March 2018

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D.C. 20543

Duane Hutchings,

Petitioner,

v.

One Nevada Credit Union f/m/k

Nevada Federal Credit Union, Does

I through V, and Roe Corporations I through V,

Respondents.

On Petition for a Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit (No. 16-16202)

PETITION FOR A WRIT OF CERTIORARI

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Question(s) Presented (Rule 14.1(a))

Whether the employers' facially neutral practices were "discriminatory in operation," and was there a true "business necessity" for its' actions. Pursuant to Griggs v. Duke Power Co.

Was the plaintiff performing up to the employer's legitimate expectations. See, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1098, 1094, 67 L.Ed.2d 207 (1981)

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Duane Hutchings and Respondent One Nevada Credit Union, Does

I through V, and Roe Corporations I through V.

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Petitioner Duane Hutchings prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit issued on October 24, 2017.

OPINIONS BELOW

On, October 24, 2017, the United States Court of Appeals for the Ninth Circuit entered its judgment and opinion affirming the District Court. Duane Hutchings, et al v. One Nevada Credit Union, No. 16-16202. A copy of that opinion is attached as Appendix A. A transcript of the District Court's ruling denying an appeal *en banc* is attached as Appendix B. The District Court's decision of Summary Judgment is attached as Appendix C.

JURISDICTION

On, December 21, 2017, the United States Court of Appeals for the Ninth Circuit entered its Denial for an appeal *en banc*. Duane Hutchings, et al v. One Nevada Credit Union, No. 16-16202 (Appendix A). This petition has been timely filed within 90 days of that order. The motion to stay the mandate was filed on December 28, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1331 and filed under Rule 33.2.

STATEMENT OF THE CASE

A. Background and Investigation

This case presents 2 important questions. The questions are important in that a protected class may have been discriminated against and precedent cases having found companies guilty of disparate treatment have had to pay in the millions of dollars in fines and restitution. The first question is whether the employers' facially neutral practices were "**discriminatory in operation**," and was there a true "**business necessity**" for its' actions, pursuant to Griggs v. Duke Power Co. The defendant, One Nevada Credit Union, (CU), fired plaintiff, Duane Hutchings, due to his refusal to stop working a second, part-time job, as a licensed real estate agent. See (ECF No. 58, pp 2-5 of 24 of the "Motion"). Hutchings felt that his "**Right to Work**" was violated by being given no chance to work[1] as an independent contractor by selling what the CU did not sell, as it was not in competition of the Credit Union.[2] After several attempts to ask for approval in writing Mr. Chang, presented

[1] ECF No. 58-6, Ex. 1 to C, ¶¶ 1-4.

[2] http://www.onenevadarealty.com/index.php? The website lists a vacant piece of land in Pahrump, NV., that is zoned ½ to 2 acres that claims to be within a multi-family parcel but is in a single family masterplan and is not zoned commercial/multi-family yet.

ECF No. 58-6, Ex. 1 to Ex. C, with news from a conversation, on 9/20/2012, that Hutchings was not going to get any approval for 2nd employment due to a conflict with his 1st job, Hutchings (asked again) for approval in writing, Chang is not telling the truth by saying, in paragraph 2,"**This approval was never requested**," nor sanctioned by One Nevada Credit Union. In paragraph 3, "due to a potential conflict between your position as an insurance agent at One Nevada Insurance Services and your involvement as a real estate agent, residential or **commercial, you are hereby informed that One Nevada cannot approve any request for you to work as a real estate agent."** Both declarations from Parrish and Traficanti tell the same thing that there would have been no approval. Hutchings refused to give up his license because of his need to supplement his income for his family and his need to keep his main job as an insurance agent,[3] with the defendant, and to keep his health insurance benefit for his ailing child. This is not a disgruntled employee who has chosen to disrespect authority, this was Hutchings attempt to ask for and expected to receive written approval to continue to sell commercial real estate on weekends or after hours due to a real need since the Insurance Department was making deliberate changes to his pay, plus he was a top producer.[4] The defendant complained that the plaintiff violated its' corporate

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[3] ECF No. 58-6, Ex 2 to C, and (ECF No. 67, p 4 line 11,12) and (ECF No. . 67-5, p 9 lines 11-20). it is curious that pg 2 of Ex 2 to C, is an email from Oct. 18, 2012, and that each email was sent to HR and Beth Galofaro first. There was already a plan in place for Hutchings' dismissal.

[4] ECF No. 58-5, Ex. 5 to Ex. B

policy to not compete in any dealings with a competitor, stating a conflict of interest. Hutchings never received an Employee Handbook from Human Resources[5] in which the policy was outlined. Hutchings placed his license with **FMI Business and Real Estate Specialists** from **Century 21 Consolidated in 2011.**[6] Because he did not sell any real estate from 2009 until 2011 he felt as though his license may have been inactive, though it was not.[7] Hutchings **verbally** explained that he was selling (a product) in real estate that was not in conflict with their subsidiary, at the time, Community Real Estate Services, by selling the (product) of commercial real estate and <u>businesses</u> which fell under but is completely its own subsection of commercial real estate.[8] The CU did not show evidence that it sold commercial real estate or businesses real estate. Although, the Senior Officer, Paul Parrish, erroneously assumed that their real estate broker had a commercial real estate license, the question was asked. **Q. But I said commercial, selling businesses. You said you didn't have a license. A. Not that I'm aware of. No, ma'am. Q. So how is that a conflict to sell a business,**

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[5] ECF No. 58-3, p 35 of 45, lines 3-6. Hutchings upon hire forms dated 8/7/2009 which he was asked to sign as a formality from HR with a promise to receive the Emp. Handbook, which was never proffered. ECF No. 58-1, Ex. 1 to Ex. A.

[6] ECF No. 74-1, Ex. 1, p 3 of 5.

[7] ECF No. 58-3, p 16 of 45, lines 1-25, and then the full answer at line 25 is cut off but lines 7-8 explain that Hutchings thought his license was still active and hanging with Century 21. Lines 17-19 explain that Hutchings did not take necessary steps to make his license inactive.

[8] NRS 645.0075

if you don't have a license? A. I don't know how that would be a conflict.[9] There is no such thing as a commercial real estate license as it does not exist, so any licensed real estate agent could sell commercial real estate but the CU's real estate focus was almost entirely on residential sales. There is, however, a Business Broker's Permit, which authorizes someone duly licensed to sell a business under commercial real estate. Someone having that experience, as testified by, a female, Barbara Higgins,[10] that she does "not have such experience or license." Hutchings also erroneously thought that **his** license was inactive when he was not actively selling, both agents were wrong as it takes certain steps, in order, to make one's license inactive. At (ECF No. 58-3, page 16 of 45, lines 17-19), **Q. Have you ever notified them** (Nevada Real Estate Division) **that you were going inactive on your license? A. No**. The active licensee can sell when and where he/she chooses to and is an independent contractor; only being employed upon having a brokerage agreement in place with a principal.[11] It is when agency begins, whether express or written,[12] that constitutes when an agent is hired, or acts on behalf of a principal, in a real estate transaction, that the agent is actually employed and not until then.[13]

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[9] ECF No. 67-5 p 9 of 12 on page 28 lines 10-15.

[10] ECF No. 67-9 Ex 9, p 3 of 4, lines 8-12.

[11] NRS 645.0045

[12] NRS 645.005

[13] NRS 645.005

If a license is with a broker, then that license is active. When changing a license to inactive status the broker and licensee would fill out and sign a form 505 and turn it into the Nevada Real Estate Division. In the absence of taking these steps that licensee's license is --- active. Hutchings and Higgins both had active real estate licenses and continue to have active licenses today. Hutchings selling only commercial and businesses[14] while Higgins sells residential real estate. Hutchings contends that as an independent contractor he was not employed by his real estate broker, that only when and during the time there was a brokerage agreement[15] either implied or signed by his client, was he employed, by his client, therefore Hutchings performed all his real estate duties[16] during the time he was an (insurance agent, starting in July, 2011) and while off duty and away from the premises of the CU. Within (ECF No. 58-1, Ex. 3 to Ex. A, p 29) is outlined in the One Nevada Credit Union's Employee Handbook, the following:

B. Conflict of Interest

> Employees are expected to devote their best efforts to the interests of the Credit Union and the conduct of its affairs. The Credit Union recognizes

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[14] Hutchings will turn in to the Court copies of the offers and acceptances of the real estate deals he completed in 2011, if allowed by the Clerk of the Court to show that there was only commercial and business sales completed.

[15] NRS 645.005

[16] NRS 645.005

> the right of employees to engage in activities outside of their employment which are of a private nature and unrelated to our business.
>
> However, employees are to avoid any situations which might, constitute a conflict of interest, or in the judgment of the Credit Union the appearance of a conflict of interest such as employment or financial interest in the business of a competitor, supplier, or member. You are required to immediately contact your supervisor or the Senior Vice President Human Resources of you have questions regarding a possible conflict of interest of the appearance of a conflict of interest.

Both Hutchings and Higgins are Independent Contractors according to Senate Bill 224 (SB 224)[17] and according to NRS 645 in Nevada. The sole reason that Hutchings lost his employment with One Nevada is because he refused to stop selling real estate. (Id at Ex. 3 to Ex A, 10-11). The CU's attorney, Dornak, needed to rebut Hutchings proof that, Higgins, has an active real estate license by applying rules that require proper authentication of documents.[18] In Hutchings "Supplemental Filing in Support of Opposition to Motion for Summary Judgment" (ECF No. 74) Hutchings former attorney, Gilkey, listed at (id. at ¶ 1-2) **1. Authentication of Evidence**. Citing Federal Rules of Evidence (FRE) 902, that documents require no extrinsic evidence of authenticity in order to be admitted. Gilkey could have been more thorough by citing under Rule 902(5), extrinsic evidence of authenticity is not required for "publication[s] purporting to be issued by

[17] Link found at https://www.leg.state.nv.us/Session/78th2015/Bills/SB/SB224_EN.pdf.

[18] ECF No. 73 p 2 of 15, lines 20,21 although most were considered by Judge Dorsey and Dornak himself when parts of documents were from his client or relevant to their case.

a public authority." Under this rule, "a proponent of ESI could use the URL, date, and/or official title on a printed Web page to show that the information was from a public authority's website, and therefore, self-authenticating," according to Williams v. Long, 585 F. Supp. 2d 679, 689 (D. Md. 2008). In this case she could have shown, https://red.prod.secure.nv.gov/Lookup/PrintLicenseDetails.aspx?cred=167733&contact=161697., or the website www.red.state.nv.us. Gilkey attempted to define what is "Inactive" status with Higgins license but a more thorough definition is, "A license that is current (renewed), unsuspended or unrevoked, and is not affiliated with a broker, developer, or real estate company is an "Inactive" license. The inactive status does not allow the individual to conduct any real estate transactions until the license is placed on "active" status." NAC 645.040. Certain steps are required by the, real estate division, in order for one to place his/her license on "Inactive Status," "The Division requires the original Salesperson and Broker-Salesperson license to be returned with a signed termination notice Form 505 from the broker. The Division must receive all original licenses within 10 days of termination or disassociation date." Found at, http://red.nv.gov/Content/Real_Estate/Inactive_Licenses/. Higgins license was never placed as inactive as evidenced by (ECF No. 74-1, Ex. 1, page 2) authenticated by, https://elicenseb.irondata.com/nvdbi/production/intranet/contLicenseHistoryView

NV DBI... 6/6/2016. A licensee or attorney or agent cannot simply "say" or "think" that their license is inactive because they are not actively participating in a "brokerage agreement" and "agency" with

a client/principal at a particular moment in time. See NRS 645.005. With an active license they are not "avoiding any situations which might constitute a conflict of interest, or the appearance thereof." (ECF No. 58-1, Ex. 3 to A,¶ 2). Furthermore they would be investing money whether small or large in the business of the broker. ECF 74-1,Ex 1 p. 2, Is merely the same information about Higgins license; only a history of the same showing which Broker[s] she had her license placed with and the times and dates of activity, thus if a license is placed with a Broker, then that license is active. In her deposition and exam by Gilkey, (ECF 74-2 p 5, page 10 line 8-11), Higgins, was asked, Q. Did One Nevada ever ask you to give up your license? A. No, but they did ask me if I was active, and I said **no**. This is a **very critical juncture** in the case because Higgins has the potential to sell real estate by, "procuring cause," by creating in the mind of a principal/client a certain amount of interest in buying residential real estate, then referring it to a broker or agent who completes the transaction, and upon closing of that transaction thereby receives a referral fee. Higgins may not have known or may have been instructed to say, that not actively being the procuring cause or referring real estate sales, in order, to receive a fee requires that one's license be active. For if it were inactive she could not be paid a fee because the money has to go to the broker who then distributes any monies to the agent. At (ECF 74-2, p 5, page 11, lines 14-25, page 12, lines 1-3),

> **Q. Why would you view it as a conflict of interest? A. "Because my loyalty is to my employer. And I would need to refer to the credit union, okay, any referral or any real estate business, but I hang my license with a different broker just to keep my license as a licensee, and I have to go through my broker for any type of income or commission from real estate. So as an employee giving a referral to the credit union, they have an incentive referral fee, but I couldn't collect that because it has to go to my broker. So I'm stuck in the middle."**

For anyone to know this, brings into question whether they truly think their license is inactive. She knew that it was required to hang her license with a broker, she knew in order to be paid she needs to have her license with a broker, and that her loyalty was to her (now former) broker,(current employer) One Nevada Credit Union, and what was Community Realty Services. Now comes Hutchings, who was told by his former direct supervisor, John Chatwin, that, as long as, he worked outside of CU hours, the CU was ok with him working selling real estate.[19] Hutchings did not sell any real estate until the new incentive plan "CISN 2.0" was put into place on or about, July 2011, with the new Compensation Structure being applied, June, 21, 2011. Mr. Dornak, can call Hutchings' affidavit a sham, and rambling to only conclude that Hutchings is asking the Court to or the CU to be the attorney with no basis in law, but it is simply a document that Hutchings was

[19] Letter from, Chatwin that was proffered to the court but perhaps omitted by Dornak as Ex. C.

instructed by his attorney to write down, "what he knew happened before his firing." It was taken from his notes on what occurred and a timeline of the same.[20] If it is a sham and rambling statement, then Dornak cannot use parts of it to claim that the affidavit disagrees with his own testimony, especially when Dornak did not include all of the deposition or any of Hutchings's wife's, Isabel Hutchings, testimony.[21] When a new supervisor began working for the CU, Alan Chang, Hutchings was continually being harassed at his desk while attempting to complete work for the CU's insurance customers asking Hutchings when he was going to give up his real estate license.[22] Chang asked continually for at least a month stating that Hutchings needed approval in writing, in order, to sell real estate and that the company Handbook required it.[23] Hutchings asked Chang several times, during that month, for approval stating that he was a top agent and that he needed approval in writing, to which Chang ignored or merely left and perhaps said he would ask.[24] Hutchings was asked to give up his real estate license and wind down his practice. Hutchings refused to give up his license and explained to Chang that he was selling businesses and commercial real estate which the CU did not sell. See

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[20] To be logged by the Clerk of the Court if approved to be logged.

[21] Isabel Hutchings testimony not admitted by Dornak.

[22] ECF No. 73-1, pp 11, 12 of 41

[23] ECF No. 73-1, pp 12, 13 of 41

[24] ECF No. 73-1 pp 14, 1 of 41

(ECF 73-1, p 18 of 41, lines 1-8). Hutchings tried to explain to, Dornak, that he did not see selling businesses as a conflict but was cut off mid- sentence. A. No, because --. Q...

Hutchings does not ignore the CU's point of view that he could have tried to reason with the CU but considering the treatment he was receiving from management there was simply no chance of recovery.[25] Higgins had her real estate license before the CU had a real estate arm and subsequently placed/hung her license there (with the CU) when they did get this subsidiary. Each employee had an interest in the business of a competitor of the CU (if the court considers a business broker a competitor). In (ECF No. 58, p 22 of 24, lines 8-15) we see, ... "Unlike Hutchings, Higgins placed her license in inactive status to keep her employment with One Nevada." This is only proof **IF** the court does not allow using Federal Rules of Evidence to authenticate Website Content, chiefly, Rule 902(5). If the evidence, (is) allowed, to be authenticated by this Federal Rule, then there was a terrible omission by the Circuit Court Judge, Dorsey, because, Hutchings, never said that his license was on inactive status neither did the CU prove that he put his license on inactive status.[26] Hutchings may have, assumed, that when he was not selling real estate that his license was inactive when, in truth, it was not inactive at all.

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[25] New exhibits, in hopes of being logged with the Clerk of the Court, that existed from mid to late 2012 and 2011, showing emails back and forth from Hutchings to Chang, Hutchings to Wible, and Hutchings to Traficanti.

[26] ECF No. 58-3, page 16 of 45, lines 17-19

Because the opposing attorney, Dornak, and the judge, Dorsey, said these things that are not of record and therefore asking that Hutchings was required to show form of proof, **they are negating the plaintiff's ultimate burden of persuasion that always remains with the plaintiff**, See Hicks, 509 U.S. at 511. Judge Dorsey considered exhibit 4, (ECF No. 76 p 7 of 11, footnote 50), the screenshot from the Nevada Real Estate Division's website showing Hutchings's active real estate licenses because Hutchings's licenses are a matter of public record. Hutchings does not understand, though, because Higgins active license printout of the same was proffered to the court at the very same time as was Hutchings printout. This action may be collusion between attorneys? The CU could not possibly assume that the earnings that Hutchings received for selling something that their customers did not hire the CU to sell or purchase should have been theirs to claim. Hutchings was hired to sell commercial real estate by his very (own clients) whom were not members of One Nevada Credit Union. The fact remains that the 2nd job that each has is not a "set hours" job[27] that could conflict with performance of their duties as employees of the CU. Each has years of experience so there was no learning curve that would cost hours for learning/training other than continuous education required by the state for which each completed on his or her own time separate from CU hours. Higgins testified that she wanted to keep her license too

[27] https://www.leg.state.nv.us/Session/78th2015/Bills/SB/SB224_EN.pdf

because it was "really difficult to get it."[28] Hutchings was given disparate treatment and Higgins was not. Silvia Garcia, was given approval by her manager to work as a "Food Runner" at a local casino which 2nd job required set hours and which job requires strenuous physical labor. Only the CU could determine if this type of work was a conflict with her performance as a One Nevada employee.[29]

The CU gave Hutchings an ultimatum to choose between a career as an insurance agent with them or leave to pursue his career as a real estate agent.[30] This would appear to be a violation of NRS 613.333 (1.)(b) "Discharge or otherwise discriminate against an employee ...because the employee engages in the lawful use in this state of **any product** outside the premises of the employer during the employee's nonworking hours, if that use does not adversely affect the employee's ability to perform his or her job or the safety of other employees."

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[28] ECF No. 74-2 p 5 of 6 line 17-19

[29] ECF No. 58-6, p 4, lines 18 -25 & p 5 line 1

[30] ECF No. 58, p 2, ¶ 2

C. Facially Neutral Practices

The new pay system of points instead of a percentage of new or renewal business, CISN 2.0, was one of the facially neutral practices that, in fact, are "discriminatory in operation."[31]

A plaintiff need not rebut all of defendant's reasons but must instead show that defendant's decision was based on a prohibited factor. See Monroe v. Children's Home Association, 128 F.3d 591, 593 (7th Cir. 1997).

Previous to being fired, Hutchings asked 3 executives of the company, through a series of emails,[32] Chris Wible, CFP, Financial Advisor, VP Member Investments & Insurance Services, and Michael Traficanti, Senior VP of Human Resources, and Alan Chang, VP of Insurance Services, if his Human Resources record could be changed to reflect his being accused of filling out his renewal worksheet with already cancelled policies on it (this being the deflection of blame) for shorting Hutchings on his February 2011, renewals as was (complained of to the Nevada Department of Labor).[33] Hutchings pleaded with these senior officers of the company to strike this from his record since he and the other insurance agents were asked to fill out these pay sheets and to, not list in them, any customers who were

[31] ECF No. 58-5, pp 2-4, Ex. 5 to Ex. B

[32] Emails to be logged if allowed by the Clerk of the Court.

[33] Emails to be logged if allowed by the Clerk of the Court.

showing being in cancel status on the particular date the sheet was filled out.[34] Hutchings was either completely ignored or not given any answer or that the company had to do an audit and that they (the CU) were no longer going to address the situation again.[35] **Hutchings had absolutely no hope of asking for anything in writing as he knew it would be ignored or denied.[36]** Hutchings was additionally told in writing that his responses would be included within his employment record, by, Wible, but upon purchase of his human resources record, there was no copy of such email letter in the package.[37] Additionally Hutchings feels he made suggestions on how the CU could improve such a situation with the CU adopting a pro rata system for early cancellations of insurance policies which may have been included in such email/letter.

D. Hutchings Performance and CU Standards

In 2011, the CU had completely changed its pay of commissions to its' insurance agents to what was called CISN 2.0.[38] [39] So Wible asked one of the carriers (insurance companies we used) representatives what he did once so Wible decided to

[34] Emails to be logged if allowed by the Clerk of the Court.

[35] Emails to be logged if allowed by the Clerk of the Court.

[36] Emails to be logged if allowed by the Clerk of the Court.

[37] Emails to be logged if allowed by the Clerk of the Court.

[38] ECF No. 58-5 Ex 5 to B

[39] ECF No. 58-4 pp 28, 29 of 43, lines 7-25 and 1-20.

create CISN 2.0 from an unknown sales rep. This document outlined a pay scale not consistent with what was previously paid, (for years) to the agents which was a percentage basis paid by amount of premium [which all insurance carriers (companies) pay their agents]. Hutchings contends that herein lies the "neutral rule that treats everyone equally in form, but has disadvantageous effect on some people of a protected characteristic compared to others." See, Watson v. Fort Worth Bank & Trust, 487 U.S. 977 at 986. Whereupon basing job performance on a points system rather than dollars of commission can give rise to an assessment of job performance, of an agent,[40] as completely arbitrary and one sided. Hutchings was judged within his employment evaluation by, Wible, to be deemed "Needs Improvement," with condemnatory remarks so ambiguous that a reasonable juror could agree, that this form of evaluation was discriminatory in its intent and a motive to lower Hutchings status as a Top Producer to a producer who Needs Improvement.[41] Each paragraph included sentences that contradicted the next and were filled with nebulous adverbs of sometimes, often times, most of the time, in "Good Order," needs to show a stronger commitment, could make, generally, Duane has achieved **some** of his goals but needs improvement in this area, regularly, at

[40] ECF No. 58-5 Ex 5 to B

[41] Hutchings thought his employee evaluation by, Wible, was entered but may have been deleted by Dornak. Hutchings can redeliver this to the Clerk to be logged if so approved.

times, not always, more collaborative, adequately, occasionally, not always and usually; which perhaps may lead anyone, not to mention a reasonable juror, to believe that this is not a true and accurate assessment. Upon the initial change agents were assigned to 1 to 4 branch areas of the state of Nevada, wherein, previously, agents were able to receive leads from any of the branches within the state. At the change, Hutchings, was given, 55 N. Maryland Pkw. Branch, in Downtown, Las Vegas, NV, the Sunrise Branch and Sunrise Teller, on the east portion of the valley, and Nellis Airforce Base.[42] Most of these areas include zip codes wherein insurance companies rate automobile insurance at a conspicuously high difference than in more affluent areas and zip codes, based upon factors including insurance company loss experience, population property ownership, individual credit, and mix of population automobile type. Hutchings speaks Spanish and Portuguese so perhaps these areas of town were heavily populated by Hispanics and most were included in low income areas which were unmistakably clientele, which were renters or non-owners of property, did not own more expensive vehicles, and which were all categories of clients that if insured at all, were searching for the most basic of insurance state minimums of coverage.[43] Standard and preferred insurance companies give best rates to (and therefore wets the marketing appetite

[42] Copy of original CISN 2.0 disseminated to all agents, dated 6/21/2011, in which Hutchings wrote down his and other agent's newly assigned territories.

[43] Economic geo-graphics of areas spoken of illustrating what Hutchings describes to be logged if approved by the Clerk of this Court.

of those companies) in favor of insureds who exhibit, through a mixture of certain criterion including the client's personal credit/insurance history rating, claims history of the zip code area where an insured resides, an insured's claims history, a claims history of the insureds residence, whether or not there is an alarm system or is in a gated community or if there is 24 hour monitored security, the value and or safety history of certain makes and models of vehicles, & etc.[44] Substandard or "high risk" insurance companies are better suited to offer coverage to a lower or challenged economic region. Having been placed within the areas of town Hutchings was placed, further accentuated the derogatory nature of CISN 2.0, notably against Hutchings. This was fine with Hutchings but lent itself to a struggle to meet the minimum new standard of 25 unit points put into place by the CU. Notwithstanding the nebulous anecdotal employment evaluation, this may have led to his being assessed as "Needs Improvement," as, Wible, expressed that, Hutchings, needed to avoid insuring customers who came to him having the state minimum in liability coverage of $15,000/$30,000/$10,000 or 15/30/10 and that he should give everyone much higher coverage such as what the insurance companies prefer, as they are, considered a better risk of say $100,000/$300,000/$50,000 or 100/300/50 and **to put himself in their shoes.**[45] Absolutely this makes sense, on the surface, but these are the CU customers who were referred by the branch

[44] Economic geo-graphics of areas spoken of illustrating what Hutchings describes to be logged if approved by the Clerk of this Court.

[45] Economic geo-graphics of areas spoken of illustrating what Hutchings describes to be logged if approved by the Clerk of this Court.

Financial Services Representatives to, Hutchings, with a promise of perhaps saving them money on a quote for car insurance, who have these certain economic limitations, and who are certainly **not** going to change insurance coverage to what agent, Hutchings, was offering by paying more money.

Hutchings was given the "Exceeds Standards" for his outstanding hard work performed in 2010.[46] Hutchings believes his talents and influence (before CISN 2.0) was rewarded when he had access to all branches (as all agents had) within the state and credit union and was able to compete for a broad base of clientele which was now limited to a very narrow base.[47] In addition, instead of being judged by the amount of premium sold he was being judged by a unit/points system of which appeared to him as quite biased.[48] Please see the enclosed forms not previously submitted within this case but were proffered to Hutchings' former attorney, Althea Gilkey, which form an important part of proof that, Hutchings, was performing well above any standards before and during CISN 2.0.[49] The forms were given out to all agents, from Chang, as a snapshot of their individual production and policy count. In addition, Wible, gives an account of agent's income within his testimony when he

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[46] Hutchings thought his employee evaluation by, Chatwin, was entered but may have been deleted by Dornak. Hutchings can redeliver this to the Clerk to be logged if so approved.

[47] Email to be logged if approved of by Clerk of the Court.

[48] CISN 2.0 at ECF No. 58-5, Ex. 5 to B, pp 2,3 of 41, (some portions perhaps purposely missing).

[49] Forms to be turned in to be logged if approved by Clerk of Court.

says, "Hutchings and Stephens were earning high $40s to $50k while others were at $30k range.[50]

E. Mixed Motives

There was never an accounting structure in place for early cancellation of any insurance policy. Hence within the new CISN 2.0 and revised CISN 2.2 there is the warning to agents "Canceled policies will be monitored and MAY be reversed pro rata."[51] As insurance agents, before CISN 2.0, we accepted a base pay of $17.31 per hour plus benefits and in exchange, if you will, we agreed, (although there was never a written contract for such), leaving the door open for the CU to change how we were paid at will, and were always paid for the 1st year only for policies that were renewing. Some automobile insurance carriers offered twelve-month policies while others offered only 6 month policies. The agents tended to lean toward writing a twelve-month policy in lieu of a 6 month policy <u>since agents were not allowed to send in a renewal of a policy that was a 6 month renewal</u>. Since agents were never subject to cancellations by pro rata accounting, should they have ever been subject to forfeiture of their 6 month renewal commissions? This was such an important question that when Hutchings received an email from, Wible, dated,

[50] ECF No. 58-4 pp 26, 27 of 43, lines 20-25 and 1-4.

[51] CISN 2.0 at ECF No. 58-5, Ex. 5 to B, p 2.

September 16, 2011,[52] he felt cheated the rest of his commission principally whereon some policies did not count because they were not in "Good Order" a term that was seen by agents as non-descriptive to be possibly used by the defendant to short it's agents. Wible contends within the letter that Hutchings never brought to his attention that he had a grievance - but Hutchings and Stephens contended that they did, orally. Hutchings decided to go to the Nevada Department of Labor (DOL) and filed a complaint for what he had previously earned in commissions.

Hutchings received at his home address, a letter from the State of Nevada, Department of Business & Industry, Office of The Labor Commissioner,[53] dated July 25, 2012, wherein the DOL did not agree with the CU and assessed penalties.[54] Hutchings did not deny having received the letters and did not deny having not received his full commissions due him. Hutchings also did not receive any correspondence from the DOL that money was no longer going to be awarded him, until long after his firing and not upon, September 20, 2012, as Dornak purports.[55]

Hutchings again asked by email to, Traficanti, to reason with him concerning his being accused of submitting renewals that were said to have been cancelled (as this

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[52] Email letter to be logged if approved by Clerk of this Court.

[53] Letter from the Nevada Department of Business and Industry, Labor Department, to be logged if approved by the Clerk of this Court.

[54] Letter from the Nevada Department of Business and Industry, Labor Department, to be logged if approved by the Clerk of this Court.

[55] ECF No. 59-2, Ex. 9 to Ex. A.

was the rebuttal to the DOL by the CU for Hutchings wage/commission claim). Hutchings said to Traficanti, that he would not pursue the State of Nevada complaint in exchange for his record to be purged of any wrong doing in submittal of renewals being in cancellation status the date he filled out his pay sheet.[56] The email is dated, September 19, 2012. Traficanti did not respond. Hutchings had already asked Wible, who had already been accusatory in several emails and within Hutchings's evaluation concerning the matter. See Ex 12, ¶ 3, Stated on the New Compensation Structure sheet, it stated that..."For NEW Policies Written, "Renewal" of 2nd 6 months of policy DOES NOT count." So based on the written format, technically nothing is owed on such renewals. I have given ½ unit count per policy on the renewal and doing so technically overstates what is actually owed. Then, he goes on to say how, Hutchings, complained to the DOL without first asking or saying that if there was a question, in paragraph 4, "Why you did not call or try to contact me or anyone else in the "chain of command" to explain your dissatisfaction before going to the labor Office puzzles me. It is this type of mentality of the use of "chain of command" and the fact that Hutchings' picture was disseminated the day after being fired to the employees at the Maryland Pkw. Branch to contact security or call 911 immediately that was a direct attempt to prevent Hutchings from going back to try to ask for his job back and is only available within discrimination for a known threat of the security of The United

[56] Email letter to be logged if approved by Clerk of this Court.

States of America.[57] Wible, and Alan Chang, did not respond either when asked on August 29, 2012 about Hutchings' human resources record.[58] Hutchings did not ever receive any correspondence from the DOL, only to hear from, Traficanti, during the Early Neutral Conference hearing[59] that the DOL had sent an email to Traficanti, dated November 9, 2012, that the case(s) was closed.[60] Traficanti, may have taken Hutchings' email dated September 19, 2012, telling him that Hutchings said he would drop the pursuit of the complaint with the State of Nevada (DOL complaint) submit it to the State, receive the email that the case was closed November 9, 2012,[61] then not reply to Hutchings or tell anyone until after Hutchings was fired? Through several meetings with HR and managers Chang, Traficanti, and Wible and finally a meeting Hutchings was asked to go to with the same managers, but this time with Parrish; Hutchings figured his time was short with the company also, stating the same, the day before the meeting.[62]

In hind sight, this complaint was the paramount motive (although it appears there are mixed motives), See 42 U.S.C. 2000e-5(g)(2)(B)(i) (overruling in part Price-Waterhouse

[57] ECF No. 17 pp 2-3 of 3. and Title VII of the Civil Rights Act of 1964

[58] Email to be logged if allowed by the Clerk of the Court.

[59] Early Neutral Conf. Hearing held April 21, 2014.

[60] ECF No. 58-2 p 24 of 30, Ex. 9 to Ex. A.

[61] Email to be logged if allowed by the Clerk of the Court.

[62] Series of emails from Chang to Hutchings to be logged if approved by Clerk of the Court.

v. Hopkins, 490 U.S. 228 (1989)). For the CU to fire Hutchings, in addition, to the fact that it added to the bottom line of the CU and its' income statement when both Hutchings and Stephens were fired freeing up $6,000.00 per month plus benefits. There had to be a reason for their pretext and that reason was Hutchings actually selling real estate with his license while employed as an insurance agent, in conflict, because he now was not performing according to the new "CISN 2.0" standards. Hutchings contends that CISN 2.0, his evaluation by, Wible, the fact that a woman is allowed to continue to hold an active real estate license and has the opportunity to sell a conflicting product of residential real estate, and his firing, with no real financial reason other than to bolster the bottom line of the company, are all discriminatory actions. See, Marshall v. American Hospital Association, 157 F.3d 520 (7th Cir. 1998). After all Hutchings was the top producer[63] and perhaps that did not sit well with certain personalities within the management of the company.

F. Business Necessity

One Nevada Credit Union sited its continued struggle with its wholly owned subsidiary, One Nevada Insurance Services, in making a profit.[64] **Was there truly a "business necessity?"** While credit unions hold a non-profit status. There was a profit within the insurance unit before the firings according to testimony of, Chris

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[63] Documents from Chang showing Hutchings production when compared with the other agents, to be logged if allowed by the Clerk.

[64] ECF No. 58-4 pp 25-27 of 43, lines 9-25, 1-25, and 1-7, this is a very ambiguous answer of how much was truly being lost by the insurance unit.

Wible.[65] In, Paul Parrish's, testimony[66] the question is asked – Q. So did you hire Mr. Chang to come in and fix it? (the insurance department as it was losing money). Answer – A. "We hired Mr. Chang to come in and make whatever changes were necessary to try to get the company turned around, because it was pretty much on its last leg."[67] A reasonable fact-finder could conclude that the new manager could make changes including firing of agents to bolster the bottom-line of the income statement or profit & loss statement of the insurance unit/company. The CU is a very financially healthy credit union as a whole,[68] which also collected some of the highest fees for any credit union.[69] In addition, to the insurance unit making a profit before the firing, Hutchings received a bonus from the CU stating "Dear Duane: Thank You! Included within your pay this pay period is a supplemental bonus in the amount of $936.12."[70] "While the local recession continues to persist, the Credit Union's financial performance has begun to show signs of gradual, slow

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[65] This was said by Wible but omitted by Attorney Dornak, Hutchings was still working at One Nevada and witnessed and attended the luncheon put on by One Nevada due to the insurance unit having earned a profit.

[66] ECF No. 58-4, Ex 4 to Ex B, p 40 of 43, lines 7-12.

[67] ECF No. 58-4, Ex 4 to Ex B, p 40 of 43, lines 7-12.

[68] Website article to be logged if allowed by the Clerk of the Court.

[69] Website article to be logged if allowed by the Clerk of the Court.

[70] Official letter to Duane Hutchings from One Nevada CU, to be logged if allowed by the Clerk of the Court.

improvement." "Accordingly, we wanted to take this opportunity to once again thank you for your ongoing commitment, hard work, and sacrifice." "In the meantime, we hope this year's one-time bonus conveys appreciation for your teamwork and patience." "As you recall, earlier this year, the Credit Union paid a similar bonus." "Added together, this one-time bonus is equal to 4% of your annual base pay, or an additional $1,440.19 in compensation received during 2011." "Sincerely, Brad and the Senior Management Team." (The team would, of course, include, Paul Parrish, Chris Wible, and Michael Traficanti.) The letter highlights, "The local economy continues to remain quite fragile, and the Credit Union's future earnings depend in large part upon local economic developments." **Hutchings received this bonus not because he "Needs Improvement," but because he, was judged as, exhibiting "teamwork and patience" and because of his "commitment, hard work and sacrifice."** The credit union depended upon the economy as there continued to be lingering effects of the Great Recession and Unemployment and Mortgage Crisis in Las Vegas, Nevada. Even with the aforementioned the CU was incredibly stable and in very good financial condition as an entire company.[71] Hutchings holds that there was truly "No Business Necessity" to create the "CISN 2.0" to completely deflate the prospect of continued employment promise and any optimism of the insurance unit and its' agents to either make money or have any claim on any ownership share on the

[71] Website article to be logged if allowed by the Clerk of the Court.

books of business of the agents. The practice was so demoralizing that some agents left just before, some during, and some after, "CISN 2.0," to where the only agent left out of the 7 licensed insurance sales agents during and after Hutchings tenure, was Karla Rivera. 4 males left or were forced out and 2 females left or were forced out. Soon after Hutchings was fired the CU had a difficult time hiring and retaining agents, as Hutchings was told by insurance agents who remained, but would soon leave, and now the CU no longer applies CISN 2.0 and that the CU now, pays renewals and some percentage share of the books of business of the agents. All, Nevada and any other states', independent insurance agencies known to Hutchings pay their agents according to a percentage of income derived from a percentage of insurance business premium.[72]

REASONS FOR GRANTING THE WRIT Under Title VII, a disparate-treatment plaintiff must establish "that the defendant had a discriminatory intent or motive" for taking a job-related action.[73] This doctrine was read into the act in, Griggs v. Duke Power Co., which interpreted the Act to prohibit, in some cases, employers' facially neutral practices that, in fact, are "discriminatory in operation." The Griggs Court stated that the "touchstone" for disparate-impact liability is the lack of "business necessity": "If an employment practice which operates to exclude (males

[72] ECF No. 58-4 pp 23, 24 of 43, lines 11-25 and 1-23

[73] Watson v. Fort Worth Bank & Trust, 487 U.S. 977 at 986.

or minorities) cannot be shown to be related to job performance, the practice is prohibited." [74][75]

Twenty years after Griggs, the Civil Rights Act of 1991 was enacted. The Act included a provision codifying the prohibition on disparate-impact discrimination. Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[76] Hutchings needed to keep his insurance job in order to attempt to make ends meet and when CISN 2.0 was instituted he had no choice but to supplement his income by working in real estate in addition to keeping his health insurance for his ailing child. Hutchings asked for relief and pleaded with his manager Chang to receive approval in writing to sell commercial real estate as he was a top producer in the company and it did not affect his work as an insurance agent since he already had many years of experience, the company did not sell any commercial real estate, and he had a flexible timeline while working in real estate. The CU knew that a female had an active real estate license, as well, yet did not ask her to give up her real estate license and real estate business as they did Hutchings. The writ should be granted because not only Hutchings has been damaged but other cases have yielded

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[74] Watson v. Fort Worth Bank & Trust, 487 U.S. at 986, and at 432 (employer's burden to demonstrate that practice has "a manifest relationship to the employment in question")

[75] Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[76] 42 U.S.C. §2000e—2 (k)(1)(A)(i).

similar results to protected classes. The defendant and it's attorney and the District Judge and Circuit Judges base their judgment on the fact that Hutchings actually sold real estate and Higgins says she did not, but have overlooked the fact that being an active licensed real estate agent means that that person is an (independent contractor) by mere fact of having that license and paying for it; is in business with their broker whether by large investment or small investment it is the same.[77] This is the nexus that breaks the policy, Conflict of Interest, of the CU by their employee handbook which reads, "However, employees are to avoid any situations which might, constitute a conflict of interest, or in the judgment of the Credit Union the appearance of a conflict of interest such as employment or **financial interest** in the business of a competitor, supplier, or member." Hopefully knowing the real estate laws and licensing laws the writ will help answer conflicts or other persons/employees who have the same type of license in the future.

CONCLUSION

Higgins was similarly situated as she was licensed and active as an independent contractor as was Hutchings. The employer's burden is one of production, not persuasion; the ultimate burden of persuasion always remains with the plaintiff. As held at, Hicks, 509 U.S. at 511. The employer **did not** show any evidence that

[77] SB 224, The agent must contribute a substantial investment of capital in the business of the broker including: I. Purchase and lease of ordinary tools, II. Obtaining a license or permission from the principal to access any work space, and III. Leasing any work space from the broker.

Higgins **did not** indeed sell any real estate but merely to state so. The CU managers completed their goal of ridding themselves of 2 male insurance agents whether they were "bad seeds" or because the CU needed to show better profit or their ages or they wanted to retaliate because of the agent's complaint to the DOL, in any case, they discriminated by using the tool of CISN 2.0. See, McDonnell Douglas, 411 U.S. at 802-04: Burdine, 450 U.S. at 252-56. CU management had been planning to make a change by getting rid of some agents and they just needed to find an excuse to make the action, since job performance was not a reason, then selling real estate was the reason.

APPENDIX

A. **Order Granting Motion for Summary Judgment 11 pages plus 1 page of Decision. By Jennifer A. Dorsey, District Judge.**

B. **Affirmed Decision by The Honorable James S. Gwyn, United States District Judge for the Northern District of Ohio. Before: Ikuta and Hurwitz, Circuit Judges, and Gwin. 8 pages.**

C. **Rehearing en banc is denied, 2 pages.**

Dated: March 21, 2018

Duane Hutchings

Duane Hutchings

Attorney Pro Se

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing with the United States Postal Service, certified, on March 21, 2018. To the attorneys of record to their mailing address:

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