No.

IN THE
Supreme Court of the United States

SAMANTHA L. COLEMAN, PETITIONER,

v.

SCHNEIDER ELECTRIC USA, INC.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Has the *McDonnell Douglas* framework for determining workplace discrimination been fatally undermined and petitioner's right to a jury trial denied when both courts below decide every triable fact issue underlying petitioner's Title VII race, gender and retaliation claims, refusing to give her proof the probative force it deserves on summary judgment?

2. Should the Court revisit the standards for disposing of summary judgment motions in employee discrimination cases in order to prevent lower courts from weighing the evidence in piecemeal fashion instead of in its totality, making credibility determinations, finding facts and imposing on Title VII plaintiffs a more onerous burden of proof than the *McDonnell Douglas* framework demands?

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The unpublished *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit in *Samantha Coleman v. Schneider Electric USA, Inc.*, C.A. No. 18-1265, decided and filed January 9, 2019, and reported at 755 Fed. App'x 247 (4th Cir. 2019), affirming the District Court's order granting summary judgment to respondent on petitioner's claims for workplace discrimination and retaliation, is set forth in the Appendix hereto (App. 1-6).

The unpublished decision the District Court for the District of South Carolina, Anderson/ Greenwood Division, in *Samantha Coleman v. Schneider Electric USA, Inc.*, C.A. No. 8:15-2466-HMH-KFM, decided and filed February 5, 2018, and reported at 2018 WL 706333 (D. S.C. 2018), adopting the Magistrate Judge's Report and Recommendation and granting respondent's motion for summary judgment on petitioner's claims for workplace discrimination and retaliation, is set forth in the Appendix hereto (App. 7-26).

The unpublished and unreported Report and Recommendation of the Magistrate Judge for the District of South Carolina, Anderson/ Greenwood Division, in *Samantha Coleman v. Schneider Electric USA, Inc.*, C.A. No. 8:15-2466-HMH-KFM, decided and filed December 11, 2017, recommending that respondent's motion for summary judgment be granted on petitioner's workplace discrimination and retaliation claims, is set forth in the Appendix hereto (App. 27-68).

The unpublished order of the United States Court of Appeals for the Fourth Circuit in *Samantha*

Coleman v. Schneider Electric USA, Inc., C.A. No. 18-1265, filed February 12, 2019, denying petitioner's timely filed petition for rehearing *en banc* is set forth in the Appendix hereto (App. 69).

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit affirming the District Court's order granting summary judgment to respondent was entered on January 9, 2019; and its order denying the petitioner's timely filed petition for rehearing *en banc* was decided and filed on February 12, 2019 (App. 1-6;69).

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

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

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

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

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the

tight of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

29 U.S.C. § 206(d)(1) [The Equal Pay Act of 1963]:

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

42 U.S.C. §§ 2000e-2(a); (m) & 3 [Title VII of the Civil Rights Act of 1964, as amended]:

2. UNLAWFUL EMPLOYMENT PRACTICES

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise 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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

....

(m) An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

....

3. OTHER UNLAWFUL EMPLOYMENT PRACTICES.

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

STATEMENT

Petitioner Samantha L. Coleman ("petitioner" or "Coleman") is an African-American female who graduated from college *cum laude* in the spring of 1986 with a Bachelor's Degree in electrical engineering; and she later also earned a Master's Degree in business administration. In September of 1992, respondent Schneider Electric USA, Inc. ("respondent" or "Schneider") hired petitioner as an Electrical Drafter in its Switchboard Order Engineering Group at its facility in Seneca, South Carolina. Having performed well, respondent promoted her in 1995 to Application Engineer within this group.

In 1999, respondent transferred its switchboard production from Seneca to Columbia, South Carolina and moved its Enclosed Drives production from Columbia to Seneca. Petitioner was not included in this transfer and remained at the Seneca facility working with the Enclosed Drives Group. Lanny Sullivan ("Sullivan") became petitioner's supervisor and he assigned her to train the Group's engineers among

whom was Jim Stryker ("Stryker"). After petitioner trained Stryker, a Caucasian male, both performed the same job as Order Engineers, a job which involved the same work, skill, effort and responsibility; and they did so working under the same conditions, in the same offices and under the same supervisor until Stryker retired in 2017. But for many years Stryker, who did not have a college degree, was paid significantly more than petitioner for the same work.

With petitioner having achieved excellent results training the new Order Engineers entering the Enclosed Drives Group, Sullivan in 2002 assigned her as Training Coordinator, an assignment, however, which brought neither a promotion nor any additional pay. In 2006, Sullivan promoted petitioner to the position of Senior Application Engineer, a role where she still continued to train new Order Engineers. Respondent characterized her job performance as "exemplary." From 2011 through 2014, respondent annually rated her job performance as "exceeds requirements," i.e., well above average, and she consistently received high marks in the Professional Behavior and Attitude Category for her ability to "[c]ommunicate in a courteous and professional manner which is clear, responsible, and respectful at all times, with both verbal and written communications."

When Sullivan retired in June of 2012, the majority of his duties in the Enclosed Drives Group was distributed to both petitioner and Stryker with petitioner performing most, if not all, of the duties of this job position herself. Petitioner received a pay increase in 2012 not because of these new duties but instead as a reflection of her "previous overall performance rating," i.e., one that in 2011"exceed[ed]

requirements," a "4" on a 1-5 scale, with "5" being the best possible score.

When a job at respondent's Seneca facility becomes vacant, its internal recruiting department receives applications online from its employees seeking promotions for which they are qualified; a recruiter then works with the hiring manager for that particular job to screen applicants who, *only* if they are qualified for the job *and* would make a "good fit" in the position, are then moved to "the short list." Consistent with this protocol, on February 5, 2014, petitioner applied for the job vacancy of Customer Service Supervisor, a supervisory position for which respondent required a four-year college degree. Possessing both a Bachelor's Degree and an MBA, she met all the qualifications for this position and was moved to "the short list."

Respondent, however, failed even to interview petitioner for this job. Instead, it announced on March 5, 2014, that this posted vacancy had been "canceled" because of an "internal *promotion* to strategize and reduce base cost." (emphasis supplied). The result of this so-called "cancellation" which caused this "internal promotion" was that Jeff Marcengill, a Caucasian male who applied for the position even though he lacked a four-year college degree and was not on "the short list," was named to the position of Customer Service Supervisor.

Petitioner also applied for the position of Assembly/Fabrication Manager in early February of 2014. She met all the qualifications for this managerial position and respondent again moved her to "the short list." Once again, however, respondent failed even to interview petitioner for the position; this job vacancy remained open for months; and on June 24, 2014, respondent eventually selected Robert Ireton, a

Caucasian male, for the job with a starting annual salary of $100,000.

In April of 2014, two months before Ireton was offered the Assembly/Fabrication Manager job, petitioner met with respondent's Human Resources representative (Jeff Brown), the only HR representative at the time, to discuss her concerns about not being interviewed, much less selected, for either of these promotions, having fulfilled *all* of the qualifications for both jobs. She believed that respondent's refusal to interview her for either position was based on race and gender discrimination. Brown told petitioner that he did not want to hear her complaints and asked her to leave his office.

In July of 2014, after respondent selected Ireton for the managerial position, petitioner met with her own manager (Ted Stokes) to discuss respondent's failure to seriously consider her applications for these promotions and the race and gender discrimination to which she believed she had been subjected. Like Brown, Stokes refused to discuss the issue with her, told her to take her complaints to the HR Department and asked her to leave his office.

Faced with this refusal by respondent and its supervisory personnel to address any of her concerns about her unfair treatment, petitioner in July of 2014 filed with the EEOC a charge of employment discrimination based on race and gender against respondent. On September 29, 2014, respondent filed its Position Statement in response to petitioner's charge. Both Brown and Stokes took part in its preparation.

In October of 2014, petitioner applied for the position of Technical Trainer which was vacant at respondent's facility in Columbia, South Carolina. To obtain this promotion and the pay increase that came

with it, she was willing to uproot her family in Seneca to move to Columbia. Petitioner was particularly well suited for this job because of her twelve years of training Order Engineers in the Enclosed Drives Group in Seneca since 2002, her documented exemplary job performance there and her accumulated skills and experience with switchboard group products.

Yet despite petitioner's exceptional qualifications, respondent failed to seriously consider her for this promotion. Its hiring manager (Christopher Bready) scheduled her for just a one-hour interview and offered her no tour of the plant when typically interviews for this job level are scheduled for two to three hours and include a plant tour. Moreover, Bready told petitioner that he had already spoken to her manager at Seneca (Stokes) about her, the same manager who had already helped prepare respondent's response to her EEOC complaint.

In the following weeks, respondent failed to advise her about the status of her pending application for this promotion. Instead, in a letter of November 11, 2014, it offered her a *demotion* from her current job as Senior Application Engineer in Seneca to that of an Application Engineer at its Columbia facility. Having no desire to uproot her family for a demotion, petitioner rejected the offer. Respondent then offered her *a lateral transfer* as Senior Application Engineer at the Columbia facility and she again rejected the offer. She had no interest in taking her family across the state for a lateral transfer, much less a demotion; and she still had not heard back from respondent about the Technical Trainer promotion for which she had interviewed in October 2014.

By early 2015, petitioner still had not heard back from respondent about her application for the Technical

Trainer promotion; respondent was continuing to take applications for that position; and she had already received two unsolicited offers from respondent of a demotion or a lateral transfer to its Columbia facility. Surmising that she had once again been rejected for this promotion, petitioner hired legal counsel and on January 23, 2015, filed with the EEOC an amended charge of discrimination based upon respondent's rejection of her application for this Trainer position.

On June 18, 2015, petitioner filed this civil action against respondent in the federal district court for the District of South Carolina, Anderson/Greenwood Division. Invoking federal question (28 U.S.C. § 1331) and civil rights (28 U.S.C. § 1343(a)(3) & (4)) jurisdiction and demanding a jury trial, she claimed that respondent had unlawfully discriminated against her on account of her race and gender in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e-2(a) and (m)) and the Equal Pay Act of 1963 (29 U.S.C. § 206(d)(1)), when it denied her these serial promotions as well as equal pay for her work.

On August 15, 2015, respondent eventually hired Pankaj Potdar from outside the company to fill the Technical Trainer position. Raised in India, Potdar spoke with a heavy accent which made him difficult to understand. During his six months as Trainer, he *never* actually trained anyone and when the position was eliminated in March of 2016 as part of a reduction-in-force, he was re-assigned as an Application Engineer but with no loss salary, benefits or bonus opportunities.

On October 8, 2015, respondent finally told petitioner that she did not receive the Trainer promotion, allegedly for having "poor communication skills" which it asserted made her a poor fit for the job, even though Potdar was given this job despite his

inability to be understood. This reason first surfaced during discovery in this suit via respondent's production of a nearly unreadable e-mail, purportedly from Bready, referencing petitioner's alleged "poor communication skills."

In the aftermath of petitioner's lawsuit against it for racial, gender and pay discrimination, respondent in February of 2016 issued its annual review of petitioner's job performance for the calendar year 2015. For the *first* time during her employment with respondent, petitioner received an overall performance rating that was *less than above average*. According to her manager Stokes, petitioner was now merely "competent" in her job rather than a "performer" which would have entitled her to a pay increase of 1.8%; and he rated her as only "[p]artially on target" in the category of Professional Behavior/Attitude, the *first* time in all her years of employment with respondent that petitioner had received a rating of anything less than "meets expectations."

Despite the fact that she had a 0% error rate and had *no* Corrective Action Reports about her work, Stokes now thought despite these objective criteria that she was only "on target" rather than "exceeds target." Moreover, even though her Service record was *perfect*, i.e., she had 100% on-time record for release of orders and zero missed shipments, Stokes now rated her performance as only "on target" as opposed to "[e]xceeds target."

In April of 2016, respondent changed petitioner's manager from Stokes to Tim Smith. On April 28, 2016, without any prior warning, petitioner was called into a meeting with her former manager Stokes, the Seneca Plant Manager and an HR representative. They presented her with a five-page Development Plan, one

unlike any development plan she had ever seen in her prior years of employment and for which petitioner had no input. It placed unreasonable burdens on her work schedule, imposing unattainable goals/requirements like working one half of every day for six to eight months with another group while still being expected to perform all of her other duties with the Enclosed Drives Group. It also contained many misleading and self-serving statements by respondent about petitioner's work history and her refusal to accept job offers at its Columbia facility without accurately noting that they constituted a *demotion* for petitioner and then one for a *lateral transfer*, both job offers for which she had never even applied.

Having been issued this Development Plan and without any choice but to comply with it as a condition of her continued employment, petitioner filed another charge of discrimination against respondent with the EEOC alleging unlawful retaliation. On August 29, 2016, she filed an amended complaint in this civil action, adding a claim of retaliation.

After further discovery by the parties, respondent moved for summary judgment on all of petitioner's claims in her amended complaint for race, gender and pay discrimination as well as for retaliation (App. 27). On December11, 2017, the Magistrate Judge, McDonald, J., issued a Report recommending that respondent's motion be granted (App. 27-68). Applying the burden-shifting framework of *McDonnel Douglas Corp. v. Green*, 411 U.S. 792 (1973) to petitioner's claims that respondent failed to fairly consider her applications for promotion, the Magistrate determined that since no candidates were ever considered or rejected for the Customer Service Supervisor vacancy before Marcengill "assumed th[ose] duties on a

permanent basis," petitioner had no claim that she was denied a promotion (App. 48-50).

He also rejected petitioner's argument that "everything about the way [the Technical Trainer] promotion [in Columbia] was handled...establishes that [she] was rejected under circumstances giving rise to an inference of unlawful discrimination," i.e., her alleged "poor communication skills" was a pretext for discrimination since it contradicted respondent's prior assessments of her excellent communication skills; her exceptional experience and fitness for this particular job; its hiring of Pankaj Potdar who found it difficult to communicate with others; his failure to train anyone during his six-month tenure; and respondent's failure to address her application *for one year* except to offer her two other jobs in Columbia, one of which was a *demotion*, neither of which she had applied for (App. 54-57). As the Magistrate saw it, respondent's explanations for all of this allegedly unfair treatment did not raise an inference of unlawful discrimination (App. 57).

Nor had petitioner presented persuasive evidence that she was paid less than either Stryker or Potdar for invidious reasons in violation of the Equal Pay Act (App. 57-63). Finally, the Magistrate saw no but-for causation between petitioner's protected activities in January and June of 2015 and the alleged adverse actions taken against her in 2016 by respondent's Performance Review of petitioner's work in 2015 and its Development Plan of 2016, over six months later, so as to raise the inference of retaliation (App. 63-67).

Petitioner filed her objections to the Magistrate's Report and on February 5, 2018, the district judge, Herlong, J., adopted the Report and its

recommendation, granting respondent's motion for summary judgment (App. 7-26). Addressing just three of petitioner's objections as adequately specific, the district judge first rejected petitioner's claim that respondent's excuse not considering her for the Customer Service Supervisor was pretextual under *McDonnell Douglas'* framework because this position was actually "filled by [the internal] promotion" of Marcengill, a white male who lacked a four-year college degree, a basic requirement for the position. As petitioner argued, respondent's own requisition history for the job showed that this job post was "[c]ancelled as [an] internal *promotion* to strategize and reduce base costs" (App. 20-21) (emphasis supplied).

Judge Herlong, however, ignored respondent's language describing its "internal promotion" of Marcengill to the position and concluded that the full entry "establishes that the recruitment for the Customer Service Supervisor position was cancelled to reduce base costs" and that the "position "was not filled by promotion" but rather was "consolidated to reduce base costs" (App. 21-22). Since no "promotion" ever took place, petitioner's failure to promote claim failed (App. 22).

As for whether respondent's reliance on petitioner's "poor communication skills" was a pretext for discrimination in never seriously considering her for the Technical Trainer promotion in Columbia, especially in view of its prior assessments of her excellent communication skills, her exceptional qualifications for this position and her justifiable placement on the "short list" for that promotion, the district court ruled that none of these elements of her prior performance mattered and that the opinion of hiring manager Bready that petitioner had "poor

communications skills" was alone enough to justify respondent's refusal to consider her for this promotion (App. 22-23).

Finally, the district judge rejected petitioner's argument that a reliance on temporal proximity alone to establish causation for the purposes of a retaliation claim is unwarranted given respondent's pervasive, continuing proof of retaliatory conduct and animus in the intervening time between petitioner's protected conduct in 2015 and the Performance Review of her job duties for the year 2015 as well as the Development Plan presented to her in 2016 (App. 23-25) . He concluded that petitioner had adduced no such proof (App. 25).

Petitioner appealed and on January 9, 2019, the court of appeals unanimously affirmed the district court's ruling in a *per curiam* opinion (App. 1-6). As to the failure to promote petitioner to the Customer Service job, it ruled that a "plaintiff cannot establish a prima facie case if the employer eliminates the position that the plaintiff applied for without other evidence of discriminatory intent" (App. 3). It further concluded that respondent was entitled to rely on its hiring manager's opinion that petitioner had "poor communication skills" in denying her promotion to the Trainer position in Columbia despite respondent's prior contrary opinions about those very communication skills or her exceptional qualifications for the job and that these contradictions did not show pretext (App. 3-4).

Finally, it saw no causative link, temporal or otherwise, between petitioner's protected activity in 2014 and 2015 and respondent's Performance Review and Development Plan, all issued in 2016, to support an inference of retaliation (App. 4-6). It accordingly ruled

that summary judgment was properly granted (App. 6).

On February 12, 2019, the court of appeals denied petitioner's timely filed petition for rehearing *en banc* (App. 69).

REASONS FOR GRANTING THE PETITION

1. This Court's *McDonnell Douglas* Framework Is Fatally Undermined When Both Courts Below Decide For Themselves Every Triable Fact Issue Underlying Petitioner's Title VII Race, Gender And Retaliation Claims, Refusing To Give Her Proof The Probative Force It Deserves On Summary Judgment And Denying Her The Right To Have A Jury Decide Whether Her Claims Warrant Redress.

Petitioner, an African-American female engineer holding advanced degrees in her profession and with over 26 years of "exemplary" job performance for respondent, cannot progress beyond her present position of Senior Application Engineer----a job she has held since 2006----because respondent repeatedly prevents her from obtaining a supervisory role in the company, refusing even to consider her for promotion to a leadership position which she has earned and for which she is otherwise qualified. Moreover, when petitioner complained to the EEOC about respondent's repeated refusal to promote her, eventually filing suit in 2015 to vindicate her rights, respondent retaliated by issuing an annual performance review falsely diminishing her job performance and a Development Plan imposing upon her unattainable work requirements and containing misleading and self-serving statements about petitioner's work history, all to her detriment.

This proof, if given the deference due it on summary judgment, presented genuine issues of triable fact under the *McDonnell Douglas* framework whether respondent's asserted reasons for its repeated refusal to even consider petitioner for promotion were a pretext for discrimination and whether respondent unlawfully retaliated against petitioner on account of her protected activity in bringing this suit. A jury should be allowed to decide these disputed issues of material fact and both courts below subverted the *McDonnell Douglas* framework by deciding these triable fact issues for themselves, depriving petitioner of a jury trial to which she was entitled on this record.

In the absence of direct proof of discrimination, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) "establishe[s] an allocation of the burden of production and an order for the presentation of proof in...discriminatory treatment cases." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000) quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). Petitioner must first establish a *prima facie* case of discrimination, i.e., one which "raises an inference of discrimination only because we presume [that] these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Respondent can rebut petitioner's *prima facie* case by adducing evidence that the adverse employment action was undertaken for a legitimate, nondiscriminatory purpose. *Reeves, supra. Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981). *McDonnell Douglas*, 411 U.S. at 802. If it succeeds, the presumption of discrimination---but *not* petitioner's evidence in support thereof —disappears;

the sole remaining issue becomes discrimination *vel non* and petitioner must prove by a preponderance of the evidence that the reasons offered by the employer were not its true reasons but were a pretext for discrimination. *Reeves*, 530 U.S. at 143 citing *Hicks*, 509 U.S. at 507-508. Helped by the same proof which established her *prima facie* case, petitioner may establish that she was the victim of intentional discrimination by showing that a discriminatory reason more likely motivated respondent, *Burdine*, 450 U.S. at 256, or that its presumptively valid reasons for disparate treatment "were in fact a coverup for a ... discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805. See *Hicks*, 509 U.S. at 510.

Petitioner's initial burden of establishing a *prima facie* case of respondent's disparate treatment in refusing to promote her is "not onerous." *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989). *Burdine*, 450 U.S. at 253. It must show: (1) her status as a member of a protected group; (2) her qualified status with comparator employees; (3) an adverse employment action; and (4) following the adverse employment action, the promotion of a comparator in an unprotected class. *Patterson*, 491 U.S. at 186-187. *Burdine*, *supra*. *McDonnell Douglas*, *supra*. As for retaliation, she had to prove that: (1) she engaged in protected activity; (2) she was subjected to an adverse action in the workplace; and (3) there was a causal link between the two events. *Id*. See *Perry v. Kappos*, 489 F. App'x 637, 643 (4th Cir. 2012); *Mickey v. Zeidler Tool and Die Co.*, 516 F.3d 516, 523 (6th Cir. 2008).

When these respective burdens of proof are imposed within the context of respondent's summary judgment motion, two core principles obtain: (1) in construing the materials adduced by the parties, both

courts below were bound to draw all reasonable inferences from these materials *against* respondent as the moving party and *in favor* of petitioner as the non-moving party; and (2) it was bound to resolve all credibility questions *in favor* of petitioner, the non-moving party, because the role of the district court is only to determine whether there is a genuine issue of material fact for trial. *Tolan v. Cotton*, 572 U.S.___,___; 134 S. Ct. 1861, 1866-1867;1868 (2014) (*per curiam*). *Beard v. Banks*, 548 U.S. 521, 529-530;534 (2006). *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000). *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255 (1986). As *Reeves* holds, it cannot make credibility determinations because this is a function of a jury, *not* a judge. 530 U.S. at 150-151 citing *Anderson*, 477 U.S. at 255. See *Tolan*, 572 U.S. at ___; 134 S. Ct. at 1866-1867.

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

Contrary to these principles for adjudicating Title VII claims via summary judgment, both federal courts below acted as a jury instead of judges when it believed and then adopted respondent's asserted reason(s) for denying petitioner's promotion to the Customer Service Supervisor position, i.e., that it had

"eliminated" or "canceled" the position altogether when, in fact, as its own contemporaneously created requisition document showed, it had actually "promoted" to the position *an employee markedly less qualified than petitioner*. According to this "internal promotion," Jeff Marcengill, a Caucasian male who had applied for the position despite the fact that he lacked a four-year college degree and was not on "the short list"----both company-wide preconditions for even applying for this supervisory position----was *promoted* to the position of Customer Service Supervisor while petitioner was never even interviewed for the job even though she held advanced college degrees and was on "the short list" for this promotion.

Respondent's *ex post facto* excuse (through its deposition witnesses) for ignoring petitioner in this promotion process was that the position was *not* filled by promotion at all but was merely "canceled" or "eliminated." But this claim directly conflicts with its own contemporaneously created document which shows that the promotion process was "canceled" as the result of an "internal *promotion*" of Marcengill. These inconsistent, contradictory justifications adduced by respondent at different times for overlooking petitioner in this process were *themselves* a reason to infer that its articulated reason(s) were a pretext or a coverup for invidious discrimination. *Reeves*, 530 U.S. at 147-149 (a *prima facie* case by the employee together with sufficient evidence to reject the employer's explanation permits a finding of liability by the factfinder).

In this regard, *Reeves* holds that an employer's shifting, incompatible reasons for treating an employee adversely are *themselves* justification for denying summary judgment to the employer in a workplace discrimination case and permitting the issue of pretext

to go to the jury. As the court of appeals for the First Circuit explained,

> [W]hen a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual [for purposes of the *McDonnell Douglas* framework].

Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 432 (1st Cir. 2000). *Accord*, *E.E.O.C. v. Ethan Allen, Inc.* , 44 F.3d 116, 120 (2nd Cir. 1994); *E.E.O.C. v. Sears, Roebuck and Co.* 243 F.3d 846, 853 (4th Cir.1993); *Thurman v. Yellow Freight Sys.., Inc.*, 90 F.3d 1160, 1167 (6th Cir.1996); *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1422 (7th Cir.1992); *Kobrin v. University of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994); *Washington v. Garrett*, 10 F. 3d 1421,1434 (9th Cir. 1993); *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000).

As the *Hicks* Court observed, the fact issue of discrimination should be treated no differently than any other ultimate question of fact, that whether an employer's "obviously contrived" reason for an employee's adverse treatment adds up to discrimination "remains a question for the factfinder to answer" and that

> [t]he factfinders' disbelief of the reasons put forward by the [employer for denying promotion] (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the [employer's] proffered

> reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

509 U.S. at 510-511;524 (emphasis in original). *Reeves*, 530 U.S. at 147.

Contrary to this law, both courts below in their respective decisions wrongly believed and then adopted respondent's contrived, incompatible reasons for marooning petitioner forever in the position of Senior Application Engineer. Whether respondent promoted a white male to Customer Service Supervisor who did not meet the job requirements, while rejecting a black female who did, presents a classic case of employment discrimination whether based on race or gender. Petitioner deserved to have a jury decide this question and both courts below deprived her of this opportunity in derogation of the *McDonnell Douglas* framework and her seventh amendment rights.

Both courts below also wrongly believed respondent's claim that petitioner's "poor communications skills" was the non-pretextual reason for its decision not to promote her to the Technical Trainer job in Columbia. In fact, however:

- this reason was directly contradicted by respondent's own prior written assessment of petitioner's communication skills as excellent throughout her career;

- it is at odds with respondent's rating of her job performance as "exemplary" for the twelve years she was Trainer and Trainer Coordinator for the Order Engineers in the

Enclosed Drives Group, a job which entails effective communication skills;

- the employee eventually selected for the position (Potdar) *could not communicate effectively* with others and *never trained anyone* during his six-month tenure on the job;

- respondent never seriously considered petitioner for this promotion, waiting one year to inform her that she did not receive the job; and

- in the interim, it offered her two other jobs in Columbia, one a *demotion*, the other a lateral transfer, neither position being one for which she applied.

In short, respondent's proffered reason of "poor communication skills" was contradicted by its own earlier assessment through the years of petitioner's excellent skills of communicating as a Trainer and Trainer Coordinator in the Enclosed Drives Group and by its own conduct showing that it never seriously considered petitioner for the promotion in the first place. This contradiction in its opinion of petitioner's communications skills, like its dissembling about whether the Customer Service Supervisor job was canceled or filled by promotion, is *itself* evidence of pretext by respondent and a justification for denying summary judgment. In fact, everything about the half-hearted way respondent processed petitioner's application for the Trainer promotion creates a triable

issue of fact about whether petitioner's "poor communication skills" was a pretext for discrimination.

Lastly, contrary to *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 69-70 (2006), both courts erred by focusing solely on the "temporal proximity" between respondent's retaliatory acts and petitioner's protected activity rather than viewing the factual scenario here from the perspective of a reasonable employee in petitioner's position given the totality of the surrounding circumstances. As the *White* Court observed, "[c]ontext matters" and the significance of any particular act of retaliation must be judged on whether it was likely either to dissuade a reasonable employee from complaining about discrimination or to punish her for having done so. *Id.* The objective focus is on petitioner and her particular circumstances. *Id.*

Those circumstances showed a sequence of events moving from pay inequity to repeated failures to promote petitioner, then culminating in her protected activities with the EEOC, an event which, in turn, led to the filing of this lawsuit in June of 2015. In its aftermath, respondent hired Potdar to the Trainer position and waited until October of 2015 to finally tell petitioner that she did not receive the Trainer promotion, allegedly for having "poor communication skills." Respondent in the latter half of 2015 also began to falsely downgrade her job performance thereby lowering her pay increases despite objective criteria showing she continued to be a stellar employee, a downgrade which was not made known to petitioner until she received her 2015 Performance Review in February of 2016. The unprecedented Development Plan soon followed in April of 2016, one which depended on this false Performance Review, imposed upon her

unattainable work requirements and contained misleading, self-serving statements about her work history, all to petitioner's detriment.

Context matters, not simply timelines. Respondent should not be excused from retaliation charges on "temporal proximity" grounds for strategically delaying until February of 2016 its false downgrading of petitioner's job performance which it began in 2015 in the wake of this lawsuit; or for presenting her with an unprecedented Development Plan in 2016 which depended on this false 2015 Performance Review for its onerous provisions. All of it was *directly connected* to petitioner's decision to sue respondent in June of 2015; and respondent has never presented a coherent, credible explanation how its 2015 Performance Review jibed with its own objective standards which showed that petitioner continued to be an outstanding employee.

Given the totality of circumstances showing other relevant evidence of continuing retaliatory conduct by respondent apart from any "temporal proximity" inquiry, a jury could reasonably find that but for petitioner having filed suit in June of 2015, she would not have received the undeserved downgrade of her job performance for 2015 or the unprecedented Development Plan which depends on it. As the Court in *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 529 (6th Cir. 2007) explained, workplace discrimination is "context-dependent" and there are many ways to prove a trial-worthy case under the *McDonnell Douglas* framework.

Especially in circumstances showing a deliberate and strategic postponement of retaliation by respondent for petitioner having filed this suit, a lack of "temporal proximity" alone between respondent's retaliatory acts and petitioner's protected activity is

not enough to keep this triable fact issue of retaliation from a jury. See, e.g., *Mickey v. Zeidler Tool and Die Co.*, 516 F.3d at 525-526 (other evidence of retaliation besides temporal proximity); *Lettieri v. Equant Incorporated*, 478 F.3d 640, 650-651 (4th Cir. 2007) (same); *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 43 (5th Cir. 1992) (same).

For these reasons, the lower courts' unfair treatment of petitioner's proof subverts the protocol of proof laid out in *McDonnell Douglas*, undermines established principles of summary judgment adjudication under Rule 56 and denies petitioner a jury trial to which she was entitled under the seventh amendment.

2. The Court Should Revisit The Standards For Disposing Of Summary Judgment Motions In Employee Discrimination Cases In Order To Prevent Lower Courts From Weighing The Evidence In Piecemeal Fashion Instead Of In Its Totality, Making Credibility Determinations, Finding Facts And Imposing On Title VII Plaintiffs A More Onerous Burden Of Proof Than The *McDonnell Douglas* Framework Demands.

Since one of the fundamental duties of the jury in civil cases is to resolve factual disputes bearing on material issues in controversy, the summary judgment procedure of Fed. R. Civ. P. 56 does not violate a party's constitutional right to a jury trial because it is presumed that if the entry of summary judgment is appropriate, there are no genuine issues of material fact for trial and therefore no right to a jury trial is implicated. *Fidelity & Deposit Co. v. United States*, 187

U.S. 315, 320 (1902). See *Pease v. Rathbone-Jones Eng. Co.*, 243 U.S. 273, 278-279 (1917).

Federal jurists and legal commentators have noted that federal trial judges regularly overuse summary judgment in order to take triable cases away from juries. Hon. W.G. Young, *Vanishing Trials–Vanishing Juries–Vanishing Constitution*, 40 Suffolk U. Law Rev. 67, 78 (2006). Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion,""Liability Crisis," and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. Law Rev. 982, 1064; 1066;1071-1072;1133-1134(2003). Professor Miller writes that Rule 56's "paper trials" of triable issues of disputed fact

> would be an unfortunate break with the past. Our civil dispute resolution system has always preferred adjudication based on oral testimony in open court subject to cross examination....[T]hey are considered aspects of what often is referred to as a "day in court," with due process embracing notions of a fair trial before an impartial tribunal.

Id. at 1072 & n. 476, citing *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 209 (1958) ("There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case.").

In his dissenting opinion in *Anderson*, Justice Brennan predicted that the majority's analysis there which encourages trial judges to assess and weigh

evidence and to ask themselves whether a fair-minded juror could return a verdict for the plaintiff on the evidence presented would impose a dramatically new burden of proof on the plaintiff as the opposing party, so conflating the role of judge and jury that this "summary" procedure will become "a full-blown paper trial on the merits." *Anderson*, 477 U.S. at 265-267. Rejecting this outcome, he wrote that whether the plaintiff's

> evidence is "clear or convincing," or proves a point by a mere preponderance, is for the factfinder to determine. As read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain.

Id. at 268. See *Scott v. Harris*, 550 U.S. 372, 389-390 (2007) (Stevens, J., dissenting) (criticizing the majority for acting as "jurors" or factfinders rather than as a reviewing court).

This misuse of summary judgment in Title VII discrimination cases has been documented. Schneider, Elizabeth M., *The Impact of Pretrial Practice on Discrimination Claims*, 158 U. Penn. Law Rev. 517, 548-551 (2010) (*Schneider I*). Schneider, Elizabeth M., The *Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 Rutgers L. Rev. 705,737-753 (2007) (*Schneider II*). McGinley, Ann C., *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 229(1993). Available data suggests

that 73% of such motions in employment discrimination cases are granted, the *highest* of any type of federal civil case. *Schneider I* at 549 & n. 150.

Courts in these kind of cases routinely weigh evidence, minimize the harm claimed by the plaintiff, make credibility determinations which accord her less credibility, draw inferences against her instead of in her favor, divide and categorize her evidence in piecemeal fashion which divorce it from its context in order to dilute its probative force, demand more proof than summary judgment requires and then resort to a "reasonable juror's" view of this now diluted, distended evidence to deny her claims. *Schneider I* at 535-536;540-546 ("Summary judgment decisionmaking...involves a tremendous amount of discretion, and discretion can be a locus of hidden discrimination."). *Schneider II* at 708-712;714-715;718-720;728;737-745. See *McGinley* at 233-236.

Adopting wholesale respondent's pretextual excuses for denying petitioner the promotions for which she was otherwise qualified and imposing a "temporal proximity" requirement which was unjustified by the totality of the circumstances, both courts discounted petitioner's proof and diluted its impact in order to deny her a trial on the merits of her claims. All of the conflicting evidence about whether respondent's asserted reasons for repeatedly denying petitioner promotions was a coverup for discrimination and whether respondent has retaliated against her for bringing this suit was fit for a jury's determination.

The district court and the court of appeals, however, decided all of these triable fact questions themselves, usurping the role of the jury and depriving petitioner of her day in court. As Professor Miller concludes, "[g]iven the existing, convoluted

jurisprudence [which surrounds the proper use of summary judgment], it is imperative that the Supreme Court provide some clarity rather than leaving the matter [of petitioner's right to a jury trial] to the genial anarchy of trial court discretion." *Miller* at 1134.

The Court should therefore take this opportunity to provide renewed guidance to inferior federal courts on the vitally important question of whether summary judgment is being misused in workplace discrimination cases to weigh evidence, make credibility determinations, find facts and impose on the non-moving party a more onerous burden of proof than the *McDonnell Douglas* framework demands in order to dispose of these claims without a trial.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to vacate the judgment and decision of the United States Court of Appeals for the Fourth Circuit, remand the matter to the district court for further proceedings and an eventual trial or provide petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,
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