

04-508 BURTON V. BUCKNER CHILDREN & FAMILY SERVICES INC.

QUESTIONS PRESENTED

1. In a Rule 56 summary judgment setting involving an employment discrimination case, is it improper for an appellate or trial court to substitute its opinion for that of the ultimate factfinder and conclude on its own volition that inconsistent and conflicting testimony by the movant-employer's representatives reference "two completely separate time periods that they were discussing", when one witness maintained he did not have ongoing conversations with regarding Burton's performance and the other manager who allegedly did not receive any call stated he did, and therefore an equally plausible conclusion could be drawn, i.e., that one or all of the employer's witnesses were not worthy of belief?

2. In an employment discrimination case, is it error to grant a Rule 56 summary judgment motion when the summary judgment evidence demonstrates equally plausible factual inferences from proven facts, being either discrimination or no discrimination, especially when the employer's affiants have demonstrated inconsistent positions regarding the stated reason for discharge and the affidavit assertions are belied by the employer's affiant's handwritten notes made earlier in time, thereby at least establishing the requisite suspicion of mendacity?

3. Does the Fifth Circuit's opinion in *Burton* which resolves credibility issues in favor of the movant-employer (by explaining the inconsistencies away as unsupported by the record [there was support] or so trivial as to be immaterial), ignore this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) which: (1) clearly places credibility determinations within the province of the factfinder; (2) permits the factfinder to infer the ultimate finding of unlawful discrimination based on the *prima facie* case combined with sufficient evidence of the falsity of the stated reason for the employment action and (3) requires no additional independent evidence of discrimination?

4. Do the conflicting opinions of the Fifth Circuit regarding the plaintiff's burden in the summary judgment setting involving an employment discrimination case undermine the principle of *stare decisis* to the point it deprives litigants of the ability to accurately consider the merits of liability?

5. Whether the Trial Court and the Appellate Court in a FMLA retaliation/discrimination case can characterize direct evidence of improper motive as trivial or non-probative, particularly when it is authored by the same individuals who contend that the employee was discharged for performance issues notwithstanding the direct evidence of improper motive?

6. Whether this Court's opinion in *Desert Palace Inc. v. Costa* places the same burden on an employer provided by 29 C.F.R. § 825.220(c) which, when coupled with unrefuted evidence of mixed motive, obliges the employer to prove the same decision would have been made without the improper influence, which, when coupled with direct evidence always renders the issue one of a question of fact?

7. Whether a Plaintiff who brings a FMLA retaliation case and presents direct evidence of improper motive in the summary judgment setting is entitled to a denial of the motion for summary judgment in light of this Court's rulings in *Desert Palace* and *Reeves v. Sanderson Plumbing Products, Inc.*, and 29 C.F.R. § 825.220(c)?

8. Whether the Fifth Circuit comports with this Court's rulings in *Reeves v. Sanderson Plumbing Products, Inc.*, *Anderson v. Liberty Lobby, Inc.*, and *Lytle v. Household Manufacturing, Inc.*, inasmuch as in this case and perhaps many others, the Fifth Circuit makes credibility determinations, weighs evidence, performs functions of the factfinder and when weighing the evidence concludes the evidence is nonexistent, trivial and non-probative without any explanation and not referencing any of the evidence offered in opposition, which in this case consisted of 62 pages of evidence?

9. In the summary judgment forum are the circuit courts, which reject the non-movant's evidence, required to articulate the evidence offered and the reasons for the conclusion the non-movant's evidence is so weak it could never be probative of unlawful discrimination, in other words, should the trial court and circuit court set out the evidence offered by the non-movant and state why the evidence is not material or so weak it could never raise a material issue of fact?

10. When comparator evidence is used as a form of circumstantial evidence to establish discrimination, must the comparable employee be involved in nearly identical circumstances in order for the evidence to be received and considered?