No. 99-536

IN THE SUPREME COURT OF THE UNITED STATES

ROGER REEVES,
Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,
Respondents

BRIEF FOR RESPONDENT

Filed February 4, 2000

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

STATEMENT PURSUANT TO RULE 29.6

Respondent, Sanderson Plumbing Products, Inc., has no parent corporation and no publicly-held company owns ten percent (10%) or more of its stock.

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

Cases:

Page

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

COUNTERSTATEMENT OF THE CASE

I. Background

Respondent, Sanderson Plumbing Products, Inc. (hereinafter "Respondent" or "Sanderson"), is a company involved in the manufacture of toilet seats and covers located in Columbus, Mississippi. (*3 R. 147; L-27*).[1] The Company has approximately 850 employees and at the time of the trial, the President of the Company was Sandra Sanderson. (*Id. at 89; L-23*). Petitioner, Roger Reeves, (hereinafter "Petitioner" or "Reeves") was a supervisor in a department of the Company known as the Hinge Room. (*Id. 147; L-27*). Reeves was terminated by Sandra Sanderson on October 23, 1995 for unsatisfactory work performance in his assigned job responsibilities, failure to follow company policy and procedures, and falsification of attendance records of employees under his supervision. (*Id. at 153-155; L-33-35*). Reeves filed suit in the United States District Court for the Northern District of Mississippi claiming that Sanderson terminated him because of his age in violation of *THE AGE DISCRIMINATION IN EMPLOYMENT ACT, (29 U.S.C. § 621, et seq.)*. (*3 R. 1*). The trial of this matter was held on September 8-12, 1997. At the conclusion of the testimony, the court overruled Sanderson's Motion for Judgment as a Matter of Law and submitted the matter to the Jury. The Jury returned a verdict in favor of Reeves and further found that the action of Sanderson was willful. Sanderson filed a timely Renewed Motion for Judgment as a Matter of Law and Reeves filed a Motion for Front Pay. On May 21, 1998, the district court entered an Opinion and Order overruling Sanderson's Renewed Motion for Judgment as a Matter of Law. (*3 R. 287-89*). Sanderson appealed to the United States Court of Appeals for the Fifth Circuit. In an Opinion rendered on April 22, 1999, the Court of Appeals found there was insufficient

1. References to testimony are made to the Official Record by Volume and Page number; to the Joint Appendix as: J. App. ___; and to the Lodging Appendix supplied by Respondent as: L-1, L-2, etc.

evidence to submit the case to a jury.[2] Thereafter, Reeves filed a Petition for Rehearing *en banc*, which was denied by the Court of Appeals on June 9, 1999.

On or about September 15, 1999, Petitioner filed a Petition for Writ of Certiorari to this Honorable Court, which was granted on November 8, 1999.

II. Factual Background and Prior Job Performance

A. Factual Scenario

Reeves began employment with the predecessor company of Sanderson in 1955. When Ms. Sanderson took over operations of the predecessor company in 1984, Reeves was supervisor in a department of the Company known as the Hinge Room. (*3 R. 32; L-2*). The Hinge Room ran a regular line and a special line. (*Id. at 33; L-3*). Reeves was supervisor over the regular line and Joe Oswalt was supervisor over the special line. (*Id.*) Russell Caldwell was the Manager of the department and supervised both Reeves and Oswalt. (*Id.*). Reeves was terminated on October 23, 1995, for the reasons stated in the opening portion of this Brief. Reeves' immediate supervisor, Caldwell, who was 45 years of age, was terminated at the same time for the same reasons. (*3 R. 153-155; L-33-35*). Additionally, the evidence is uncontradicted that the third and other supervisor in the Hinge Room, Oswalt, approximately 33 years of age,[3] would have been terminated for the same reasons had he not quit work at Sanderson in August of 1995. (*4 R. 210-11; L-64-65*).

2. The entire Opinion of the Fifth Circuit is found in the Joint Appendix (J. App. pp. 10-20).

3. Oswalt testified at the trial of this matter in September of 1997 that he was 35 years of age. At the time of the termination of Reeves in October of 1995, obviously, Oswalt would have been approximately 33 years of age. Various places in the Record and in the Opinion of the lower court refer to Oswalt being 35 years of age and, while this minor difference is not significant, Oswalt was approximately 33 years of age.

Sanderson had a union that represented the production and maintenance employees of the Company. The union contract included general work rules. (*Union Contract, Ex. D-7, 4 R. 188-189; L-42-43*).[4] Included in those rules was a paragraph dealing with attendance, which read as follows:

> Employees are expected to maintain a good attendance record. Time lost from work in excess of five percent (5%) of the scheduled hours in a month or lateness at the start of the work shift or returning from break in excess of two (2) occasions per month, will subject an employee to disciplinary action.

(*Ex. D-7 at p. 40; Id. at 188*).

The contract also stated that with regard to violations of the rules relative to attendance, progressive discipline would be handed down as follows:

First Offense: Verbal warning, with a written record being made of the warning;

Second Offense: A written warning;

Third Offense: Suspension for three (3) days; and

Fourth Offense: Discharge.

(*Ex. D-7 at p. 41; 4 R. 189; L-43*).

The purpose of the progressive steps is not only to have a record of infractions by an employee but also to enable the Company to be able to continually reinforce and attempt to rehabilitate an employee. (*Id. at 189-190; L-43-44*).[5] Reeves,

4. The Collective Bargaining Agreement is Ex. D-7 contained in the original Volume of exhibits in the Record.

5. As an example of the rule with respect to attendance, if a particular employee is excessively absent or tardy for four (4) straight

(Cont'd)

being a supervisor for a number of years, was well familiar with the attendance policy and the five percent (5%) rule and knew that there was a step procedure for disciplinary action when employees violated the rule. (*3 R. 38; L-7*). Reeves readily acknowledged that one of his functions as a supervisor was to make sure the people under his supervision (around 35 employees) were at work and on time. (*Id. at 36; L-5*). He further recognized that he was required to note any absences or tardiness of employees under his control. (*3 R. 38-39; L-7-8*). Reeves admitted at trial that Sanderson placed great emphasis on being present and timely at work. (*Id. at 36; L-5*). Moreover, he agreed that Sanderson had continuously attempted to emphasize this matter not only to rank-and-file employees but also to supervisors. (*Id.*).

Timesheets were important because they were not only the record of an employee's time worked to allow accurate pay of employees, but were also very important to monitor the employee's attendance and tardiness so that equal implementation of the step procedures for disciplinary action could be effected. In fact, the timesheets contained a particular code that explained why a person was tardy or absent. Thus, it is critical to Sanderson that a supervisor keep accurate attendance and tardiness records on a daily, weekly and monthly basis to ascertain where employees stand in the step procedure. This was the responsibility of the supervisor of every department. Supervisors received daily timesheets, which they checked off and approved regarding an employee's attendance. If the employee was present, the supervisor noted whether the

(Cont'd)
months and the same is properly noted, then it would take four (4) months before the employee would complete the steps and be discharged. Thus, the employee would have that period to rehabilitate himself. (*4 R 190; L-44*). The applicable portion of the Contract further provided that after disciplinary action has been issued and has been in an employee's file for 12 months, it will not be considered. (*Ex. D-7 at p. 42*).

employee was tardy, and if the employee was absent and/or tardy, the reason was noted. (*3 R. 39, 43; L-8, 12; 4 R. 191; L-45*).

It was, therefore, critically important that timesheets be correctly maintained by supervisors such as Reeves. (*4 R. 192; L-46*). Additionally, if an employee who was not supposed to be at work until 7:00 a.m.[6] clocked in at 6:30 a.m., but ate breakfast in the break room before going to work at 7:00 a.m., that employee would be paid improperly for thirty (30) minutes that he/she did not work unless the supervisor made a notation of this on the daily timesheet. (*4 R. 192; L-46*). If for some reason the employee actually worked longer than the clock showed, it was the function of the supervisor to make that notation. Again, all such corrections or adjustments were the responsibility of supervisors such as Reeves. (*Id. 192-193; L-46-47*).

Reeves readily admitted, as an example, that if an employee who is supposed to be at work at 7:00 a.m. does not clock in until 7:00 a.m. or does not come into work until after 7:00 a.m., then he is required to make a notation on the daily timesheet to indicate that the person was absent and/or tardy so that information would be recorded on the weekly and monthly reports. Reeves further admitted that after the daily timesheet, as aforementioned, he would then receive a weekly report listing each employee's hours worked each day that week, and he was to review the report for accuracy and correct any errors resulting from the daily timesheets. He would then give the weekly report to his supervisor, Russell Caldwell, who would also review it. It was then sent to data processing. (*3 R. 39-40; L-8-9*). Although checked by Caldwell, Reeves admitted he was the first one who would receive the weekly reports and it was his duty and responsibility to review them. (*Id. at 40; L-9*). A report was generated weekly and then monthly showing each employee's attendance. (*Id. at 39; L-8*).

6. The normal starting time for most employees was 7:00 a.m. (*3 R. 39; L-8*).

Reeves was likewise familiar with the monthly reports and on a monthly basis his department received a monthly report of each employee showing how many days the employee had been absent or tardy, the reasons for same, and a percentage related to total attendance. (*3 R. 41; L-10*). He contends that there is "evidence of pretext" because he had no involvement with the monthly report from which write-ups were given, as that was the responsibility of Russell Caldwell. (*Br. of Pet. at pp. 12, 43, n.26(a)*). A review of the uncontradicted evidence reveals otherwise. After testifying as to his responsibility to fill out the daily reports, Reeves admitted he was the one who received the weekly report to check and make sure there were no errors because of his daily records. (*3 R. 40; L-9*). Obviously, the monthly report was based upon the daily and weekly reports compiled by Reeves. Even then, Reeves, contrary to the assertion in his Brief, admitted that when the monthly reports came out, he reviewed them with Caldwell. (*Id. at 42; L-11*). He admitted there were occasions when employees would improperly clock in and it would be his responsibility to correct the time records. (*Id. at 39-40; L-8-9*). Reeves readily admitted the importance of correctly maintaining the daily, weekly and monthly records and further admitted, for example, that if an employee was absent or tardy and this was not reported by the supervisor, then that employee would not be disciplined, whereas if another employee was also absent or tardy and was reported and written up, that employee would be disciplined and this would result in unequal treatment between the two employees. (*Id. at 43; L-12*).

The weekly time records were introduced into evidence as Ex. D-3. (*Id. at 116*). At the end of the month, a monthly absentee report was generated showing a summary of time lost within the month (dependent, of course, upon correct reporting by the supervisor). In other words, if at the end of the month, an employee was absent one percent (1%) or eight percent (8%) during the scheduled hours, this would be reflected. (*An example of this document is that introduced as Ex. D-4 — contained in the original Exhibit file*) (*4 R. 195-96; L-49-50*).

B. 1993 Performance Problems of Plaintiff

Problems in the Hinge Room began to surface as early as the fall of 1993.[7] At that time, Powe Chesnut, who was then Director of Quality Control at Sanderson, conducted a review of the entire operating procedures in the Hinge Room in an effort to improve productivity and determine quality and quantity problems in the department. (*Id. at 197; L-51*). The study revealed that supervision in the Hinge Room on the assembly line supervised by Reeves was very lax inasmuch as people were not following general work rules, employees were late returning from break, and employees were taking unscheduled breaks. (*Id. at 198; L-52*).

As a result of the findings, in December of 1993 Reeves was placed on probation by his immediate supervisor, Russell Caldwell, and then Director of Manufacturing, Everett Livingston (who died before trial) for unsatisfactory work performance that included, among other things, not counseling or writing up employees for tardiness and not following absentee policies. (*Id. at 198-199; L-52-53*). As memorialized by memo dated December 13, 1993, from Russell Caldwell to Roger Reeves placing Reeves on probation, supervision in the department was weak and needed substantial improvement, and lack of leadership shown by Reeves was a major problem in the department. (*December 13, 1993 Memo contained in Personnel File of Reeves at Ex. P-1 - last page of Ex. P-1, 3 R. 28*).[8]

7. Sanderson performed an audit of the Hinge Room in 1991. In 1991, the Quality Control Department, which is empowered to do such studies, ran the regular line in the Hinge Room for six (6) months. (*4 R. 196; L-50*). To improve efficiency, the QC Department developed a Standard Operating Procedures Manual, which was given to Russell Caldwell and Roger Reeves for future use. (*Id. at 197; L-51*). Many of the same problems that occurred in 1991 surfaced again in the 1993 study. (*Id. at 198; L-52*).

8. Though at the trial Reeves attempted to castigate Powe Chesnut as evil, at this time in 1993 Chesnut had no direct authority over Reeves

(Cont'd)

Petitioner contends there is some "confusion" as to whether or not Reeves was placed on probation in 1993 by Chesnut. (*Br. of Pet. at p. 10*). There is no confusion in the Record. The Record is clear that in 1993, Reeves was put on probation by Russell Caldwell and then Director of Manufacturing (*predecessor to Chesnut*), Everett Livingston. (*4 R. 199; L-53*). While Reeves claims there was a contrary affidavit submitted by Chesnut, a review of the Record reveals without contradiction that Chesnut did not put Reeves on probation in 1993 but simply made a recommendation — indeed, as Director of Quality Control, it was his responsibility to make such recommendations. Even then, he testified he made many recommendations that were not followed. (*Id. at 237*).

C. Events Leading to Termination of Petitioner

In the summer of 1995, problems and complaints again surfaced in the Hinge Room. (*Id. at 203-204; L-57-58*). Chesnut, who became Director of Manufacturing in January of 1995 (*4 R. 201; L-55*), was informed by Hinge Room Manager Caldwell that he was unable to meet production because of constant absenteeism and tardiness of employees within the department. (*Id. at 203; L-57*). Chesnut had daily 7:30 a.m. meetings with supervisors where they discussed the schedule, production, and things of that nature. (*Id. at 202; L-56*). Although Caldwell complained of absenteeism and tardiness, records under the control of Caldwell and Reeves utilized by Sanderson to detect such problems failed to reflect the same. (*Id. at 204; L-58*). For example, monthly absentee reports did

(Cont'd)
or his supervisor, Russell Caldwell. (*4 R. 198; L-52*). Moreover, Chesnut was not involved in placing Reeves on probation and after he was placed on probation, and after Chesnut became the Director of Manufacturing, Chesnut gave Reeves a wage increase when Reeves was 55 years old! (*3 R. 65; L-18*). This is very important as one recognizes that the only evidence Reeves had of alleged age discrimination was an alleged statement made by the same person who gave him the raise — Powe Chesnut.

not show these particular problems with attendance, as few employees were shown as late or exceeding the 5% absence rule. This led Chesnut to believe that something was wrong in reporting procedures, and accordingly, he requested an audit of the timesheets. (*Id. at 203-204; L-57-58*).

In late September or early October of 1995, Chesnut requested that Lucille Reeves, who was and is presently in the position of Manager of Quality Control, review records relative to attendance and tardiness in the Hinge Room. (*Id. at 204; L-58*). As part of her investigation, L. Reeves reviewed the weekly timesheets and monthly absentee reports for the months of July, August, and September of 1995. (*Id. at 205-206, 275-276; L-59-60; Weekly Reports, Ex. D-3; Monthly Reports, Ex. D-4; Id. at 275-279; L-79-83*).[9] After completing a review of the documents, L. Reeves prepared a summary report. (*Id. at 277; L-81; Ex. D-5; 3 R. 146; J. App. pp. 21-29*). As noted in the summary, there were numerous errors and omissions on the part of Reeves, Oswalt and their immediate supervisor, Russell Caldwell.[10] Ms. Reeves identified Ex. D-5(a) (*3 R. 146;*

9. L. Reeves was initially requested to review only September records but after finding so many errors and miscoding instances, she was then requested to go back and do a study of the two previous months as well. (*4 R. 205; L-59*).

10. Although counsel for Reeves contended that the errors (Reeves never denied the errors were committed) were insignificant and/or fabricated, Reeves' counsel readily admitted that the same types of errors made by Oswalt (foreman of the special line) as committed by Reeves were present. Counsel stated, "Then the other people who are listed as employees of the special line, I concede there are numerous violations". (*4 R. 294; L-93*). This is a very telling admission, and is one of many reasons why this case should not have been submitted to the jury! *Although Petitioner contends (Br. of Pet. at p. 5) there were "alleged occurrences" or that no problem of absenteeism was identified (Br. of Pet. at p. 44, n. 26(b)) —Petitioner's own counsel has admitted that the errors committed by the 33-year-old Oswalt (as shown in Ex. D-5) were almost identical to those committed by Petitioner and were sufficient to constitute termination!*

J. App. pp. 30-37), which she prepared from her original summary - Ex. D-5 - and set forth the problem in terms that a non-manufacturing person could understand. (*4 R. 277-278; L-81-82*).[11] As to Reeves, errors and misrepresentations were found on 12 different employees out of only 35 employees under his supervision. (*See Ex. D-5(a)*).[12] Reeves and Caldwell were responsible for employee absentee and tardiness records for the regular line in the Hinge Room. They failed to properly note and reflect that employees were absent or tardy which allowed employees to bypass disciplinary actions. (*3 R. 127-128; L-25-26; 4 R. 205-206; L-59-60*). Furthermore, there were several instances where time records were misrepresented or wrongfully adjusted, resulting in overpayment. (*3 R. 127-128; L-25-26*).[13] There were also errors made that prejudiced employees, as being incorrectly marked absent. (*4 R. 285-294; L-85-93*).[14] Reeves readily admitted that he made many errors

11. Ex. D-5 sets forth the numerous errors committed by both Reeves and Oswalt. For purposes of demonstrating just the Petitioner's errors, Ex. D-5(a) was prepared, which only listed errors committed by Reeves.

12. As shown in Ex. D-5, there were errors with respect to employees in the regular line of the Hinge Room supervised by Reeves, as well as the special line supervised by Oswalt. Importantly, Oswalt voluntarily left Sanderson in August of 1995. (*3 R. 77*). At the time these records were reviewed in the fall of 1995, if Oswalt had still been employed at Sanderson, he likewise would have been terminated along with Reeves and Caldwell. (*4 R. 210-211; L-64-65*).

13. The time records reflect that Reeves, Oswalt, and Caldwell continuously misrepresented or wrongfully adjusted employee absences and tardiness. Their actions resulted in disparate application and enforcement of Sanderson rules. (*4 R. 206; L-60*). Such unequal treatment of similarly situated employees could very well result in numerous grievance and arbitration cases with the union. (*Id.*).

14. The Court can readily see from a review of Ex. D-5 and D-5(a) the numerous errors and omissions on the part of Reeves, Oswalt and

(Cont'd)

on time records, but claimed that the errors did not warrant dismissal. (*3 R. 51, 61; L-13, 17*).[15]

(Cont'd)

Caldwell. The errors and misrepresentations as to employees Marcella Hogan and D. C. Mitchell were particularly troubling. As shown in the exhibits, not only were there errors as to tardiness, but Hogan was marked absent on July 21, 1995, when he was actually present; on July 28, 1995 the timesheets showed that this employee was sent home early (a devise which would not count against him on his absentee policy) even though the entire line ran that day and thus, there was no way this employee would have been sent home. (*Ex. D-5(a) at J. App. p. 32*). Thus, Reeves' comments on p. 44 of his Brief at n. 26(b) are not supported by the Record but, indeed, the Record shows just the opposite!

D. C. Mitchell, a Unit Leader who was often tardy, was supposed to report to work at 6:00 a.m. Yet, Ex. D-5 and D-5(a) reveal numerous instances of Mitchell coming in at times like 6:21 a.m., 6:30 a.m., 6:40 a.m., 6:48 a.m., etc. However, Mitchell was never marked or written up for this tardiness and apparently was paid as if he were on time. (*Ex. D-5(a), J. App. pp. 30-37; 4 R. 288-89; L-87-88*). This uncontradicted evidence of errors on the part of Reeves is most noteworthy when we recall that Reeves now argues that his only "error" was the failure to "assign a tardy code ["01"] to employees who clocked in at 7:00 a.m.". (*Br. of Pet. at pp. 6, 44, n. 26(c)*). Of course, it is also interesting that this in and of itself is a violation, because if an employee clocked in at 7:00 a.m., he/she could not be at work on the assembly line, and yet Petitioner now (*contrary to his trial testimony*) would have us believe that he did not make errors!

15. Reeves on rebuttal attempted to recant much of his testimony but his testimony was revealing. Though, for instance, he initially denied the testimony of company witnesses that an employee named D. C. Mitchell was to come in at 6:00 a.m. (he said this man was supposed to come in at 7:00 a.m.), yet, accepting Reeves' testimony that Mitchell was to come in at 7:00 a.m. as true, we then note from a review of the Record that when Mitchell was punching in at 6:15 a.m., 6:21 a.m., 6:27 a.m., 6:30 a.m., 6:40 a.m., 6:48 a.m., etc., Reeves was not making the necessary corrections in the records and, according to his own testimony, was allowing Mitchell to be paid for periods of time when he was not working! (*4 R. 336; L-19*). Thus, either Reeves was

(Cont'd)

Upon receipt of the results of the investigation, Chesnut discussed the matter with Tom Whitaker, Vice President of Operations, and both decided that the problem was of such magnitude that they "needed to take it to Dana Jester, who was Vice President of our Human Resources." (*4 R. 208-09; L-62-63*). Jester independently reviewed the time sheets and the personnel files of the employees in question. (*Id. at 208, 314; L-63, 100*). Jester personally reviewed all of the information, including the source documents (timesheets), to see if they had been marked correctly. (*Id. at 314; L-100*). His review confirmed that there had been numerous instances where time had not been recorded correctly and where disciplinary action was not taken. (*4 R. 314*).[16] Chesnut, Whitaker and Jester

(Cont'd)
improperly allowing Mitchell to be paid prior to his starting time or, if we accept the testimony of company witnesses that as a Unit Leader, Mitchell was required to come in at 6:00 a.m., then we find that Mitchell was clocking in well past 6:00 a.m. (6:21 a.m., 6:30 a.m., 6:40 a.m., 6:48 a.m., etc.) but yet Mitchell was never written up for his tardiness and apparently was paid as if he were on time.

In his deposition, Reeves testified quite clearly he did not remember an employee named Marcella Hogan; yet, on rebuttal he attempted to say he sent Hogan home because he was sick. He admitted his deposition testimony was contradictory but stated that he changed his testimony after reviewing the records sent to him by "the lawyers," which caused him to remember things differently. This is interesting, as Reeves also testified on direct examination that he was unable to read! (*4 R. 338; L-20; — prior testimony of being unable to read at 3 R. 42, L-11, 46*).

16. Jester, who was Vice President of Human Resources during the timeframe in question, was no longer an employee of Sanderson at the time of the trial. (*4 R. 312; L-98*). He reviewed the weekly time reports. (*Ex. D-3; Id. 313; L-99*). He also reviewed the monthly absentee reports. (*Ex. D-4; Id. 313-314; L-95-100*). After reviewing the study, Jester's response was "I was shocked. I found there were numerous instances where the time had not been recorded correctly and where disciplinary action where it was indicated had not been taken." (Cont'd)

all recommended dismissal of Reeves and Caldwell to the Company's President, Sandra Sanderson. (*3 R. 151-52; L-31-32; 4 R. 209-210, L-63-64, 314-315, L-100-101*).[17]

After review and discussion of the matter, President Sandra Sanderson made the final decision and terminated both Reeves and Caldwell. (*3 R. 151; L-31; 4 R. 209; L-63*).

(Cont'd)
(*Id. at 314; L-100*). On cross-examination, Jester pointed out that if there was a clock-in time of 7:00 a.m., that meant the person was late and if the supervisor would code it as 01, that would show up on the report that would be sent into data processing as late and then it would come out on the weekly report. However, if it was not properly coded, it would not show up on the report and that would be the error. (*Id. at 318-319; L-103-104*). Jester, who was not involved in this study, gave further examples of the errors made by Plaintiff on Ex. D-5. (*Id. at 319-320; L-104-105*). As a matter of fact, he pointed out that one particular employee, Melvin Brownlee, was not shown to be late at any time and as Jester said, "That's right. That's the point. If this had been coded 01, this showed up right here." (*Ex. D-4; Id. at 320; L-105*). In other words, when an employee was late, it would not show up on the records as being late if the supervisor did not record it as an 01 or as being late — since the supervisor didn't code it properly on the daily timesheets, then obviously, there was no showing on the weekly or monthly reports that the person was late or absent. (*Id. at 320-321; L-105-106*). As Jester explained, it is not the weekly reports but the daily timesheets that had to be coded properly (the responsibility of Reeves) and obviously, if these absentees and tardies did not show up on the weekly reports, this meant that the supervisor had not coded it on the daily timesheets. (*Id. at 321; L-106*).

17. Jester was 56 years old when he made the recommendation — approximately the same age as Reeves. (*Id. at 315; L-101*). Further, the decision to recommend termination of both Reeves and Caldwell was extremely difficult for Jester because of Reeves' many years of service and because Caldwell's wife worked for Jester in Human Resources. However, it was his opinion that this was a decision that needed to be made. (*4 R. 315; L-101*). As Jester stated, age had nothing to do with it and his recommendation "was based strictly on job performance." (*Id.*)

D. Respondent's Managerial and Employee Complement

At the time of Reeves' termination there was one manager who was 68 years old, one manager who was 62 or older, two people who had previously retired from the Company at age 65 in managerial positions and had since returned, one being 72 and the other in the late sixties. There were 20 management people over the age of 50, 12 between the ages of 45 to 49 and numerous managers over the age of 60. (*3 R. 155-156; L-35-36*). This, of course, is significant factual documentation that Reeves repeatedly neglects to mention. Indeed, Petitioner even boldly (*and with absolutely no factual support*) makes an assertion concerning the fact that Respondent prefers "younger employees to an older one". (*Br. of Pet. at p. 28*). As aforestated, the very opposite exists!

III. The Decision to Terminate

As aforementioned, the President of the Company, Sandra Sanderson, made the final decision and terminated both Reeves and Caldwell. (*Id. at 151; L-31; 4 R. 209; L-63*).[18]

Ms. Sanderson was somewhat concerned initially because the Company was in violation of the union contract for failure to properly discipline certain employees in the department for violation of the attendance policy. (*3 R. 127-128; L-25-26*). Ms. Sanderson was 54 years of age when she made the decision to dismiss both Reeves and Caldwell. (*Id. at 152*). When Ms. Sanderson was asked if the decision to terminate Reeves was related to his age, she emphatically stated, "absolutely not". (*Id. at 152-153; L-32-33*). Her response was as follows:

18. Although Chesnut, Whitaker, and Jester each independently recommended termination — after their independent reviews of the records, the decision to terminate was in the hands of Sandra Sanderson. Thus, there was only one decisionmaker. Giving the Petitioner more than the benefit of the doubt, his "culprit" in the picture, Chesnut, would at most have been only one of three who recommended termination to Ms. Sanderson.

> When a person manages a company or a department, they have to depend on lower management to do their job. In essence, you have to trust people . . .
>
> This termination was especially difficult because I've known of Roger Reeves since I came to town in 1969. And, of course, I worked with him rather closely sometimes from 1984 until he was terminated. I spent a lot of time on the line talking to Roger Reeves. I think I know Roger quite well. Mr. Caldwell has not been with the company long, but he's a very likeable person. His wife is also employed by our Human Resources Department, and she's a very valuable employee. So that also, you know, I had to think about that too.
>
> But the fact remained we had evidence or evidence was presented to me that in my opinion Mr. Reeves, Roger, had not done his job properly. He had not coded employees properly so that they could be disciplined according to our union contract. This can cause us a problem if we could have a grievance or an unfair labor practice. In one department, if you don't discipline people per the contract and you do in another department.
>
> . . . I trusted that everyone was doing the time sheets correctly. And they were going to data processing, not once but many times. And Roger has heard me, and so has Russell and everyone in that company, stress Sanderson's consistency in your disciplinary actions and accuracy on your payroll numbers. Do the daily time sheets.
>
> So, it was a difficult decision. You never want to lose a long-term employee. You lose experience, you lose knowledge. It's a loss to the company. But a superior or manager or director has to set an example

> for the employees that they supervise . . . Management has to present an example. They have to be the example and the leader to follow.
>
> So, faced with what was presented to me, I decided that this was justifiable grounds for termination, not only for one who did not code it correct, who did not properly administer the payroll records, but also for his manager who approved his actions. No, I didn't want to do it. And sitting here today, you know, I wish I weren't sitting here, but I honestly feel like I did the right thing. And I feel like if anyone in my position and anyone in another company falsified company records it's grounds for termination. But age had nothing to do with it.

(3 R. 153-155; L-33-35).

IV. Reeves' "Evidence" of Age Discrimination

Out of 379 pages of trial testimony, Petitioner's only "evidence" of age discrimination (and thus, his only showing of "pretext for discrimination") consists of two alleged comments attributed to Powe Chesnut. Petitioner testified in this regard as follows:

> One comment he made I was so old I must have come over on the Mayflower. Another one, I was working on a machine, walked up to me, I couldn't get it running, told me I was too damn old to do my job.

(*Id. 26; L-1*).[19]

19. At trial, Reeves admitted that the reference to the Mayflower was only said to him one time, and he does not remember when. (*3 R. 59; L-15*). In his deposition, he never mentioned that Chesnut had informed him that he was too old to do the job, but alleged only that Chesnut mentioned that he must have come over on the Mayflower. (Cont'd)

According to Petitioner's own testimony, these two statements were made to him "about two months before I was dismissed". (*3 R. 26; L-1, 15*).

Chesnut denied making the statement with reference to Petitioner being "too old for the job" and denied making any comment relative to "the Mayflower". (*4 R. 215-216; L-69-70*). It is significant and uncontradicted that nicknames were frequently used and that, for instance, Chesnut was referred to as the "walking boss". Moreover, there was an employee who worked on the regular line (where Reeves was supervisor) for many years who was referred to as "the old man." In fact, Roger Reeves referred to this employee (John Williams) as the old man. (*Id. at 215, 280; L-69, 84*).[20] Indeed, at Sanderson Plumbing, there are many people who retired and who came back to work on a part-time basis. Many of them are referred to as the old man. (*Id. at 216; L-70*). One employee named Clyde Cook retired when he was 62 years of age but returned and continues to work at Sanderson. He is now 73 and is often referred to by employees as the old man. (*Id. at 216; L-70*).

Lucille Reeves, who was not involved in either the recommendation to terminate or the termination, stated that the Company is known for its nicknames. Her name is Lucille but her nickname is "Sill" and she noted that a Manager there is referred to as "Snake". She pointed out their Personnel Manager is referred to as "that woman". (*Id. at 280; L-84*).

(Cont'd)
When Reeves was asked at his deposition if there was any other statement made to him, he responded, "I don't know of anything else." Indeed, at trial Reeves admitted this was true. (*3 R. 60-61; L-16-17*). Reeves never explained this obvious discrepancy in his testimony — made under oath on both occasions.

20. After Chesnut and Lucille Reeves testified, Petitioner took the stand on rebuttal but never denied referring to Mr. Williams as "the old man" — yet, Reeves now attributes much significance to the alleged statements of Chesnut, who was not the person who terminated him.

Mrs. Sanderson, the person who terminated Petitioner, had no information as to whether Chesnut ever made such a statement to Reeves (*3 R. 160; L-38*) because frankly that was not a factor in her decision. (*Id. at 152-153; L-32-33*).

V. The Decision of the Court of Appeals

The Fifth Circuit held that once an employer articulates a legitimate, non-discriminatory reason "then the presumption of discrimination fades, and the plaintiff must prove that the employer's articulated reason is a pretext for unlawful discrimination". (*J. App. pp. 15-16*). In analyzing the requirements of establishing pretext, the Fifth Circuit stated in part as follows:

> . . . [T]o establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination "had a determinative influence on" the employer's decisionmaking process. Age-related comments may serve as sufficient evidence of discrimination if the remarks are (1) proximate in time to the termination; (2) made by an individual with authority over the challenged employment decision; and (3) related to the employment decision. Mere "stray remarks" — *i.e.*, comments which are "vague and remote in time" — however, are insufficient to establish discrimination.

J. App. p. 16.

The Fifth Circuit opined further, "the important inquiry is whether plaintiff had produced sufficient evidence for a jury to find that discrimination has occurred". (*J. App. p. 16, n.17,* citing authority). The Fifth Circuit pointed out that the only way (*which is extremely significant*) Petitioner attempted to cast suspicion on Sanderson's proffered explanation was his testimony that at the time he was discharged, he was only told about errors related

to one employee. (*J. App. p. 17*). The court held quite clearly that while this was disputed, nevertheless, this alleged "inconsistency" could hardly be considered "mendacious". (*J. App. p. 18*). The court correctly found that "Sanderson has, at all times, supported its decision to fire Reeves with the charge that Reeves' work performance was unsatisfactory". (*J. App. p. 18*).

The Fifth Circuit determined that an essential final step was to determine "whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision". (*J. App. p. 19*). The court correctly noted that the alleged age comments of Chesnut "were not made in the direct context of Reeves' termination". Furthermore, the court recognized that Chesnut was just one of three (3) individuals who recommended to Mrs. Sanderson that Reeves be terminated and there was no evidence to suggest that any of the other decisionmakers were motivated by age. (*J. App. p. 20*). As part of this last statement, the court also found it significant that each of the three (3) Hinge Room supervisors were accused of inadequate record-keeping, including not only Petitioner and Caldwell but the younger Oswalt as well. (*J. App. p. 20*). Thus, the court concluded that Reeves did not "introduce sufficient evidence of age discrimination to support the jury's finding of liability under the ADEA". (*J. App. p. 20*).

SUMMARY OF ARGUMENT

Petitioner's argument is: (1) Petitioner need only show there is some question as to whether or not the legitimate, non-discriminatory reason proffered by Respondent was true to enable the jury to resolve whether Respondent is guilty of age discrimination; and (2) that in such a case, when considering a Motion for Judgment as a matter of law (Rule 50), the court should only consider Petitioner's evidence and/or the uncontradicted evidence.

Since Reeves alleges age discrimination, mere dislike or disbelief of Sanderson's decision without countervailing evidence, as opposed to speculation, surmise and conjecture, that Sanderson's reason was not the true reason for discharge should not allow the courts or a jury to second-guess the wisdom or soundness of a business decision. To require more than "disbelief" of an employer's proffered reason is essential in order to protect not only the rights of an employer but to require the plaintiff to submit evidence allegedly forming the basis of his or her discrimination claim. Here, contrary to the arguments of Petitioner and those filing *amici curiae* briefs on behalf of Petitioner, a review of the evidence reveals that Petitioner did not show that the reasons for the termination of Petitioner (*as well as that of Caldwell and what would have been the termination of Oswalt if he were still employed*) were false. What Petitioner demonstrated, however, was his subjective belief that the reasons were false — but such speculation, surmise, and conjecture will not take the place of evidence. Indeed, the cases cited hereinafter, including decisions of this very court (*cited by Petitioner in his Brief*) reject such an argument!

Petitioner argues for what he calls the "pretext only" rule. As shown hereinafter, numerous courts of appeal and this Court have held that to create a jury issue, the plaintiff must show *both* that the defendant's reason was false *and* that discrimination was the real reason. However, even if a "pretext only" rule is applied, Petitioner has absolutely no probative evidence that would warrant submitting this case to a jury. Under the "sufficiency of the evidence" test, as well as close scrutiny of the circuits supposedly employing the "pretext only" test, it is clear that when the evidence taken as a whole does not: (1) create a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer; and (2) create a reasonable inference that age was a determinative factor, then there is no issue to submit to a jury and in the proper exercise of its "gatekeeper" function, the trial court should not

allow the same to be submitted to the possible whims of jurors who may (*and probably will*) dislike the employment decision at issue.

Petitioner's argument relative to the Seventh Amendment standard is also misplaced and unsupported by the basic facts and law applicable to this case. For instance, employment discrimination cases rely upon the shifting burden of proof established in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny and as shown hereinafter, analysis of all the evidence is mandated with reference to determination of not only a jury issue but the propriety of the action of a jury. Petitioner's own citation of authority supports the proposition that the Seventh Amendment does not deprive the federal courts of the power in a jury case to direct a verdict upon the ground of insufficiency of the evidence, with the essential requirement being that mere speculation is not sufficient and the standard of proof required for the submission of evidence to a jury is essentially one to be applied with reference to particular situations and particular types of cases. *See, e.g., Galloway v. United States*, 319 U.S. 372, 389, 395 (1943). (*Br. of Pet. at pp. 33, 36*). *See, also, Parklane Hosiery v. Shore*, 439 U.S. 322, 336-337 (1979) (the Seventh Amendment has never been interpreted in a rigid manner [*advocated by Reeves*] but on the contrary, many procedural devices developed since 1791 have diminished the civil jury's historic domain but yet found not to be inconsistent with the Seventh Amendment).

Moreover, and as shown hereinafter, it is submitted that every circuit subscribes to the well-accepted principle that in passing on a motion for a directed verdict, the courts consider all of the evidence in a light most favorable to the non-movant. *See pp. 38-40, infra.* By the same token, this Court has specifically approved such. *Whitley v. Albers*, 475 U.S. 312, 322 (1986) (in ruling on a motion for a directed verdict, court must consider all of the testimony, including conflicting expert testimony).

Although erroneous, Petitioner's argument that the correct standard under Rule 50 is that only the non-movant's evidence and/or the uncontradicted evidence should be considered leads to the same result reached by the Court of Appeals. Petitioner, under the clearly established law, may not rest upon surmise and suspicion as the basis for evidence and as will be clearly demonstrated hereinafter, even if one considers the Petitioner's evidence and/or the uncontradicted evidence, the following facts are established: (1) Petitioner committed errors and violations of his duties and responsibilities as a supervisor; (2) two others who committed the same violations were and/or would have been (if still employed) discharged for the same reason; (3) Petitioner's own counsel, in effect, admitted that the same infractions committed by Petitioner were committed by his co-foreman (the 33-year-old Oswalt) and that certainly the violations committed by Oswalt were grounds for discharge; (4) the alleged remarks of Chesnut, not the one who made the decision to terminate and only one of three who recommended termination, had no connection with the employment decision leading to the termination of Petitioner or the events leading up to the same; and (5) the use of the name "old man" was one admittedly used by Reeves in his own supervision of employees.

To hold as Petitioner requests in this case, the Court must abandon the standards set forth by this Court six (6) years ago in *Hicks* and negate a substantial body of law now entrenched in the circuits on issues as far ranging as an employer's right to engage in business judgment, absence of liability where the alleged discriminatory remarks are not causally connected to the employment decision in question and/or made by one without termination authority, and broader procedural rules whereby the appellate court is allowed to act as a "gatekeeper" to review the evidence as a whole in determining the propriety of a jury's decision.

ARGUMENT

I. PETITIONER ATTEMPTS TO SUBSTITUTE HIS OPINION OF CORRECT BUSINESS JUDGMENT FOR THAT OF RESPONDENT

Although never denying he committed errors — but disputing their significance, Reeves contends that he should not have been discharged and places great emphasis on the fact that, in his opinion, Director of Manufacturing Chesnut did not like him. Reeves overlooks the undisputed fact that dislike is not enough to prove pretext. All of the circuits have so held. *See, e.g., Waggoner v. City of Garland, Tex.*, 987 F.2d 1160, 1165-66 (5th Cir. 1993); *Grimes v. Tex. Dep't of Mental Health*, 102 F.3d 137, 143 (5th Cir. 1996); *Freeman v. Package Machine*, 865 F.2d 1331, 1341 (1st Cir. 1988) (claimant needs to show more than that his employer miscalculated in deciding that he had outlived his corporate usefulness; good-faith errors in an employer's business judgment are not the stuff of ADEA transgressions; claimant must show more than that the employer made an unwise business decision, or an unnecessary personnel move or acted arbitrarily or with ill will). Reeves further argues that since he does not agree with the decision, then the Jury should be allowed to determine whether it was appropriate. Other than turning the ADEA on its head and making it a "just cause" statute (which all of the courts have held is not appropriate, *see, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 52 (1993); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1085 (6th Cir. 1994); *Walker v. Nationsbank of Fla.*, 53 F.3d 1548, 1558 (11th Cir. 1995); *Bienkowski v. Am. Airlines, Inc.*, 851 F.2d 1503, 1506 n.6 (5th Cir. 1988)), Petitioner further implicitly requests this Court to overrule precedent accepted by all circuits that the ADEA was never intended to be a vehicle for judicial second-guessing of business decisions nor was it intended to transform the courts into personnel managers. *See, e.g., Turner v. North Am. Rubber, Inc.*, 979 F.2d 55, 60 (5th Cir. 1992); *Ross v. Univ. of Tex. San Antonio*, 139

F.3d 521, 527 (5th Cir. 1998); *Norton v. Sam's Club*, 145 F.3d 114, 119-120 (2d Cir. 1998) *cert. denied*, 525 U.S. 1001 (1998); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 378 (5th Cir. 1991), *cert. denied*, 503 U.S. 908 (1992); *Bell v. Gas Serv. Co.*, 778 F.2d 512, 515 (8th Cir. 1985); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991).

Indeed, other than claiming that the many errors that he admittedly made did not warrant dismissal and although having no explanation for the termination of his much-younger supervisor, Caldwell, or of the fact that his co-supervisor, the 33-year-old Oswalt, would have been terminated, he, nevertheless, contends that simply because he disagrees with the decision and because of two statements allegedly made to him months before his termination, that thus, the jury should be called upon to decide if his termination was because of age. This is not sufficient evidence for a jury determination. *See, e.g., Woythal v. Tex-Tenn Corp.*, 112 F.3d 243, 247 (6th Cir. 1997), *cert. denied*, 522 U.S. 967 (1997); *Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *Elrod*, 939 F.2d at 1470; *Turner*, 979 F.2d at 60.

II. THE ALLEGED REMARKS OF CHESNUT DO NOT CONSTITUTE EVIDENCE OF AGE DISCRIMINATION

Petitioner's alleged "evidence" consisting of the "stray remarks" attributed to Chesnut is misleading. All circuits agree that stray remarks, — *those that are* vague and remote in time, and not related to the employment decision in issue — are insufficient to establish discrimination. *See, e.g., Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1995) (statements must be proximate in time to the terminations and related to the employment decision at issue, otherwise, a stray remark);

Krystek v. Univ. of S. Miss., 164 F.3d 251, 256 (5th Cir. 1999); *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 434-35 (5th Cir. 1995); *Hoffman v. MCA, Inc.*, 144 F.3d 1117, 1121-22 (7th Cir. 1998) (in order to raise a genuine issue of material fact to prove age discrimination, a defendant's comments on which plaintiff relies must be contemporaneous with and related to the firing, and made by the decisionmaker); *Shorter v. ICG Holdings*, 188 F.3d 1204, 1210 (10th Cir. 1999) (plaintiff must still show some nexus between the statements and the defendant's decision to terminate the employee); *Simmons v. OCE-USA, Inc.*, 174 F.3d 913, 916 (8th Cir. 1999) (absent a causal link between the racial comments and the adverse employment decision, statements by a decisionmaker, are best classified as unrelated to the decisional process and thus, not evidence of pretext); *see also Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1456-57 (10th Cir. 1994) (isolated comments unrelated to the challenged action are insufficient to show discriminatory *animus* in termination decisions and plaintiff must demonstrate a nexus between the allegedly discriminatory statements and the defendant's decision to terminate — absent causal nexus between the statement and the action in question, the statement has no relevance); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994) (citing decisions of numerous other circuits that isolated comments unrelated to the challenged action do not demonstrate a sufficient nexus between the alleged discriminatory statement and the decision in question).

Furthermore, the circuits are in agreement that remarks attributed to someone who did not make the decision to terminate the Plaintiff or were isolated comments and were *the Plaintiff's only evidence of discrimination* are insufficient to constitute direct evidence or supply circumstantial evidence of discrimination. *See, e.g., Sreeram v. La. State Univ.*, 188 F.3d 314, 320 (5th Cir. 1999); *Turner v. North Am. Rubber, Inc., supra*, 979 F.2d at 59 (5th Cir. 1992); *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990); *Gagne v.*

Northwestern Nat'l Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989); *Hopkins v. Elec. Data Sys. Corp.*, 196 F.3d 655, 658, 662-663 (6th Cir. 1999); *Smith v. Firestone Tire & Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989); *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 254-55 (1st Cir. 1986); *Montagne v. Am. Convenience Prod.*, 750 F.2d 1405, 1412 (7th Cir. 1984); *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980); *Walton v. McDonnell-Douglas Corp.*, 167 F.3d 423, 426 (8th Cir. 1999); *Mitchell v. USBI Company*, 186 F.3d 1352, 1355 (11th Cir. 1999); *Smith v. The Thresholds*, 1999 WL 410030, *7 (N.D.Ill. 1999); *Davidson v. Quorum Health Group, Inc.*, 1 F. Supp. 2d 1321, 1325 (N.D.Ala. 1997); *see also Price-Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J. concurring) (". . . [s]tray remarks in the workplace . . . statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" do not constitute direct evidence of discrimination).

Thus, one comment by one of three who independently recommended dismissal to the ultimate decisionmaker that Petitioner "came over on the Mayflower" and another alleged comment, "I was too damn old to do my job" occurring some two months before dismissal and having no connection with the numerous *admitted* infractions committed by Petitioner, and his two counterparts in the department, obviously are in no way even "remotely" causally connected to the termination. As stated previously, these two alleged "stray remarks" cannot even bridge the circumstantial evidence requirement. Thus, there is not even a scintilla, much less an inference, which would enable Reeves to submit his dislike for the business judgment of Sanderson to the jury in an effort to persuade the jury to substitute it's decision for the proper business judgment of Sanderson. Certainly, it is incumbent at this point to recall that Reeves referred to employees as the "old man". *See, supra*, n.20 at p. 17.

Reeves cites a number of authorities, none of which bear on the issue *sub judice*. (*Br. of Pet. at p. 30, n. 21*). For instance, *Anderson v. Bessemer City*, 470 U.S. 564 (1985) is not dispositive inasmuch as there were five (5) members selected to choose the person for the position in question and the court found that the four (4) men on the committee were biased against petitioner because she was a woman. Here, there is uncontradicted testimony (the only contradiction being Petitioner's "belief" in opposition) that Ms. Sanderson was the sole decisionmaker. Thus, here there is no credibility issue as to the motive of the decisionmaker. Likewise, *Abrams v. Lightolier, Inc.*, 50 F.3d 1204 (3d Cir. 1995), is not pertinent because, in *Abrams*, the statement of a supervisor was introduced for the purpose of demonstrating the company's policy toward older workers. There is no company policy at issue here. Indeed, the overall statistics concerning the ages of supervisors at Sanderson would absolutely defeat any such inference of a policy of age discrimination. Further showing of the irrelevance of *Abrams* is demonstrated in *Williams v. Betz Lab.*, 1996 WL 114815 (E.D. Pa. 1996). Likewise, *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998) is inapposite. In *Ercegovich*, there were allegations of "numerous" discriminatory comments by supervisors indicating "a cumulative, managerial attitude". Again, there is the exact opposite *sub judice* — Respondent's statistics negate this scenario. Furthermore, there is an allegation of two comments by *one* person and there has been no effort to show a "managerial attitude". Of further significance is the fact that, in *Ercegovich*, the statements were related to the employment action at issue. *Ercegovich* was further distinguished in *Hopkins v. Elec. Data Sys. Corp.*, *supra*, 196 F.3d at 663-664.

Similarly, *Woodson v. Scott Paper Co.*, 109 F.3d 913 (6th Cir. 1997), *cert. denied*, 522 U.S. 914 (1997) is irrelevant. The alleged remark present in that case was directly related to the issue of alleged retaliation against plaintiff for filing an administrative complaint against defendant. *Griffin v.*

Washington Convention Ctr., 142 F.3d 1308 (D.C. Cir. 1998) suffers the same malady. There the person allegedly making the statement in question was the "chief source" of information the company had to rely upon in evaluating plaintiff's job performance. Here, the opposite exists. Two other persons, Whitaker and Jester, each independently reviewed the numerous errors and infractions committed by Petitioner (as well as the errors committed by Caldwell and Oswalt) and recommended termination to the decisionmaker. Finally, *Kelley v. Airborne Freight Corp.*, 140 F.3d 335 (1st Cir. 1998), *cert. denied*, 525 U.S. 932 (1998) is of no comfort to Petitioner. The statements in question were directly related to adverse employment action involving the plaintiff and the statement that the employment action was "an excellent opportunity to get rid of some of the older mediocre managers" was actually made by the decisionmaker. *Id.* at 341.

III. The Rule Petitioner Denominates as "Pretext Plus" is the Appropriate Rule Envisioned in *St. Mary's Honor Ctr. v. Hicks*

Petitioner contends the Fifth Circuit employs a "pretext plus" test requiring that prior to submission of a case to the jury, there must be evidence both that the reason enunciated by the employer was false and that discrimination was the real reason. (*Br. of Pet. at pp. 16, 23*).[21] He then urges this Court to adopt the "pretext only" theory requiring only that a plaintiff introduce evidence that will cast doubt upon the reasons offered by the defendant to create a jury question. (*Id. at p. 22*). As shown hereinafter (Argument IV., *infra*), there is serious doubt

21. Petitioner denotes this as requiring "direct evidence" — as do arguments in some of the briefs of *amici curiae* submitted on behalf of Petitioner. However, this is a false prognostication as, indeed, a review of the decisions clearly shows that the circuits hold that such circumstantial evidence, rather than "direct evidence" may suffice to provide "pretext for discrimination" if it is sufficient "evidence". Such was not the case *sub judice*.

the Fifth Circuit employed such a "test" but, it is submitted the court was correct in its ruling regardless as to whether the "pretext plus" or the "pretext only" test is employed.

This Court in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) neither adopted a "pretext-plus" nor a "pretext-only" rule but simply requires proof of discrimination and held mere proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct". *Id.* at 524. *Hicks* teaches that one should not confuse pretext for discrimination with pretext in the more common sense. *Id.* at 515-516.

Once an employer articulates a legitimate, non-discriminatory reason then any presumption raised by the *prima facie* case drops and plaintiff must meet the ultimate burden of proving intentional discrimination. *Id.* at 507-08; and at 529 (Souter, J. dissenting). The burden of plaintiff to persuade the trier of fact that the defendant intentionally discriminated against the plaintiff merges with the ultimate burden of persuading the court that plaintiff has been the victim of intentional discrimination. *Hicks*, 509 U.S. at 507. This may not be accomplished by simply disproving the employer's asserted reason but rather there must be sufficient evidence of intentional discrimination. *Id.* at 514, 517. Indeed, in *Hicks*, the Court reminded that the ultimate question in a Title VII discrimination case is "discrimination *vel non*". *Id.* at 518. "*Vel non*" literally means "or not". BLACK'S LAW DICTIONARY 1555 (6TH ED. 1990). As *Hicks* teaches, "it is not enough . . . to disbelieve the employer" but rather a reason cannot be proved to be a pretext for discrimination unless it is shown "both that the reason was false and that discrimination was the real reason". *Hicks*, 509 U.S. at 515, 519).

Justice Souter in dissent argued that *Hicks* may be read to require the "more extreme conclusion, that proof of the falsity of the employer's articulated reasons will not even be sufficient

to sustain judgment for the plaintiff". *Id.* at 535. But, in *Hicks*, the Court repeatedly re-emphasized that pretext means both casting doubt on the reasons given by the employer for the decision and showing (by proof) that discrimination was the real motivation, thus plainly contemplating two separate showings. The Court opined, "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination to the much different (and much lesser) finding that the employer's explanation of its action was not believable". *Id.* at 514-515.

Numerous courts of appeal have clearly followed the teaching in *Hicks* that it must be shown *both* that the reason was false *and* that discrimination was the real reason. *See, e.g., Walton v. Bisco*, 119 F.3d 368, 370 (5th Cir. 1997); *Smith v. Stratus Computer Co.*, 40 F.3d 11, 16 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995); *Fagan v. New York State Elec. & Gas Corp.*, 186 F.3d 127, 132, 135 (2d Cir. 1999); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995); *Udo v. Tomes*, 54 F.3d 9, 13 (1st Cir. 1995); *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 959 n. 8 (5th Cir. 1993); *Chaffin v. John H. Carter Co., Inc.*, 179 F.3d 316, 320 (5th Cir. 1999). The reasoning of these courts is legally and logically sound. To hold otherwise would be to turn discrimination statutes into "truth" statutes. However, falsity has never, in any area of the law, served as a proxy for the plaintiff's burden of proving the specific wrongdoing.

IV. In the Case *Sub Judice*, Regardless of the Alleged "Pretext Plus" or "Pretext Only" Rule, there was Insufficient Evidence to Submit to the Jury

Regardless of whether "pretext plus" or "pretext only" is embraced, Petitioner was not entitled to a jury determination. As an example, the seminal case of *Manzer, supra*, 29 F.3d at 1084, reveals the lack of merit to Petitioner's argument. The Sixth Circuit falls under the mantle of a "pretext only" circuit

and the significance of *Manzer* is that in showing pretext, the plaintiff is required to show by the preponderance of the evidence *either*:

> . . . (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge. . . . The first type of showing is easily recognizable and consists of evidence that the proffered bases for the plaintiff's discharge never happened, *i.e.*, that they are factually false. . . . The third showing is also easily recognizable and, ordinarily, consists of evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff. These two types of rebuttals are direct attacks on the credibility of the employer's proffered motivation for firing plaintiff and, if shown, provide an evidentiary basis for what the Supreme Court has termed a suspicion of mendacity. . . .
>
> The second showing, however, is of an entirely different ilk. There, the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct could motivate dismissal. . . . In such cases, the plaintiff attempts to indict the credibility of his employer's explanation by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the defendant. . . .

Manzer, 29 F.3d at 1084.

Indeed, *Manzer* stated as follows that:

> If the bare bones elements of a plaintiff's *prima facie* case were sufficient to make this showing, however, the entire 'burden-shifting' analysis of *McDonnell-Douglas* and its successors would be illusory. No case could ever be culled out after the *prima facie* stage and every case would have to be determined by a jury. We do not believe that this was the intent of Congress or the outcome envisioned by the Supreme Court in its long line of cases implementing employment discrimination legislation. Accordingly, we hold that, in order to make this type of rebuttal showing, the plaintiff may not rely simply upon his *prima facie* evidence but must, instead, introduce additional evidence of age discrimination.

Id.

Other circuits referred to by Petitioner as "pretext only" circuits have adopted the same analysis as *Manzer* and each require some showing of discrimination. *See Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 983 (7th Cir. 1999). (Indirect evidence of pretext showing that an employer's proffered reasons are not credible may be made by demonstrating that the reasons are factually baseless, were not the actual motivation for the discharge, or were insufficient to motivate the discharge). Moreover, in *Pilditch v. Bd. of Educ. of City of Chicago*, 3 F.3d 1113 (7th Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994), the Seventh Circuit stated that under *Hicks* a plaintiff "is left to unmask, if he can, the reasons proffered by the employer as fake. Beyond this, he must also prove that the true reason for his firing was discriminatory". *Id.* at 1117-1118. In addition, *Walker*, *supra*, 53 F.3d 1548, merely reinforces that the Eleventh Circuit follows the same analysis as in *Manzer*. *See Walker*, 53 F.3d at 1564-65 (Johnson, Senior Circuit Judge specially concurring). While *Walker* was criticized by a subsequent

Eleventh Circuit decision of *Combs v. Plantation Patterns*, *supra*, 106 F.3d 1519, a reading of *Combs* shows that the Eleventh Circuit followed the same analysis as relied upon and established in *Manzer*. *See Combs*, 106 F.3d at 1541-43. To be sure, in *Mitchell v. USBI Company*, the Eleventh Circuit recently reaffirmed that a reason cannot be proved to be a pretext for discrimination unless it is shown *both* that the reason was false *and* that discrimination was the real reason. *Mitchell*, 186 F.3d at 1355-56, (citing *Hicks*). Moreover, *Mitchell* held that even assuming the employer deviated from its policy, the deviation did not raise an inference of discrimination, as deviation from a company policy does not demonstrate discriminatory *animus* (citing other circuits). Thus, this "pretext only" analysis reinforces the action of the Court of Appeals in the case *sub judice*.

Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998), *rejected* the allegation of plaintiff that a fact-finder's rejection of the defendant's "proffered explanation" will always support an inference of discrimination and that in such case "no additional proof of discrimination is ever required" for the reason that "common sense compels us to reject so broad a reading". *Id.* at 1291. Thereafter, the court embarked upon a review of the "sufficiency of the evidence" concluding "the plaintiff's attack on the employer's explanation must always be assessed in light of the total circumstances of the case". *Id.* Thus, this pronouncement from a court Petitioner would denominate as "pretext only" clearly compels the conclusion that by making this same analysis *sub judice* (by review of the facts as previously set forth in this brief) the result is the same. Therefore, the result reached by the Fifth Circuit in its ruling was correct. Indeed, the Fifth Circuit subscribes to this same theory.

Indeed, in *Barbour v. Browner*, 181 F.3d 1342, 1346-47 (D.C. Cir. 1999), the court clearly revealed that under a "pretext only" analysis, the "casting into doubt" of only a part of the defendant's proffered explanation (as is the very most that can

be said for Petitioner's case *sub judice*), is insufficient to provide for a jury determination of the issue.

In *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), the court held that a plaintiff can avoid judgment as a matter of law if the evidence taken as a whole: (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer; and (2) creates a reasonable inference that age was the determinative factor in the actions of which plaintiff complains. However, the employer would be entitled to judgment as a matter of law if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory. *Id.* at 994-95.

It is submitted that even under this theory espoused by Petitioner, the Court of Appeals *sub judice* was correct and, in fact, did not necessarily employ any other review of the evidence! Thus, using this standard (*Manzer* and its progeny), it is clear that Petitioner is entitled to no relief and the opinion of the Fifth Circuit was correct. For instance, with respect to Point 1 (that the proffered reasons had no basis in fact), there is no doubt and it is undisputed that not only Petitioner but the two other management employees in his department committed the infractions in question, which led to the discharge of Petitioner's supervisor and would have led to the discharge of the younger supervisor had he still been employed there. With respect to Point 2 (that the proffered reasons did not actually motivate his discharge), there is no evidence to the contrary. Indeed, the factual background relative to the termination of the younger supervisor over Petitioner, the fact that the 33-year-old supervisor would have been terminated had he still been employed, and Sanderson's statistics showing the numerous employees over 50 in supervisory positions clearly defeat any attempt of Petitioner to show that there was a factual issue that "the proffered reasons did not actually motivate his discharge". With respect to Point 3 (that the proffered reasons were insufficient to motivate discharge), obviously, there is no issue

here and Petitioner does not contend that the numerous errors made (*not only by Petitioner but his two colleagues in the department*) would have been and were insufficient to motivate discharge.[22]

Petitioner's evidence of pretext as set forth in his Brief does not constitute "pretext for discrimination" under any standard. (*Br. of Pet. at pp. 10-13*). For instance, contrary to Petitioner's statement in the Brief the following facts are undisputed: Reeves admitted he made errors; there is absolutely no confusion as to who placed Reeves on probation in 1993 just as there is no issue as to the fact that Chesnut gave Reeves a raise in 1995; not only has Reeves admitted he made errors (indeed, Ex. D-5(a) shows that out of approximately 35 employees under the supervision of Reeves, he made numerous errors involving 12 of those employees during this three-month study!) but, as shown, *supra,* n.14 at 10, Reeves made numerous errors on certain employees and on rebuttal clearly admitted that with respect to, as an example only, D.C. Mitchell, regardless of which direction he wanted to take as to when the employee was to report to work, Reeves did not properly document this employee's attendance (*i.e.,* either Mitchell was late but not marked tardy or he was improperly clocking in long before he was supposed to and being paid for not working!); Reeves admitted that he not only had the initial responsibility for the daily and weekly charting of attendance and time but also reviewed with his manager the monthly reports. Reeves' argument that he was the only supervisor disciplined is not only misplaced but also contradicted by the numerous records — the younger manager, Caldwell, was terminated — the 33-year-old Oswalt would have been terminated — and studies done by the Company in other departments concerning other

---

22. In this regard, it is noteworthy to again recall that Reeves' own counsel, during examination, conceded that the identical violations committed in the same department by Petitioner's young, supervisor colleague (age 33) were "numerous violations". *4 R. 294.*

supervisors did not show discrepancies. *4 R. 270; L-74.*[23] Perhaps it is in order here to remember that the issue *always* is "pretext for discrimination" and that it is accepted, without dispute, that Reeves' subjective belief that, although he admitted many errors, Sanderson was not justified in dismissing him and his subjective belief only as to why he was dismissed, does not under any standard provide the necessary proof to create a jury issue as to age discrimination. *Molnar v. Ebasco Constructors, Inc.*, 986 F.2d 115, 119 (5th Cir. 1993) (citing other cases to the effect that self-serving and speculative testimony regarding subjective belief that termination resulted from age discrimination is insufficient to make an issue for the jury); *Woythal, supra*, 112 F.3d at 247; *Elliott v. Group Medical & Surgical Serv., supra*, 714 F.2d at 564.

Perhaps it is also wise to recall as stated in *EEOC v. La. Office of Community Serv.*, 47 F.3d 1438, 1443-44 (5th Cir. 1995) that in determining "whether the employer's stated reason is false, the trier of fact may not disregard the defendant's explanation without countervailing evidence that it was not the real reason for the discharge". In other words and in line with the earlier authorities, "countervailing evidence" does not include "speculation, surmise, and conjecture".

23. Petitioner makes the assertion that since Oswalt left August 1, "this did not account for why the special line's claimed errors continued after July". (*Br. of Pet. at p. 14*). The obvious reason is undisputed in the Record — after Oswalt left on August 1, the Department Manager, Russell Caldwell, took over the responsibilities of Oswalt. *4 R. 206; L-60.* Thus, another reason why Caldwell was terminated!

V. Petitioner's Argument of Error by the Fifth Circuit in Considering All of The Evidence is Without Merit[24]

Petitioner submits a somewhat misleading argument and one shrouded in fundamental error. Petitioner contends that a court commits error by considering all of the evidence rather than just the evidence that supports the non-movant's case. *Br. of Pet. at p. 33.* This argument is, of course, fatally flawed. Initially, it is submitted that at this stage of any proceeding, the entire question is "sufficiency of the evidence". Again, the only question at this juncture is whether the court has "all the evidence it needs" (*Hicks*, 509 U.S. at 519), to determine whether or not "defendant intentionally discriminated against the plaintiff". *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

Even if Reeves was correct that only the evidence considered by Reeves and/or the uncontradicted evidence should be determinative, as shown hereinabove, there is absolutely no evidence of age discrimination.[25] Reeves' only evidence involves stray remarks, which do not supply the necessary showing of pretext that would warrant submitting the case to the jury. It is beyond question that "a mere scintilla of evidence is insufficient to present a question for the jury." *Rhodes v. Guiberson Oil*

24. This argument advanced by Petitioner was noted in the Response in Opposition to the Petition for Writ of Certiorari (Br. of Resp't at p. 18) to raise an issue not raised in the Court of Appeals. Additionally, Petitioner raised for the first time in his Brief on the merits questions relative to the Seventh Amendment and the standard of review under Rule 50 as opposed to the standard under Rule 56 of the Fed. R. Civ. Proc. Again, none of these issues is properly before this Court but, notwithstanding such, Respondent will subsequently address Petitioner's arguments.

25. Again, Petitioner seems to lose sight of the fact that his Complaint was based upon age discrimination and logically, to prevail, there must be evidence from which the fact-finder can determine that the adverse action resulted from the discrimination prohibited — here, age. Your Honors so held in *Aikens*, 460 U.S. at 715.

Tools, 75 F.3d at 993; *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999) (citing additional authorities). Indeed, subsequent to *Rhodes*, the Fifth Circuit again, relying upon *Rhodes,* ratified the universal rule that at the stage of the proceeding where all the evidence is submitted, the test is "sufficiency of evidence" and that the question as to whether there is evidence such as to permit the matter to be submitted to a jury depends upon whether or not the "evidence taken as a whole: (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer; and (2) creates a reasonable inference that age was a determinative factor in the actions of which the plaintiff complains". Otherwise, the employer would be entitled to judgment as a matter of law if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory. *EEOC v. Texas Instruments, Inc.*, *supra*, 100 F.3d at 1180.

As stated previously, this Court in *Whitley v. Albers*, 475 U.S. at 322-323, stated quite clearly that in ruling on a motion for a directed verdict all of the evidence must be reviewed to determine whether there was sufficient evidence to create a jury issue and this included not only all of the lay evidence but even consideration of "conflicting expert testimony". Thus, clearly, Petitioner's argument in this regard is clearly misplaced and unsupported.

For many years, the Fifth Circuit and practically all the other circuits have applied what in effect is the standard approved in *Whitley*, as above stated. In *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*) overruled on other grounds *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997), the Fifth Circuit set forth the universal standard:

> On motions for directed verdict and for judgment notwithstanding the verdict, the court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper.

Boeing Co., 411 F.2d at 374.

As is shown in the cases cited below, the circuits have considered all of the evidence in a light most favorable to non-movant and with all reasonable inferences most favorable to the non-movant when considering a motion for judgment as a matter of law or judgment notwithstanding the verdict. *See, e.g., Silva v. Worden*, 130 F.3d 26, 30 (1st Cir. 1997) (court will consider all evidence offered during trial, including evidence introduced by the defendants when ruling on motions for judgment as a matter of law); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1314 (2d Cir. 1990) (the court is not restricted solely to the evidence that supports a non-movant's case, but rather the court must also consider the evidence favoring the movant to the extent that it is uncontradicted and unimpeached); *Cassidy Podell Lynch, Inc. v. Snydergeneral Corp.*, 944 F.2d 1131, 1137 (3d Cir. 1991) (in reviewing a district court order denying a motion for a judgment notwithstanding the verdict, we "view all the evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict . . . [and] ascertain from a review of the record whether there is sufficient evidence to sustain the verdict of the jury"); *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir. 1979) (court held that in ruling on a motion for judgment notwithstanding the verdict, the trial court must consider the record as a whole and in the light most favorable to the party opposed to the motion); *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104-05 (6th Cir. 1978), *cert. denied,* 441 U.S. 906 (1979) (age discrimination case citing

Boeing, the court held that when reviewing a case for sufficiency of the evidence, the Court of Appeals reviews evidence presented in the light most favorable to the non-moving party); *Deimer v. Cincinnati Sub-Zero Prod., Inc.*, 58 F.3d 341, 343-44 (7th Cir. 1995) (the court must view the evidence in the light most favorable to the non-moving party and determine whether there is a jury question presented); *Panter v. Marshall Field*, 646 F.2d 271, 281-82 (7th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) (standard requires court to view all of the evidence in the light most favorable to appellant); *Schudel v. General Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997), *cert. denied*, 140 L. Ed. 2d 798 (1998) (when ruling on a Rule 50(b) motion, the entire record should be considered as it existed when trial closed); *Advantor Capital Corp. v. Yeary*, 136 F.3d 1259, 1263 (10th Cir. 1998) (judgment as a matter of law is warranted only if the evidence points but one way and all of the evidence and inferences therefrom must be construed most favorable to the non-moving party); *Polston v. Boomershine*, 952 F.2d 1304, 1307 (11th Cir. 1992) (when considering a motion for directed verdict or judgment notwithstanding the verdict, we consider the evidence in the light most favorable to the party opposing the motion); *Bauer Lamp Co. v. Shaffer*, 941 F.2d 1165, 1169-70 (11th Cir. 1991) (citing *Boeing* court held that it should consider all of the evidence in light most favorable to the party opposing the motion); and *Aka v. Washington Hosp., supra*, 156 F.3d at 1290.

There is strong support that even the Eighth Circuit would now support this logic and rule of law. While in *Dace v. ACF Indus., Inc.*, 722 F.2d 374, 376 (8th Cir. 1983), the Eighth Circuit appeared to hold that only the non-moving party's evidence should be considered, the court's discussion at 377-378 n.7 makes it clear that the Eighth Circuit was not deciding that particular issue.[26] More importantly, the more recent Eighth

26. Indeed, on rehearing, the Eighth Circuit clearly revealed it was not deciding that issue. *Dace v. ACF Indus., Inc.*, 728 F.2d 976 (8th Cir. 1984).

Circuit opinion of *Bass v. Gen. Motors Corp.*, 150 F.3d 842, 845 (8th Cir. 1998), specifically holds that a post-verdict motion for judgment as a matter of law requires the court to determine whether the Record contains sufficient evidence to support the jury's verdict. *Bass*, 150 F.3d at 845. The court stated "in determining whether a plaintiff has made a submissible case, we must examine the sufficiency of the evidence in the light most favorable to the plaintiff and view all inferences in his or her favor". *Id.* The *Bass* court considered the sufficiency of all the evidence in a light most favorable to the plaintiff, the same standard the Fifth Circuit and every other circuit applies.

The standard for judgment as a matter of law at the end of all the evidence requires consideration of all the evidence but in a light most favorable to the non-moving party. When that is done *sub judice*, the opinion of the Fifth Circuit is unassailable. Reeves failed to present and create a jury issue of pretext — whether that is provided by the so-called "pretext plus" doctrine or by the so-called "pretext only" doctrine, as espoused and refined by the Sixth Circuit in *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d at 1084.

The issue in discrimination cases is simply whether or not there was evidence that the defendant intentionally discriminated against the plaintiff. The *McDonnell-Douglas* burden-shifting framework mandates that the court consider evidence by the employer in support of its employment decision. If plaintiff establishes a *prima facie* case, defendant then produces evidence in support of its decision, and then the plaintiff must establish that the reasons given by the employer were false and that the real reason for the decision was discrimination. This court has made it clear that the reason given by the employer for its decision is very important in determining whether a jury question is created and to hold that only the non-movant's evidence should be considered would directly contradict the burden-shifting analysis previously mandated in *McDonnell-Douglas*. The standard for judgment as a matter of law is and

should always be viewing all of the evidence in a light most favorable to the non-moving party. Otherwise, the statute has been turned into a for-cause statute and employers will have a jury decide whether any decision that the employer makes was appropriate in the jury's eyes. This is certainly not what this Court envisioned and the *Boeing v. Shipman* standard is a sound approach to considering whether the cases should be submitted to the jury.

As part of this fallacy in the argument of Petitioner, throughout his brief, he totally departs from the scheme of proof, which necessarily flows in an employment discrimination case (established in *McDonnell-Douglas* and its progeny) but instead cites cases requiring a different scheme of proof with no requirement that in the ultimate analysis a plaintiff must prove "pretext for discrimination". To be sure, Petitioner's own citation of authority (*Br. of Pet. at pp. 33, 36*), *Galloway v. United States*, supports the proposition that the guaranty of jury trial in suits of common law, given by the Seventh Amendment, do not deprive the federal courts of the power in a jury case to direct a verdict upon the ground of insufficiency of the evidence, just as the standard of proof required for the submission of evidence to a jury is essentially one to be worked out in particular situations and for particular types of cases, the essential requirement being that mere speculation should not be allowed to "do duty for probative facts". *Galloway v. United States*, 319 U.S. at 389, 395. *See also Parklane Hosiery v. Shore*, 439 U.S. at 336-337.

Even if we were to accept Reeves' argument that the court should only consider the evidence favorable to Petitioner and/or the uncontradicted evidence, the result would be the same. The undisputed facts are: (1) Petitioner made errors; (2) the same errors were made by Caldwell and Oswalt and did and would have resulted in their discharge; (3) Petitioner made reference to at least one employee in his department as "the old man"; (4) the alleged remarks of Chesnut had no connection to the

subsequent termination decision resulting in the termination of Petitioner and Caldwell; and (5) the person who allegedly made the statements was only one of three (3) persons who independently recommended termination and not the one who made the decision to terminate. Thus, under the "sufficiency of evidence", obviously, there was no showing of pretext! Therefore, if Reeves' showing is sufficient to create a jury issue, this would mean that speculation, surmise, and conjecture would be sufficient to create a jury issue.[27] This, undoubtedly, is what the D.C. Circuit had in mind in *Aka v. Washington Hosp. Ctr.*, *when* the court found that:

> . . . [t]he court must consider all the evidence in its full context in deciding whether the plaintiff has met his burden of showing that a reasonable jury could conclude that he had suffered discrimination. . .

Id., 139 F.3d at 1290.

Again, at this stage of the trial, a trier of fact may not disregard the defendant's explanation without countervailing evidence (not a subjective belief) that the employer's stated reason was not the real reason for the discharge. *EEOC v. La. Office of Community Serv.*, *supra*, 47 F.3d at 1443-44.

---

27. Obviously, this is what Petitioner desires inasmuch as he contends that a jury could speculate that Petitioner was fired because of his age but Caldwell for non-age reasons. (*Br. of Pet. at p. 29*). Further comment would only reiterate the obvious.

CONCLUSION

The issue in this case was dictated by the Petitioner when he filed his Complaint — alleging his termination was because of age — not because of personality clashes, conflicts, or hurt feelings. Thus, it is only logical that one such as Petitioner, after presentation by Respondent of its legitimate, non-discriminatory reason, should be required to introduce evidence that Respondent committed the action upon which the Complaint is based, to-wit, "age discrimination" and that this should be done beyond speculation. *Hicks* stated so by finding that the fact that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that plaintiff's proffered reason of [age] is correct." *Hicks*, 509 U.S. at 524. As this Court in *Hicks* held that Title VII is not a cause of action for perjury, *Id.* at 521, it is also beyond doubt and beyond question that the Act is not a "just cause" statute but prohibits and proscribes only one action — discrimination because of age.

Again, Petitioner totally departs from the scheme of proof that necessarily flows in an employment discrimination case and, instead, cites and relies upon cases requiring a different scheme of proof with no requirement in the ultimate analysis that a plaintiff must prove "pretext for discrimination".

There is serious doubt as to whether this case is even the appropriate case for the Court to decide between what Petitioner, in essence, denominates as "pretext plus" as opposed to "pretext only". Regardless of the standard applied, Petitioner's failure is absolute, as he failed to overcome more fundamental rules of proof that are entrenched in these types of cases and which have been established both in this Court and in the courts of appeal. Thus, it is submitted, that in this particular case, the Court of Appeals was correct in finding there was insufficient evidence under the "sufficiency of

evidence" test for submission of this case to the jury based upon an alleged violation of the Act. Moreover, regardless of whether this Court follows the standard of considering all the evidence but in the light most favorable to the non-movant, or (*as Reeves prefers*) of considering only the testimony of the non-movant and/or the uncontradicted testimony, the action of the Court of Appeals was correct.

Respectfully submitted,

TAYLOR B. SMITH
Counsel of Record
BERKLEY N. HUSKISON
MITCHELL, MCNUTT, THREADGILL,
SMITH & SAMS, P.A.
Post Office Box 1366
Columbus, MS 39703
(662) 328-2316

POPE S. MALLETTE
MITCHELL, MCNUTT, THREADGILL,
SMITH & SAMS, P.A.
Post Office Box 947
Oxford, MS 38655
(662) 234-4845

Attorneys for Respondent