805. See *Hicks*, 509 U.S. at 510. The matter thus became at this third stage of the *McDonnell Douglas* framework a classic contest of credibility which only a jury trial could resolve. *Sada*, 56 Cal. App.4th at 150-151.

The district court decided, however, that even if Non had proven a *prima facie* case of workplace discrimination, he failed to raise a genuine issue of material fact for trial about whether Comcast’s reasons for firing him were a pretext for unlawful discrimination (App. 6-7). The motion judge focused on Comcast’s “honest belief” that Non was asleep in his truck, had falsified his time sheet and had lied during its investigation of the incident (*Id.*). Because he thought Non presented *no* evidence to suggest that Comcast did not honestly believe the report from the anonymous caller and since the facts discovered in the course of Comcast’s investigation “*corroborated the caller’s account*, ...[they] supported Comcast’s honest belief that Non committed the misconduct and then lied to cover it up” (*Id.*) (emphasis supplied).

The facts discovered in Comcast’s investigation, however, did *not* corroborate the caller’s account and

could not have amounted to a legitimate, nondiscriminatory reason to fire him. For the district court to conclude otherwise, it had to discount entirely Non's proof showing that Comcast's reasons for his firing were undercut by "weaknesses, implausibilities, inconsistencies, incoherences, or contradictions," *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994), and were therefore pretextual. That is, Non asserted that he was never asleep in his truck at the time of the anonymous call; that never slept during work hours; that Comcast's GPS report showing him at Sharp Park Golf Course was inaccurate and unreliable; that he was parked nearby on Francisco Boulevard near Sharp Park Road for good reason, i.e., in order to obtain reliable internet access; and that after unsuccessfully attempting several times to access Comcast's Watchtower program (which was not functioning), he reviewed and analyzed information he had on his computer for the node on which he needed to work for a customer.

Non asked Comcast to pull his computer records to show what he had been doing at the time he was accused of sleeping but Comcast refused to do so. Nor did Comcast provide him with the hard drive log of his company-issued computer, despite his requests that it do so, so he could prove he had been working on his computer at all relevant times, not sleeping. Nor was he given Comcast's Watchtower analysis which might have corroborated some of the events which transpired. Finally, Non's company-issued cell phone which Comcast confiscated showed *no missed calls*, refuting Comcast's claim that a supervisor called Non several times without response after receiving the anonymous call; and Comcast refused to produce the cell phone log for this phone to support such a claim.

Thus in the face of repeated denials of wrongdoing by an excellent employee of fifteen (15) years and his truthful explanation of where he and his truck were and what was transpiring at the time, Comcast chose to disbelieve him and fire him anyway despite the fact that it: (1) failed to authenticate or corroborate in any way the anonymous caller who said he was sleeping in his truck at Sharp Park Golf Course when he was actually working on Francisco Boulevard near Sharp Park Road; (2) failed to corroborate his actual location since its inaccurate GPS report could only provide the *approximate* location of Non's repair truck at the designated times; (3) failed to show that his repeated efforts to access its non-functioning Watchtower program were not actually made; (4) failed to show through Non's computer log that he was not working on his computer, as he asserted; (5) failed to provide Non with such a log from his Comcast-issued computer so that he could back up his claims about what he was doing; and (6) failed to show that a supervisor called Non several times without response after receiving the anonymous call, having refused to produce the cell phone log to support such a claim and to refute Non's proof that his cell phone showed *no missed calls*.

In short, Comcast's asserted reasons for firing Non, untethered as they were to any reliable corroborating evidence, created *more* fact questions than answers about the crucial events of May 3, 2013; and it was far from clear that Comcast could have had an "honest belief" that Non was asleep in his truck, had falsified his time sheet or had lied during its investigation of the incident, the reasons relied upon by Comcast to terminate him. Summarily resolving these disputed fact questions, all hinging on credibility and

the reasonable inferences drawn from this circumstantial evidence, against Non and in favor of Comcast, as the district judge did on the issue of pretext, was an egregious abuse of the *McDonnell Douglas* protocol and summary judgment procedure because it ignored the ultimate fact question to be resolved by a jury on this record: whether Non had proven “that [Comcast] intentionally discriminated against [him] because of his race” and national origin. *Hicks*, 509 U.S. at 510-511, quoting *Burdine*, 450 U.S. at 253. *Reeves*, 530 U.S. at 153.

After all, a jury’s disbelief of the reasons put forth by Comcast, particularly if this disbelief is accompanied by a suspicion of mendacity, may, together with the elements of Non’s *prima facie* case, suffice to show intentional discrimination; and a jury’s rejection of Comcast’s proffered reasons for Non’s firing, “will *permit* the trier of fact to infer the ultimate fact of intentional discrimination....” *Hicks*, *supra* (emphasis in original) (footnote omitted). *Reeves*, 530 U.S. at 148. In this regard, a jury rather than a motion judge should have the opportunity to make these credibility determinations in order to determine whether the evidence as a whole supports a reasoned inference that Comcast’s action in firing Non was the product of discriminatory animus. *Cheal v. El Camino Hosp.*, 223 Cal. App.4th 736, 755 (Cal. App. 2014). *Sandell v. Taylor-Listug, Inc.*, 188 Cal. Rptr. 297, 315 (Cal. App. 2010) (whether reasons given by employer for terminating employee were pretextual is a jury question). *Begnal v. Canfield*, 78 Cal. App.4th 66, 77 (Cal. App. 2000) (same).

The district court’s utter disbelief of Non’s proof of pretext not only short-circuited any meaningful analysis of Comcast’s discriminatory animus under

McDonnell Douglas but also skewed its assessment of whether he had raised a triable fact question of disparate treatment, distorting to Non's detriment his well developed showing that his comparators were disciplined more leniently than he was for similar violations of the collective bargaining agreement. See *McDonnell Douglas*, 411 U.S. at 804 ("Especially relevant to [a showing of pretext] would be evidence that white employees involved in acts against [the employer] of comparable seriousness...were nevertheless retained or rehired.").

In his proof that similarly situated but non-Filipino, non-immigrant employees were treated less harshly than he was, Non showed that two Comcast Technicians (a Caucasian and an Hispanic American), subject to the same CBA standards as Non and charged with more egregious work time falsifications than Non, were given merely written warnings while Non was fired for his alleged violation of the same CBA provision. Another Hispanic American Technician who was charged with a different records violation under the CBA was not fired but given only a written warning; and another Hispanic American Technician who committed a time falsification violation by lying about time spent working was given only an oral warning, not fired like Non.

In addition, Non showed that his earlier discipline episodes, while being questionable on their merits, also reflected disparate treatment. Richard White, Non's Hispanic American co-worker Technician responsible for the Burlingame voltage mishap, received no discipline at all while Non was harshly disciplined despite the extenuating circumstances. Non was also given a written warning for not following Comcast's then-new protocol for securing its generators

while a Caucasian Technician whose repeated negligence lost two generators was given only a written warning after the second theft; and another Mexican American Technician was not disciplined at all for losing a generator.

The district court, the only one to address the issue of Non's disparate treatment, rejected these comparators because some of them had different supervisors and because none of the Technicians "was caught sleeping on the job by a member of the public...[and] lied to Comcast throughout their disciplinary proceedings" (App. 7). First, the district judge unfairly assumed on this record that Non had, in fact, committed violations more serious than the comparators when the evidence instead created a jury question about whether he had committed those violation at all; and it was a jury question as well whether Non's alleged violations were more serious than the violations committed by his comparators.

Second, some of the same supervisors of Non were involved in disciplining these comparator Technicians and, even if there were different supervisors involved, it was a distinction without a difference because all the violations implicated breaches of the company-wide CBA which Comcast claimed had established a "company-wide standard of discipline" to be enforced by *all* supervisors evenhandedly.

Non was not required to demonstrate an *exact* correlation with his fellow Technicians who received more favorable treatment in order for them to be considered similarly situated for purposes of his disparate treatment analysis. Instead, Non and these other Technicians must be similar in "all the relevant [or material] aspects." *Ercegovich v. Goodyear Tire &*

Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998) quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994) (footnote omitted). Accord, *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001). Thus where Comcast has instituted company-wide standards of discipline dictated by a company-wide collective bargaining agreement, those standards are intended to provide guidance to *all* company supervisors so that they will be implemented with some degree of uniformity. *Philip v. Ford Motor Co.*, 413 F.3d 766, 769-770 (8th Cir. 2005) (Heaney, J., dissenting). *Bowden v. Potter*, 308 F. Supp.2d 1108, 1117 (N.D. Cal. 2004) (footnote omitted). *Petsch-Schmid v. Boston Edison Co.*, 914 F. Supp. 697, 704-705 n.18 (D. Mass. 1996).

The only relevant or material aspects of this comparison between Non and his fellow Technicians is how Comcast's company-wide collective bargaining agreement and the standards of discipline it contains----which *all* supervisors were required to apply uniformly----affected each of them. *Philip*, *supra* ("Unlike disciplinary decisions, which may be made by an immediate supervisor, a policy dictated by a collective bargaining agreement will be implemented with some degree of uniformity."). *Petsch-Schmid*, *supra* (same supervisor not required where a company has instituted company-wide standards of discipline intended to provide guidance to all company supervisors). That some or any of Non's comparators had a different supervisor when they were disciplined therefore does not prevent Non's use of these comparators to prove his claim of disparate treatment and the district judge was wrong to rule otherwise.

At the very least, whether and to what degree Non's fellow Technicians could be similarly situated so as to be his comparators for the purpose of showing

different discipline and therefore disparate treatment under Comcast's company-wide CBA and the standards of discipline it contains is a fact question which a jury should have been allowed to decide on all the evidence. *Johnson v. United Cerebral Palsy/Spastic Children's Foundation*, 173 Cal. App.4th 740,759-761 & n.14 (Cal. App. 2009). *Earl v. Nielsen Media Research Inc.*, 658 F.3d 1108, 1114-1115 (9th Cir. 2011). *Beck v. United Food and Commercial Workers Union*, 506 F.3d 874, 885 & n.5 (9th Cir. 2007) ("We agree with our sister circuits that whether two employees are similarly situated is ordinarily a question of fact.").

At least the district court addressed, however improperly, the issues of pretext and disparate treatment, moving the case to *McDonnell Douglas*' third stage on the issue of Non's discriminatory firing. The court of appeals, however, never went beyond the first stage of Non's *prima facie* case, immediately believing Comcast's uncorroborated excuse for terminating Non, calling his now assumed violation a "serious offense" under the CBA and even suggesting that Non's episodes of discipline in 2012 were also reasons to fire him *even though Comcast never relied upon these incidents as reasons for terminating Non*. In this way, the court of appeals collapsed entirely the *McDonnell Douglas* framework, a judicial overreach which deprived Non of his right under the burden-shifting framework to prove even his *prima facie* case.

The Problem With The McDonnell Douglas Framework and Summary Judgment Protocol.

When the respective burdens under *McDonnell Douglas* are imposed within the context of Comcast's summary judgment motion, two core principles obtain:

(1) in construing the materials adduced by the parties, the district judge and the court of appeals were bound to draw all reasonable inferences from these materials *against* Comcast as the moving party and *in favor* of Non as the non-moving party; and (2) they were also required to resolve all credibility questions *in favor* of Non, the non-moving party, because the role of the district court is only to determine whether there is a genuine issue of material fact for trial. *Beard v. Banks*, 548 U.S. 521, 529-530;534 (2006). *Reeves*, 530 U.S. at 150-151. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255 (1986). As *Reeves* holds, they cannot make credibility determinations because this is a function of a jury, *not* a judge. 530 U.S. at 150-151 citing *Anderson*, 477 U.S. at 255.

In *Tolan v. Cotton*, 572 U.S. ____; 134 S.Ct. 1861 (2014) (*per curiam*), the Court recently reinforced these summary judgment principles. In reversing the dismissal of a civil rights action brought against a police officer for using excessive force, the Court noted that where the parties disagreed about the fundamental facts surrounding the shooting, it was error for the court of appeals on summary judgment to weigh the evidence and then to credit the police officer's version of the facts rather than believing the plaintiff, thereby denying him the right to have his claim for injuries decided by a jury. *Id.* at ____; 134 S.Ct. at 1866-1867. Noting that the court below credited the evidence of the party seeking summary judgment while failing to properly acknowledge key evidence offered by the party opposing that motion, it "neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party," i.e., the plaintiff. *Id.* at ____; 134 S.Ct. at 1868.

Informing these principles is the further proviso that a motion judge should be cautious about granting summary judgment to employers in workplace discrimination case, especially when intent and credibility are in issue. “[A]dded rigor” is called for because direct evidence of discriminatory intent will rarely be available; “affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.” *Gorzynski v. Jetblue Airways Corp.*, 596 F.3d 93, 101 (2d Cir. 2010). *Gallo v. Prudential Residential Services, Ltd. Partnership*, 22 F.3d 1219, 1224 (2d Cir. 1994).

None of this summary judgment jurisprudence was at work in this litigation. Both federal courts acted as a jury instead of judges, believed and then adopted every one of Comcast’s asserted reasons for discharging Non, even suggesting that Comcast had *other* reasons for terminating Non, *reasons upon which Comcast never relied*. This abuse of summary judgment protocol failed to give the materials adduced by Non, the non-moving party, the deference they deserved; failed to read all of the materials *against* Comcast as the moving party; and made crucial credibility determinations in Comcast’s favor and to Non’s detriment which a jury—not judges—should have been allowed to make at trial. These failures to comply with Rule 56 practice has led to egregious factfinding on the most crucial fact issues in this case and render the disposition by the district court and the court of appeals not only unfair as a matter of due process, i.e., the denial of petitioner’s right to a jury trial on disputed fact issues, but also a misuse of the summary judgment procedure.

The court of appeals’ abusive summary judgment analysis also works a denial of Non’s right to

a jury trial on the merits of his claims. The seventh amendment to the federal constitution provides that in suits at common law, “the right of trial by jury shall be preserved....” As late Justice Scalia observed in *Blakely v. Washington*, 542 U.S.296, 305-306 (2004), the right to a jury trial in civil cases is not a procedural formality but rather a fundamental “reservation of power in our constitutional structure,” assuring the people’s ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320 (H. Storing ed.1981). This guaranty of a jury trial in the Constitution and the common law traditions it entrenches “do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.”*Id.* at 313 citing 3 Blackstone, *Commentaries*, at 373-374; 379-381.

Since one of the fundamental duties of the jury in civil cases is to resolve factual disputes bearing on material issues in controversy, the summary judgment procedure contained in Fed. R. Civ. P. 56 does not violate a party’s constitutional right to a jury trial because it is presumed that if the entry of summary judgment is appropriate, there are no genuine issues of material fact for trial and therefore no right to a jury trial is implicated. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902). See also *Pease v. Rathbone-Jones Eng. Co.*, 243 U.S. 273, 278-279 (1917). But where numerous triable fact issues exist regarding pretext, disparate treatment and whether Non’s fellow employees are similarly situated for purposes of comparing their respective discipline, his right to a jury trial on these genuine issues of material fact remains inviolate and should have been honored.

This misuse of summary judgment procedure in workplace discrimination cases has been documented. Schneider, Elizabeth M., *The Impact of Pretrial*

Practice on Discrimination Claims, 158 U. Penn. Law Rev. 517, 548-551 (2010) (*Schneider I*). Schneider, Elizabeth M., *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 Rutgers L. Rev. 705, 737-753 (2007) (*Schneider II*). McGinley, Ann C., *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 229 (1993). Recent data suggests that approximately 77% of summary judgment motions in workplace discrimination cases are granted, the *highest* of any type of federal civil case. Chin, Denny, J., *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. Sch. L. Rev. 671, 672-673 nn. 7 & 8 (2013). See *Schneider I* at 549 & n. 150.

Because the *McDonnell Douglas* framework does not immediately focus on the employer's intent to discriminate, the ultimate issue in the case, and since its three-stage, burden-shifting approach actually contains more moving parts than this, see Chin, *supra*, 57 N.Y.L. Sch. L. Rev. at 677-678, it is an "extremely inefficient way of addressing the issues," *id.* at 678, allowing judges impatient with the protocol to interpose their own views of the evidence. Thus it has been observed that motion judges in employment discrimination cases routinely weigh evidence, minimize the harm claimed by the plaintiff, make credibility determinations which accord him less credibility, draw inferences against him instead of in his favor, divide and categorize his evidence in piecemeal fashion which divorce it from its context in order to dilute its probative force, demand more proof than summary judgment requires and then resort to a "reasonable juror's" view of this now diluted and distended evidence to deny his claims. *Schneider I* at

535-536;540-546 (“Summary judgment decisionmaking...involves a tremendous amount of discretion, and discretion can be a locus of hidden discrimination.”). *Schneider II* at 708-712;714-715;718-720;728;737-745. See *McGinley* at 233-236.

The serious mishandling of the *McDonnell Douglas* framework by both courts below calls into question the utility of using this protocol in the future to decide the viability of employment discrimination claims on summary judgment. Non therefore requests this Court to adopt a more simplified, more focused regime for these cases which on summary judgment requires the motion judge first to evaluate the plaintiff’s direct or indirect proof of discrimination; second, to evaluate the employer’s proof that it did not discriminate, including any explanation for its employment decision; and third, to evaluate the evidence as a whole. Resolving any conflicts in all this evidence in the plaintiff’s favor, the motion judge should then decide the ultimate issue of whether the evidence is sufficient to permit a reasonable factfinder to conclude that the employer’s decision was more likely than not motivated by a discriminatory reason. See Chin, D. & Golinsky, J., *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 Brook. L. Rev. 659, 673-678 (1998).

This more simple, direct and fair way of resolving employers’ summary judgment motions in employment discrimination cases recognizes that the more cumbersome, less focused *McDonnell Douglas* framework was originally developed for use at trial, not in summary judgment proceedings; and this new regime would return the district judges to the

traditional methods they employ in assessing summary judgment motions in other civil actions.

CONCLUSION

For all the reasons stated herein, a writ of certiorari should issue to review and vacate judgment of the court of appeals, remand the matter to the federal district court for the Northern District of California for further discovery and a trial on the merits of petitioner's claims; or provide petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,
Daniel Ray Bacon
Counsel of Record
Law Offices of Daniel Ray Bacon
234 Van Ness Avenue
San Francisco, CA 94102-4515
(415)864-0907
E-mail: bacondr99@gmail.com

QUESTION(S) PRESENTED

1. Does the egregious mishandling of the *McDonnell Douglas* framework by both courts below call into question the utility of this burden-shifting protocol henceforth for deciding the viability of petitioner's workplace discrimination claims on summary judgment?
2. Should this Court adopt a more simplified regime on summary judgment which requires the motion judge first to evaluate the plaintiff's direct or indirect proof of discrimination; second, to evaluate the employer's proof that it did not discriminate, including any explanation for its employment decision; third, to evaluate the evidence as a whole; and then, resolving any conflicts in all this evidence in the plaintiff's favor, decide the ultimate issue of whether the evidence is sufficient to permit a reasonable factfinder to conclude that the employer's decision was more likely than not motivated by a discriminatory reason?

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