GRANTED

No. 99-536

IN THE
Supreme Court of the United States

ROGER REEVES,
Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.
Respondent.

On Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Under the Age Discrimination in Employment Act, is direct evidence of discriminatory intent required to avoid judgment as a matter of law for the employer?

2. In determining whether to grant judgment as a matter of law under Fed. R. Civ. P. 50, should a district judge weigh all of the evidence or consider only the evidence favoring the nonmoving party?

3. Is the standard for granting judgment as a matter of law under Fed. R. Civ. P. 56 the same as the standard for granting judgment as a matter of law under Fed. R. Civ. P. 50?

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The opinion of the Court of Appeals, which is not reported, is set out at pp. 1a-10a of the Appendix to the Petition for Writ of Certiorari ("Pet. App."). The order of the District Court denying Respondent's motion for judgment as a matter of law, which is not reported, is at Joint Appendix ("J.A.") 9.

JURISDICTION

The decision of the Court of Appeals was entered on April 22, 1999. A timely petition for rehearing and suggestion for rehearing en banc were denied on June 18, 1999. The Petition for Writ of Certiorari was filed on September 15, 1999. This Court granted certiorari on November 8, 1999. Jurisdiction of this Court exists under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) provides, in pertinent part: "It shall be unlawful for an employer ... to discharge an individual ... because of such individual's age ...."

The Seventh Amendment to the United States Constitution provides "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

Federal Rule of Civil Procedure 50 provides, in pertinent part:

(a) **Judgment as a Matter of Law.**

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue ...

(b) **Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59...

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Petitioner, Roger Reeves, brought this age discrimination suit against Respondent, Sanderson Plumbing Products, Inc., which fired Mr. Reeves when he was fifty-seven years old and had worked forty years for Defendant and its predecessors. Record ("R.") 1-3. After the parties had full discovery, the district court denied Defendant's summary judgment motion

and set the case for trial by jury. R. 221. The parties held a four day trial in which the jury heard Mr. Reeves' evidence that Defendant's decision-maker was biased because of Mr. Reeves' age, Defendant's evidence that it had discharged Mr. Reeves and another employee (Caldwell) because they failed to discipline employees, and Mr. Reeves' response that his disciplinary record was proper and, hence, could not explain his termination. During the trial, the district court twice denied Defendant's directed verdict motion and submitted the case to the jury. The jury returned a verdict for Mr. Reeves, finding that Defendant had engaged in willful age discrimination against Mr. Reeves. Post-trial, the district court denied Defendant's renewed directed verdict motion.

After reviewing the evidence *de novo*, the Fifth Circuit reversed, concluding that "there was insufficient evidence for a jury to find that Defendant discharged Mr. Reeves because of his age," vacated the jury verdict, and entered judgment as a matter of law for Defendant. What follows is a summary of the evidence offered by the parties at trial on which the jury based its determination that Mr. Reeves had satisfied his burden that Defendant had willfully discharged him because of his age, which the Fifth Circuit set aside.

B. MR. REEVES' EVIDENCE OF AGE DISCRIMINATION

Mr. Reeves began work for a corporate predecessor of Defendant when he was eighteen years old in 1955. Transcript ("Tr.") 2, 3. In 1979, Mr. Reeves was promoted to supervisor in the "hinge department." Tr. 4, 32. The hinge room had both a regular line supervised by Mr. Reeves, and a "special line" supervised by Joe Oswalt. Tr. 32-33. The thirty-five-year-old Oswalt and the fifty-seven-year-old Mr. Reeves were both supervised by the hinge room manager, forty-five-year-old Joe Caldwell. Tr. 3, 32-33.

The Defendant manufactures toilet seats and toilet products. Tr. at 147. Ninety-eight percent of its stock is owned by company President Sandra Sanderson, widow of the previous owner of the company. Tr. at 9.

In 1988, Mrs. Sanderson married Powe Chesnut. Tr. at 90, 93. Joe Oswalt, who worked for Defendant through July 1995, and Mr. Reeves both testified that Powe Chesnut, age forty-seven, was the "absolute power" in control of the company. Tr. 3, 4, 80-81.

Oswalt testified that his treatment from Chesnut was "nothing" compared to Chesnut's treatment of Reeves. Tr. 82-83. Oswalt was allowed to "defy Chesnut," but Chesnut always watched Mr. Reeves, or had another employee, such as Lucille Reeves, watching him. Tr. 83. Mr. Reeves testified that Chesnut's interaction with him consisted of "cussing him out" and shaking his finger in his face. Tr. 26.

The jury heard evidence that Chesnut's harsh treatment of Mr. Reeves was age-based. Chesnut told Mr. Reeves that he was "so old that he must have come over on the Mayflower." About two months before Mr. Reeves was fired, Chesnut told him, when he was trying to get a machine running, that he was "too damn old to do the job." Tr. 26, 50.

On October 23, 1995, Chesnut instructed Mr. Reeves to follow him to the main office, where two other company officials [Personnel Manager Jester and Vice-President Whitaker] were present. Chesnut brought out the time card of an hourly employee [Genie Mae Coley] and said "You paid her for two days when she wasn't there." Tr. 23. Personnel Manager Jester then told Mr. Reeves he was fired "for making a mistake on [Coley's] time card." Tr. 23. Mr. Reeves then explained that he had not been at work on the days when Coley

was not there, Tr. 23, because he had been hospitalized during this time. Tr. 17. When he came back to work from his illness, he found a note written by Hinge Room Manager Caldwell directing that Coley, who was herself hospitalized on the two days in question, Tr. 249-250, be given credit for the two days' work. Tr. 17, 20. Indifferent to the fact Mr. Reeves' boss [Caldwell] had directed that Coley be paid, Chesnut walked Mr. Reeves out of the plant, terminating his forty years of employment. Tr. 17, 20-22, 25.

By the time of the trial, Defendant had used three different replacements for Mr. Reeves. All were in their thirties. Tr. 101-102. Mrs. Sanderson testified that there would be a "learning curve" in replacing Reeves with these younger persons. Tr. at 104. Chesnut also conceded that "because of the training time" which the new, younger employees required, efficiency would be harmed. Tr. 224-225. Joe Oswalt testified that it took him a learning period of three years to match Mr. Reeves' efficiency. Tr. 79.

At the close of Mr. Reeves' evidence, and following extensive argument, the District Judge denied Defendant's Motion for Judgment as a Matter of Law. Tr. 167-183.

C. SANDERSON PLUMBING'S ARTICULATION OF REASONS FOR DISCHARGE DECISION

Through tedious, detailed evidence of alleged occurrences at the workplace, Defendant tried to show that Mr. Reeves was fired because an investigation revealed a failure to discipline certain subordinates. Also, Defendant claimed that, since it also fired Joe Caldwell (age forty-five), the firing of Reeves was not based on his age. Tr. 152-155, 209-220, 314-315.

Powe Chesnut testified that Hinge Room Manager Caldwell told him that the hinge department employees were "leaving early," that there was an "absentee problem," and that the units per man hour were down. Tr. 203. Accordingly, Chesnut directed Lucille Reeves[1] to investigate the hinge room. Tr. 203-204. This investigation was for the months of July, August and September, 1995. Tr. 203-205.

The Defendant introduced both a summary of the investigation and a layman's explanation of the investigation, which was prepared at Defendant's counsel's office. Tr. 205-206, 277-278. J.A. 21, 29 (Exhibits D-5, D-5A).[2] The documents state that Mr. Reeves, Oswalt, and the unnamed superior who replaced Oswalt after he left in July 1995 (all of whom worked under Caldwell), were guilty of inadequate disciplinary practices.

The asserted error that was the subject of most of the trial testimony was Reeves' alleged failure to assign a tardy code ["01"] to employees who clocked in at 7:00 a.m. Tr. 119, 128, 140, 141, 205-206, 241, 245-247, 262, 319. The Defendant claimed that if an employee clocks in at 7:00 a.m., he was "tardy," since this would mean that he could not have been at his work station by 7:00 a.m. when the shift began. Tr. 245-

[1] This is the same Lucille Reeves, no relation to Mr. Reeves, who had been watching Mr. Reeves at Chesnut's direction. Tr. 83.

[2] Exhibits D-5 and D-5A are only the employer's conclusions that errors were made. The only records Mr. Reeves prepared consisted of corrections to daily and weekly time records, plus his handwritten notes. Tr. 20. These documents were not offered into evidence by Defendant.

247, 249-250.

On cross-examination, Chesnut admitted that he "can't say" that the investigation, J.A. 21, 29, referenced any failures to write up tardy employees, except the asserted failure to code them as tardy when they clocked in at 7:00 a.m. Tr. 241. Defense witness, and former Personnel Manager, Jester agreed: "[W]here someone punched in at 7:00 o'clock and the supervisor didn't code it correctly ... that's what the whole case is about."[3] Tr. 324. Both Mrs. Sanderson and Chesnut testified that the problem with Mr. Reeves' not writing up his subordinates was that "we were in violation of our union contract [by] not disciplining people," Tr. 128, which could cause problems with the union. Tr. 127, 128, 154, 188-189, 206, 212, 266-267.

In an attempt to mitigate the effect of his age-based statements, Chesnut denied that he made the decision to fire Mr. Reeves. Instead, Chesnut claimed that his wife, Mrs. Sanderson, who was not accused of age-based statements, had, in reality, decided to fire Mr. Reeves. Tr. 207. Similarly, Chesnut repeatedly claimed he had no part in a 1993 decision to put Mr. Reeves on probation, Tr. 198, 199, 205, 236, 270-276, a claim which was also proved a lie by an affidavit Chesnut had earlier executed. Tr. 236-238.

Mrs. Sanderson, who was claiming she terminated Mr. Reeves, did not exactly understand the reasons being assigned

[3] In other parts of his testimony, Chesnut claimed Reeves allowed employees to clock in early and be paid when they were not working, since the shift had not yet started. Mr. Reeves rebutted this evidence. Tr. 138, 142, 260, 263, 333-334, 335, 452.

for the firing. She thought the reason was "intentionally falsifying pay records." Tr. 100. There was absolutely no proof Mr. Reeves had ever intentionally falsified a pay record.[4] Mrs. Sanderson was so unfamiliar with the reasons for Mr. Reeves' firing that her counsel objected to her even being asked about the matter, saying that "she didn't do" the investigation. Tr. 127. Mrs. Sanderson even asked Mr. Reeves' counsel to refresh her memory about what the "codes" meant. Tr. 127.

Besides claiming that the age-biased Chesnut did not make the termination decision, the Defendant also rationalized age-based statements as "joking." Chesnut testified: "I don't remember ever referring to Mr. Reeves as an old man. I could have. I don't remember it. If I did it was kind of a joking manner, in the way it was done with a lot of other people." Tr. 215.

Chesnut did deny saying that Mr. Reeves was "too damn

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[4] The employer's case was based on contents of the investigation, which based its conclusions on the monthly reports (Exhibit D-4), and weekly reports (Exhibit D-3), both of which were done in data processing. Writeups for "tardies" were given only if one exceeded five percent of late work or three tardies in one month. Tr. 21, 38. Thus, only by examining the monthly reports could it be determined whether a worker should receive a writeup. The fact that Mr. Reeves did not do the monthly reports and only saw one monthly report, Tr. 20, 265, discredited the employer's claim that Mr. Reeves was fired for not giving writeups to his subordinates. A jury could therefore have reasonably concluded that Mr. Reeves was not fired for failing to give writeups, but for some other reason.

old to work here."[5] Chesnut defended any other age-based comments as "joking," or due to a "lax atmosphere," and said one older employee "enjoyed" age-based comments.[6]

Mrs. Sanderson testified there was no age discrimination, since the company has many older workers and supervisors. Tr. 155-156.[7]

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[5] However, Defendant's counsel did not phrase the question exactly the way Mr. Reeves had testified the comment occurred. Mr. Reeves had testified that Chesnut had said that he was too damn old to do "my job," whereas Defendant's counsel asked whether Chesnut had said Mr. Reeves was "too damn old to work here." Tr. 216.

[6] Chesnut testified that there were many old people who came back to work after retiring, and made whatever Social Security "allows" them to make, and that referring to them as "old man" is done simply because of the "lax atmosphere" at the plant. Tr. 215-216. Chesnut testified that Reeves himself had referred to employee John Williams as "old" since Reeves had stated that he would go "relieve the old man to let him to go to the bathroom." Tr. 215.

Chesnut related the case of Clyde Cook, who had retired and came back to work at seventy-three years old. Employees at the plant called Cook an "old man" and Cook "enjoyed" it. Tr. 216.

[7] However, she did not give any names of the alleged older supervisors. Tr. 155-156.

D. PETITIONER'S EVIDENCE OF PRETEXT

Mr. Reeves challenged as downright lies practically every item of Defendant's evidence. The defense that the results of the investigation caused Mr. Reeves' discharge was contradicted with Mr. Reeves' testimony that the only incident mentioned when he was fired was Coley's being paid for days she was hospitalized. Mr. Reeves testified there was no mention of an investigation until after his age discrimination complaint was filed. Tr. 17, 30, 48-49, 50-51, 306.

When the Defendant surmised that no jury would believe the Coley incident was the reason for Mr. Reeves' termination, a new and improved reason was meticulously constructed.[8] The jury was entitled to believe the investigation was an "after-the-fact inspiration triggered by the necessity of fending off this litigation." *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 21 (7th Cir. 1987).

Mr. Reeves challenged Mrs. Sanderson's claim that Chesnut was "low down in the company," Tr. 90-91, through cross-examination about a May 1994 Chesnut letter. Tr. 109-110, 113, 220, Exhibit P-7. When Chesnut's title was only "Quality Control Supervisor," he had written his boss, the Director of Manufacturing, a letter containing profanity and telling the boss to "wake up and learn to do his job." Tr. 109-

[8] The Court of Appeals even acknowledged that the testimony justifying the firing meant the "investigation" was probably the product of "competent trial preparation," which it said was different from "telling a lie." Pet. App. 8a. But a jury was entitled to believe that defense counsel's changing the reasons for the discharge was itself indicative that the reasons originally assigned were not true.

110, 113, 220, Exhibit P-7.[9]

Besides the fact that this Chesnut letter might convince a reasonable juror that Defendant was lying about Chesnut's role at the company, Mr. Reeves and Mr. Oswalt repeatedly testified that the age-biased Chesnut had *de facto* control. Tr. 4, 10, 12, 14, 16, 36, 64, 65, 81-82.

There was also indisputable proof that Chesnut's claim that he had not participated in the probation decision was fabricated. Time and again, Chesnut had testified on direct examination that other decision-makers, not himself, caused Mr. Reeves to be placed on probation in 1993. Tr. 198, 199, 205, 235, 236, 275-276. But then, on cross-examination, Mr. Reeves' attorney produced Chesnut's signed affidavit when he swore that he had "recommended" Mr. Reeves be placed on probation in 1993. Tr. 236-238, Exhibit P-9.

Defendant's claim that Mr. Reeves had failed to properly code specific employees was also rebutted. Tr. 138, 142, 333-334, 335, 452).[10]

[9] The Defendant then tried to justify this letter by claiming that Chesnut was not actually correcting a superior when he testified the Quality Control Supervisor was actually in an "equal" position with the Director of Manufacturing. Tr. 219. This absurdity was contradicted by Defendant's own witness, Lucille Reeves, who testified that the Director of Manufacturing is a higher job than Quality Control Supervisor. Tr. 306.

[10] Mr. Reeves denied that he had improperly coded employee Hogan, by testifying that employee Hogan's code

(continued...)

The Defendant's attempt to blame Mr. Reeves for failing to write up tardy employees was refuted with Mr. Reeves' testimony that he had no dealings with the monthly codes from which writeups were given. Tr. 20. These writeups were solely Caldwell's job,[11] since he, alone, received the monthly

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[10](...continued)
was correct. Hogan wanted to remain at work and had been sent home against his wishes, making the code entry Mr. Reeves made correct. Tr. 333-334. Also, Mr. Reeves' counsel emphasized that Defendant never produced any documents explaining the codes, or explaining how Reeves' interpretation of the codes was incorrect. Tr. 452.

Mr. Reeves disputed Defendant's claim that Ms. Coley should have been written up for clocking in at 6:30 a.m. or 6:39 a.m. because she was clocked in and eating breakfast. To the contrary, Mr. Reeves testified that he allowed Ms. Coley to clock in early because she had extra work to do on those mornings. Tr. 334. There was also no explanation from Chesnut why if he saw Ms. Coley clocking in early and eating breakfast on company time, he did not fire her, or at least discipline her. *See* Tr. 258, 260, wherein Chesnut claims that he saw Ms. Coley being paid for not working on numerous occasions, but apparently did nothing about it. Chesnut also denied that he had improperly allowed employee Williams to check in early, testifying that Williams was required to arrive early in order to prepare for the 7:00 a.m. shift. Contrary to Defendant's testimony, there was no requirement that Williams check in at 6:00 a.m. Tr. 334-336.

[11] One gets a writeup only after he misses more than five percent of work a month. This can only be determined (continued...)

reports after they were created in data processing. Tr. 138, 142, 335. Contrary to Defendant's testimony that the investigation was the result of workers leaving work early or excessive absences, the Defendant's own study contains no evidence anyone was leaving work early or had excessive absences. *See* J.A. 21, 29.

Chesnut knew the claim about workers being tardy was a farce. Chesnut himself testified that he was in the Hinge Room by 6:30 a.m. in the morning. Tr. 333-335. Therefore, Chesnut would have observed any workers who were tardy, and would not have needed any investigation to discover it. The record contains no testimony that Chesnut had ever corrected anyone about this.

Mr. Reeves testified that his workers were not late, but were on time, since he would see them at their work stations at 7.00 a.m., when he marked his daily time sheets. The time clocks often did not work. In these instances, Mr. Reeves wrote down 7:00 a.m. on his daily record, even though the workers actually arrived at work earlier. Workers who were coded as being there at 7:00 a.m. were thus on time. Tr. 39, 56, 84, 86, 214, 235, 243, 286. Mr. Oswalt corroborated this testimony, and said his practices were the same as Mr. Reeves'. Tr. 95.

An absurdity about Defendant's case developed from testimony about an adjustment of its time records. According to the Defendant, if workers arrived within ten minutes before 7:00 a.m., they were, under the Defendant's clock system, automatically clocked in at 7:00 a.m. Tr. 129, 191-192. This was done since they were not to be paid before the 7:00 a.m.

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[11](...continued)
from the monthly reports.

shift started. The Defendant then claimed that Mr. Reeves was fired for not making employees tardy when he marked they arrived at 7:00 a.m., but that Defendant's own computer system marked employees as arriving at 7:00 a.m., even though they arrived earlier!

There were also adverse inferences to be drawn from a lack of evidence produced by the Defendant. For example, there was no evidence that any supervisor's disciplinary practices were any different than Mr. Reeves. There was no evidence that any supervisor marked employees tardy when their time cards were marked 7:00 a.m. The only other supervisor about whom any records were introduced was Hinge Room Special Line Supervisor Oswalt. But Defendant's investigation lists *more* errors on the special line than on Mr. Reeves' regular line. J.A. 21, 29. The Defendant attempted to repair this gaping hole in the defense through Chesnut's testimony that Oswalt would himself have been fired if he had not quit work in July. Tr. 210-211. But this does not account for why the special line's claimed errors continued after July when Oswalt had left the company. Also, this argument defeated itself, since Chesnut's testifying that Oswalt "would have been fired" is inconsistent with the defense that Chesnut was *not* the person making termination decisions.

The jury probably questioned whether an employer, who presumably complies with federal law,[12] would have marked an employee as "tardy" for arriving at 7:00 a.m. when the employer required him to be there at 7:00 a.m. Tr. 249, 263. Can a company described by Chesnut as being "lax," be truthfully claiming that it is marking employees as tardy even though they are at the workplace at 7:00 a.m., when the shift

[12] 29 U.S.C § 207.

starts?[13]

The attempt to defend on grounds of Mr. Reeves' probation in 1993 was turned into yet another example of discrimination. Mr. Reeves was placed on probation in 1993, Tr. 226, but the thirty-five year old Oswalt was not. However, their production records were basically the same, both good. Tr. 228-229. In addition, any relationship between the 1993 probation and the firing was disproved. After Mr. Reeves had been placed on probation in 1993, Tr. 113, he had thereafter received a merit pay raise. Tr. 16-17.

One reason Defendant had given for launching the investigation was that "efficiency" was down. However, on cross-examination of Chesnut, it was demonstrated the actual records showed Mr. Reeves' efficiency level at the time was sixty units per man hour, far above the company's efficiency goal of forty-eight units per man hour.[14] Tr. 16-17. According to Chesnut, "efficiency" is the best test of how a supervisor is performing. Tr. 230.

[13] Defendant may claim that it did not have to pay employees who clocked in at 7:00 a.m. but only reached the line at 7:00 a.m., because any time for which they were not paid would be "de minimus." *See Mireles v. Frio Foods, Inc.*, 899 F.2d 1407 (5th Cir. 1990). If so, Defendant must be claiming that it fired Mr. Reeves for not disciplining employees over de minimus periods of time.

[14] While the personnel file does contain a letter where Caldwell states that he placed Mr. Reeves on probation, Mr. Reeves testified that Caldwell had told him that this had been directed by Chesnut. Tr. 66.

Mr. Reeves was also treated differently from others in the same situation. Mr. Oswalt testified that the only remedy in the past when an employee, such as Coley, had been overpaid was to simply withhold payment from the employee's next paycheck. Tr. 72.

Defendant's claim of union problems was also a farce. On cross-examination it was revealed that there had never been a single claim by the union of unequal treatment by a supervisor. Tr. 267.

Contradicting Mrs. Sanderson, Mr. Reeves testified that at the time he was fired he knew of no supervisor at the plant older than himself. Tr. 333.

At the close of the proof, the district court again denied Defendant's motion for judgment as a matter of law. J.A. 9.

E. THE JURY VERDICT

After receiving the instructions from the trial judge that the Court of Appeals did not challenge, R. 231-254, the jury found that Defendant had been guilty of willful age discrimination. R. 224-228. Accordingly, the Court entered a jury verdict for the amount of Mr. Reeves' back pay ($35,000.00), less interim earnings, and doubled the lost wages to Seventy Thousand Dollars ($70,000.00) pursuant to the willful finding. R. 224, 262-263.

After the trial, Defendant again moved for judgment as a matter of law, which the district judge denied. R. 264-266, J.A. 9. The district judge also awarded front pay ($28,490.86) to Mr. Reeves. R. 227, J.A. 9.

F. THE APPEAL

The Fifth Circuit followed its practice of reviewing all of the evidence "*de novo*" to determine whether the evidence is sufficient to support the verdict. *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*). After reviewing the evidence, the Court decided that Petitioner had produced insufficient evidence of age discrimination.

The Court of Appeals found that Petitioner "very well may be correct" that "based on the evidence...a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual." Pet App. 8a. The Court nonetheless stated:

> whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decisions.

Id. The Court of Appeals then proceeded to discount Petitioner's evidence of prejudicial statements by a decision-maker because "it is clear that these comments were not made in the direct context of Reeves's termination." *Id.* at 9a. The Fifth Circuit apparently concluded that little short of direct evidence made at the time of Petitioner's discharge would be sufficient to sustain a jury verdict of ADEA liability.

In reviewing the jury verdict, the Fifth Circuit made various of its own findings of fact without regard to whether the jury could reasonably have found to the contrary. For example, the Court of Appeals asserted that "Chesnut was just one of three individuals who recommended to Ms. Sanderson that Reeves

be terminated," and that "at least two of the decision makers were themselves over the age of 50," *id.* at 7a-8a, even though Petitioner presented evidence at trial that Chesnut was Respondent's sole decision-maker. The Court of Appeals also downplayed the significance of Respondent's prevarication in explaining to Petitioner why he was discharged:

> [a]lthough proof that an employer lied to its employee about its reason for discharge does, under some circumstances, raise a 'red flag' of pretext, the inconsistency noted by Reeves in this case can hardly be considered mendacious.

Id. at 9a. Having thus weighed the evidence presented by both parties, the Fifth Circuit rejected the jury's verdict and concluded that "there was insufficient evidence for a jury to find that Sanderson discharged Reeves because of his age."

SUMMARY OF ARGUMENT

The Fifth Circuit held that proof that a member of the disfavored class was replaced by a member of the favored class, combined with evidence that the employer's explanation is pretextual, and other circumstantial evidence, are insufficient to permit a jury to infer discrimination. This contravenes *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), which established that just such a circumstantial case is sufficient to allow a fact finder to infer discrimination. This Court expressly so stated in *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

The fact that Mr. Reeves was replaced by less-efficient, much younger employees, and that the reasons given for this replacement were all contrived, left the logical inference that age is the reason for the termination. Any doubts about

whether age, rather than some other arbitrary reason, caused Mr. Reeves' discharge was resolved by the jury in Mr. Reeves' favor. The fact that the company's "absolute power" (Chesnut) had earlier manifested an age-bias against Mr. Reeves is circumstantial evidence sufficient to cause a jury to infer that age-bias was the cause of Mr. Reeves' dismissal.

The Court of Appeals was also wrong to consider without limitation "all of the evidence," when deciding whether or not to grant judgment as a matter of law.

In ruling on such a motion, a court may not (1) credit testimony by witnesses for the moving party over contrary testimony by witnesses for the non-moving party; (2) resolve disputes about what inferences should be drawn from the evidence of the moving party; or (3) attempt to balance the weight of the evidence submitted by the parties. The Court of Appeals violated each of these precepts.

The proper test for deciding whether to grant judgment as a matter of law involves consideration only of the non-movant's evidence, together with any unimpeached, uncontradicted testimony by the movant from unbiased witnesses. Only when the evidence of the moving party is uncontradicted and unimpeached or otherwise "conclusive" may it be relied upon to grant judgment as a matter of law.

Had the Court of Appeals considered only the non-movant's evidence, together with any uncontradicted and unimpeached evidence of unbiased witnesses of the movant, the test utilized would be the same as that utilized for summary judgment under Fed. R. Civ. P. Rule 56. This Court has previously held that Fed. R. Civ. P. Rule 56 and Fed. R. Civ. P. Rule 50 substantive standards are the same. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-253 (1986). *Anderson*

dictates reversal since there were disputed "issues of material fact," in view of the contradictions between Mr. Reeves' evidence and Defendant's evidence on whether age bias caused Mr. Reeves' firing.

This Court should also hold on appeal the standard of review for denial of a Rule 50 motion is different from that for a Rule 56 motion. It is proper on appeal to consider a motion for summary judgment "*de novo*." The court of appeals has the same opportunity to review the evidentiary materials on file as does a district court.

However, once there has been a jury trial, and a Rule 50 motion has been denied, deference should be given to the trial judge's and jury's understanding and evaluation of the evidence. The trial judge and jury had the opportunity to hear and see the witnesses. The appeals court did not.

Just as the Seventh Amendment requires deference be given to a trial judge's ruling to deny a motion for new trial, *Gasperini v. Center for Humanities*, 518 U.S. 415, 435-436 (1996), the same deference should be given the decision of the trial judge and jury on a motion for judgment as a matter of law.

ARGUMENT I.

EVIDENCE THAT PETITIONER WAS DISPLACED BY A YOUNGER EMPLOYEE FOR PRETEXTUAL REASONS AND OTHER CIRCUMSTANTIAL EVIDENCE ADEQUATELY SUPPORT A JURY FINDING OF AGE DISCRIMINATION.

Mr. Reeves produced evidence that the reasons given for replacing him with younger employees were a pack of lies. The Defendant lied when it claimed the age-biased Chesnut did not make the decision to fire Mr. Reeves. It lied when it claimed the age-biased Chesnut did not participate in the probation decision in 1993. It lied when it claimed the results of an investigation caused his firing. Perhaps grudgingly, the Fifth Circuit conceded that "Reeves very well may be correct" on his pretext argument. J.A. 19. Nevertheless, the Court of Appeals ruled there was no "substantial evidence" of age discrimination. The Fifth Circuit refused to permit a jury to infer age discrimination from the fact that Mr. Reeves was replaced by younger employees for pretextual reasons, or from Mr. Reeves' other indirect evidence. This refusal to accept circumstantial evidence as adequate reflects a disagreement among the court of appeals over the meaning of *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

Hicks held that a finding that a member of the disfavored class was replaced by a member of the favored class for "pretextual" reasons does not *compel* a finding of age discrimination. But the courts of appeals have differed over the question of whether a finding that a member of a disfavored class was replaced by a member of the favored class, coupled with proof of pretextual reasons, permits a jury to infer discrimination. The majority of the courts of appeals have allowed a jury finding to be upheld if there is proof that a

member of the disfavored class is replaced by a member of the favored class for pretextual reasons.[15]

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[15] *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 347 (6th Cir. 1997) ("The import of the *Hicks* decision in this circuit is that once a plaintiff has disproved the reasons offered by the defendant, the fact finder is permitted to infer discrimination. A plaintiff does not need to introduce additional evidence of discrimination to prevail on the merits"); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1535 (11th Cir. 1997) ("*Hicks* ... means ... that evidence sufficient to discredit a defendant's proffered nondiscriminatory reasons for its actions, taken together with the plaintiff's *prima facie* case, is sufficient to support (but not require) a finding of discrimination"); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1066-67 (3rd Cir. 1996) ("[w]e have understood *Hicks* to hold that the elements of the *prima facie* case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination"); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1110 (8th Cir. 1994) ("Based upon the elements of the plaintiff's *prima facie* case and the jury's rejection of the defendant's explanations, the jury could infer that discrimination had occurred"); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994) ("*Hicks*...states that the plaintiff may prevail in a discrimination case by establishing a *prima facie* case and by showing that the employer's proffered non-discriminatory reasons for her demotion or discharge are factually false ... '[N]o additional proof is *required*") (emphasis added); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) ("[t]here will always be a question for the factfinder once a plaintiff establishes a *prima*

(continued...)

On the other hand, a minority of the Courts of Appeals have required direct evidence, finding proof of pretext alone is insufficient to present a jury question on discrimination.[16]

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[15](...continued)
facie case and raises a genuine issue as to whether the employer's explanation for its action is true").

[16] *See Bienkowski v. American Airlines*, 851 F.2d. 1503, 1508, n. 6 (5th Cir. 1988) (Pre-*Hicks*, proving pretext alone insufficient because it would hold employers liable for firing employee for arbitrary, but non-discriminatory reasons, as is permitted by the employment-at-will doctrine); *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 443 (11th Cir. 1996) (majority rule is "hurtful to employers"); *Price v. Marathon Cheese Corp.*, 119 F.3d. 330, 337 (5th Cir. 1997); *LaBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 842-43 (1st Cir. 1993) (in order to sustain finding of discrimination, there must be proof not only of "'minimally sufficient evidence of pretext,' but evidence that overall reasonably supports a finding of discriminatory animus").

Discussions of the split of authorities among the Circuits are found in Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses; the Fallacy of the 'Pretext Plus' Rule in Employment Cases*, 43 Hst. L.J. 57 (1991); Jody H. O'Dell, *Between Pretext Only and Pretext-Plus; Understanding St. Mary's Honor Ctr. v. Hicks and its Application to Summary Judgment*, 69 Notre Dame Law Rev. 1251 (1994); Frank J. Caviliere, *The Recent Respectability of Summary Judgments and Directed Verdicts in Intentional Age Discrimination Cases; ADEA Analysis Through the Supreme Court Summary Judgment Prism*, 41 Clev. St. L. Rev. 103 (1993).

The Fifth Circuit's holding is inconsistent with the following language from *Hicks*:

> The fact finder's disbelief of the reasons put forward by the Defendant (particularly if this belief 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 Defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that upon such rejection, "no additional proof of discrimination is required."

509 U.S. at 511 (emphasis in original).

Defendant will no doubt claim that the above language in *Hicks* is overcome by the statement in the *Hicks* opinion that the employee must show "both the reason was false and discrimination was the real reason." *Id.* at 515. Mr. Reeves agrees that he must show that discrimination was the real reason. The issue, however, is whether he can make this showing through proof that he was replaced with a much younger employee for pretextual reasons.

The Fifth Circuit's view was also rejected in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) (emphasis in original):

> ... We know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Obviously, the Fifth Circuit comes dangerously close to requiring direct evidence ("I'm firing you because you are too old."). For example, the Fifth Circuit rejected the proof that Mr. Reeves was treated far differently than the much younger employee who was his co-supervisor. It rejected the proof that a decision-maker (Chesnut) had made age-based statements, including telling him that he was "too damned old for the job." It rejected the proof that Mr. Reeves was replaced by much younger, less efficient supervisors on three occasions. If this indirect evidence does not suffice, little short of direct evidence will do.

Requiring direct evidence is inconsistent with this Court's long-established model for proving discrimination cases. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), held that a plaintiff, seeking to prove intentional discrimination, may make this proof by establishing a *prima facie* case with proof that he (a member of the disfavored class) was replaced by a member of the favored class. The Defendant must then articulate a legitimate, non-discriminatory reason for the disputed action, after which Plaintiff then bears the burden of persuading the trier of fact that the proffered explanation was pretextual. As this court said in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981), the plaintiff has:

> the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason motivated the employer or indirectly by showing that the employer's proffered explanation is

unworthy of credence.

The Fifth Circuit's holding, which will usually result in requiring direct evidence, contravenes the *McDonnell-Douglas* and *Burdine* line of authority.[17]

Patterson v. McLean Credit Union, 491 U.S. 164, 187-188 (1989), held there are various ways to prove discrimination, and showing the displaced employee was better qualified is only one of the accepted methods. In making this point, this Court equated proof of pretext as one method of proof of intentional discrimination. In holding proof of pretext is not sufficient to prove intentional discrimination, the Fifth Circuit disregards *Patterson*.

Furthermore, forbidding the jury to find discrimination, from the fact the employer lied about its reasons is inconsistent with well-established precedents. Many cases allow adverse inferences to be drawn from the fact that a witness has lied. In the criminal law context, a jury is permitted to infer guilt from the fact that a Defendant gave a false exculpatory statement:

> ...If the jury were satisfied from the evidence that false statements in the case were made by defendant ... they had the right, not only to take such statements into consideration in connection with all the other

[17] Even under this approach, there might be a theoretical case where circumstantial evidence would suffice. For example, a company which for the last ten years had fired everyone reaching age fifty could be held liable without direct proof. But most employers are sufficiently aware of the discrimination laws so as to make such a extreme case unlikely.

> circumstances of the case in determining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements in explanation of defense ... as in themselves, tending to show guilt. The destruction, suppression, or fabrication of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury.

Wilson v. United States, 162 U.S. 613, 620-21 (1896).[18]

This is a hornbook principal. According to 2 John H. Wigmore, *Evidence in Trials at Common Law*, § 278(2) (Chadbourne Rev. 1979):

> It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's falsehood ... in the preparation and presentation of his cause ... is receivable against him as an indication that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.

Most significantly, forbidding juries to infer discrimination

[18] *Accord United States v. Hughes*, 716 F.2d 234, 240-41 (4th Cir. 1983); *United States v. Rajewski*, 526 F.2d 149, 160 (7th Cir.), *cert. denied*, 426 U.S. 908 (1976); *United States v. DeVore*, 368 F.2d 396, 397 (9th Cir. 1966); *United States v. Zang*, 703 F.2d 1186, 1191 (10th Cir. 1982); *United States v. Johnson*, 46 F.3d 1166, 1171 (D.C. Cir. 1995).

from the employer's lies[19] is inconsistent with the constitutional mandate that inferences to be drawn from the facts must be left to the jury. *Sioux City and Pacific R.R. Co. v. Stout*, 84 U.S. 657, 664 (1873) ("It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge"); *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944) ("The very essence of [the jury's] function is to select among conflicting inferences and conclusions that which it considers most reasonable"); *Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct. 1545, 1552 (1999) (where reasonable inferences from undisputed facts can lead to either of two conclusions, it is error to resolve this issue of fact by summary judgment).

Obviously, there are at least two possible inferences that can be drawn from the fact that the Defendant lied about its reasons for preferring younger employees to an older one. One

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[19] According to "pretext plus," allowing "pretext" to prove discrimination would undermine that public policy which allows employers to fire employees for arbitrary reasons or without "just cause." *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1508, n. 6 (5th Cir. 1988). But employment at-will is a doubtful policy in Mississippi. *See McArn v. Allied Bruce Terminix*, 626 So.2d 603, 606-607 (Miss. 1993) (public policy exception to employment at-will); *Bobbitt v. The Orchard, Ltd.*, 603 So. 2d 356 (Miss. 1992) ("We disposed of the argument that such a rule was fair because the employee was as free to quit as the employer to discharge him, and also signaled our direction for the future with the following comment: '[T]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread'").

such inference is the Defendant discriminated on the grounds of age. This is a particularly logical inference in view of Chesnut's comments about Reeves' age.

Of course, it is not the only possible inference. Another possible inference is that the employer had some undisclosed reason for the decision. But the settled law is that the jury decides which inference to draw. *Hunt v. Cromartie*, *supra*.

Besides rejecting Mr. Reeves' evidence as insufficient, the Court of Appeals also relied on other evidence of a lack of discrimination. For example, the employer emphasized that it also fired Caldwell (age forty-five). It claimed it has many other older supervisors. This type of statistical argument was rejected, as conclusive evidence of non-discrimination, in *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 878-879 (1984):

> A racially balanced workforce cannot immunize an employee for liability for specific acts of discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978). A piece of fruit may well be bruised without being rotten to the core.

A reasonable jury could find the employer fired Mr. Reeves because of his age but fired Caldwell for non-age reasons, such as his decision to credit Genie Mae Coley for work hours when she was hospitalized. No law requires that all of an employer's terminations be for the same reason.

Whether to accept the firing of Caldwell as persuasive evidence that Mr. Reeves was not the victim of age discrimination was but one factor for the jury to consider. In view of the other evidence, a jury was entitled to be as skeptical

of Defendant's statistical evidence as was Mark Twain.[20]

Similarly, the Court of Appeals' reliance on decision-makers Mrs. Sanderson and Jester being over fifty was misplaced. The jury was entitled to believe the termination decision was made by the age-biased Chesnut. Furthermore, many cases recognize that the motives of *all* decision-makers need not be proved to establish a discrimination case. *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985)(two members of five member selection committee had made biased recommendations).[21]

The Fifth Circuit also erred in ruling that the jury was not

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[20] "There are three kinds of lies: lies, damn lies and statistics."

[21] *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 355 (6th Cir. 1998) (discriminatory remarks of those who may have influenced the employment decision are relevant when the plaintiff challenges the motive behind that decision); *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308, 1311-1312 (D.C. Cir. 1998) (evidence of subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence); *Kelley v. Airborne Freight Corp.*, 140 F.3d 335, 347, 348 (1st Cir. 1998) (finding of discrimination supported by remark made by official who "participated closely" in termination decision); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 922 (3d Cir. 1997) (finding of discrimination supported by remark by company official who participated in the process that resulted in termination); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995) (finding of discrimination supported by remarks of official who "played a role" in the termination decision).

allowed to infer discrimination from age-based comments, such as Chesnut's informing Mr. Reeves that he was fired because he was "too damn old" to do the job. Prior expressions of attitudes or emotions have long been regarded as probative evidence to explain later actions. 2 John H. Wigmore, *Evidence in Trials at Common Law*, §395-406 (1940). If a jury believed that Chesnut had manifested an age bias against Mr. Reeves in late August 1995, it could reasonably believe that he still adhered to these biased views, and was acting upon them, when he fired Mr. Reeves two months later in October 1995. "...[S]tereotyped remarks can certainly be evidence that [age] played a part" in the decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).[22]

Similarly, the Fifth Circuit's finding that evidence that Mr. Reeves was treated much more harshly than a much younger supervisor does not support a finding of discrimination is

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[22] Many lower court cases have recognized this. For example, see authorities cited in note 21, *supra*. "The very essence of [the jury's] function is to select among conflicting inferences ..." *Tennant v. Peoria & P.U.R.. Co.*, 321 U.S. 29, 35 (1944). For an appeals court to decide that age-based comments by a decision-maker shortly before firing an employee do not prove the firing was age-motivated, but non-discrimination, because this same decision-maker also fired someone else for non-age reasons, is the epitome of an improper invasion of the jury's basic function. Courts are not free to reweigh the evidence and enter the verdict they think the jury should have reached merely because they believe the inferences they draw are more reasonable. *Anderson v. City of Bessemer*, 470 U.S. 564, 574-75 (1985). Whether a "discriminatory motive" exists is an issue for the jury. *Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct. 1545, 1552 (1999).

inconsistent with *McDonald v. Santa Fe Trail Transp. Corp.*, 427 U.S. 273 (1976), which held that firing white thieves, while permitting black thieves to continue their employment, constituted race discrimination. Similarly, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977), noted proof of discrimination can be inferred from differing treatment of members of the disfavored class.

In short, by effectively requiring that persons claiming discrimination can prevail only by producing direct evidence of bias in the decision making process itself, the Fifth Circuit ruled in a manner wholly inconsistent with this Court's decisions. If sustained, this ruling would produce a result, like this one, that seriously undermines the ability of victims of discrimination to enforce our Nation's laws forbidding age, race, gender, and national origin bias in employment matters.

ARGUMENT II.

THE COURT OF APPEALS ERRED IN EXAMINING ALL OF THE EVIDENCE TO DETERMINE WHETHER JUDGMENT AS A MATTER OF LAW SHOULD BE GRANTED. THE COURT SHOULD HAVE USED THE SAME STANDARDS USED IN CONSIDERING A SUMMARY JUDGMENT MOTION.

HOWEVER, UNLIKE REVIEW OF A DENIAL OF A RULE 56 MOTION, AN APPEALS COURT SHOULD GRANT DEFERENTIAL REVIEW TO A DECISION OF A TRIAL JUDGE TO DENY A RULE 50 MOTION.

In granting judgment as a matter of law, the Fifth Circuit considered all of the evidence, not just the non-movant's evidence. This follows its leading decision in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969)(en banc) which states:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence -- not just the evidence which supports the non-movant's case . . . . There must be a conflict in substantial evidence to create a jury question.

Boeing contains a vigorous dissent by Judge Reeves who argued the decision could not be reconciled with the Seventh Amendment or with *Galloway v. United States*, 319 U.S. 372, 395 (1943), or *Lavender v. Kurn*, 327 U.S. 645 (1946). *Boeing*, 411 F.2d at 394. Judge Reeves accused the *Boeing* majority of "error of constitutional proportions which will continue to plague this Court and the district courts of this Circuit until the Supreme Court grants certiorari on this or some future case and

corrects the error."

Consistent with the *Boeing* dissent, other Circuits have given more deference to a jury than does the Fifth Circuit. As Justice White noted:

> In the Eighth Circuit, however, it appears that the only evidence which supports the verdict winner is to be considered. *Simpson v. Skelly Oil Co.*, 371 F.2d 563 (8th Cir. 1967). The First and Third Circuits follow a middle ground: The reviewing court may consider uncontradicted, unimpeached evidence from disinterested witnesses. *Lane v. Binzont*, 657 F.2d. 468, 472 (1st Cir. 1981); *Inventive Music Ltd. v. Cohen*, 617 F.2d 29, 33 (3d Cir. 1980). Thus, the federal courts of appeals follow three different approaches to determining whether evidence is sufficient to create a jury issue. ...this disagreement among the federal courts of appeals is of far more than academic interest.

Venture Tech., Inc. v. National Fuel Gas Distribution Corp., 459 U.S. 1007 (1982) (White, J., dissenting).

Shunning the Rule 56 "issues of material fact" standard, the Fifth Circuit relied upon the movant's (employer's) evidence which was contradicted by Mr. Reeves' evidence. For example, Mr. Reeves' evidence was that the age-biased Chesnut was the "absolute power." On the other hand, Defendant's corporate representative testified at deposition that age-biased Chesnut was only one of four joint decision-makers. Then, all of the employer's witnesses testified at trial that Mrs. Sanderson made the decision. The Fifth Circuit rejected Mr. Reeves' contradictory evidence that the prejudiced Chesnut actually "ran the company," and accepted as the truth the employer's deposition testimony, which minimized Chesnut's

role.

In view of the fact that the testimony the Fifth Circuit relied upon was directly contradicted by Mr. Reeves' evidence, the decision to consider *all* of the evidence was improper. A respected commentator has urged this is error:

> The correct view seems to be that the district court may consider all of the evidence favorable to the position of the party opposing the motion for a judgment as a matter of law as well as any unfavorable evidence that the jury is required to believe.
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> Thus, a judge may take into account evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses. Statements that all of the evidence is to be considered are too broad. Unfavorable evidence that contradicts the favorable evidence must be disregarded, as must evidence that is admitted for limited purposes, such as impeachment.

Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 2529 at 297-99 (2d ed. 1994).

Considering only non-movant's evidence — together with any uncontradicted and unimpeached evidence from disinterested witnesses produced by movant — is consistent with both the common law and with the decisions of this Court. The beginning point must be the Seventh Amendment teaching that "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." U.S. Const. amend. VII.

The "rules of the common law" have been described in many authorities, including *Galloway v. United States*, 319 U.S. 372, 393-94 (majority opinion), 399-400 (Black, J. dissenting) (1943); *Slocum v. New York Life Ins.*, 228 U.S. 364, 388-92 (majority opinion), 409-17 (Hughes, J., dissenting) (1913). What follows is a short summary of the "rules of the common law."

The common law analogy to a directed verdict is a demurrer to the evidence. Under this procedure, the moving party was required to stipulate the truthfulness of the evidence produced by the non-movant. As Justice Story has explained, the party demurring to the evidence must "distinctly admit, upon the record, every fact, and every conclusion, which the evidence given for his adversary conduced to proof." *Fowl v. Common Counsel of Alexandria*, 24 U.S. 320, 322 (1826). As put in *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 388 (1913), "a demurrer to evidence ... must contain an express and direct admission by the demurrant of every fact which the evidence of the adversary conduces to prove ... ." *Webb v. Illinois Cent. R.R.*, 352 U.S. 512, 513-14 (1957) held:

> In passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given.

Wilkerson v. McCarthy, 336 U.S. 53, 57 (1949) said:

> It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury, we need look only to the evidence and reasonable inferences which tend to support the case of the litigant against whom a peremptory instruction has been given.

Thus, cases from *Foul* in 1826 to *McCarthy* in 1949 have reiterated the "rules of the common law" of considering *only that evidence supporting the non-movant*. These authorities describing the common law have been modified by this Court's modern decisions, only to the extent the Court allows consideration of the *uncontradicted* and *unimpeached* or "conclusive" evidence of the movant. For example, *Texas v. Lesage*, ___ U.S. ___, 120 S.Ct. 467, 468 (1999), approved a grant of summary judgment where the movant's evidence established, without contradiction, that the non-movant (Plaintiff) could not have been admitted to the academic program in issue, even if there had been no race discrimination against him. In *Lesage*, besides the non-movant's evidence, the *uncontradicted* and *unimpeached* or "conclusive" evidence of the movant was considered. 120 S.Ct. at 468.

But this is not a case where the movant showed *conclusively* or through uncontradicted and unimpeached evidence, that there was a lack of age discrimination. To the contrary, each piece of evidence offered by the Defendant was *contradicted* by Mr. Reeves' evidence, or impeached by cross-examination or prior inconsistent statements. In such a situation, the "rules of the common law" command only non-movant's evidence be considered.

The Fifth Circuit's practice of considering all the evidence results in the Appeals Court's *balancing* the evidence to decide which side it believes. For example, in this case, Mr. Reeves' evidence was that Chesnut was the "absolute power." The Defendant's testimony was to the contrary and that four people made the termination decision. The Fifth Circuit weighed the evidence on both sides and agreed with Defendant, finding a termination decision by four persons, two of whom were over fifty.

Consideration of "all of the evidence" thus causes the appeals court to weigh the evidence so as to determine which evidence it believes. This contravenes *Richmond & Danville R.R. Co. v. Powers*, 149 U.S. 43, 47 (1893):

> It is true that there was testimony tending to show a different state of facts ... But, of course, all conflict in the testimony was settled by the jury, and could not be determined by the court....

According to *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891):

> The jury were the judges of the credibility of the witnesses ... and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case . . . belongs to a jury, who are presumed to be fitted for it by their natural intelligence and a practical knowledge of men and the ways of men....

The Appeals Court accepted as true the employer's denial of age discrimination. But granting credibility to Defendant's witnesses runs afoul of *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 408 (1899):

> [T]he mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.

This also contravenes *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468 (1962), which discounted the value of affidavits from company officials, since "it is readily apparent that each of these persons was an interested party." *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624-25 (1941) also discounted the value of affidavits of interested witnesses.

By deciding to credit Defendant's denial of discrimination, the Fifth Circuit is inconsistent with *Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct. 1545, 1552 (1999):

> Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence. Summary judgment ... is inappropriate where the evidence is susceptible of different interpretations or inferences by the trier of fact.

Of course, *Boeing v. Shipman*, *supra*, denied an intent to authorize "balancing" the evidence. But this case demonstrates that a court cannot consider *all* of the evidence without balancing it to decide which to believe. An appellate court is not the forum to make credibility choices. This displaces the jury. "The very essence of [the jury's] function is to select among conflicting inferences and conclusions that which it considers most reasonable." *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 35 (1944). As stated in *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879), "If the Court admits ... testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony."

The Fifth Circuit's consideration of *all* of the evidence of the moving party contradicts the *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-253 (1986) teaching that the standard for directed verdicts under Rule 50, and for summary judgment under Rule 56, are the same. If one considers *only the non-*

movant's evidence, and uncontradicted, unimpeached evidence of the movant, issues of material fact exist under Rule 56. Contradictions between Plaintiff's evidence and Defendant's evidence on material points (e.g., identity of the decision-maker) created issues of material fact. Established summary judgment procedure requires the court to disregard movant's evidence which is contradicted by non-movant's evidence. Contradiction in evidence on material points precludes summary judgment under Rule 56. *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-253 (1986); *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986).

The contradictions in the evidence on material points should have precluded a directed verdict under Rule 50 for the same reason they preclude summary judgment under Rule 56. Otherwise, this Court's direction to equate the two motions has not been followed. *See* Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 Fla. St. U.L. Rev. 689, 712 (1996) (arguing that denial of summary judgment should ordinarily bar grant of judgment as a matter of law under the "law of the case" doctrine).[23]

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[23] Liberal use of Rule 56 summary judgment procedures has already eliminated many cases without a jury trial. *See* Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897 (1998); William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus" and the Escalating Subordination of Federal Employment Discrimination Law for Employment at Will: Lessons from McKennon and Hicks*, 30 Ga. L. Rev. 305 (1996); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII* (continued...)

However, Rule 56 and Rule 50 differ in one important particular. This is the standard of review on appeal. A summary judgment motion involving no jury trial is subject to *de novo* review. E.g., *Degan v. Ford Motor Co.*, 869 F.2d 889, 892 (5th Cir. 1989); *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1010 (1989); *Thrasher v. State Farm Fire & Cas. Ins. Co.*, 734 F.2d 637 (11th Cir. 1984). This is quite proper. The appeals court has the same opportunity to review the evidence as the trial judge. However, a Rule 50 motion, unlike a Rule 56 motion, must take into account the Seventh Amendment prohibition of re-examination of the findings of a jury except according to "the rules of the common law." The rules of the common law forbid any appeal of a jury's fact finding.[24]

As stated in 2 *The Complete Anti-Federalists* at ¶ 2.8.194:

> By the common law, in Great Britain and America, there is no appeal from the verdict of the jury, as to

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[23](...continued)
and ADEA Cases, 34 B.C. L. Rev. 203 (1993).

[24] *See* Chief Justice Rehnquist's dissent in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979) and Justice Scalia's dissent in *Gasperini v. Center for Humanities*, 518 U.S. 415, 435-436 (1996). *See also* M. Horowitz, *The Transformation of American Law*, 28-29, 141-43 (1977); Johnston, *Jury Subordination Through Judicial Control*, 43 Law & Contemp. Probs., at 24, (Autumn 1980); W. Holdsworth, *A History of English Law*, 298-350 (7th ed. 1956); J. Thayer, A Preliminary Treatise on Evidence at the Common Law, 137-262 (1898); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. Law Rev. 639, 731 (1973).

facts, to any judge whatsoever.

According to 3 William Blackstone, *Commentaries on the Laws of England*, 405-406 (1st ed. 1768):

> The writ of error only lies upon matters of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it; and there is no method of reversing an error in the determination of facts, but by an attaint, or a new trial, to correct the mistakes of the former verdict.

Since the English common law, at the time of the adoption of the Seventh Amendment[25], did not allow any appellate review of a jury's fact finding, appellate reversal of jury fact finding, to meet Seventh Amendment Standards under Rule 50, must be highly deferential, if at all.

Practical considerations also indicate that an appeals court should avoid, wherever possible, granting judgment as a matter of law on the grounds the jury and trial judge erred in finding the facts. Trial judges (and jurors) have the "unique opportunity to consider the evidence in the courtroom context," which makes them a more accurate fact finder than appeals court judges who see only the "cold paper record." *Gasperini v. Center for Humanities*, 518 U.S. 415, 435-438 (1996). Trial judges (and jurors) have:

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[25] The "common law" referred to the Seventh Amendment in the English common law, at the time of adoption of the Seventh Amendment, not the common law as modified by statutes or rules in the various states. *Capital Traction Co. v. Hof*, 174 U.S. 1, 8 (1899).

> personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses ... and ... the feel of the case which no appellate printed transcript can impart.

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 216 (1947).

The facts of this case had the undivided attention of the trial judge and jurors for four days. The trial judge reviewed the evidence four times and four times found the evidence was adequate. On the other hand, the appeals court reviewed the evidence at oral argument when its attention was divided among three other cases. The appeals court heard a summary of the evidence secondhand, from the lawyers. With these disadvantages, it is not surprising that the appeals court misunderstood the facts in several particulars.[26]

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[26] A glaring error was the Fifth Circuit's finding that two of the decision-makers (Sanderson and Jester) were over fifty. (Pet. App. 9a). To the contrary, Mr. Reeves' evidence was that age-biased Chesnut alone had to be pleased in order for one to keep his job.

Other significant factual errors in the Court of Appeals' opinion include the statements that:

(a) "Reeves was required to keep daily, weekly, and monthly records of the attendance and tardiness of employees under his control." (Pet. App. 2a). Actually, the weekly and monthly records were kept by the personnel department. Reeves never even saw a monthly report except on one occasion. Tr. 20. Yet, Defendant claims he was fired for not

(continued...)

[26](...continued)
giving writeups which could only be ascertained from the monthly reports he never saw!

(b) "[Sanderson] argues, employees under Reeves' control ... were not being disciplined for their habitual absenteeism." (Pet. App. 7a) In fact, Defendant's study had never identified a problem of absenteeism, and the only case in which a worker was incorrectly recorded as present involved an employee who was in the hospital. This error is important because Exhibit D5-A actually exonerates Mr. Reeves of having covered up absenteeism.

(c) "Th[e] investigation revealed numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves and Oswalt." (Pet. App. 3a) In fact, nearly all of the incidents to which the study objected concerned Mr. Reeves' failure to place on "01" code on the sheets of employees listed as starting work at 7:00 a.m. rather than 6:59 a.m., a matter that involved neither inaccurate time records nor misrepresentations. The parties were in sharp disagreement about whether the lack of that '01" code was improper at all, and about whether any such error was trivial. The Court of Appeals, however, appears not to have understood either the contents of the report or the nature of that dispute, especially since such details are easily overlooked when one is attempting to digest the cold record as opposed to listening, one at a time, to each witness.

(d) "The fact remains that as a result of the 1995 investigation, each of the three hinge room supervisors was accused of inaccurate recordkeeping, including not only Reeves and Caldwell, but thirty-five year old Oswalt as well." Pet. (continued...)

The type of tedious, workplace issues involved in this case are those for which appeals court judges have no expertise and little experience. Realities of discipline in a factory workplace are far more familiar to ordinary working people who sit on juries than to appellate judges. Jurors accustomed to working in a factory environment are in a far superior position to judge the truthfulness of the employer's claim that a union would be dissatisfied with Mr. Reeves' alleged lax treatment of workers. Persons who work in a factory environment and sit on juries are in a superior position to judge the plausibility of Defendant's claim that workers were regarded as tardy if they clocked in at 7:00 a.m. when the shift started. Jurors who observe the demeanor of witnesses are in a superior position to judge whether or not Mr. Reeves was truthful when he testified Chesnut dominated the company.

A district judge who presides over the trial also has the same advantages of observing the demeanor of witnesses as do jurors. "Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of the fact determination and at a high cost in

[26](...continued)
App. 3a. Actually, there is no evidence Oswalt was accused of inaccurate timekeeping. Mr. Reeves was accused only *after* this case was filed. Furthermore, the Court of Appeals evidently believed, from the above quotation, that the study of personnel records occurred in the summer of 1995, while Oswalt was still employed, and he had avoided dismissal only by quitting before Mrs. Sanderson could act on the accusations against him. In fact, Oswalt resigned on August 1, 1995, and the study did not occur until October of 1995, and Defendant would have known at that time that it could not lead to any action against the departed Oswalt.

diversion of judicial resources." *Anderson v. City of Bessemer*, 470 U.S. 564, 574-75 (1985). "The cost of providing 'duplicate' decisions ... outweigh the benefits ... of *de novo* judicial review." *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993).

For these reasons, the Fifth Circuit erred in reviewing the evidence *"de novo,"* as would be proper when considering an appeal of a Rule 56 summary judgment ruling. The correct practice is that of the Eighth Circuit to:

> ... give great credence to the findings of the jury and the trial judge. They heard the testimony and reviewed the evidence firsthand; ... Appellate courts should be extremely reluctant to interfere with a verdict where twelve jurors sit through a long trial and an experienced and competent trial judge finds no error in the jury's determination.

Herold v. Burlington Northern, Inc., 761 F.2d 1241, 1245 (8th Cir. 1985).

Indeed, a deferential standard of review of denial of a Rule 50 motion is commanded by *Patton v. Texas & Pacific Railway Co.*, 179 U.S. 658, 660 (1900):

> hence, it is seldom that an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict ... the judge is primarily responsible for the just outcome of the trial ... He has the same opportunity that jurors have for seeing the witnesses, for noting all of those matters in a trial not capable of record ... an appellate court will pay large respect to his judgment.

Rule 52(a) of the Federal Rules of Civil Procedure addresses the standard of review of a district court's findings of fact, permitting reversal on appeal only if the trial judges fact finding is "clearly erroneous." Why are the trial judge's rulings so suspect that they are reviewed "*de novo*" when he finds that the jury had an ample factual basis for its decision, but his rulings are reversed only if "clearly erroneous" when he finds the facts?

A great degree of deference is also accorded to a trial judge's decision to grant or deny a new trial. Such trial court decisions were once regarded as entirely unreviewable. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247 (1940). However, *Gasperini*, 518 U.S. at 435-436, departed from common law tradition to allow an appellate court to review a trial judge's decision to deny a motion for a new trial. However, *Gasperini* also held that such a review of the facts, for purposes of deciding a motion for new trial, is constitutional only if the appeals court review is limited to an abuse of discretion standard. *Gasperini*, 518 U.S. at 434.

An appeals court's entering final judgment for a party whom a jury has found should lose is a far greater diminishment of the jury's prerogative than is the sustaining of a motion for a new trial. The sustaining of a motion for a new trial results only in another jury's deciding the case. On the other hand, judgment as a matter of law is a final decision awarding victory to the party which a jury, after hearing days of testimony, has decided should lose.

Gasperini held that an abuse of discretion standard is constitutionally required for an appeals court review of a trial judge's decision to deny a motion for a new trial. It follows that a "*de novo*" review of the greater intrusion on the jury's prerogative (the grant of a judgment as a matter of law) is

constitutionally impermissible.

A Rule 50 motion, unlike a Rule 56 motion, should not be reviewed *de novo*. It should be afforded a highly deferential review, just as are all other decisions of a district judge who views the witness. The same deference accorded the trial judge should also be accorded the jury. *See* Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 Cornell L. Rev. 325, 328 (1995) (stating "[t]he marginalization of the jury undermines the democratic vision of full participation and may discourage citizen respect for the legal system in general").

The proper deference to be afforded a jury verdict was eloquently stated by the dissent in *Shipman*:

> This is no occasion for an old common-law lawyer to indulge in a panegyric on the virtues of jury trial; how in our fallible system of human justice it is the best instrument yet devised for the determination of the facts, how even its imperfections operate to rub the rough edges off the technical principals of law when they would result in unjust verdicts, how it is constantly improving with the progress of our jurisprudence and with the advance of education and enlightenment, how it gives a citizen a proud and rightful place in the administration of justice, and tends to make real our utopian dream of a single 'government of the people, by the people, and for the people.' There are many who do not agree with my almost reverential attitude toward jury trial, but this is no occasion for a debate on that subject, because our forefathers wrote into our Constitution the right of trial by jury in both criminal and civil cases.

411 F.2d at 387.

By independently reviewing the evidence adduced at trial, and weighing the credibility of the witness, the Court of Appeals seriously overstepped its role, in violation of the Seventh Amendment and the Federal Rules of Civil Procedure. When, as here, a properly-instructed jury has before it a *prima facie* case of discrimination, and where the parties have presented sharply conflicting evidence as to whether bias or some legitimate reason was the basis for the employer's decision being challenged as a violation of the federal anti-discrimination laws, it is the province of the jury, not the Court of Appeals, to weigh that conflicting evidence and to decide whether the motive was a permissible or unlawful one. Because the Court of Appeals clearly overstepped its proper function here, the decision below must be reversed.

CONCLUSION

The jury verdict should be reinstated.

Respectfully submitted,

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