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In the Supreme Court of the United States

HENRIETTA BROWNING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE SECRETARY OF THE TREASURY IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
HOWARD S. SCHER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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QUESTION PRESENTED

Whether it is *per se* reversible error for a trial court in a discrimination case to decline to give a permissive inference instruction on pretext—*i.e.*, to inform the jury that it may infer that defendants' motives were discriminatory if it finds defendants' explanation of its actions not to be credible—regardless of whether such an instruction is justified by the evidence or whether the absence of such an instruction causes prejudice to the plaintiff.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Miscellaneous:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 567 F.3d 1038.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2009. A petition for rehearing was denied on August 12, 2009 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on November 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Although petitioner styles her petition as an action against the United States, *et al.*, the only proper party in this Title VII action is the Secretary of the Treasury. See 42 U.S.C. 2000e-16(c). See also note 3, *infra*.

STATEMENT

Petitioner began working at an Internal Revenue Service (IRS) call center in Portland, Oregon in 1989. Pet. App. 2a-3a. In 1998, she was temporarily promoted to the position of team leader; the following year, petitioner's promotion was made permanent. *Id.* at 3a. Art Ayotte became petitioner's supervisor in 2002 when petitioner transferred as a team leader from the night shift to the day shift. *Ibid.* In that job, petitioner was required to monitor a certain number of the calls made by each employee on her team each month, write a detailed critique of each call, and enter the review into a computerized database. *Ibid.* Each team leader was also responsible for a distinct area of tax law and was expected to monitor employees' performance regarding that subject matter. *Ibid.*

In 2003, Ayotte evaluated petitioner's performance and rated her as not having met expectations because she had failed to complete the required number of phone reviews. Pet. App. 3a. Petitioner was placed on a 60-day performance improvement plan (PIP) to address her shortcomings, and she met with Ayotte weekly during those 60 days. *Ibid.* At the conclusion of petitioner's PIP, Ayotte concluded that she still had not completed the required number of phone reviews for employees or submitted the requisite employee security reviews; Ayotte therefore recommended that petitioner be demoted. *Ibid.* Petitioner contested her demotion, but, with the exception of one specification,[2] petitioner's challenge was rejected by the agency. *Id.* at 3a-4a. In 2004,

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[2] A labor relations specialist agreed that a miscommunication was responsible for petitioner's failure to complete one element of her PIP. Pet. App. 3a-4a.

she was demoted and reassigned to her former position as a taxpayer service specialist. *Ibid.*

In November 2003, after receiving her evaluation, petitioner filed a complaint with the Equal Employment Opportunity (EEO) Office. Her complaint alleged discrimination on the basis of race and retaliation for a prior EEO complaint petitioner had filed against a different supervisor. Pet. App. 4a. The EEO investigation concluded that no discrimination had occurred. *Ibid.*

2. Petitioner then filed this action, alleging race discrimination and retaliation. Pet. App. 4a.[3] At the conclusion of the jury trial, the judge instructed the jury as follows:

> [I]n order to prevail on her first claim for race discrimination, the plaintiff must prove the defendants took certain actions against her and that the plaintiff's race was a motivating factor in the defendants taking the action.
>
> In particular, the plaintiff must prove . . . that her race was a motivating factor in the defendants' conduct. * * *
>
> In order to prevail on her second claim for retaliation, the plaintiff must prove the defendants took certain actions against her because she complained about race discrimination in the workplace. In particular, the plaintiff must prove . . . that her pro-

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[3] The complaint named as defendants: (1) the United States of America, (2) the Department of the Treasury, (3) the Internal Revenue Service, and (4) John W. Snow, the then-Secretary of the Department of the Treasury. In a Title VII action, only the head of the agency is the proper defendant. See note 1, *supra*.

> tected activity was a motivating factor in the defendants' conduct.

Id. at 7a-8a. The district court defined a "motivating factor" as "a factor that played a role in the decisions" of petitioner's supervisor. *Id.* at 8a. The court also instructed the jury both that it should "weigh and evaluate the testimony and the credibility of each witness," and that it should consider direct and circumstantial evidence (after explaining both concepts). *Ibid.*

Petitioner asked that the following additional instruction be given to the jury, based on this Court's decision in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000):

> Consistent with the general principle of law that a party's dishonesty about a material fact may be considered as affirmative evidence of guilt, if you find that the defendants' explanation about why they took adverse action against a plaintiff is not worthy of belief, you may infer a discriminatory or retaliatory motive from that fact.

Pet. App. 4a. The district court declined to give petitioner's requested instruction, explaining that it was "mindful of Ninth Circuit authority that cautions trial judges against giving any kind of inference instruction" as well as of "the risk that an inference instruction can be seen as potentially a comment on the evidence." *Id.* at 9a. However, the court expressly allowed "counsel full latitude to argue inferences, based on a circumstantial evidence instruction." *Ibid.* Thereafter, without contradiction from the court or defense counsel, petitioner's counsel argued to the jury: "if you don't believe the IRS witnesses, then you have the right to find for

[petitioner]." *Ibid.* The jury ultimately found for the defendants. *Id.* at 11a.

3. Petitioner appealed, arguing that the district court's refusal to give her requested "permissive inference instruction" was reversible error.[4] The court of appeals affirmed. Pet. App. 1a-10a. The court recognized this Court's holding in *Reeves* that, in "appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Id.* at 5a (quoting *Reeves*, 530 U.S. at 147). Reviewing the jury instructions as a whole under an abuse of discretion standard, the court of appeals found no reversible error because the instructions "'set forth the essential elements that [petitioner] had to prove in order to prevail,' and [petitioner] was free to explain those elements to the jury in order to make clear that finding the IRS's proffered reasons for [petitioner's] demotion pretextual could justify the jury['s] finding the IRS had discriminated against [her]." *Id.* at 9a (quoting *Cassino* v. *Reichhold Chems., Inc.*, 817 F.2d 1338, 1345 (9th Cir. 1987), cert. denied, 484 U.S. 1047 (1988)). The court also noted that petitioner did in fact set forth her pretext argument before the jury—albeit in a cursory fashion—arguing "if you don't believe the IRS witnesses, then you have the right to find for [petitioner]." *Ibid.*

ARGUMENT

Petitioner asks this Court to resolve a conflict among the courts of appeals about whether a plaintiff alleging

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[4] In her appeal, petitioner also made other arguments, which were disposed of in a separate unpublished opinion affirming the district court's judgment. See Pet. App. 12a-13a. Petitioner did not reassert those arguments in her petition for a writ of certiorari.

discrimination is always entitled to a jury instruction regarding the inference jurors may make if they believe that the defendant's proffered reason for the action in question was pretextual. Further review of this case is not warranted, however, because (1) petitioner's proposed instruction was not a complete and correct statement of the law; (2) petitioner has not argued that the evidentiary predicate existed to enable her jury to draw an inference of discrimination from a finding of pretext; and (3) petitioner does not even attempt to establish that she suffered prejudice as a result of any error the district court may have committed.

1. Petitioner is correct that this Court held in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-148 (2000), that it is permissible for a jury to find intentional discrimination when a plaintiff establishes a prima facie case of discrimination and the jury does not believe the defendant's proffered justification for the action in question. But the decision in *Reeves* addressed substantive issues of proof, not jury instructions. And this Court has never held that a district court must instruct a jury about every legal nuance implicated in a case as long as the instructions it does give are complete and correct. Cf. *Gibson* v. *Lockheed Aircraft Serv., Inc.*, 350 U.S. 356, 357 (1956) (per curiam).

Although the courts of appeals are divided about whether it is error for a district court to decline to issue an inference instruction regarding pretext when a plaintiff requests one,[5] the courts do agree about what such

[5] The Second, Third, Fourth, Fifth, and Tenth Circuits have found that a district court should give a permissive inference instruction where sufficient evidence has been presented to raise a likelihood that the jury will disbelieve the nondiscriminatory justification offered by a defendant. *Kanida* v. *Gulf Coast Med. Pers. LP*, 363 F.3d 568, 573-577

an instruction should say if given. A proper inference instruction should inform the jury that it is permitted, *but not required*, to infer discrimination or retaliation if it disbelieves a defendant's proffered justification for taking the action in question. See *Williams* v. *Eau Claire Pub. Schs.*, 397 F.3d 441, 445-446 (6th Cir.), cert. denied, 546 U.S. 836 (2005); *Conroy* v. *Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1228, 1235 (11th Cir.), cert. denied, 543 U.S. 1035 (2004); *Kanida* v. *Gulf Coast Med. Pers. LP*, 363 F.3d 568, 576 (5th Cir. 2004); *Kozlowski* v. *Hampton Sch. Bd.*, 77 Fed. Appx. 133, 144 (4th Cir. 2003); *Townsend* v. *Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Smith* v. *Borough of Wilkinsburg*, 147 F.3d 272, 278 (3d Cir. 1998); *Gehring* v. *Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994), cert. denied, 515 U.S. 1159 (1995); *Cabrera* v. *Jakabovitz*, 24 F.3d 372, 382 (2d Cir.), cert. denied, 513 U.S. 876 (1994). However, in this case petitioner did not request such an instruction. Instead, she asked the court to instruct the jury only that it may draw such an inference—leaving

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(5th Cir. 2004); *Kozlowski* v. *Hampton Sch. Bd.*, 77 Fed. Appx. 133, 142-145 (4th Cir. 2003); *Townsend* v. *Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Smith* v. *Borough of Wilkinsburg*, 147 F.3d 272, 278-281 (3d Cir. 1998); *Cabrera* v. *Jakabovitz*, 24 F.3d 372, 382-383 (2d Cir.), cert. denied, 513 U.S. 876 (1994). In contrast, in addition to the Ninth Circuit below, Pet. App. 9a-10a, the First, Sixth, Seventh, Eighth, and Eleventh Circuits have found that it is not error for a district court to decline to include such an instruction. *Williams* v. *Eau Claire Pub. Schs.*, 397 F.3d 441, 445-446 (6th Cir.), cert. denied, 546 U.S. 836 (2005); *Conroy* v. *Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1233 (11th Cir.), cert. denied, 543 U.S. 1035 (2004); *Moore* v. *Robertson Fire Prot. Dist.*, 249 F.3d 786, 789-790 (8th Cir. 2001); *Fite* v. *Digital Equip. Corp.*, 232 F.3d 3, 7 (1st Cir. 2000); *Gehring* v. *Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994), cert. denied, 515 U.S. 1159 (1995).

out altogether the language about jurors' not being "required" to draw such an inference. See Pet. App. 4a ("[I[f you find that the defendants' explanation about why they took adverse action against a plaintiff is not worthy of belief, you may infer a discriminatory or retaliatory motive from that fact."). It is not an abuse of discretion for a district court to decline to include such a one-sided instruction. See 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2552, at 22-27 (3d ed. 2008).

2. In any case, even if petitioner had requested a properly worded inference instruction, the courts of appeals are apparently in full agreement that such an instruction is appropriate only when the plaintiff has established a prima facie case and there is a sufficient evidentiary basis for a jury to disbelieve the defendant's nondiscriminatory justification. See *Kozlowski*, 77 Fed. Appx. at 144 (district courts should give inference instruction "when the evidence presented at trial creates some likelihood that the jury might disbelieve the legitimate non-discriminatory reasons given by the employer to justify its actions"); *Townsend*, 294 F.3d at 1241 ("We do not hold that a pretext instruction is always required, but rather that it is required where, as here, a rational finder of fact could reasonably find the defendant's explanation false and could 'infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.'") (quoting *Reeves*, 530 U.S. at 147); *Moore* v. *Robertson Fire Prot. Dist.*, 249 F.3d 786, 789-790 (8th Cir. 2001) (finding no abuse of discretion in declining to include inference instruction where the plaintiff "introduced scant evidence of pretext"). Indeed, the *Reeves* decision itself noted that a trier of fact could "infer from the falsity of the explanation that

the employer is dissembling to cover up a discriminatory purpose" only "[i]n appropriate circumstances." 530 U.S. at 147.

Petitioner makes no effort before this Court to argue that there was a sufficient evidentiary predicate to justify the district court's including an inference instruction. Indeed, she cites no evidence of pretext whatsoever in her petition for a writ of certiorari, and does not even assert that a reasonable factfinder could have found that Ayotte's proffered justification for her demotion—her poor performance—was a pretext for racial discrimination or retaliation. On the contrary, Ayotte consistently stated that he admonished petitioner for her poor performance and ultimately recommended her reduction in grade because she failed to complete her work in a timely fashion and failed to respond to his inquiries. C.A. Supp. E.R. (SER) 342-343, 346-350, 401; see also SER 408-409, 570 (testimony and video deposition of labor relations specialist Phia Williams). He explained that, for Fiscal Year 2003, petitioner did not complete several of the required paper, security, and schedule reviews. SER 393-394. Moreover, although he agreed that petitioner did complete her phone monitoring requirements in that fiscal year, he testified that she did so only after repeated reminders from him. SER 393. In the court of appeals (though not in her petition for a writ of certiorari), petitioner argued that the jury had a reasonable basis to disbelieve Ayotte's testimony because the non-supervisory quality-assurance worker assigned to assist petitioner in cleaning up her computer and organizing her files found that petitioner was responsive to his own suggestions. See Pet. C.A. Br. 46. But the fact that petitioner may have been responsive to a co-worker's suggestions does not raise an inference

that Ayotte was dishonest in claiming that petitioner was not responsive to his. Nor does such evidence call into question the Ayotte's testimony that petitioner failed to complete various job requirements. Ayotte's concerns regarding petitioner's performance were well documented and thoroughly reviewed, see SER 316, 346-359, 566, and confirmed by labor relations specialist Phia Williams, see SER 408-409. See generally Gov't. C.A. Br. 10-12.

3. Finally, even if it were error for the district court to decline petitioner's proposed instruction, such an error would warrant reversal of the jury's verdict only if the error "affect[ed]" petitioner's "substantial rights." 28 U.S.C. 2111; *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553-554 (1984). Even courts of appeals that have held that it is error for a district court to decline to give an inference instruction when warranted by the evidence have held that such an error is subject to harmless error review. See *Kozlowski*, 77 Fed. Appx. at 144; *Townsend*, 294 F.3d at 1241-1242; *Ratliff* v. *City of Gainesville*, 256 F.3d 355, 359 (5th Cir. 2001) ("Even if an instruction erroneously states the applicable law or provides insufficient guidance, this Court will not disturb the judgment unless the error could have affected the outcome of the trial.") (quoting *Rubinstein* v. *Administrators of the Tulane Educ. Fund*, 218 F.3d 392, 404 (5th Cir. 2000), cert. denied, 532 U.S. 937 (2001); see also *Kanida*, 363 F.3d at 578-579 (error in declining to give inference instruction was not reversible error because plaintiff was "not seriously impaired in presenting her claim").

Petitioner makes no effort in her petition for a writ of certiorari to establish that the district court's failure to include an inference instruction affected her substan-

tial rights. Nor could she. As discussed at pp. 8-10, *supra*, petitioner did not establish an evidentiary predicate that would have justified the instruction she requested. In addition, the district court properly instructed the jury about the elements petitioner was required to demonstrate to prove discrimination or retaliation. SER 452-456. The court also instructed the jury that it should consider "indirect evidence[,] that is the proof of one or more facts from which you could find another fact." SER 451-452. Finally, the district court expressly informed petitioner's counsel that he could argue to the jury that it could infer discrimination if it disbelieved the IRS's proffered justification for petitioner's demotion, and petitioner's counsel did so, arguing that the jury had "the right to find for" petitioner if it didn't believe the IRS's witnesses. See Pet. App. 9a. Courts have consistently found that the ability of a plaintiff's attorney to argue to the jury about the inferences it may draw if it disbelieves the defendant's proffered justification mitigates any prejudice a plaintiff might suffer from a court's declining to give an inference instruction. See *Kanida*, 363 F.3d at 579 (petitioner was free to argue "that the jury should infer actual discrimination based upon the evidence she presented in [the] case showing pretext on the part of" the defendant); see also *Conroy*, 375 F.3d at 1235 (noting that plaintiff's counsel "made good use of his opportunity to argue pretext to the jury in closing statements"); *Moore*, 249 F.3d at 791 ("[A]lthough the District Court elected not to submit a pretext instruction, it in no way prevented [plaintiff] from presenting his pretext arguments to the jury. * * * Therefore, even if there were instructional error, [plaintiff] incurred no prejudice."); *Gehring*, 43 F.3d at 343 ("Many an inference is permissible. Rather than de-

scribing each, the judge may and usually should leave the subject to the argument of counsel.").

Petitioner's counsel was permitted just such an opportunity, and made use of it. Petitioner cannot identify any possibility that the verdict in her case might have come out in her favor if the district court had included either the instruction she requested or a properly worded inference instruction.

Because petitioner cannot show that she suffered prejudice as a result of the district court's declining to give her requested inference instruction, the outcome of her case would not be affected by this Court's resolution of the disagreement among the courts of appeals, even if this Court were to resolve that disagreement in the manner petitioner suggests. This case does not, therefore, warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
HOWARD S. SCHER
Attorneys

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