

No. _____

In The
Supreme Court of the United States

Ronald L. Green,
Petitioner,

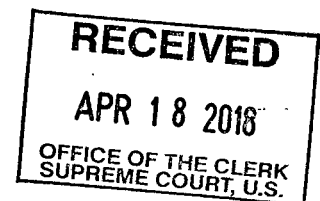
v.

Steven T. Mnuchin, Secretary,
Department of the Treasury,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Ronald L. Green, J.D.
Petitioner, *In Proper Person*
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QUESTIONS PRESENTED FOR REVIEW

1. When there is no genuine dispute as to any material fact in the plaintiff's motion for summary judgment, can a district court grant defendant's countermotion (with alternative facts that are genuinely disputed) without considering whether the plaintiff has established he is entitled to judgment as a matter of law?
2. Is the heightened standard for a prima facie case, fashioned by this Respondent and accepted by the courts below, consistent with Supreme Court precedent, or is it merely a contrived artifice that only serves the Respondent's current predicament?
3. When the law requires an employer "articulate a legitimate, nondiscriminatory reason" for acts alleged to be discriminatory, when is the reason not legitimate, and when is it not nondiscriminatory?
4. Can a supervisor under the *Ellerth/Faragher* framework create a hostile work environment for a disabled veteran, and violate Executive Order 5396 and the Rehabilitation Act of 1973, when the supervisor repeatedly demands disability-related disclosures under threat of possible termination, allegedly necessary to process a request for sick leave?

LIST OF ALL PARTIES TO THE PROCEEDING

The Petitioner was the Appellant in the proceedings before the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") and he was the Plaintiff in the proceedings before the United States District Court for the District of Nevada ("district court").

The Respondent was the Appellee in the proceeding before the Ninth Circuit and the Defendant in the proceedings before the district court.

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PETITION FOR WRIT OF CERTIORARI

Ronald L. Green ("Green") respectfully petitions for a writ of certiorari for the Supreme Court of the United States ("Court") to review the 3-page judgment of the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's memorandum is reproduced at App. 1-3. The district court order granting summary judgment for the Respondent and denying summary judgment for the Petitioner is reproduced at App. 4-31. The Administrative Record appears as EEOC Appeal No. 0120110922 and Appeal No. 0120090348.

**CONCISE STATEMENT OF THE
BASIS OF JURISDICTION**

On January 16, 2018, the Ninth Circuit issued an Order denying Petitioner's Request for Rehearing En Banc in conjunction with Request for Rehearing after the United States District Court for the District of Nevada ("district court") granted summary judgment for the Secretary of the Treasury ("IRS") and against the Petitioner on his claims under Title VII of the Civil Rights Act of 1964, as amended ("Civil Rights Act or Title VII") codified as 42 U.S.C.S. §§ 2000e-2, 2000e-3 and 2000e-16, and the Rehabilitation Act of 1973, as amended ("Rehabilitation Act") under 29 U.S.C.S. § 794, et al. This action was filed within 90 days of January 16, 2018 and this Court has jurisdiction pursuant to 28 U.S.C.S. § 1254(1).

**CONSTITUTIONAL PROVISIONS, TREATIES,
STATUTES, ORDINANCES AND REGULATIONS**

U.S. Const. amend. I:

Congress shall make no law . . . abridging the freedom . . . of the people . . . to petition the Government for a redress of grievances.

U.S. Const. amend. V:

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

Executive Order 5396:

Signed by President Herbert Hoover, July 17, 1930.

With respect to medical treatment of disabled veterans . . . it is hereby ordered that, upon the presentation of an official statement from duly constituted medical authority that medical treatment is required, such annual or sick leave as may be permitted by law . . . shall be granted by the proper supervisory officer to a disabled veteran in order that the veteran may receive such treatment, all without penalty in his efficiency rating.

29 U.S.C.S. § 794. Nondiscrimination under Federal grants and programs:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability . . . be denied the benefits of, or be

subjected to discrimination . . . under any program or activity conducted by any Executive agency.

42 U.S.C.S. § 2000e-2. Unlawful employment practices:

It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.S. § 2000e-3. Other unlawful employment practices:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C.S. § § 2000c-2000e-17].

42 U.S.C.S. § 2000e-16. Nondiscrimination in Federal Government employment:

(a) Discrimination prohibited. All personnel actions affecting employees . . . shall be made free from any

discrimination based on race, color, religion, sex, or national origin.

5 C.F.R. § 630.201 Definitions and General Provisions for Annual and Sick Leave:

Medical Certificate means a written statement signed by a registered practicing physician or other practitioner certifying to the incapacitation, examination, or treatment, or the period of disability while the patient was receiving professional treatment.

5 C.F.R. § 630.401 Granting sick leave:

(a) An agency must grant sick leave to an employee when he or she . . . (r)eceives medical . . . treatment.

5 C.F.R. § 630.405 Supporting evidence for the use of sick leave:

(a) . . . An agency may consider an employee's self-certification as to the reason for his or her absence as administratively acceptable evidence, regardless of the duration of the absence. An agency may also require a medical certificate or other administratively acceptable evidence as to the reason for the absence.

29 C.F.R. § 1630.4 Discrimination prohibited:

It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual

with a disability in regard to . . . (e) Leaves of absence, sick leave, or any other leave.

29 C.F.R. § 1630.7 Standards, criteria or methods of administration:

It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity . . . (t)hat have the effect of discriminating on the basis of disability.

29 C.F.R. § 1630.13 Prohibited medical examinations and inquiries.

(b) it is unlawful for a covered entity to . . . make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability.

29 C.F.R. § 1630.14 Medical examinations and inquiries specifically permitted.

(c) A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity.

CONCISE STATEMENT OF THE CASE

In November 2005, while serving as a Grade 11 Anti-Money Laundering ("AML") Examiner for the IRS' Bank Secrecy Act ("BSA") Group in Las Vegas, NV, Petitioner Ronald L. Green ("Green") was not

selected for promotion to a Grade 12 AML Examiner position in Vacancy Announcement Number 50-14-SP50889B ("Vacancy 889") for the Las Vegas BSA Group. The selecting official ("SO") maintained he selected a Caucasian with no prior Equal Employment Opportunity ("EEO") protected activity because the selectee was the top ranked candidate on the Best-Qualified ("BQ") list. (App. 4-5).

Green later determined that the same SO selected another Caucasian with no prior EEO protected activity for a similar Grade 12 AML Examiner position in Vacancy Announcement Number 50-52-SP50119B ("Vacancy 119") when Green was the top ranked candidate on that BQ list. He filed a formal EEO complaint on December 12, 2005 alleging he was discriminated against on the basis of race (African American) and in retaliation for prior EEO protected activity (Chairman of the IRS' Mountain States Diversity and EEO Advisory Committee ("DEEOAC")) when he was not selected in Vacancy 889. (App. 38).

Nevertheless, in January 2006, Green was selected for a Grade 12 Revenue Agent position in the Las Vegas General Programs Group under Group Manager, HM, and Territory Manager, DT. (App. 44).

Also in January 2006, while his formal EEO complaint for his non-selection in Vacancy 889 was being investigated, his treating physician ("Dr. Z") at Department of Veterans' Affairs ("VA") reported that he was incapacitated from duty due to his Dysthymic

Disorder (aka chronic depression) and would need three months off. On or about January 10, 2006, Green requested sick leave on IRS Standard Form ("SF") 71 and submitted it, along with Dr. Z's medical certificate to SS, his BSA Group Manager. (App. 43).

The IRS' response to his sick leave request, *inter alia*, generated eleven additional employment actions that were added to the formal complaint.

Green raised the following twelve claims in his formal complaint of unlawful discrimination:

The IRS discriminated against him on the basis of race (African-American) and in retaliation for his prior EEO protected activity (DEEOAC) when:

1. On or about November 1, 2005, he was not selected for the position of Internal Revenue Agent (AML Examiner), GS-0512-12, advertised under the Agency's Vacancy Announcement Number 50-14-SP50889B;

The IRS discriminated against him on the bases of race (African-American), disability (Dysthymic Disorder) and in retaliation for his prior EEO protected activities (DEEOAC and formal complaint re his non-selection) when:

2. On or about January 10, 2006, his request for 478 hours of sick leave was

not approved, despite the fact that he provided medical documentation with his request;

3. On January 18, 2006, his immediate supervisor (HM) issued a memorandum advising him that he would have to sign the (voluntary) "Federal Occupational Health Authorization for Disclosure of Information ("FOHA")," so that his sick leave request could be processed;
4. On February 2, 2006, HM directed him to waive his statutory rights and to fully comply with the instructions issued by the examiner who was conducting an examination of his personal tax returns;
5. On February 23, 2006, HM directed him to report for duty on Monday, February 27, 2006, or be charged absence (sic) without leave (AWOL), if he did not provide "acceptable medical documentation" or if he did not sign the attached FOHA;
6. On or about February 27 and March 14, 2006, his former supervisor (SS) refused to meet with him to discuss his performance appraisal;
7. On February 28, 2006, HM directed him to provide confidential medical

information and documentation by March 10, 2006;

8. Also, on February 28, 2006, HM reclassified his time and attendance records to reflect all sick leave, instead of the combination of sick leave, direct and indirect time charged and approved since January 9, 2006, including official time he spent on the instant EEO complaint;
9. On or about March 9, 2006, SS issued him an inaccurate performance appraisal;
10. On March 17, 2006, HM directed him to submit written requests for approval prior to any time and attendance changes to his sick leave status;
11. Also, on March 17, 2006, HM refused to direct his communications and directives to his National Treasury Employees' Union ("NTEU") representative or his physician and requested he provide him with his EEO contact point; and
12. On May 3, 2006, SS denied his request to be compensated for higher-graded duties he performed in 2004 and 2005.

(App. 35-36). After the EEO investigation concluded, the IRS moved for summary judgment and alleged it had a LNDR for not selecting Green in Vacancy 889, because it "objectively" selected the top ranked candidate for promotion in Vacancy 889.

The IRS also alleged that its additional disability-related inquiries, its demands for Green's confidential VA medical records and disclosures from his VA physician were necessary because Green allegedly requested "advance sick leave." (App. 61-63).

In his counter-motion for summary judgment, Green argued that the IRS' alleged LNDRs were pretextual because (1), he was not selected in Vacancy 119 when he was the top ranked candidate, (2), Vacancy 889 had two positions available and, objectively, if he ranked second on the BQ list for Vacancy 889, Green should have been selected for the second available position and the SO never explained why he did not fill the second position, and (3), because his (SF-71) request for sick leave clearly showed that he did not request advance sick leave but rather to use his earned and accrued sick leave.

The Administrative Judge ("AJ") assigned by the Equal Employment Opportunity Commission ("EEOC") did not enter a decision on the parties' respective motions for summary judgment. However, more than two years later, a hearing was conducted and, over Green's objections that it violated his due process rights, the AJ allowed the SO's Big Lie. The SO testified for the first time and without prior notice

that Green was not selected in Vacancy 889 because he was under investigation for misconduct. (App. 42).

Void of any specificity whatsoever, the SO alleged he became aware of the investigation because an unnamed investigator told him. However, under cross-examination, the SO also testified that he did not know the date he spoke to unnamed investigator, he did not know when the alleged investigation began, he did not know when or if it had concluded and he did not know what, if any, the findings were. (Ninth Circuit Excerpts of Record "ER" at US00973 and US00975). Green was never charged or even disciplined for any misconduct.

Nevertheless, the AJ found the SO articulated a LNDR for not selecting Green in Vacancy 889, (he was allegedly under investigation), and she also found, in spite of Green's First Amendment rights, that the issues surrounding his sick leave were "self-inflicted" based on his repeated objections to HM's demands.

Following the AJ's decision, Green appealed her Decision of no discrimination and the IRS' final agency decision ("FAD") but the EEOC affirmed. After his request for reconsideration was denied. Green received a "Right to Sue" letter on or about January 31, 2013 and he timely filed a complaint in federal district court in April 2013 and requested a jury trial.

After discovery closed, Green filed "Plaintiff's Motion for Summary Judgment (Plaintiff's Motion)". In response, the IRS filed "Defendant's Combined

Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment ("CMO") to which Green responded in opposition (Plaintiff's Opposition") and replied. The IRS then filed a reply to Green's opposition. (App. 4).

Although the IRS' CMO was captioned as an "opposition" to Green's motion for summary judgment, the IRS did not dispute or otherwise controvert any of the undisputed facts enumerated in Plaintiff's Motion as required by Local Rule ("LR") 7-2(b), LR 56-1 and Rule 56 of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 56). (App. 77). (*Carolina Acquisition v. Double Billed*, 627 F. Supp 2d 1337, 1338, U.S. District Court SD Florida (2009)),

Consistent with comments made by Chief Justice Roberts regarding "antagonistic tactics, wasteful procedural maneuvers and teetering brinkmanship," it appears the IRS' unethical strategy was to present alternative facts more favorable to the IRS that were contrary to those presented in Plaintiff's Motion and still maintain the illusion that it was not disputing Green's "undisputed" material facts. (Chief Justice John Roberts, *Chief Justice's Report Praises Limits on Litigants Access to Information*, New York Times, Jan. 1, 2016, at A16.). With the district court's complicity, they succeeded.

However, Plaintiff's Opposition to the IRS' CMO did comply with LR 7-2(b), LR 56-1 and Fed. R. Civ. P. 56 and did specifically list the disputed facts the IRS alleged in its CMO were undisputed, and

Green provided the detailed reasons why each fact was disputed. In fact, Green opposed approximately thirteen (13) of the IRS' alleged material facts pursuant to Fed. R. Civ. P. 56(c)(1)(B) on the basis that they were not supported by the material the IRS cited in its CMO and therefore could not be presented in a form that would be admissible at trial.

In *Burdine*, this Court clearly stated, "To (articulate a LNDR), the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection . . . and frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." (*Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-256 (1981); Fed. R. Civ. P 56(c)(1)(B) and 56(c)(2); Fed. R. Evid. 802).

Even though the district court found "Plaintiff argues that evidence of the investigation would be inadmissible hearsay and therefore, no evidence of the non-discriminatory reason exists," the district court nevertheless granted the IRS' motion for summary judgment and against Green on all claims in his complaint. (App 4).

The court found, *inter alia*, the IRS articulated two LNDs for not selecting Green in Vacancy 889: (1), because the IRS selected the top ranked candidate, and (2), "the overriding reason" that Green was allegedly under investigation for misconduct. (App. 13). Curiously and foretelling, the court didn't include the controverted LNDs as issues. (App. 9).

The court also found the IRS articulated a LNDR for HM's additional demands for Green's disability-related medical information. According to the court, "(HM) explained that he had never encountered a sick leave request that was as lengthy as Plaintiff's request. In an effort to make an informed decision, HM turned to the Labor Relations Division and an FOH doctor for guidance . . . From that point on, HM merely followed the guidance of the Labor Relations Division and an FOH doctor in processing Plaintiff's request." (App. 16). However, the FOH doctor actually concluded Green qualified for sick leave under the Family Medical Leave Act ("FMLA"). (App. 58 and 61).

On appeal, and without analysis and without discussing the challenged LNDRs, the three judge panel of the Ninth Circuit affirmed the district court's decision on the grounds that Green allegedly did not establish a *prima facie* case for the position the SO chose not to fill. In addition, the panel alleged that he failed to raise a genuine dispute of material fact that the IRS' actions were pretextual and he allegedly also failed to specifically and distinctly raise matters in his opening brief and a due process claim before the appeal. (App. 2-3).

Green timely filed a Petition for Rehearing En Banc in conjunction with a Petition for Rehearing alleging, *inter alia*, the panel's memorandum was clearly erroneous. The panel voted to deny the petition for panel rehearing and no judge requested a vote on whether to rehear the matter en banc.

Accordingly, Green's petition for panel rehearing and petition for rehearing en banc were denied on January 16, 2018. This petition followed. (App 32).

All the Undisputed Facts Contained in Plaintiff's Motion, Replete With Evidence of Pretext, Are Not Included Here Due To Space Limitations. However, the Reader is Urged to Review Them in the Appendix at App. 37 through App. 50.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case comes before the Court at a time when individuals who have used the power of their office and position are finally being held accountable for the offensive, unlawful and even criminal conduct perpetrated against vulnerable members of our society. Astonishingly, in almost every instance, these perpetrators have been allowed to continue their bad acts and flourish because people who knew failed to take the necessary steps to stop them.

Even though Congress' intent in enacting Title VII was to eradicate unlawful discrimination, that task has fallen squarely on the back of the injured and financially disadvantaged *pro se* litigant, especially when the federal government is involved.

When officials of the federal government are alleged to have engaged in unlawful discrimination, there is not much incentive for them to stop their

unlawful behavior because those officials suffer no personal liability when, ironically, the full resources of the office of the United States Attorney are marshaled in their defense, even when, as here, unlawful discrimination and retaliation are obvious and those with the power, authority and responsibility to stop it turn a blind eye and use dubious/unethical tactics to defend clearly unlawful acts, facts recited by reluctant plaintiff's attorneys.

This is the important and rare case where the injured employee's case-in-chief is supported almost entirely with uncontroverted documentary evidence prepared by the defendant employer's own officials, including prior inconsistent statements that bear directly on their veracity and their own regulations which they violated. On the other hand, the IRS' case is almost totally made up from the uncorroborated and self-serving testimony of alleged discriminating officials.

In *McDonnell Douglas v. Green*, the seminal case for the burden-shifting framework for disparate treatment cases of discrimination under Title VII, the Supreme Court established only one burden for the defendant (employer), to articulate a LNDR for the acts alleged to be discriminatory. (*McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973)).

Now, *Green v. Mnuchin* (no relation) raises significant and important questions regarding the rising conflict between the circuit courts regarding if and when employers meet that burden.

This question is especially significant because, as provided in *Celotex* and *St. Mary's Honor Center*, and as argued below, when an employer fails to articulate a LNDR for the acts alleged to be discriminatory, the employee, like Green, is entitled to judgment as a matter of law. (*Celotex v. Catrett* 477 U.S. 317, 322 (1986) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 528 (1993)).

In addition, if an employer succeeds in articulating a LNDR, this case also asks the Court to resolve the conflict between the Ninth Circuit and other circuit courts regarding what constitutes pretext.

Moreover, as stated above, Green is a disabled veteran who suffers with a chronic disability. His perception of unfair racial discrimination against him caused his incapacitation and, providing a medical certificate from the VA and the appropriate IRS form SF-71, he requested sick leave.

The trial court's treatment, and the Ninth Circuit's acquiescence, of Green's sick leave issues highlights a significant split among the circuit courts regarding sick leave policies that require medical certification and how that may or may not violate the Rehabilitation Act. (Sick Leave Policies Requiring Medical Certification Violate ADA and Rehabilitation Act, 23 *Geo. Mason U. Civ. Rts. L.J.* 365, Summer 2013). This case asks the Court to resolve that split.

However, we first ask the Court to determine if the heightened standard for the prima facie case for race discrimination, fashioned by the IRS and accepted by the trial court and the Ninth Circuit, is permissible under current law.

The IRS' Heightened Standard for a Prima Face
Case Conflicts With Supreme Court Precedent

Facing scrutiny for articulating one alleged LNDR during the EEO investigation and another for the first time over two years later in the EEO hearing, the IRS' predicament was skillfully overcome when it successfully argued the distracting and unprecedented position that Green should be required to establish a (separate but equally important) prima facie case for each position available in Vacancy 889. (App. 96-97).

During the EEO investigation, when it was not widely known that there were two positions available in Vacancy 889, the SO alleged that he did not select Green because he chose the top-ranked candidate on the BQ list (who just happened to be Caucasian) to ensure objectivity. However, that explanation did not explain why he did not select Green, who ranked second on the BQ list for the second available position. (App. 54-55).

Based on this inconvenient fact, the SO failed to articulate a reason for not selecting Green but rather only a reason why he selected the candidate he did. Notably, the SO also did not select Green, an

African American, when he was the top ranked candidate in Vacancy 119.

As the Court foretold in *McDonnell Douglas*, because the SO did not select the top ranked candidate in both Vacancy 119 and Vacancy 889, the SO's selection criterion was not applied alike for all races and therefore, it was not a LNDR for not selecting Green. (*McDonnell Douglas v. Green*, 411 U.S. 792, 804, 1973)(Selection/non-selection criterion must be "applied alike to members of all races.").

In *Blise*, the Court of Appeals for the Seventh Circuit found, as the trial court later determined here, that selecting the top ranked candidate, who just happened to be Caucasian, was an objective LNDR for not promoting Paula Blise, an African American. (*Blise v. Antaramian*, 409 F.3d 861, 867 (2005)). However, according to this Court, it would not be a truly objective standard unless selecting the top ranked candidate was "applied alike to members of all races." (*McDonnell Douglas* at 804).

Therefore, assuming Ms. Blise had presented evidence, as Green did in the present case, that her employer had not selected a top ranked candidate who was African American, according to this Court, that selection criterion would not have been a LNDR for her non-selection. (*Id.*).

On this basis, when the IRS moved for a decision without a hearing (summary judgment) before the EEOC and alleged Green was not selected

because he was not the top ranked candidate, the IRS failed to articulate a LNDR for not selecting Green because the criterion of selecting the top ranked candidate was not applied alike for all races. In addition, because there were two positions available in Vacancy 889 and the SO did not provide a reason why Green was not selected for the second available position or why he chose not to fill it, Green was entitled to judgment as a matter of law. (App. 57).

The district court stated it considered a prima facie case for each of the two available positions in Vacancy '889 allegedly because the plaintiff was acting *pro se*. (App. 11). However, citing *Coghlan*, the IRS argued Green did not establish a prima facie case for the position the SO chose not to fill because that position did not go to someone outside plaintiff's protected class. (App. 96-97; *Coghlan v. Am. Seafoods Co. LLC*,). The IRS did not dispute that Green satisfied the prima facie elements as to the position filled by the Caucasian who was selected in Vacancy 889. (App. 97).

The three judge panel of the Ninth Circuit also concluded Green did not establish a prima facie case for the position the SO chose not to fill despite our citing specific cases where this Court held, even when a position is left vacant, a plaintiff can still establish a prima facie case of race discrimination. (*Teamsters v. U.S.* 431 U.S. 324, 358 n. 44 (1977); App. 2).

To justify its position that Green allegedly did not satisfy the prima facie case for the unfilled position, the panel stated:

The district court properly granted summary judgment on Green's racial discrimination claim relating to an unfilled position because Green failed to raise a genuine dispute of material fact as to whether, "after his rejection, the position remained open and the employer continued to seek applicants from persons of [his] qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)."

(App. 2). However, there can be no clearer example of why a quote should not be taken out of context.

In *McDonnell Douglas*, this Court actually said:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. [13] (emphasis added) (The

Ninth Circuit's extracted quote is underlined for clarification).

In footnote [13], the Court specifically stated:
The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from (the employee) is not necessarily applicable in every respect to differing factual situations.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 and footnote 13 (1973).

Clearly, and contrary to the panel's selective recitation, *McDonnell Douglas* does not support the panel's conclusion that when a position is left vacant, as it was here, the employee cannot establish a prima facie case of race discrimination because Green surely did.

A Conflict Among the Circuit Courts Occurs When
Employers Change Their Alleged LNDR

The Court of Appeals for the Seventh Circuit (Seventh Circuit) and the Tenth Circuit have an opposing view. Instead of allowing the defendant employer to fashion new law as the IRS did here, when an employer offers different explanations for its alleged discriminatory acts, the Seventh Circuit and the Tenth Circuit hold that such changes in the alleged LNDR can be evidence of pretext.

The Seventh Circuit looks to two factors to evaluate a change in the employer's explanation for an employment decision: (1) the timing of the change in (the LNDR) and (2) the evidentiary basis for the new rationale. (*Perfetti v. First Nat'l Bank*, 950 F.2d 449, 456 (7th Cir. 1991)("If . . . the decision-maker gave one reason, but at the time of the trial gave a different reason which was unsupported by the documentary evidence, the jury could reasonably conclude that the new reason was () pretextual.")).

The timing of the change of the LNDR has also been found to support the inference of pretext when it occurs after significant legal proceedings have occurred. In *Zaccagnini v. Chas. Levy Circulating Co.*, the employer argued that it only hired individuals recommended by the union, and the union did not recommend that plaintiff. However, during discovery, and in its initial briefing to the district court, the employer argued it had a policy against rehiring workers who had been laid off. The court found the employer's change of the LNDR late in the proceedings was "fishy" and might allow a jury to find pretext. (*Zaccagnini v. Chas. Levy Circulating Co.*, 338 F.3d 672, 676-678 (7th Cir. 2003)).

Similarly, in *Cole*, the Court of Appeals for the Tenth Circuit ("Tenth Circuit") found pretext when a school district stated that it terminated the plaintiff, a school principal, because of budgetary constraints. After she filed an EEOC complaint, however, the district relied on the plaintiff's alleged inability to

maintain a cohesive faculty. (*Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373, 1381 (10th Cir. 1994)).

Here, in *Green v. Mnuchin*, the SO stated during the EEO investigation that he did not select Green in Vacancy 889 because he was not the top ranked candidate and the IRS even moved for summary judgment during the administrative phase based on that fact. However, at the EEO hearing, the SO testified without evidentiary support that he did not select Green because he was allegedly under investigation for misconduct. (App. 41-42).

Also in *Zaccagnini*, the Seventh Circuit held that a change in the alleged LNDR also supports a finding of pretext when the new rationale is not supported by the evidence but the plaintiff introduced evidence, as Green did, that undermined both of the employer's rationales. (*Zaccagnini*, 338F.3d at 678-79).

In *Cole*, the Tenth Circuit found the record revealed "glaring contradictions" in the school district's alternative rationale. (*Cole*, 43 F.3d at 1380). The district claimed that faculty conflict began immediately after the plaintiff started as principal; however, the record included "glowing evaluations" indicating that she maintained positive faculty relations, as well as affidavits from teachers stating that Ms. Cole's predecessor faced similar problems with the faculty. (*Cole* at 1380, 1381 n. 6.).

Here, though specifically required by Federal Rule of Evidence 1002 for the *Best Evidence*, the IRS offered not one shred of reliable evidence to support the SO's uncorroborated and self-serving testimony that Green was allegedly under investigation when he made the selection in Vacancy 889, or in Vacancy 119, even if being under investigation was a LNDR.

On the other hand, even in its flawed and contradictory decision, the district court found Green: (1), "was likely qualified for the position, because he tied for second on the (BQ) list," and (2), "received the second-highest overall rating of 'exceeds fully successful'" in his annual performance appraisal from SS for the same time period and that evaluation was "fair and accurate." (App. 12 and 18).

In addition, it was indisputable that SS provided in a affidavit that, "(the selectee) and (Green) have both been good employees. They both work hard to meet Territory and group goals. And they both do quality work. I would have been hard pressed to explain to the one not selected why he was not selected so I based the decision solely on the ranking scores." (App. 71).

The absence of any documentary evidence of alleged misconduct and the "glaring contradictions" made by and "glowing evaluations" received from IRS officials is substantial evidence that Green had not engaged in any misconduct and, even if the SO's uncorroborated allegations were not inadmissible, which they are, Green provided substantial and

uncontroverted evidence that he did not engage in any misconduct and those allegations are a pretext for discrimination. (*McGinest v. GTE Service Corp.*, 380 F.3d 1103, 1123 (9th Cir. 2004)).

The IRS' Disparate Treatment, Caused Only
By the Amount of Sick Leave Requested,
is Disability Discrimination Per Se

Under the Rehabilitation Act, "It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to . . . (e) Leaves of absence, sick leave, or any other leave. (29 C.F.R. § 1630.4).

Moreover, under Executive Order 5396, that is incorporated in the IRS regulations, disabled veterans like Green must be given sick leave when properly requested. (IRS Time and Leave Handbook, p. 60, attached in ER in the Ninth Circuit as US00550; *Cassie v. U.S.* (Fed. Cir. 2005).

Furthermore, under *Wade*, if an employee has accrued sick leave and the absence is due to an incapacitating illness, the agency must grant sick leave for the absence. (*Wade v. Dep't of the Navy*, 829 F.2d 1106, 1109 (Fed. Cir. 1987)).

Contrary to the district court's conclusion to the contrary, HM did not have a LNDR for repeatedly demanding additional disability-related disclosures allegedly necessary to process Green's request for sick leave because, based on Executive

Order 5396 and 29 C.F.R. § 1630.14, HM had no legitimate authority or reason to question Green's sick leave, and when he did, it was discriminatory *per se*. (29 C.F.R. § 1630.14; *Walton v. U.S. Marshal Serv.*, 492 F.3d 998, 1003 n. 1 (9th Cir. 2007)).

HM's ignorance and his "They told me to do it" defense are not LNDRs for the disparate treatment he inflicted on Green based solely on the length of his incapacitation. Moreover, HM is not the defendant in this case. HM, the Labor Relations Division and the FOH doctor are all agents of the IRS.

The IRS Blatantly Disregarded Its Own Sick Leave
Regulations, *inter alia*. In Violation of
This Court's *Accardi Doctrine*

It is axiomatic that qualified individuals with disabilities, by definition, would be the only ones who require lengthy sick leave and the gang of three were bound by law to follow the IRS' benign regulations pertaining thereto. (*Accardi v. Shaughnessy*, 347 U.S. 260, 267-68 (1954); *Service v. Dulles, et. al.*, 354 U.S. 363, 388-389 (1957)). (App. 52-53).

Under IRS regulations, "(a)bsences of more than 3 workdays will be supported by a medical certificate or other . . . evidence (e.g. SF 71)." (IRS Time and Leave Handbook, p. 78; (5 C.F.R. § 630.201; App. 43).

Instead of following the benign instructions contained in its own regulations, HM and the Labor

Relations Department, under the pretext that their intrusive ad hoc requirements were authorized by law, falsely stated that "To approve sick leave for more than three days, acceptable medical documentation is . . . outlined in 339.104 of Part 5 of the Code of Federal Regulations" (App. 45). In actuality, the federal provisions for granting sick leave are outlined in 5 C.F.R. §§ 630.201, 630.401 and 630.405.

It is also unlawful under the Rehabilitation Act for the IRS to make medical inquiries regarding the nature and severity of an employee's disability unless it is job related and consistent with business necessity. (29 C.F.R. § 1630.7).

Here, HM testified that he couldn't accept Dr. Z's medical certification because Dr. Z was not an IRS employee. (App. 61). Clearly, that is not job-related and consistent with business related.

Moreover, when an employee requests a reasonable accommodation, as Green did here, when he requested sick leave and simultaneously asked to be able to work when he was able to do so, HM violated the Rehabilitation Act because HM never so much as alleged, let alone prove, that those accommodations would create an undue hardship for the IRS. Nevertheless, record evidence proves and common sense prove otherwise.

Green's request to be able to work when he could actually benefited the IRS, especially when HM

reclassified the hours Green had already worked to sick leave, the IRS was unjustly enriched.

The Scales of Justice were Always Unfairly
Tipped In Favor of the IRS

The remaining discussion concisely exposes a small plethora of the instances not yet discussed where substantial record evidence did not support the grant of summary judgment in favor of the IRS, in blatant disregard for this Court's precedents and the Federal Rules of Civil Procedure and Evidence.

Not one inference was drawn in favor of this nonmovant and in no instance was his *pro se* pleadings construed liberally. (*Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)). The record shows, in fact, that Green was held to a higher standard and the district court impermissibly weighed the evidence regarding two crucial material facts. (App. 14, 15, 24 and 25).

Even though the district court dismissed out of hand Green's argument that the IRS' alleged LNDR was based on inadmissible hearsay, the court found evidence proffered by Green wasn't authenticated even though Green identified the document with the IRS' Bates stamp. (App. 20).

CONCLUSION

The IRS' heightened standard of requiring a prima facie case for each position that might be

available in a vacancy announcement is inconsistent with the Court's precedents. The Court should grant certiorari to correct the lower courts and maintain uniformity in this significantly important area of discrimination law.

HM's harassment of Green violated Executive Order 5396 and the Rehabilitation Act because it served no legitimate purpose. Dr. Z reported HM's actions were detrimental to Green's treatment and recovery. Green was subsequently forced to retire because of his chronic disability. These facts stand as compelling evidence that HM created a hostile work environment for Green. (Dr. Z's VA Medical Report dated 10/27/2006, Undisputed Fact #38). (App. 48).

Granting this important petition will provide the Court with the opportunity to consider the IRS' new legal standard for a prima facie case, to resolve the circuit court conflicts and to impress upon those charged with and capable of protecting the rights of the vulnerable that their allegiance should be to the law and not to the powerful and influential.

RESPECTFULLY SUBMITTED this 16th day of April, 2018.

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