No. 05-

IN THE

Supreme Court of the United States

LARRY ALAN WARCH,

Petitioners,

v.

THE OHIO CASUALTY INSURANCE COMPANY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When assessing whether a plaintiff has met his employer's job qualifications at the prima facie stage of an age discrimination case, must a terminated employee also show that he continues to meet the employer's legitimate job expectations?

2. Whether a plaintiff must always show that he was replaced by a substantially younger employee to establish a prima facie case in an age discrimination action or whether the fourth element of the *McDonnell Douglas* formulation may take on various formulations including evidence of statements by management showing stereotypical age animus.

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The opinion of the Fourth Circuit (App., *infra,* beginning at 1a) is reported at 435 F.3d 510. The opinion of the district court (App., *infra,* beginning at 21a) is unreported.

JURISDICTION

The court of appeals entered its opinion and judgment on January 30, 2006. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AUTHORITY

The Age Discrimination in Employment Act of 1967, as amended, at 29 U.S.C. §623 (a) states "It shall be unlawful for an employer-(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

STATEMENT OF FACTS

A. Relevant Facts

Larry Alan Warch brought this action against his former employer, the Ohio Casualty Insurance Company ("OCIC"), where he was employed in the Special Investigation Unit ("SIU") as a fraud investigator. His complaint alleged that his employer unlawfully discriminated against him based upon his age (59) when it fired him.

The district court granted OCIC's motion for summary judgment rejecting Warch's prima facie case and holding that

he failed to establish two of the four required elements of a prima facie case. Specifically, the court held that he: (a) had not met his employer's legitimate job performance expectations; and (b) had failed to produce sufficient evidence that he was replaced by a substantially younger employee. Finally, the district court held that Warch had not established a "mixed motive" claim.

The Fourth Circuit affirmed the district court's holding although acknowledging a split with the Sixth Circuit Court of Appeals as to whether or not, at the prima facie stage, an employee must show that he was meeting his employer's legitimate job performance expectations.

This case presents issues relating to what is required of a plaintiff at the prima facie stage of an age discrimination case and concerns questions that the circuits have been split over for a long time and over which there is still disagreement.

1. Warch's Prior Related Employment

From October of 1989 to November of 1992, Warch was employed by Cigna Property and Casualty Insurance Companies. In that job his duties involved the investigation and evaluation of first and third party property damage and bodily injury claims to include automobile and general liability lines of business. JA 64 ¶ 6.[1]

From November of 1992 until March of 1993, Warch was employed by the State of Maryland Mass Transit

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[1] "JA __" refers to the Joint Appendix filed in the court of appeals. "JA(S)__" refers to the sealed portions of the Joint Appendix.

Administration as a Claims Representative. In that position he investigated and evaluated first and third party property damage and bodily injury claims to include automobile and general liability lines of business. JA 64 ¶ 7.

From March of 1995 to January of 1994, Warch was employed by Kemper National Insurance Company as a Claims Representative. Again, he continued to investigate and evaluate first and third party property damage and bodily injury claims to include automobile and general liability lines of business. JA 64 ¶ 8.

From January of 1994 until Ohio Casualty purchased the commercial lines of The Great American Insurance Companies, Larry Warch was employed by Great American as a Special Investigator in its Special Investigation Unit. It was his intent to complete his working career at Great American and eventually retire from there. During his tenure with Great American, he turned down other higher paying employment opportunities because he enjoyed working at Great American. JA 65 ¶ 9. At Great America, Warch was rated "competent plus." JA 240, 242.

2. Warch's Employment At Ohio Casualty Insurance Company

When defendant, Ohio Casualty Insurance Company, purchased from Great American its commercial product line, those employees employed by Great American as SIU investigators were able to apply for employment with Ohio Casualty as SIU investigators. Warch was hired by defendant as a Special Investigation Unit Investigator I on December 1, 1998, the date the purchase became effective. JA 65 ¶10.

Warch's work at Ohio Casualty was progressing well,

and the only criticism he received from SIU management was about the way he kept his files organized. He quickly corrected that problem. Warch's investigations were never criticized until the SIU unit came under new management. JA 65 ¶ 12.

In the year 2000, the company decided to change the management of the SIU from home office control to regional control. Bill Johannsen, who had worked many years at Ohio Casualty, was its manager, and also served as an Assistant Vice President of Ohio Casualty, was terminated. Supervisor Bradley Bennett was kept on during the transition from home office control to regional control. Tommy Evans and Larry Warch were assigned to be investigators in the Raleigh Regional Office. Warch continued to receive above average performance ratings from the Raleigh management. JA 65-66 ¶¶ 13 & 14. Prior to Bruce Montgomery's taking over the SIU early in 2001, Warch's performance rating was "Effective" in all categories. JA 66 ¶ 14; JA 238-239; JA(S) 303-506, 1748, 1754.

In fact, at a meeting held on June 25, 2001 (after Montgomery had become Director of SIU), a conference call was held with Bruce Montgomery, Bob Eades (Warch's supervisor at Raleigh), and Larry Warch in order to evaluate Warch's 2000 performances. During this meeting Warch received an overall rating of "Good" and received a 3% merit increase in his salary. This meant an increase in his annual salary from $48,927.06 to $50,394.87 which became effective June 7, 2001. JA 68-69 ¶ 23; JA(S) 238-239, 326-327. According to his prior supervisor (during home office control of the SIU), Warch, in fact, "was qualified and performed well above the level acceptable for an SIU Investigator II position at Ohio Casualty." JA 76,79 ¶ 13.

Almost immediately after taking control of the SIU unit

in early 2001, Bruce Montgomery manipulated an audit of the two SIU investigatiors working out of the Raleigh office so as to claim poor performance by Warch (JA 76, 82). From that time on, Warch was the target of subjective criticism and disciplinary action by Montgomery and his assistant, Robert Burgess.

Around the time of Warch's firing, both Burgess, Warch's immediate supervisor, and Montgomery, the Director of the SUI unit, made almost identical statements to the effect that people who were of a certain age (apparently age 46 or above) did not produce like younger people. JA 208-214. There were also other indications of age discrimination. JA(S) 318-323, 332-333, 335-336.

Although David Hasler, whose department included the SIU unit, claims to have made the decision to fire Warch, Hasler, in fact, knew nothing of Warch's situation other than what Bruce Montgomery told him (JA 141, 145-149, 156-158). The decision to fire Warch was made jointly by Hasler and Montgomery.

B. Proceedings Below

The employer filed a motion for summary judgment in the district court basing its motion on the claim that Warch had not made out a prima facie case of age discrimination. The principal argument made by Ohio Casualty was that at the prima facie stage the plaintiff was required, in addition to demonstrating his basic qualifications for the position, to shoulder the additional burden of establishing that his work performance continued at the requisite level of the employer's expectations.

The court of appeals "reject[ed] Warch's contention that

consideration . . . [of Warch's work performance] at the prima facie stage improperly allow[ed] consideration of evidence the employer would typically present in the second stage of the *McDonnell Douglas* framework, that is, where the employer offers the legitimate, non-discriminatory reason for the termination." App., infra, 7a-8a.

The court of appeals acknowledged that Warch's position was supported by "the approach announced in *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000), which held that, 'when assessing whether a plaintiff has met her employer's legitimate expectations at the prima facie stage of a termination case, a court must examine plaintiff's evidence independent of the nondiscriminatory reason "produced" by the defense as the reason for terminating plaintiff.' *Id.* at 660-61." App., infra 8a.

The court of appeals noted its disagreement with the decision in *Cline* "because [according to the Fourth Circuit] a plaintiff must show by a preponderance of the evidence that he met the employer's legitimate job expectations to prove his prima facie case . . . ." App., infra, 9a.

The Fourth Circuit also held that Warch's prima facie case also fails because he did not produce sufficient evidence from which a reasonable jury could decide that he was replaced by a substantially younger employee. *Causey v. Balog*, 162 F.3d 795, 802 n.3 (4th Cir. 1998). App., infra, 15a.

Lastly, the court of appeals rejected Warch's "mixed motive" claim. The court concluded that age comments made by Warch's supervisors to the effect that a job candidate who happened to be similar in age and experience to Warch would have a difficult time getting a job because people his age don't work as hard as those younger was not sufficient to create a

genuine dispute on his claim under the mixed motive approach. (App., infra, 18a).

REASONS FOR GRANTING THE PETITION

1. There Is A Split In The Circuits, Which Now Should Be Resolved, As To Whether An Employee Must Show That He Has Met His Employer's Performance Expectations At The Prima Facie Stage.

As the Fourth Circuit acknowledged (App., infra, 10a), its decision in this case directly conflicts with *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000). The court below stated that at the prima facie stage, the terminated employee is required to show that he continues to meet the employer's legitimate expectations for job performance, not only that he is qualified for the job (App., infra, 6a). The Fourth Circuit based its decision on an earlier holding, *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982), and the First Circuit's decision in *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979). The position taken by the court in *Loeb* has been repeatedly rejected by other circuits.

The court in *Loeb* held that a prima facie case requires the employee to demonstrate "that he was 'qualified' in the sense that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative." *Id.*

A. The Fourth Circuit's Reasoning Has Been Rejected By Other Circuits.

But the Fifth Circuit in *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988), specifically rejected the reasoning in *Loeb* stating:

> Although the *Loeb* approach has some appeal as a matter of principle, we cannot reconcile it with the Supreme Court's attempt in *McDonnell Douglas* and *Burdine* to simplify presentation of an employment discrimination case. Placing plaintiff's "qualifications" in issue at both the prima facie case and pretext stages of a termination case is an unnecessary redundancy.... The requirement that a plaintiff prove he is meeting his employer's reasonable expectations represent an imperfect attempt at analogy with *McDonnell Douglas*.

Id. at 1505.

The Second Circuit also rejected the *Loeb* position in *Powell v. Syracuse University*, 580 F. 2d 1150, 1155 (2nd Cir. 1978). The court disagreed with the district court's ruling that the plaintiff had failed to establish a prime facie case because she had failed to establish her qualifications for the job. The circuit court stated such a requirement "unnecessarily collapses the steps suggested by *McDonnell Douglas* by shifting the considerations which are more appropriate to the employer's rebuttal phase to the earlier requirement that the employee demonstrated competence to perform the specified work."

Not only did the Sixth Circuit reject the *Loeb* reasoning in *Cline*, but reiterated that rejection more recently in *Wexler v. White's Fine Furniture, Inc.*, 317 F. 3d 564 (6th Cir. 2003). The Sixth Circuit, citing *Cline*, stated that "a court may not consider the employer's alleged nondiscriminatory reason for taking an adverse employment action when analyzing the prima facie case." *Id.* at 574.

The court in *Wexler* citing *Aka v. Washington Hosp. Ctr.*,

156 F.3d 1284, 1298 (D.C. Cir. 1998), and *MacDonald v. Eastern Wyoming. Mental Health Center*, 941 F.2d 1115, 1121 (10th Cir. 1991),[2] stated that "[a]t the prima facie stage, a court should focus on a plaintiff's objective qualifications to determine whether he or she is qualified for the relevant job." *Id.* at 575.

B. The Decision Below Is Inconsistent With The Prior Reasoning Of This Court.

Not only is the Fourth Circuit's view out of step with other circuits but also with the language of this Court's opinions. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1992), a case focused on the intermediate and final phase of the

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[2]In *MacDonald*, the Tenth Circuit held that the district "court erred in giving dispositive weight to its conclusion that the MacDonalds failed to disprove defendant's reasons for discharge." That court stated:

> Moreover, concluding that the MacDonalds did not establish a prima facie case based on the reasons for their discharge raises serious problems under the *McDonnell Douglas* analysis, which mandates a full and fair opportunity for a plaintiff to demonstrate pretext. Short-circuiting the analysis at the prima facie stage frustrates a plaintiff's ability to establish that the defendant's proffered reasons were pretextual and/or that age was the determining factor. . . .

941 F.2d at 1119.

McDonnell Douglas presumption, stated that formulation "is a *procedural* device, designed only to establish an order of proof and production." *Id.* at 521. The *Hicks* Court assumed that in discipline and discharge cases, the plaintiff need only to prove that he was *qualified* not the level of his performance. *Id.* at 506.

Most recently, this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), directly faced the job performance issue in a termination case. At trial, the employer contended that the employee had been fired due to his failure to maintain accurate attendance records. *Id.* at 142-44. In *Reeves*, this Court dealt with the prima facie case issue stating:

> First, the plaintiff must establish a prima facie case of discrimination. . . . It is undisputed that petitioner satisfied this burden here: (i) at the time he was fired, he was a member of the class protected by the ADEA... (ii) he was [except for the performance issue] otherwise qualified for the position of Hinge Room Supervisor, (iii) he was discharged by respondent, and (iv) respondent successively hired three persons in their thirties to fill petitioner's position.

Id. at 142.

The Sixth Circuit in *Cline* also relied on this Court's decision in *U.S. Postal Service Bd. Of Governors v. Aikens*, 460 U.S. 711 (1978), stating:

> We need look no further than some of the most important Supreme Court cases in this area – scrutinizing not only what the Court

> said, but the trials which it reviewed – to see that this position is the only logical application of the *McDonnell Douglas* test. In *Aikens*, the district court noted Aikens general qualifications and positive employer reviews to conclude initially that Aikens had made out a prima facie case.

Cline, 206 F.2d at 661-62.

Contrary to the reasoning of the courts below, adequacy of work performance is properly the part of defendant's burden of demonstrating a nondiscriminatory reason for the discharge. This is why this Court has taken the position that in making out a claim of discrimination, the prima facie requirement "is not onerous." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

> The Sixth Circuit in *Cline* explained:
> The district court ignored these precepts when it held that Cline failed to make a prima facie showing. In addition to setting a burden far too high, it conflated the distinct stages of the *McDonnell Douglas* inquiry by using St. Paul's "nondiscriminatory reason" as a predicate for finding Cline to have failed to make a prima facie case. The court found Cline "unqualified" under prong two of the prima facie case because she had not lived up to the promises she made to "exemplify the moral values thought by the Church."... This analysis improperly imported the later stages of the *McDonnell Douglas* inquiry into the prima facie stage.

Id. at 660.

The Sixth Circuit, unlike the Fourth Circuit in this case, held that rather than resolve such an issue at the prima facie stage, "*McDonnell Douglas* requires that the district court consider this dispute at the inquiry's third stage when its role is to decide the "ultimate question" of discrimination." *Id. at* 660. The court in *Cline*, 206 F.2d at 661, concluded that "a court must examine plaintiff's evidence independent of the nondiscriminatory reason 'produced' by the defense as its reason for terminating plaintiff."

Clearly, the court's analysis of the "qualification" factor in this case improperly imported the final inquiry under *McDonnell Douglas* into the prima facie stage. The trial court here used what it describes as "Warch's poor performance, his supervisor's concerns, and efforts made to encourage Warch to elevate his work to OCIC's standards" to conclude that Warch had not met the second (qualification) prong of the prima facie requirement. JA 49-50.

The Sixth Circuit's analysis in *Cline* is particularly instructive because it demonstrates that the decisions below are not consistent with this courts prior analysis and thus bears an extensive quote from that decision:

> The *Hicks* decision confirms the logic of *Aikens* and applies it to the termination context. In that case, after a number of years of successful employment which included a promotion, St. Mary's fired Hicks following a series of disciplinary actions and a demotion. *See* 509 U.S. at 504-05, 113 S.Ct. 2742. The district court nevertheless found him "qualified" for prima facie purposes by looking only at the evidence of Hicks' employment record *prior* to the events that spurred his demotion and

> consequent termination. *See Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1249 (E.D. Mo. 1991). In other words, the court did not consider Hick's alleged violation of various rules as part of the prima facie case (even though they arguably showed that he was not "qualified," just as Cline's violation of an essential rule allegedly deemed her "unqualified" in St. Paul's eyes), but properly reserved its consideration of those alleged violations until the production stage. . . . Although the Court reversed the court of appeals on the question of whether Hicks met that ultimate burden, the structure of the *Hicks* trial reflects the logic of *Aikens* in the termination context: that whether or not a plaintiff makes a prima facie case must be ascertained by weighing the plaintiff's evidence that she was meeting her employer's legitimate expectations, not by considering the nondiscriminatory reasons produced by the defendant as its reason for terminating her. Moreover, the *Hicks* trial shows that in the termination context, this determination will often involve assessing whether the plaintiff was meeting the employer's expectations *prior* to the onset of the events that the employer cites as its reason for the termination, because weighing the litigants' evidence on the veracity and propriety of that nondiscriminatory explanation comprises the "ultimate issue" of the case.

Id. at 662-63.

The *Cline* court, 206 F.3d at 665, provides logic for its position observing that "[t]he burden-shifting analysis of *McDonnell Douglas* exists, in part, to resolve 'the disparity in access to information between employee and employer regarding the employer's true motives for making the challenged employment decision,'" citing *Walker v. Mortham*, 158 F.3d 1177, 1192 (11th Cir. 1988).

C. The Lower Courts' Decisions Are Erroneous.

As in *Hicks*, the evidence here is that prior to the onset of events that the employer cites as its reasons for terminating Warch, he was meeting the employer's performance expectations. In this case, Larry Warch received from OCIC a rating of "Good" for the performance period of 3/21/00 to 12/31/00 and had thereby received a 3% merit increase. This decision was made by Montgomery and Robert Eades on June 21, 2001. JA 238, JA(S) 326-327. Also Bradley Bennett, who had been Warch's supervisor,[3] stated that "Larry Warch's overall job performance met or rose above Ohio Casualty's reasonable expectations." JA 79.[4]

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[3]The Bennett Declaration (JA 76-83 at ¶¶ 6, 8, 9, 10 and 12) clearly shows that Bennett was Warch's prior supervisor contrary to the lower court's determination (JA 50-51).

[4]Contrary to the assertion of management suggesting that Warch did not perform thorough investigations, his 1999 performance evaluation stated as one of Warch's strengths that he is "detailed in conducting investigations." JA 315. Likewise, with regard to the quality of Warch's investigations, the performance evaluation stated that he "Exceeds Expectations." JA 314.

In a performance evaluation for the year 2001, Warch received a rating of "Marginal Performance." Def's Ex. 32 (JA 285-289). *See* JA 34. The evaluation was clearly subjective in the most part as to performance criteria. For example, there are criteria dealing with "customer-driven quality," "Innovation," and "Stewardship." JA 286. However, as to the few objective criteria, Warch was rated as "exceeding" expectations. For example, Warch handled 17.0 files per month (the criteria for exceeding expectation was 16 or more). *Id.* Also, Warch was rated as "Exceeding" with regard to training hours. *Id.*

It is also important to note that at the summary judgment stage, the plaintiff need not present a prima facie case of discrimination, but must simply raise a genuine issue of material fact as to the existence of a prima facie case. *Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633, 641 n.8 (5th Cir. 1985).

Part of the error in the reasoning the lower court's opinion in this case is the failure of the opinion to specify what job expectations, objective or subjective, were the basis for the court's conclusion that Warch failed to meet the employer's expectations or, for that matter, which expectations were legitimate.

In *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 681 (5th Cir. 2001), the court concluded that only "objective qualifications" should be considered at the prima facie stage. The court warned that "[w]hile subjective criteria . . . 'may serve legitimate functions, they also provide opportunities for unlawful discrimination' because the criteria itself may be pretext for age discrimination." Thus, subjective criteria should only be considered later. Most, if not all, of the job performance "problems" the lower court referenced were based upon subjective determinations.

The Seventh Circuit recognized the problems in requiring a plaintiff to demonstrate that he met his employer's job expectations concluding that, at the prima facie stage, an employee need not prove subjective qualifications. *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 134-35 (7th Cir. 1985).

D. The Circuits' Split Should Be Resolved Now.

Because in age discrimination cases the most common explanation that employers offer for terminations or demoting employs is that the employee is guilty of poor performance, this issue affects thousands of individuals seeking judicial relief for claims of age discrimination. This case presents an opportunity for the Court to reject the line of authority embraced by the majority of courts of appeal that the employee need not show that he meets the employer's legitimate job expectations at the prima facie stage or, as petitioner urges, reject the minority view represented by the decision below.

The split in the circuits extends beyond more than two circuits to several other courts of appeal over many years. The conflict is no longer tolerable, and there is a need for a uniform rule to determine when a prima facie case has been established in age discrimination cases. *See Commissioner v. Bilder,* 369 U.S. 499, 501 (1962). The pipeline is replete with many lawsuits affected by this issue. *See Massachusetts Trustees v United States*, 377 U.S. 235, 237 (1965).

2. Contrary To The Fourth Circuit's Holding, Other Circuits Do Not Require That A Plaintiff Show That He Was Replaced By A Substantially Younger Employee As Part Of A Prima Facie Case.

There is also an apparent conflict between the Fourth

Circuit in this case and other circuits as to the "replacement" issue, which was the second reason for which the district court entered summary judgment for the employer. The Fourth Circuit in this case states that Warch's prima facie case fails because "he did not produce sufficient evidence from which a reasonable jury could conclude that he was replaced by a substantially younger employee." App., infra, 15a.

A. The Fourth Prong Of A Prima Facie Case Must Be Flexible And Vary With The Circumstances.

The Seventh Circuit in *Collier v. Budd Co.*, 667 F.3d 886, 890 (7th Cir. 1995), stated that a prima facie case is a flexible standard and the fourth (replacement) prong of the formulation varies with the circumstances.

The district court ruled that Warch failed to establish a prima facie case also under the fourth element of the *McDonnell Douglas* framework. The district court found that to establish a prima facie case, Warch must also show that he was replaced by someone with comparable qualifications outside the protected class, citing *Causey v. Balog*, 162 F.3d 795, 802 (4th Cir. 1998). However, the district court acknowledged that the Supreme Court has rejected strict adherence to this standard in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13, but continued to focus on whether Warch was, in fact, replaced.

The court of appeals stated that Warch initially admitted he was not replaced by anyone but also stated that David Hasler, the head of the department under which the SIU operated at the time of Warch's termination, "testified, however, that Warch's work 'was probably spread out among various investigators' after he was let go. JA 166." The district

court, thus, seemed to hold, as a matter of law, citing *Causey*, 162 F.3d at 802, "that reassignment of a terminated employee's work to existing employees does not satisfy the replacement requirement." *See* JA 53.

In fact, Hasler testified that in December of 2001 "we announced the sale of our New Jersey personal auto business to another company; that was a very significant volume of business." *Id.* at 167. Hasler admitted that at the very time Warch was fired there was a reorganization of the SIU working out of the Voorhees, New Jersey, office. He testified:

> Eventually, the claims on that business would diminish, and the work load of the SIU investigator in New Jersey would go down, so they could pick up part of that. I think that that's initially what we did, was had two or three of the SIU investigators assigned to the Voorhees office that was in the southern part of that region handled SIU cases that may have formerly been referred to Mr. Warch.

Id.

Hasler further explained that "effective March 15 or 16, 2002," shortly prior to Warch's termination, the sale of the New Jersey personal auto business to Performance Insurance Company became effective (*Id. at* 181, 183). According to Hasler, because of this sale "just as the claims staff has been reduced in Voorhees [New Jersey office] knowing that the number of claims is going down, the SIU investigators should have less cases in Voorhees." *Id.* at182.

The sale of the New Jersey personnel auto business, which caused the reduction of the needed SIU investigators,

took place in December of 2001. (JA 182). Warch was placed on probation for his "work product" performance on December 6, 2001, with the stated "consequence of non-improvement being termination. JA(S) 312.

In addition, Bruce Montgomery, the SIU head, and Robert Burgess, Warch's immediate supervisor, viewed older employees stereotypically. Both made very similar statements during the time when Warch was being terminated that people of a certain age (apparently age 46 or above) did not produce like younger people and would not likely be hired to work in the SIU. JA 208-214.

This Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), indicated that the stereotyping of older employees was the focus of the ADEA. There, the Court stated that "[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." As the court stated in *Zimmitti v. Aetna Life Ins.Co.*, 64 F. Supp. 2d 69, 83 n.29 (D. Conn. 1999):

> As the Supreme Court noted in *Hazen*, the age discrimination that prompted Congress' promulgation of the ADEA " 'rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact...'" 507 U.S. at 610, 113 S. Ct. 1701 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983)).

After referring to a congressional hearing which prompted a report by the Secretary of Labor, this Court in *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983), concluded:

> (1) Many employers adopt specific age limitations in those States that had not prohibited them by their own antidiscrimination laws, although many other employers were able to operate successfully without them. (2) In the aggregate, these age limitations had a marked effect upon the employment of older workers. (3) Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotype unsupported by objective fact, and was often defended on grounds different from its actual causes. (4) Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that as an overall matter, the performance of older workers was at least as good as that of younger workers. (5) Finally, arbitrary age discrimination was profoundly harmful in at least two ways.

B. The Decisions Below Are Erroneous.

In this case, both Montgomery and Burgess made statements that demonstrated stereotypical age animus. Robert Beasley, who was hired as an SIU investigator at about the same time Warch was fired, testified about conversations he had with both Bruce Montgomery and Robert Burgess near the time of Warch's termination.

Beasley testified that Burgess and Montgomery inquired as to whether he knew of anyone in Western North Carolina who might be interested in an SIU investigator position. JA 204-214. He testified that after finding a potential candidate:

> I called back Mr. Burgess and told him he [Jim Weber] was to fax it [a resume] over to Mr. Montgomery. In that conversation with Mr. Burgess, I told him how old the guy was. I told him where the guy was coming from, that he had been the Chief of Police in Dearborn Heights, Michigan. And his response to me was *it will probably be hard for him to get a job because him and Mr. Montgomery had found out that hiring people at that age, they didn't get the work out of them that they did younger people.*

Id. at 211 (emphasis supplied).

Beasley further testified about Montgomery's identical adverse reaction to hiring a 48-year-old retired police officer. JA 213-214. The district court concluded that the age stereotypical statements made by Burgess and Montgomery were only "stray" comments. JA 57.

One type of circumstantial evidence of intentional discrimination "consists of suspicious timing, ambiguous statements, oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn" *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994).

As the Seventh Circuit stated in *Dey v. Colt Const. & Devel. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994), "[s]ummary judgment generally is improper where the plaintiff can show that an employer with discriminatory animus provided factual information or other impute that may have affected the adverse employment action."

In *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990), the court found that the employee's supervisor had set the employee up to fail and influenced the Committee's deliberations by portraying the employee's performance in a poor light. The court thereupon imputed the supervisor's actions to the employer and reversed the district court's grant of summary judgment.

Likewise, in *Wells v. New Cherokee Corp.*, 58 F.3d 233, 238 (6th Cir. 1995), that court said that "courts must consider as probative evidence any statements made by those individuals who are in fact meaningfully involved in the decision to terminate an employee."

There is also evidence that shortly after Montgomery was installed by the company to direct the SIU program, he manipulated the audit process so that Warch would fail the audit. After the reorganization of the SIU and Montgomery became its head in early 2001, Montgomery audited the files of Warch and Evans. Not being satisfied that Warch passed the file audit, Montgomery then intentionally manipulated the audit results to lower Warch's audit score. JA 76, 78-79, 82-83 ¶¶ 5, 9, 12, 22-26. From that time on, Warch was subjected to disparaging and unwarranted criticism of his files.

Bennett testified that Montgomery adjusted the audit program after the first audit result, which was "based on criteria provided in a computer program which was developed and supported by the SIU Guidelines. . .," and resulted in Warch passing the audit. According to Bennett, Montgomery decided to adjust the audit program to reflect a lower scoring for Warch. This resulted in Warch failing. JA 82.

The Second Circuit in *Montana v. First Federal S. & L. of Rochester*, 869 F.2d 100,104 (2nd Cir. 1989), read the

decision in *Furnco Const. Co. v. Waters,* 438 U.S. 567 (1978), as stressing "that the *McDonnell Douglas* analysis is neither 'rigid' nor 'mechanized' and that the primary focus is always whether an employer treats an employee less favorably than other employees for an impermissible reason."

Further, the Seventh Circuit has recognized that the fourth element may take on various formulations. *Cengr v. Fusibond Piping Systems, Inc.* 135 F.3d 445, 451 n.1 (7th Cir. 1998). *See also Moore v. Sears, Roebuck and Co.*, 464 F. Supp. 357, 363 n.7. (N.D. Ga.1979).

When David Hasler was asked if Warch had been replaced by any employee, he stated: "not in that location." When further pressed as to whether Warch had been replaced at any location Hasler, replied: "We added a special investigator, and I guess I'd have to looks at the hire dates for that." This suggests that a "replacement" for the SIU might be at any location. JA 141, 165. But when asked who picked up the work that Warch was doing Hasler responded:

> I think it was probably spread out among various investigators. We had work load changes over time in different locations, depending on what underwriting/production people were doing, where they wanted to concentrate their focus on marketing certain lines of business.

Id. at166-67. The evidence is that those employees who were available were substantially younger than Warch. JA 187-89; JA(S) 107, 316-17.

Warch offered sufficient evidence that the director of the SIU, Bruce M. Montgomery, did not treat age neutrally

when making employment decisions, and a reasonable inference can be drawn from the testimony of Hasler that Warch's territory was subsequently covered by individuals substantially younger than Warch who performed the same responsibilities as Warch. Thus, the fourth element to establish a prima facie case has been satisfied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

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Respectfully submitted,

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