No. 07- 07-233

In The
SUPREME COURT OF THE UNITED STATES

DANIEL CRAWFORD,

Petitioner,

v.

CITY OF FAIRBURN, GEORGIA

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ERIC SCHNAPPER*
University of Washington School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

CHRISTOPHER G. MOORMAN
Law Offices of Christopher G. Moorman
945 East Paces Ferry Road, Suite 2610
Atlanta, GA 30326
(404) 760-2730

ROBERT N. KATZ
Katz, Stepp & Miller, LLC
945 East Paces Ferry Road, Suite 2610
Atlanta, GA 30326
(404) 240-0400

Attorneys for Petitioner *Counsel of Record

Blank Page

QUESTION PRESENTED

In an employment discrimination case in which an employer proffers *multiple* reasons for an allegedly unlawfully motivated dismissal, can the plaintiff establish a violation of the law by proving that one such reason was a pretext for discriminatory animus, or must the plaintiff go further and also separately and "directly rebut" each and every other reason?

PARTIES

The parties to this action are set forth in the caption.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF APPENDICES

Page

PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Crawford respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on March 29, 2007.

OPINIONS BELOW

The March 29, 2007, opinion of the court of appeals, which is reported at 482 F. 3d 1305 (11th Cir. 2007), is set out at pp. 3a-9a of the Appendix.[1] The May 23, 2007, order of the court of appeals denying rehearing en banc, which is not officially reported, is set out at pp. 1a-2a of the Appendix. The May 18, 2006, opinion of the district court, which is not officially reported, is set out at pp. 10a-21a of the Appendix. The February 1, 2006, Report and Recommendation of the Magistrate Judge, which is not officially reported, is set out at pp. 22a-81a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on March 29, 2007. A timely petition for rehearing en banc was denied on May 23, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 704(a) of Title VII, 42 U.S.C. §2000e-3, provides in pertinent part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees... because he has

[1] An earlier opinion was issued on February 21, 2007. Following a timely petition for rehearing and suggestion for rehearing en banc, that opinion was vacated. (App. 4a).

> opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

STATEMENT OF THE CASE

In 2003 petitioner Daniel Crawford, then a Major in the Fairburn Police Department, was assigned to investigate a sexual harassment complaint that had been filed in that year by Officer Louise Tallman. Tallman alleged that she had been sexually harassed by a Sergeant in the Department.

Crawford conducted an exhaustive investigation of Tallman's allegations, interviewing approximately 25 witnesses and reviewing a substantial number of documents. (App.26a). During the course of this investigation Crawford also looked into a sexual harassment complaint that Tallman had filed with the Fairburn Police in 2002. Tallman had also filed a Title VII charge with EEOC about the incidents in 2002, and that Title VII charge was still pending at the EEOC when Crawford conducted his 2003 investigation. On December 11, 2003, the EEOC made a finding that there was probable cause to believe that Tallman had been sexually harassed in 2002. The City asked the EEOC to defer further action on the Title VII charge until Crawford had completed his investigation. (App.26a).

City officials, however, were very displeased by the nature of Crawford's investigation of the sexual harassment allegation. In December, 2003, the City Administrator in a meeting with the Police Chief objected to Crawford's investigation on several grounds.

> "[The City Administrator] stated that: (1) it was Plaintiff's fault that the EEOC investigation was occurring; (2) Plaintiff "opened a can of worms"; and (3) Plaintiff's investigation was going to get Fairburn sued." (App.26a)

On January 22, 2004, Crawford submitted his report on the Tallman allegations. Crawford concluded that the Sergeant had been guilty of verbal harassment and disrespectful conduct toward Tallman, but that the harassment had not created a hostile work environment. (App.28a).

The finding of disrespectful conduct was based on verbal comments that the Sergeant had made to Tallman, which Crawford concluded were "based on gender." (App.32a).

Within a month of his report Crawford was dismissed. The City Administrator recommended that the City Council dismiss Crawford by abolishing his job, and the Council agreed. The City Administrator directed the Police Chief to dismiss Crawford, and advised the Chief that one reason for the dismissal was that the sexual harassment investigation that Crawford had conducted was "inaccurate." (App.38a). The Police Chief in turn fired Crawford, explaining to him that the sexual harassment investigation was among the reasons for the dismissal. (App.39a).[2]

Crawford brought suit against the city under Title VII, alleging that he had been dismissed in retaliation for his role in the sexual harassment investigation. After a period of discovery, the city moved for summary judgment. In support its summary judgment motion, Fairburn asserted that it had dismissed Crawford for several different reasons.[3]

The Magistrate Judge who first considered the summary judgment motion concluded that one of the reasons for Crawford's

---

[2]The Police Chief permitted Crawford to resign. (App.38a-39a). Respondent and the courts below properly treated this forced resignation as a dismissal. (App.41a).

[3]At the time of Crawford's dismissal, the City Administrator advised the Police Chief that there were three reasons for the dismissal, and the Chief mentioned only those reasons when he fired Crawford. (App.41a).

dismissal was his conduct of the sexual harassment investigation. City officials insisted they objected only to an assertedly "inaccurate" aspect of the investigation. But the Magistrate Judge held that trier of fact could find that the city's actual objection was to the vigor with which Crawford had pursued the sexual harassment allegations.

> "[A]t least one motive for firing Plaintiff was his inaccurate investigation [of Tallman's complaints.]... Although it is not clear what [the City Administrator] meant by an "inaccurate" investigation, the Court can reasonably infer, in the absence of any evidence regarding the meaning of this statement, that this was a result of the fact that Plaintiff investigated events surrounding the 2002 EEOC complaint. [The City Administrator] even stated that one of his concerns with Plaintiff's investigation was Plaintiff's decision to delve into events of 2002... Further, [the City Administrator] indicated that Plaintiff's investigation would open a can of worms and subject the city to a lawsuit... As a result, Defendant's arguments that the inaccuracies must have dealt with some non-protected aspect of the investigation is not persuasive." (App.60a).

The Magistrate Judge concluded that a second reason proffered for dismissing Crawford might also have been a pretext. (App.67a and App.69a).

The Magistrate Judge nevertheless held that summary judgment should be granted on Crawford's retaliation claim. Although Crawford had discredited two of the City's reasons, Crawford had failed to offer separate evidence directly addressing three other reasons that had been offered by the City. Citing the controlling Eleventh Circuit decision in *Chapman v. Al Transport*, 229 F. 3d 1012 (11th Cir. 2000)(en banc), the Magistrate Judge reasoned that the plaintiff's evidence was insufficient because "he failed to rebut all legitimate reasons provided by Defendant. *See Chapman*, 229 F. 3d at 1037." (App.74a). The District Judge agreed that summary judgment was required. (App.20a-21a).

The Eleventh Circuit affirmed, concluding that the decision in *Chapman* was controlling. The court of appeals noted that Fairburn had offered several reasons to justify its decision to fire Crawford.

> "The City introduced evidence that Crawford was terminated for five nondiscriminatory reasons: the inaccuracy of the Tallman investigation, patrols and traffic stops on Interstate 85, complaints relating to officer pay, problems with the dispatchers, and complaints of low morale and favoritism." (App.7a).

The Eleventh Circuit, like the Magistrate Judge, concluded that Crawford had proffered sufficient evidence to support a finding that the first of these reasons was pretextual. "Viewed in the light most favorable to Crawford, [the remarks of the City Administrator] suggest a retaliatory animus" behind the city's objection to the Tallman investigation. (App.8a). But that evidence, the court held, was inadequate to prove unlawful retaliation.

The en banc decision in *Chapman*, the panel noted, required a plaintiff to offer evidence separately rebutting each of an employer's proffered reasons.

> "If the employer proffers more than one legitimate, nondiscriminatory reason, the plaintiff must rebut each of the reasons to survive a motion for summary judgment. *Chapman v. AI Transp.*, 229 F. 3d 1012, 1037 (11th Cir 2000)(en banc).... Crawford erroneously argues that evidence of a discriminatory animus allows a plaintiff to establish pretext without rebutting each of the proffered reasons of the employer." (App.7a-8a).

Although the City Administrator's remarks about the sexual harassment investigation

> "suggest a retaliatory animus, they do not respond to

> the explanation of the City that Crawford's performance was unsatisfactory in four *other* areas of his responsibility." (App.8a)(emphasis added).

Thus, under *Chapman*, Crawford's evidence was insufficient because it did not "directly rebut[]" some of the City's proffered reasons. (App.8a).

Crawford petitioned for rehearing en banc, urging the Eleventh Circuit to overturn the requirement in *Chapman* that a discrimination plaintiff "directly rebut[]" each and every reason proffered by a defendant. Subsequent to the decision in *Chapman*, the petition noted, the Mississippi Supreme Court had rejected that precedent in deciding federal employment discrimination claims.[4] The Eleventh Circuit denied the petition for rehearing en banc. (App.1a-2a).

REASONS FOR GRANTING THE WRIT

I. THERE IS A WELL ESTABLISHED CONFLICT AMONG THE COURTS OF APPEALS AND A STATE SUPREME COURT REGARDING THE STANDARD FOR EVALUATING DISCRIMINATION CASES IN WHICH AN EMPLOYER GIVES MULTIPLE EXPLANATIONS FOR THE DISPUTED ACTION

This case presents a well established and complex inter-circuit conflict regarding the standard for proving intentional discrimination in employment.[5] Most federal employment cases are resolved under

---

[4]Petition for Rehearing En Banc, *Crawford v. City of Fairburn, Georgia*, No. 06-13073-F (11th Cir.), pp. 3-13.

[5]The same question has also arisen under the Federal Housing Act, 42 U.S.C. §3601. *Tyler v. RE/MAX Mountain States, Inc.*, 232 F. 3d 808, 814 (10th Cir. 2000).

this Court's decisions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. Once a plaintiff has made out a prima facie case, *McDonnell Douglas* requires the defendant to articulate a non-discriminatory reason for the disputed employment action. The burden then returns to the plaintiff to rebut the proffered reason by demonstrating that it is "unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). The *McDonnell Douglas* line of decisions in this Court set out a framework for evaluating a discrimination case in which the employer offers a single explanation for the disputed action.

As this case illustrates, however, employers often give *multiple* reasons for the dismissal, promotion denial, or other action complained of. The lower courts are sharply divided regarding what evidence a plaintiff is required to offer in such a case. Some circuits, like the Eleventh Circuit in this case, require that the plaintiff separately rebut each and every reason given by the employer; the fact that one or more proffered reasons has been shown to be untruthful is accorded no significance in evaluating the truthfulness of the employer's remaining reasons. Most circuits hold, to the contrary, that the pretextuality of one reason may or does constitute evidence that the remaining reasons are also pretextual; the circuits adhering to that view, however, have themselves articulated widely divergent standards.

The instant case involves a claim of unlawful retaliation violating Title VII of the 1964 Civil Rights Act. The same issue has arisen regarding alleged violations of the Age Discrimination in Employment Act[6], the Americans With Disabilities Act[7], 42 U.S.C. §

---

[6]*Tomasso v. The Boeing Co.*, 445 F. 3d 702 (3d Cir. 2006); *Martinez v. United States Department of Energy*, 170 Fed. Appx. 517, 521 n. 7 (10th Cir. 2006) *Bryant v. Farmers Insurance Exchange*, 432 F. 3d 1114, 1126 (10th Cir. 2005); *Kautz v. Met-Pro Corp.*, 412 F. 3d 463 (3d Cir. 2005); *Minshall v. McGraw Hill Broadcasting Co.*, 323 F. 3d 1273, 1280 (10th Cir. 2003); *Chapman v. AI Transport*, 229 F. 3d 1012, 1037 (11th Cir. 2000)(en banc); *Narin v. Lower Merion School District*, 206 F. 3d 323 (3d Cir. 2000); *Wilson v. AM General Corp.*, 167 F. 3d 1114 (7th Cir. 1999); *Adreani v. First Colonial Bankshares Corp.*, 154 F. 3d 389 (7th Cir. 1998); *EEOC v. Texas Instruments Inc.*, 100 F. 3d 1173 (5th Cir. 1996); *Wolf v. Buss (America) Inc.*, 77 F. 3d 914 (7th Cir. 1996); *Rhodes v. Guiberson Oil Tools*, 75 F.

1981[8], and the Title VII prohibitions against discrimination on the basis of race[9], gender[10], national origin[11] and religion[12] discrimination. The courts of appeals are in agreement that the same standard--whatever it may be--applies to all these federal statutes.

A. The Eleventh and Fifth Circuit Separate Rebuttal Requirement

The decision in this case applies the longstanding Eleventh Circuit rule that a plaintiff must adduce evidence separately and

---

3d 989 (5th Cir. 1996)(en banc); *Cash Distributing Co. v. Neely*, 947 So. 2d 286, 296-98 (Miss. 2007).

[7]*Chapman v. AI Transport*, 229 F. 3d 1012, 1037 (11th Cir. 2000)(en banc); *Smith v. Chrysler Corp.*, 155 F. 3d 799 (6th Cir. 1998).

[8]*Tyler v. RE/MAX Mountain States, Inc.*, 232 F. 3d 808, 814 (10th Cir. 2000); *Roebuck v. Drexel University*, 852 F. 2d 715 (3d Cir. 1988).

[9]*Preston v. Texas Dept. of Family and Protective Services*, 222 Fed. Appx. 353 (5th Cir. 2007); *Staten v. New Palace Casino, LLC*, 187 Fed. Appx. 350 (5th Cir. 2006); *Johnson v. City of Fort Wayne, Indiana*, 91 F. 3d 922, 937 n. 22 (7th Cir. 1996); *Russell v. Acme-Evans Co.*, 51 F. 3d 64, 70 (7th Cir. 1995); *Fuentes v. Perskie*, 32 F. 3d 759 (3d Cir. 1994); *Roebuck v. Drexel University*, 852 F. 2d 715 (3d Cir. 1988).

[10]*Champ v. Calhoun County Emergency Mgmt. Agency*, 2007 WL 879846 at *7 (March 26, 2007); *Bryant v. Farmers Insurance Exchange*, 432 F. 3d 1114, 1126 (10th Cir. 2005); *Jaramillo v. Colorado Judicial Dept.*, 427 F. 3d 1303, 1311 (10th Cir. 2005); *Wallace v. Methodist Hospital System*, 271 F. 3d 212 (5th Cir. 2001).

[11]*Sher v. U.S. Department of Veterans Affairs*, 488 F. 3d 489, 2007 WL 1532655 (1st Cir. 2007); *Martinez v. United States Department of Energy*, 170 Fed. Appx. 517, 521 n. 7 (10th Cir. 2006); *Vigil v. City of Albuquerque*, 210 Fed. Appx. 758, 764 n. 4 (10th Cir. 2006); *Abramson v. William Patterson College of New Jersey*, 260 F. 3d 265 (3d Cir. 2001).

[12]*Sher v. U.S. Department of Veterans Affairs*, 488 F. 3d 489, 2007 WL 1532655 (1st Cir. 2007).

"directly" rebutting each reason proffered by a defendant employer, regardless of whether the plaintiff has already proved that one or more of the employer's asserted reasons was pretextual. That rule dates from the 1997 decision in *Combs v. Plantation Patterns*, 106 F. 3d 1519, 1539 (11th Cir. 1997).

The panel relied specifically on the divided en banc decision in *Chapman v. AI Transport*, 229 F. 3d 1012 (11th Cir. 2000), which endorsed that circuit's "well-established rule that a plaintiff must show pretext as to each proffered reason." 229 F. 3d at 1037 n. 30. "In order to avoid summary judgment, a plaintiff must produce sufficient evidence for a reasonable factfinder to conclude that each of the employer's proffered reasons is pretextual." 229 F. 3d at 1037. In a case (like *Combs*) in which an employer adduced three reasons, a defendant would be entitled to judgment as a matter of law (or summary judgement) if the plaintiff offered evidence rebutting only two of the three reasons. There must be distinct evidence "related to *each* of the three proffered nondiscriminatory reasons." 229 F. 3d at 1037 n. 30 (*quoting Combs*)(emphasis in *Chapman*). The majority in *Chapman* emphatically rejected the argument of several dissenters that the pretextuality of one proffered reason could itself be evidence that the other reasons were also pretextual. 229 F. 3d at 1037 n. 30.

Since *Chapman* the Eleventh Circuit has repeatedly applied the rule that a plaintiff must offer separate evidence directly rebutting each reason proffered by an employer. In *Cooper v. Southern Co.*, 390 F. 3d 695 (11th Cir. 2004), the court of appeals emphasized that a plaintiff must present "sufficient evidence to demonstrate the existence of a genuine issue of fact as to the *truth* of each of the employer's proffered reasons for its challenged action." 390 F. 3d at 735-36 (*quoting Combs*, 106 F. 3d at 1529)(emphasis added).

> "[E]ven if Cooper could discredit one of the reasons . . . offered for not hiring him, it would still not establish pretext, because to do so, Cooper would have to establish that *each* of [the employer's proffered] reasons was pretextual. *See Chapman....*"

390 F. 3d at 730 (emphasis in original). The Eleventh Circuit reiterated this requirement in *Champ v. Calhoun County Emergency Management Agency*, 2007 WL 879846 at *7 (11th Cir. 2007), *Arnold v. Tuskegee University*, 212 Fed. Appx. 803, 810 (11th Cir. 2006), and *Bojd v. Golder Associates, Inc.*, 212 Fed. Appx. 860, 862 (11th Cir. 2006).

The instant case is a routine application of this Eleventh Circuit rule. The court of appeals acknowledged that Crawford had adduced sufficient evidence to establish that the defendant's reliance on purported defects in the sexual harassment investigation was a pretext for discrimination. Under *Chapman*, however, that was insufficient as a matter of law. The evidence related to that investigation

> "suggest[s] a retaliatory motive, but... do[es] not respond to the explanation of the City that Crawford's performance was unsatisfactory in four other areas of his responsibility." (App.8a).

Evidence that city officials may have lied in explaining their objection to the sexual harassment investigation "is not evidence that the City's other proffered reasons were false." (App.7a). *Chapman* requires a plaintiff to separately and "directly rebut[]" each of the employer's multiple reasons. (App.8a).

The Fifth Circuit, like the Eleventh Circuit, requires a discrimination plaintiff to offer separate evidence rebutting each and every reason advanced by an employer.

> "[T]he plaintiff in [a]... disparate treatment case must offer evidence to rebut each of the employer's articulated legitimate, nondiscriminatory reasons... '[A] plaintiff can avoid summary judgment and judgment as a matter of law if the evidence . . . creates a fact issue as to whether *each of the employer's stated reasons* was what actually motivated the employer.' "

EEOC v. Texas Instrument Inc., 100 F. 3d 1173, 1180 (11th Cir. 1996)(*quoting Rhodes v. Guiberson Oil Tools*, 75 F. 3d 989, 994 (5th Cir. 1996)(en banc))(emphasis added in *Texas Instrument*). Applying that rule, the Fifth Circuit overturned a jury finding of discrimination in *Wallace v. Methodist Hospital System*, 271 F. 3d 212 (11th Cir. 2001). "The plaintiff must put forward evidence rebutting each of the nondiscriminatory reasons the employer articulates." 271 F. 3d at 220. The evidence in *Wallace* was held insufficient because it only demonstrated the falsity of one of the two reasons given by the employer.[13] In *Staten v. New Palace Casino, LLC*, 187 Fed. Appx. 350 (11th Cir. 2006), the Eleventh Circuit held that summary judgment was required because the plaintiff's evidence directly rebutted only one of the employer's two reasons.[14] In *Preston v. Texas Dept. of Family and Protective Services*, 222 Fed. Appx. 353 (11th Cir. 2007), the plaintiff offered evidence demonstrating that two reasons given by her employer were pretextual. The court of appeals held that summary judgment for the employer was required, because the employer had offered a total of six reasons, and four remained unrebutted. 222 Fed.

---

[13]271 F. 3d at 221-22:

"We agree with Wallace that this [proof] constitutes evidence of disparate treatment with respect to the first reason Methodist articulated. Methodist offered two *independent* reasons for terminating Wallace, each of which alone could have served as a basis for terminating her.... Wallace falls short of her burden of presenting evidence rebutting *each* of the legitimate nondiscriminatory reasons produced by Methodist." (Emphasis in original).

[14]187 Fed. Appx. at 360-61:

"Our review of the record supports Staten's claim of pretext regarding New Palace's [first] explanation... Considering all the facts and drawing all inferences in favor of Staten, a factfinder could "reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves* [*v. Sanderson Plumbing Products, Inc.*], 530 U.S. [133,] 147 [(2000)].... Although Staten has successfully rebutted New Palace's [first] explanation..., she must rebut *each* nonretaliatory reason articulated by New Palace.... Staten has produced no evidence to contradict New Palace's [second] asserted explanation." (Emphasis in original).

Appx. at 359-60. "Preston must rebut *each* legitimate reason articulated by [the defendant." *Id.* (emphasis in original).

B. The Third Circuit Impaired Credibility and "Fair Number" Standards

The Third Circuit holds that a plaintiff is not required to directly rebut each and every explanation proffered by an employer.

> "We do not hold that, to avoid summary judgment, the plaintiff must cast doubt on each proffered reason in a vacuum. If the defendant proffers a bagful of legitimate reasons, and the plaintiff manages to cast substantial doubt on *a fair number* of them, the plaintiff may not need to discredit the remainder. That is because the factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining the remaining rationales in particular is available."

Fuentes v. Perskie, 32 F. 3d 759, 764 n. 7 (3d Cir. 1994) (Emphasis added).

The Third Circuit has repeatedly reaffirmed its view that evidence rebutting "a fair number" of the employer's proffered reasons could be sufficient to impair the employer's credibility and thus undermine the remaining reasons.

> "As we stated in *Fuentes*, the employee need not always offer evidence sufficient to discredit all of the rationales advanced by the employer... In *Fuentes* we explained that the rejection of some explanations may so undermine the employer's credibility as to enable a rational factfinder to disbelieve the remaining rationales, even where the employee fails to produce evidence particular to those rationales."

Tomasso v. The Boeing Co., 445 F. 3d 702, 707 (3d Cir. 2006). In *Tomasso* evidence rebutting two of the employer's seven proffered reasons was sufficient under *Fuentes* to fatally undermine the remaining five. 445 F. 3d at 709-10. The *Fuentes* standard was reiterated in *Narin v. Lower Merion School District*, 206 F. 3d 323, 332 (3d Cir. 2000)(*Fuentes* was "careful to note" that rejection of some reasons could undermine the rest); *Abramson v. William Patterson College of New Jersey*, 260 F. 3d 265, 283 (3d Cir. 2001)("importantly" *Fuentes* made clear that a plaintiff need not invariably offer evidence separately rebutting each proffered reason.)

Although rebuttal of a "fair number" of employer reasons may be sufficient under *Fuentes*, that is not the only circumstance in which a plaintiff's rebuttal evidence can call into question the credibility of non-rebutted reasons. In *Roebuck v. Drexel University*, 852 F. 2d 715 (3d Cir. 1988), evidence rebutting a single reason was held sufficient to impair the credibility of the key employer official regarding another proffered explanation. In that case a University department head testified that Roebuck had been denied tenure for two reasons, inadequate service and insufficient scholarship. If the jury concluded that the first reason was pretextual, the Third Circuit held, it could infer that the second reason was as well.

> "[G]iven [the department head's] willingness to apply a more rigorous standard to Roebuck's service activities than that called for in college guidelines (or, alternatively, given a jury finding that [this] asserted explanation was merely pretextual), a jury reasonably could conclude that [the department head] likewise was willing to treat Roebuck's scholarship more harshly than it otherwise would deserve. Put differently, once a jury has concluded that [the department head] would have rated Roebuck's service "outstanding" but for his race, common sense allows the jury to conclude that [the department head] was similarly willing to allow race to determine his rating of Roebuck's other qualifications."

852 F. 2d at 734 (3d Cir. 1988). In *Kautz v. Met-Pro Corp.*, 412 F. 3d 463, 476 (3d Cir. 2005), the Third Circuit applied the *Fuentes* impaired credibility standard to a case involving only two proffered reasons.

C. The Sixth and Seventh Circuit "Intertwined" And "Suspicious" Standards

The Seventh Circuit has also rejected the Eleventh (and Fifth) Circuit rule that each employer reason must always be separately rebutted. In *Russell v. Acme-Evans Co.*, 51 F. 3d 64 (7th Cir. 1995), the Seventh Circuit held that there were two types of situations in which evidence rebutting only one (or some) of an employer's proffered reasons could be sufficient to support a finding of discrimination:

> "cases in which the multiple grounds offered by the defendant for the adverse action of which the plaintiff complains are... intertwined, or the pretextual character of one of them is... fishy and suspicious..."

51 F. 3d at 70.

The Seventh Circuit has reiterated that standard in six subsequent decisions. *Zaccagnini v. Chas. Levy Circulating Co.*, 338 F. 3d 672, 679-80 (7th Cir. 2003); *Rhodes v. Professional Transportation, Inc.*, 3 Fed. Appx. 515, 520 (7th Cir. 2001); *Wilson v. AM General Corp.*, 167 F. 3d 1114, 1120 (7th Cir. 1999); *Crim v. Board of Ed. of Cairo School Dist. No. 1*, 147 F. 3d 535, 542 (7th Cir. 1998); *Adreani v. First Colonial Bankshares Corp.*, 154 F. 3d 389, 399 (7th Cir. 1998)[15]; *Johnson v. City of Fort Wayne, Indiana*, 91 F.

---

[15]"[W]e have indicated that [a requirement that the plaintiff contest all an employer's reasons] ought not be followed when the grounds that are offered are so intertwined or the pretextual ground for one of them so strong that a reasonable jury, hearing all the proffered grounds, could find for the plaintiff on the discrimination issue."

3d 922, 937 n. 23 (7th Cir. 1996); *Wolf v. Buss (America) Inc.*, 77 F. 3d 914, 920 (7th Cir. 1996).

In *Zaccagnini* the Seventh Circuit relied on this rule to overturn an award of summary judgment.

> "We believe this case is one 'in which the multiple grounds offered by the defendant for the adverse action... are so intertwined or the pretextual character of one of them so fishy and suspicious, that the plaintiff [can] withstand summary judgment.' *Russell*...."

338 F. 3d at 679. In *Wilson* the court of appeals applied the "intertwined" or "suspicious" standard to uphold a jury verdict in favor of the plaintiff. 167 F. 3d at 1120-21. In *Johnson* the Seventh Circuit set aside an award of summary judgment in favor of the employer and remanded the case for additional development of the record regarding whether the proffered reasons were intertwined. 91 F. 3d at 937 n. 23.

The Sixth Circuit in *Smith v. Chrysler Corp.*, 155 F. 3d 799, (6th Cir. 1998), adopted the Seventh Circuit's "intertwined" or "suspicious" standard. 155 F. 3d at 809. *Smith* quoted the rule in *Russell*, and warned that under that standard "an employer's strategy of simply tossing out a number of reasons to support its employment action in the hope that one of them will 'stick' could easily backfire." 155 F. 3d at 809.

D. The Tenth Circuit Seven Part-Standard

The Tenth Circuit has identified seven different circumstances in which evidence rebutting only some, or even one, of an employer's multiple reasons can be sufficient to undermine all the other proffered reasons.

(1) "[T]he multiple ground offered by the defendant... are so intertwined... that the plaintiff may prevail." *Tyler v. RE/MAX Mountain States*, 232 F. 3d 808, 814 (10th Cir. 2000). For this rule *Tyler* cited two Seventh Circuit cases, *Wilson* and *Russell*. This basis for holding that a plaintiff can prevail despite rebutting fewer than all of an employer's proffered reasons was reiterated in *Vigil v. City of Albuquerque*, 210 Fed. Appx. 758, 764 n. 4 (10th Cir. 2006), *Martinez v. United States Dept. of Energy*, 170 Fed. Appx. 517, 521 n. 9 (10th Cir. 2006), and *Jaramillo v. Colorado Judicial Dept.*, 427 F. 3d 1303, 1311 (10th Cir. 2005).

(2) "[T]he pretextual character of one explanation is 'so fishy and suspicious,'... that a jury could 'find that the employer (or its decisionmaker) lacks all credibility.'" *Jaramillo*, 427 F. 3d at 1311 (*quoting* the dissenting opinion of Judge Birch in *Chapman*, 229 F. 3d at 1050). This basis for holding that a plaintiff can prevail despite rebutting fewer than all of an employer's proffered reasons was reiterated in *Vigil*, 210 Fed. Appx. at 764 n. 4, *Martinez*, 170 Fed. Appx. at 521 n. 9, and *Tyler*, 232 F. 3d at 814.

(3) "'[W]hen the plaintiff casts substantial doubt on many of the employer's multiple reasons, the jury could reasonably find the employer lacks credibility. Under those circumstances, the jury need not believe the employer's remaining reasons.'... *[a]ccord Fuentes v. Perskie*, 32 F. 3d 759, 764 n. 7 (3d Cir. 1994)." *Bryant v. Farmers Insurance Exchange*, 432 F. 3d 1114, 1126 (10th Cir. 2005)(*quoting Tyler*). This basis for holding that a plaintiff can prevail despite rebutting fewer than all of an employer's proffered reasons was reiterated in *Vigil*, 210 Fed. Appx. at 764 n. 4, *Martinez*, 170 Fed. Appx. at 521 n. 9, *Jaramillo*, 427 F. 3d at 1311, *Plotke v. White*, 405 F. 3d 1092, 1103 (10th Cir. 2005), and *Minshall v. McGraw Hill Broadcasting Co., Inc.*, 323 F. 3d 1273, 1280 (10th Cir. 2003).

(4) "[I]f a person is shown to be a liar in an outrageous manner..., the inference that the person is non-credible, and should not be believed as to other issues, is a reasonable one." *Tyler*, 232 F. 3d at

814 (*quoting* the dissenting opinion of Judge Birch in *Chapman*, 229 F. 3d at 1050).

(5) "[T]he employer has changed its explanation under circumstances that suggest dishonest or bad faith." *Jaramillo*, 427 F. 3d at 1311. This basis for holding that a plaintiff can prevail despite rebutting fewer than all of an employer's proffered reasons was reiterated in *Martinez*, 170 Fed. Appx. at 521 n. 9.

(6) "[T]he plaintiff discredits each of the employer's objective explanations, leaving only subjective reasons to justify its decision." *Jaramillo*, 427 F. 3d at 1311. This basis for holding that a plaintiff can prevail despite rebutting fewer than all an employer's proffered reasons was reiterated in *Martinez*, 170 Fed. Appx. at 521 n. 9.

(7) "Where... one of the stated reasons... predominates over the others, demonstrating that reason to be pretextual is enough to avoid summary judgment." *Bryant*, 432 F. 3d at 1127.[16]

Relying on one or more of these seven rules, the Tenth Circuit reversed awards of summary judgment in *Bryant* and *Plotke*, and upheld jury verdicts for the plaintiffs in *Minshall* and *Tyler*.

E. The Mississippi Supreme Court Standard

In *Cash Distributing Co., Inc. v. Neely*, 947 So. 2d 286 (Miss. 2007), the Mississippi Supreme Court expressly rejected the rule in the Fifth and Eleventh Circuits that a plaintiff in a federal employment discrimination case must separately rebut every explanation given by the employer. The plaintiff in *Cash Distributing* had brought suit in

---

[16]"It is not simply a question of how many of the defendant's reasons a plaintiff has refuted, but rather a question of whether casting doubt on a particular justification necessarily calls into doubt the other justifications."

state court under the ADEA, and the Mississippi Supreme Court acknowledged that the standard of proof was governed by federal law.[17] The plaintiff had rebutted only one of the reasons that Cash Distributing gave for having fired him.

The company argued that the plaintiff had to "rebut every nondiscriminatory reason offered for his termination... to offer proof that each of the events Cash claims led to his dismissal did not actually happen." 947 So. 2d at 296. The company specifically urged the Mississippi Supreme Court to adopt the Fifth Circuit rule in *Wallace*, and a minority of the Mississippi Supreme Court agreed with *Wallace*. 947 So. 2d at 307 (dissenting opinion). But the majority "decline[d] to follow the Fifth Circuit's view that an ADEA plaintiff must specifically rebut each and every nondiscriminatory reason offered by the employer [for] its adverse employment action." 947 So. 2d at 296. "We do not read *McDonnell Douglas* and *Burdine* to require a Title VII (or ADEA) plaintiff to rebut with specific evidence each and every nondiscriminatory reason offered by an employer for the determination." 947 So. 2d at 293-94.

The plaintiff in *Cash Distributing* had rebutted one proffered reason for his termination by showing that younger workers guilty of the same asserted misconduct had not been dismissed. 947 So. 2d at 307 (dissenting opinion). That evidence was sufficient, the majority reasoned, to permit the jury to infer that the other asserted misconduct--even if it had indeed occurred--also would not have led to the dismissal of younger workers, and thus was not the actual reason for his termination.

F. The First Circuit Standard

The recent First Circuit decision in *Sher v. U.S. Department of Veterans Affairs*, 488 F. 3d 489 (1st Cir. 2007), reflects the confused state of the law in the lower courts.

---

[17] 947 So. 2d at 292 ("When a plaintiff brings an ADEA claim in out state courts, we are bound to apply the law as interpreted by the United States Supreme Court.")

The discussion in *Sher* begins with an ambiguous statement that

> "when an employer offers multiple legitimate, nondiscriminatory reasons for an adverse employment action, a plaintiff *generally* must offer evidence to counter each reason."

488 F. 3d at 507 (emphasis added). That indicates that there would be some cases in which separate rebuttal evidence is not required.

Sher then cites three cases which it describes as "consistent with" this rule. The First Circuit quotes the Seventh Circuit decision in *Wolf*, setting forth that circuit's "intertwined" and "fishy" standards. 488 F. 3d at 508. *Sher* also quotes a passage from the Third Circuit decision in *Fuentes*, but not the critical footnote 7 in *Fuentes*, which established that circuit's "fair number" standard. 488 F. 3d at 507-08. Finally, the First Circuit cites, but does not quote, a Fifth Circuit decision[18] that contains neither that circuit's standard, nor indeed any rule at all, regarding cases in which an employer proffers several reasons. 488 F. 3d at 508

Sher then simply concludes, without further comment, "Thus, Sher must provide evidence that *both* [reasons proffered by the employer] were pretext for discrimination." 488 F. 3d at 508. (emphasis in original). The First Circuit opinion offers no explanation whatever as to why the "general[]" rule, as opposed to the quoted exception in *Wolf* (or perhaps the somewhat different exceptions in *Fuentes*) applied in that particular case. It is apparent that in the First Circuit, unlike the Fifth and Eleventh Circuits, a plaintiff need not always have evidence separately rebutting each reason proffered by an employer, but when and why a plaintiff is permitted to do less is entirely unclear.

---

[18] *Bodenheimer v. PPG Indus.*, 5 F. 3d 955, 958 (5th Cir. 1993).

II. THE CONFLICT IS WELL RECOGNIZED

The inter-circuit conflict on this issue is well recognized. In the Eleventh Circuit en banc decision in *Chapman*, for example, three members of the court of appeals rejected the majority's absolute requirement that each reason be separately rebutted. The dissenters argued that the Eleventh Circuit should instead "adopt the Third, Sixth, Seventh and D.C. Circuits' exceptions to the general rule of requiring a plaintiff to rebut each proffered reason." 229 F. 3d at 1051. The dissenters expressly endorsed the Third Circuit decision in *Fuentes*, the Seventh Circuit decisions in *Russell*, *Wolf*, and *Adreani*, and the Sixth Circuit decision in *Smith*. 229 F. 3d at 1049. The *Chapman* majority emphatically rejected the broader Third, Sixth, Seventh and D.C. Circuit standard proposed by the dissent.[19]

In *Cash Distributing* the Mississippi Supreme Court noted that there was among the lower courts "an inconsistent understanding and application of the concept of rebutting the employer's nondiscriminatory explanation for terminating the aggrieved employee." 947 So. 2d at 293. The Mississippi Supreme Court correctly characterized the Fifth Circuit rule as the "minority position." 947 So. 2d at 294. The court acknowledged that its own holding was "a rejection of the test set forth by the Fifth circuit in *Wallace*," which it noted was the same as the Eleventh Circuit standard in *Chapman*. 947 So. 2d at 294 n. 9. The Mississippi court insisted that the Fifth (and Eleventh) standard were based on "confusion" and a "misreading of the Supreme Court's holdings in *McDonnell Douglas* and *Burdine*." 947 So. 2d at 294. "[W]e are unable to find any statutory support for the [Fifth Circuit rule], nor do we find it espoused or approved by any decision of the United States Supreme Court." *Id.*

In the Tenth Circuit, the decision in *Tyler*, 232 F. 3d at 814,

---

[19] 229 F. 3d at 1037 n. 30:

"The dissenting opinion would carve out a number of exceptions to the well-established rule that a plaintiff must show pretext as to each proffered reason... [W]e reject that exception."

endorsed and quoted excerpts from the dissenting opinion in *Chapman* articulating the "outrageous lie" and "casting doubt on many reasons" standard. The Tenth Circuit decision in *Jaramillo*, 427 F. 3d at 1311, quoted and endorsed the "fishy and suspicious" standard in the *Chapman* dissent.

One commentator correctly concluded, after an exhaustive analysis of the lower court decisions on this issue, that "different circuits have different approaches to the multiple justification situation." L. Rosenthal, *Motions for Summary Judgment When Employers Offer Multiple Justifications for Adverse Employment Actions: Why The Exceptions Should Swallow The Rule*, 2002 Utah L. Rev. 335, 371.

These conflicting standards give rise to inconsistent litigation incentives. As the Sixth Circuit noted in *Smith*, in that and several other circuits "an employer's strategy of simply tossing out a number of reasons to support its employment action in the hope that one of them will 'stick' could easily backfire." 155 F. 3d at 809. On the other hand, as a District Judge in the Eleventh Circuit recently noted, the Eleventh Circuit decision in the instant case "invites employers to articulate multitudinous facially legitimate reasons for their adverse employment decisions, each and all of which must be proven pretextual by evidence beyond that in the prima facie case."[20]

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

---

[20]Memorandum Opinion, *McKinney v. R & L Foods, LLC*, Civil Action No. 06-AR-0696-S, (N.D.Ala.), p. 29 (Opinion dated May 31, 2007).

Respectfully submitted,

ERIC SCHNAPPER*
University of Washington School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

CHRISTOPHER G. MOORMAN
Law Offices of Christopher G. Moorman
945 East Paces Ferry Road, Suite 2610
Atlanta, GA 30326
(404) 760-2730

ROBERT N. KATZ
Katz, Stepp & Miller, LLC
945 East Paces Ferry Road, Suite 2610
Atlanta, GA 30326
(404) 240-0400

Attorneys for Petitioner *Counsel of Record

Blank Page