

No. 16-464

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IN THE  
**Supreme Court of the United States**

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TERRANCE J. LAVIGNE,

*Petitioner,*

*v.*

CAJUN DEEP FOUNDATIONS, L.L.C.,

*Respondent.*

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

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**BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

(1) Did The Fifth Circuit err as a matter of law by applying this Court's test set forth in *St. Mary's Honor Center* in determining that Petitioner failed to establish a *prima facie* case of discriminatory termination?

(2) Does a charge of discriminatory retaliation that was untimely filed with the EEOC relate back to a disparate treatment claim that was timely filed with the EEOC?

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**BRIEF IN OPPOSITION**

Cajun Deep Foundations, LLC (“Deep Foundations”) respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Terrance Lavigne (“Petitioner”).

**OPINIONS BELOW**

Petitioner attached the July 6, 2016 opinion of the court of appeals which is unreported at 2016 WL3626719 to its Petition at 1a-25a of the Appendix. The July 10, 2014 ruling of the district court dismissing Petitioner’s wrongful termination and retaliation claims on summary judgment is reported at 32 F.Supp.3d 718 (M.D.La. 2014). After trial, the district court rejected all of Petitioner’s discriminatory treatment claims which included facts relating to his previously dismissed wrongful termination and retaliation claims. The district court decisions rejecting these claims are reported at 86 F.Supp.3d 524 (M.D.La 2015) and 2015 WL 4454772 (M.D.La. July 20, 2015).

**JURISDICTION**

The court of appeals filed its opinion on July 6, 2016. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(a).

**STATEMENT**

This case involves complaints of race discrimination and retaliation made by a former employee who was routinely promoted, given pay raises, and was being



groomed for upper management until he committed multiple violations of company policy. These violations compelled Deep Foundations to terminate Petitioner's employment because his violations of company policy prevented him from performing the duties of his position and because Deep Foundations terminated employees outside of his protected class for far less egregious and far fewer violations.

The facts established that Petitioner was initially hired as a laborer by Cajun Constructors, Inc., an affiliate of Deep Foundations on August 18, 2005, even though he had almost no construction experience. (R.Doc. 36, and attachments thereto<sup>1</sup> & ROA1518). Less than two months later, Petitioner was promoted to driller helper and received a pay raise. (ROA1518). Petitioner received two more raises in 2006 until he was earning \$16.00 per hour upon his promotion to leadman on October 26, 2006. (ROA1518 & R.Doc. 36).

In 2007, Petitioner began working for Deep Foundations. (ROA1518). At that time, Deep Foundations promoted Petitioner to drill shaft operator and increased his hourly pay twice within a year until he was earning \$19.00 per hour. (ROA 1518). Less than two years later, Deep Foundations again promoted Petitioner, this time to the supervisory position of drill shaft foreman and increased his pay to \$20.00 per hour. (ROA1518). In total, Petitioner was promoted four times and received

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1. These documents were placed under seal by the district court and are not part of the public record but are available to this Court. Deep Foundations refers to these pleadings for this Court's consideration on the application.

six raises in a little less than four years of employment. These raises and promotions were based solely upon Petitioner's performance, experience, and supervisory tasks. Additionally, Deep Foundations was grooming Petitioner to be promoted to superintendent. To that end, it placed him in the highly selective ELITE Program that Deep Foundations used to develop and prepare employees for promotion to superintendent. (ROA 990 & 2083). Petitioner did not allege or even suggest, either during or after his termination, that Deep Foundations discriminated against him as to any of the promotions or pay raises he received. Instead, all of Petitioner's claims before this Court relate solely to the period after Deep Foundations promoted him to the supervisory position of drill shaft foreman. (ROA 228-229).

As part of his employment with Deep Foundations, Petitioner received training on and copies of Deep Foundations' handbook. (ROA 988). Despite his acknowledgment that he had been trained on and understood Deep Foundations' policies and procedures, Petitioner committed multiple violations of these policies and procedures, which infractions required discipline. (ROA 988-999). One such violation occurred when Petitioner reported to work late. However, instead of punishing him in any way for this violation, Deep Foundations only gave Petitioner a warning for being late.

After Deep Foundations promoted him to the supervisory position of drill shaft foreman, Petitioner committed a serious violation of company policy on February 7, 2011, when the boom of an excavator he was operating struck the girder of an interstate bridge. (ROA 994 & 1989). This accident was caused solely by

Petitioner's fault and inattention. The accident was a violation of company policy, and it resulted in damage to the bridge that was repaired at the company's expense. (ROA 994, 1993 & 2247). Pursuant to company policy on conduct and behavior and disciplinary action, Petitioner was drug tested, given a written reprimand, and put on operator probation for one year from the February 7, 2011 accident. (ROA 994). This discipline was consistent with Deep Foundations' policies that were applied equally to all of Deep Foundations' employees. (ROA 988-990).

While on operator probation from the February 7, 2011 incident, Petitioner knowingly violated Deep Foundations' Motor Vehicle Policy. (ROA 988-990). Specifically, Petitioner concealed motor vehicle violations that he received and that Deep Foundations did not discover until it ran Petitioner's annual Louisiana Department of Transportation Motor Vehicle Record on March 14, 2011. (ROA 988-990). Petitioner's concealment of these traffic violations breached Deep Foundations' policies, which required the complete disclosure of such violations. (ROA 988-990). Petitioner's violation of this policy was even more egregious because he was a supervisor and had executed an acknowledgment confirming his duty to report these violations immediately to Deep Foundations. (ROA 988).

As a result of his violation of Deep Foundations' Motor Vehicle Policy, Petitioner was no longer qualified to operate heavy equipment or drive company vehicles. (ROA 988). This disqualification precluded Petitioner from performing many of his most significant job duties as a drill shaft foreman. (ROA 988). Because Petitioner committed a subsequent violation of company policy (the violation of the Motor Vehicle Policy) while on probation

for an on-the-job accident and could not perform the job duties assigned to a drill shaft foreman, Deep Foundations terminated his employment on March 22, 2011. (ROA 988). As with his prior discipline, this termination was consistent with Deep Foundations' policies and the discipline of other employees outside of Petitioner's protected class. (ROA 988 & R.Doc. 36).

Before, during, and after Petitioner's employment, Deep Foundations maintained in effect Equal Employment Opportunity policies and procedures, including anti-discrimination and harassment policies ("EEO Policy"). (R.Doc. 36). These EEO policies extend to and include all aspects of the employment relationship, including hiring, promotions, training, terminations, discipline, and compensation. Pursuant to these EEO policies, employees were provided a toll free complaint hotline to report any discrimination or harassment. (R.Doc. 36). This hotline allowed all employees to file a complaint of discrimination 24 hours a day, 7 days a week without fear of retaliation. Each employee, including Petitioner, received specific training on and copies of the EEO Policy. (Petitioner's Record Exceprts on Appeal Record Document 62-4 at 000091).

Despite acknowledging his training on and understanding of Deep Foundations' EEO Policy, Petitioner failed to take advantage of the hotline at any time during or after his employment. Instead, Petitioner claimed in this case that he reported alleged discrimination to his supervisor in writing. This report of discrimination then formed the basis for Petitioner's wrongful termination and retaliation claims at issue before this Court. However, Deep Foundations has no record of any such report of

discrimination or allegations of discrimination during his employment. Moreover, Petitioner's supervisor, the grandfather of Petitioner's daughter, and the supposed recipient of the alleged complaint, specifically denied ever receiving any such allegations of discrimination, either written or otherwise, from Petitioner during or after his employment. (Petitioner's Record Excerpts at 000091; R.Doc. 36). Most importantly, Petitioner failed to produce a copy of his alleged written discrimination complaint in discovery or introduce a copy of it into evidence at trial. Regardless, Petitioner made no allegations of retaliation against Deep Foundations at any time during his employment or when he was terminated. (R.Doc. 36).

Instead, the first written notice that Deep Foundations received of Petitioner's allegations of discrimination was his first EEOC Charge of Discrimination (the "Original Charge") of August 6, 2011. (ROA 228). In this Original Charge, Petitioner only alleged two specific acts of discrimination. (ROA 228). First, he confirmed that the "earliest date discrimination took place" was February 7, 2011 (the date of his accident while operating heavy equipment) and the "latest date discrimination took place" was February 17, 2011 (prior to his termination). (ROA 228). The Original Charge gave the Petitioner multiple options from which to choose when identifying the basis on which he had allegedly been discriminated. Among these options were race, color, sex, and most importantly, retaliation. When presented with these clear and easily understandable options, Petitioner only checked the box alleging "race" discrimination and did not check the box alleging "retaliation". (ROA 228). Thus, based upon the information he provided to the EEOC and swore was accurate, Petitioner did not allege in his Original Charge

that he was wrongfully terminated or retaliated against due to his alleged complaint of discrimination in December 2010.

Petitioner instead claimed only that he had been discriminated against in two ways. First, he claimed that he was suspended on February 7, 2011 for three days for striking an overpass with an excavator and was required to take a drug test. (ROA 228). Second, Petitioner claimed that he was “not receiving a Supervisor’s pay even though I have supervising job” while “Other Supervisors of a different race have received pay increases because of their Supervisory tasks.” (ROA 228). Because Petitioner elected to limit his allegations to these two claims, the EEOC did not investigate any other allegations or claims.

Petitioner then waited seven months before filing an amended EEOC charge of discrimination (hereinafter the “Amended Charge”) on March 21, 2012 adding new claims that contradicted his Original Charge. (ROA 229). This Amended Charge was filed 364 days after Petitioner’s termination, and in it, Petitioner added factual allegations and asserted new claims of discrimination, which he had previously denied in his Original Charge and which the EEOC had not investigated in any way.

In the Amended Charge, Petitioner alleged for the first time that he had been wrongfully terminated on March 22, 2011. (ROA 229). He had been terminated months before he filed his Original Charge, yet he made no mention of this claim in that charge. Similarly, Petitioner alleged for the first time in his Amended Charge that he had been “retaliated against for opposing unfair employment practices”. (ROA 229). Thus, the Amended

Charge contradicted the Original Charge by alleging that Petitioner suffered discrimination prior to December 2010, that he complained of the discrimination at the time it occurred, and that those complaints resulted in retaliation and wrongful termination. The claims of discrimination set forth in the Amended Charge are now before this Court on Petitioner's petition for certiorari.

### **Proceedings Below**

Petitioner filed suit in the district court on July 24, 2012, more than sixteen months after his termination. In the complaint, Petitioner reasserted the allegations that he made in his Original Charge and Amended Charge. Additionally, he asserted multiple new claims that he had neither brought before the EEOC nor reported to Deep Foundations during his employment. These claims consisted of allegations that he was (1) "treated less favorably than white male employees who violated the same or similar policies;" (2) overlooked and/or denied promotion to superintendent while white males were promoted to the position; (3) denied the pay rate of a superintendent while white males were paid as superintendents; (4) cited for policy violations that saved Deep Foundations from making a costly mistake; (5) cited for policy violations related to his Department of Motor Vehicle records while white males were treated more favorably; (6) retaliated against for seeking a promotion to superintendent; and (7) retaliated against due to Deep Foundation's concern that he could alert OSHA about reportable violations. (ROA 1407-1408). Petitioner claimed that Deep Foundations discriminated against him through these acts in violation of Title VII. Additionally, he alleged for the first time in the complaint that Deep Foundations discriminated against him in violation of "applicable Louisiana law."

Deep Foundations sought to dismiss all of these claims via summary judgment due to the factual and legal defects inherent in each of them. The district court dismissed all but two of Petitioner's claims on summary judgment. These two claims consisted of a disparate compensation claim and a disparate treatment claim relating to Petitioner's discipline for striking the interstate girder while operating heavy equipment. After trial, the district court dismissed Petitioner's disparate treatment claim and initially ruled in Petitioner's favor on his disparate compensation claim. Upon reconsideration, the district court dismissed Petitioner's disparate compensation claim on July 20, 2015. The disparate compensation and disparate treatment claims are not before this Court. The only two questions raised by the Petitioner involve the district court's dismissal of Petitioner's wrongful termination and retaliation claims via summary judgment.

The district court dismissed Petitioner's wrongful termination claim via summary judgment after finding that Petitioner had failed to establish a prima facie case of discrimination as to this claim. In doing so, the district court applied the long-standing precedent based upon this Court's ruling in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The fourth prong of that test requires Petitioner to establish that he "was replaced by someone outside the protected class, the other similarly situated employees were treated more favorably, or that he was otherwise terminated based upon his race." (Pet. App. 60a). The district court held that Petitioner had utterly failed to satisfy any part of the fourth prong and thus had not proven that he was replaced by someone outside the protected class, that other similarly situated employees were treated more favorably, **or that he was otherwise**



**terminated based upon his race.** Indeed, this case is different from those cited by the Petitioner in that, here, the district court, in a bench trial, found *no* ultimate evidence of discrimination that would suggest pretext in any form.

Next, the district court dismissed Petitioner's retaliation claim via summary judgment. It did so because Petitioner failed to include this claim in his Original Charge. Instead, Petitioner first asserted his retaliation claim in his Amended Charge which was filed after the 300-day EEOC limitation period expired. (Pet. App. 35a). Because neither EEOC regulations nor court of appeals precedent allowed the assertion of a new claim to relate back to the Original Charge, the district court dismissed Petitioner's retaliation claim as time-barred.

The court of appeals affirmed the dismissal of the wrongful termination claim. In doing so, it relied upon this Court's *prima facie* test set forth in *St. Mary's Honor Center* and Fifth Circuit precedent that applied that test. Likewise, the court of appeals affirmed the dismissal of Petitioner's retaliation claim because it was time-barred based upon EEOC regulations and Fifth Circuit precedent.

### **REASONS FOR DENYING THE PETITION**

The petition should be denied because the court of appeals' decision upholding the district court's dismissal of Petitioner's wrongful termination and retaliation claims does not satisfy any of the traditional standards for the exercise of certiorari jurisdiction. The Fifth Circuit's ruling does not represent a conflict with other appellate

courts regarding the application of this court's decision in *McDonnell Douglas*. The Fifth Circuit's ruling has not departed from the accepted and usual course of judicial proceedings, and it has not sanctioned the district court's departure from the accepted and usual course of judicial proceedings. Instead, the Fifth Circuit's decision merely reflects the flexibility of the test applied to determine whether a claimant has established a *prima facie* case of discrimination. This flexible approach permits the circuits to apply both tests identified by Petitioner since neither impacts the claimant's ultimate burden of establishing discrimination by direct or circumstantial evidence. Thus, the Fifth Circuit's dismissal of the wrongful termination claim merely reflects a careful determination by the court of insufficient evidence and a straightforward application of the holding in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and the test applied in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1981). Likewise, the dismissal of the retaliation claim was proper since it was based upon EEOC regulations, Title VII, and years of jurisprudential precedent. As such, the granting of the petition would not further the purpose of Title VII or conform to the applicable EEOC regulations, but would instead reverse this Court's prior rulings.

In addition, this case is, at best, a problematic vehicle for review of Petitioner's claims because of the lack of evidence supporting his claims, the factual findings of the district court and court of appeals, and the legal defects relating to Petitioner's wrongful termination and retaliation claims. The district court ruled on two separate occasions that Petitioner failed to produce evidentiary support for his discrimination claims. It first did so at the summary judgment level. Subsequently, it again ruled

against Petitioner following a multi-day trial. Therefore, even if this Court granted Petitioner's petition for review of the lower courts' decisions, this Court would be forced to affirm the lower courts' rulings based on a complete lack of evidentiary support for Petitioner's claims. Thus, this Court should wait to decide these issues when doing so would result in a reversal of the lower courts' rulings.

**I. THIS COURT'S DECISION IN *ST. MARY'S HONOR CENTER V. HICKS* IS CONSISTENT WITH AND FURTHERS THE PURPOSE OF TITLE VII**

The purpose of Title VII can be easily gleaned from the text of the statute. Title VII proscribes as an "unlawful employment practice" discrimination "against any individual with respect to his compensation ... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 646, 127 S. Ct. 2162, 2179, 167 L. Ed. 2d 982 (2007), *overturned due to legislative action* (Jan. 29, 2009). Thus, by its clear and unambiguous language, the purpose of Title VII is to provide a claimant with a cause of action if his employer discriminates against him or otherwise treats him differently based upon his membership in a protected class. Thus, a claimant can only prevail on a Title VII claim if he establishes that he was treated differently because of his protected classification. Moreover, because the facts of each claim are unique, the *prima facie* test established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the crucial question of discrimination." *Furnco v. Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Since this is the claimant's ultimate burden of proof in a Title VII case, it cannot be said that requiring the claimant to establish that they were treated differently because of their classification at the *prima facie* level is improper. Furthermore, such a requirement cannot be inconsistent with Title VII. This Court has recognized this conclusion and utilized this very test in *St. Mary's Honor Center*. Multiple circuits have adopted this test and should be permitted to continue utilizing it when faced with claims under Title VII.

Regardless, of the test applied, where a defendant, such as Deep Foundations, has done everything required of it as if the claimant had properly made out a *prima facie* case, whether the claimant established a *prima facie* case is no longer relevant. See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). Instead, the relevant question is whether the claimant has carried its ultimate burden of proving by direct or circumstantial evidence that he was discriminated against. In this case, the district court and the court of appeals both correctly concluded that Petitioner failed to carry his burden of proof as to any claim at any stage of the case. Therefore, the *prima facie* test applied by the Fifth Circuit is irrelevant because all of Petitioner's claims would be dismissed since he failed to carry his ultimate burden of proving racial discrimination.

## **II. THE DECISION OF THE FIFTH CIRCUIT IS A CORRECT APPLICATION OF THIS COURT'S DECISION IN *ST. MARY'S HONOR CENTER V. HICKS***

In *McDonnell Douglas*, the plaintiff's employment with respondent was terminated and later he applied to

be rehired. After being rejected, he filed suit alleging that he had been discriminated against based upon his race and his protected activities. On certiorari, this Court was asked to determine the burden that a Title VII claimant bears in order to prove its claim of discrimination due to protected classification. Based upon the questions presented, this Court established an allocation for the burden of production and an order for the presentation of proof in Title VII discriminatory treatment cases. Specifically, this Court held that the claimant alleging that he was not hired because of racial discrimination in violation of Title VII has the burden of establishing a *prima facie* case which can be satisfied by showing that (1) he belongs to a racial minority, (2) he applied and was qualified for the job the employer was trying to fill; (3) though qualified, he was rejected; and (4) thereafter the employer continued to seek applicants with complainant's qualifications. *McDonnell Douglas*, 411 U.S. at 792-93.

Subsequently, this Court was tasked with determining the impact of the trier of fact's rejection of an employer's asserted reasons for the action it took against the claimant. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). In that case, the claimant alleged that his demotion and termination were because of his race. Rather than apply the same test it had previously applied in *McDonnell Douglas*, this Court adopted the test applied by the district court. Specifically, the district court applied, and this Court adopted the following test to determine whether the claimant established a *prima facie* case of wrongful termination in violation of Title VII: (1) he belongs to a protected class, (2) that he was qualified for the position at issue, (3) he was discharged from the relevant position, and (4) that his position was ultimately

filled by someone outside his protected class. *St. Mary's Honor Center*, 509 U.S. at 506.

While there is a split among the circuits relating to the elements of a *prima facie* case applied to Title VII wrongful termination cases, the test applied by the Fifth, Fourth, Sixth, Ninth, and Eleventh circuits reflects a correct and straightforward application of settled Supreme Court precedent. This precedent is based upon at least two cases from this Court which dealt with claims under Title VII, including one that dealt with a wrongful termination claim. In *O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308, this Court affirmed that membership in a protected class was relevant to the burden shifting test and the establishment of a *prima facie* case as to Title VII claims. In doing so, this Court distinguished the basis for a Title VII claim from an ADEA claim.

As Petitioner admits, multiple courts of appeals, including the Fifth Circuit have adopted the test this Court utilized in *St. Mary's Honor Center* and applied it to countless Title VII cases. Thus, the court of appeals' decision in this case merely follows the holdings in the *McDonnell Douglas* and *St. Mary's Honor Center* cases. Indeed, the application of those holdings and the dismissal of Petitioner's wrongful termination and retaliation claims is the only outcome consistent with Title VII and this Court's precedents.

The longstanding application of the test set forth in *St. Mary's Honor Center* by the Fifth Circuit goes back at least as far as *Rios v. Rossotti*, 252 F.3d 375 (5th Cir. 2001). In that case, the claimant filed suit under Title

VII alleging that her employer's decision to reject her application for two job vacancies constituted unlawful discrimination and retaliation based upon her age, race, national origin, and gender. In determining whether Ms. Rios established a *prima facie* case, the Fifth Circuit applied the test utilized by this Court in *St. Mary's Honor Center*. This test has been consistently applied by this circuit since then. See *Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009); *Abarca v. Metro. Transit. Auth.*, 404 F.3d 938, 941 (5th Cir. 2005). Because the ultimate issue in Title VII discrimination cases is whether the claimant was intentionally discriminated against because of their protected classification, a test that considers the employer's replacement of the claimant with someone from outside of the protected class is relevant and, in fact, goes to the heart of the claims and the actions taken by the employer which are at issue, and should therefore not be replaced.

This conclusion is further supported by the test this Court applied in ADEA cases. Starting with *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996) and adopted in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this Court distinguished ADEA cases from Title VII cases and applied a modified version of the *prima facie* burden-shifting test in ADEA cases. These cases were distinguished because the issue to be determined in Title VII cases is whether the claimant was treated differently than a person outside of their protected class. In contrast, the issue to be determined in ADEA cases is whether the claimant was treated differently because of his age. *O'Connor*, 517 U.S. at 308. Based upon this distinction, this Court slightly modified the test utilized in *St. Mary's Honor Center* by requiring an

ADEA claimant to show that they were treated differently because of their age. In light of the ultimate issue to be determined in Title VII cases, it cannot be said that the test applied by the court of appeals in this case warrants the granting of the petition.

### **III. THE DISTRICT COURT APPLIED AN ACCEPTABLE BURDEN-SHIFTING TEST TO DISMISS PETITIONER'S WRONGFUL TERMINATION CLAIM**

Ultimately, and regardless of the framework utilized by the court, the claimant bears the burden of creating a fact issue regarding whether an adverse employment decision was, even in part, motivated by discriminatory animus. *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 652 (5th Cir.2004). Because this remains the claimant's ultimate burden, it is not enough that a fact finder would simply disbelieve the defendant's proposed justification for its actions; the fact finder must also proactively believe the plaintiff's proof of intentional discrimination. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993).

In determining whether Petitioner established a prima facie case of wrongful termination under Title VII, the district court did not merely apply the test that forms the question presented in his petition. Instead, the district court went beyond that test and determined that Petitioner merely had to show that he "(4) was replaced by someone outside the protected class, the other similarly situated employees were treated more favorably, or that he was otherwise terminated because of his race." (Pet. App. 60a). This suggests that the district court applied a test that essentially incorporated the standards adopted



by all circuits as well as this Court to determine whether Petitioner established a prima facie case. By applying such a broad test, the district court ensured that Petitioner had every opportunity to establish a prima facie case but failed to do so. (Pet. App. 61a-63a). In light of the test applied by the district court, it cannot be said that Petitioner's wrongful termination claim was dismissed because of the application of the the replacement requirement test. Thus, the question presented by Petitioner as to his wrongful termination claim is inapplicable, and the petition should be denied until this Court is faced with a case that only applied the test of which Petitioner complains.

#### **IV. BOTH THE EEOC AND COURTS OF APPEALS PRECEDENT REQUIRE THE TIMELY FILING OF TITLE VII RETALIATION CLAIMS**

EEOC regulations allow a claimant to amend his EEOC charge of discrimination in certain limited situations. Such amendments are allowed only if their purpose is to “cure technical defects or omissions” or to “clarify and amplify” the initial allegations. 29 C.F.R. § 1601.12(b); see also, *Manning v. Chevron Chemical Company, LLC*, 332 F.3d 874, 878 (5th Cir.2003). If the amendments involve acts or events that “relate [ ] to or grow [ ] out of the subject matter of the original charge,” the amendments “relate back to the date the charge was first received.” *Manning*, 332 F.3d at 878; see also 29 C.F.R. § 1626.8(c).

Generally, amendments to an EEOC charge that assert or raise a new legal theory do not “relate back” to an original charge of discrimination. *Manning*, 332 F.3d at 878 (plaintiff's amended charge alleging disability

discrimination did not relate back to his timely charge alleging race, gender, and retaliation claims); see also, *EEOC v. Miss. Coll.*, 626 F.2d 477, 483-84 (5th Cir.1980) (observing that “[b]ecause [the claimant’s] allegations of racial discrimination do not relate to or grow out of the allegations of sex discrimination advanced in the original charge, that aspect of the amended charge does not relate back to the time of filing of [the] original charge”); *Simms v. Oklahoma ex rel. Dep’t of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1327 (10th Cir.1999) (holding that the plaintiff’s amended charge did not relate back under § 1601.12(b) because the original charge alleged only race discrimination, while the amended charge included **retaliation** which is “a new theory of recovery”); *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 575 (7th Cir.1998) (“[A]n untimely amendment that alleges an entirely new theory of recovery does not relate back to a timely filed original charge.”); *Fairchild*, 147 F.3d at 576 (concluding that an amendment containing a claim of disability discrimination did not relate back to the original charge, which alleged age discrimination); *Evans v. Tech. Applications & Serv. Co.*, 80 F.3d 954, 963-64 (4th Cir.1996) (holding that the plaintiff’s age discrimination claim did not relate back to the originally filed charge of sex discrimination).

This rule is justified by an important policy regarding the basis for the filing of an EEOC charge of discrimination. One of the central purposes of the employment discrimination charge is to put employers on notice regarding the “existence and nature of the charges against them.” *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984). In order for an employer to be adequately notified about the nature of the charges against them, employees

must inform them from the outset about their claims of discrimination. *Manning*, 332 F.3d at 878-79; see also *Simms*, 165 F.3d at 1327 (“Prohibiting late amendments that include entirely new theories of recovery furthers the goals of the statutory filing period-giving the employer notice and providing opportunity for administrative investigation and conciliation.”); *Fairchild*, 147 F.3d at 575 (“The charge filing requirement ensures that the employer has adequate notice of the charges and promotes conciliation at the administrative level.”).

One extremely narrow exception to this general rule exists. The Fifth Circuit has held that an amendment, even one that alleges a new theory of recovery, can relate back to the date of the original charge if “the facts supporting both the amendment and the original charge are essentially the same.” *Manning*, 332 F.3d at 879; See also *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247 (5th Cir.1985) (concluding that plaintiff’s amendment alleging gender discrimination related back to the age and retaliation claims from her original charge because the factual allegations in the original charge **included** a reference to gender discrimination). In light of the general rule and this limited exception, an amendment will relate back to the timely filed charge only when “the employee *already included* sufficient facts in his original complaint to put the employer on notice that the employee might have additional allegations of discrimination.” *Manning*, 332 F.3d at 879; see *Hornsby*, 777 F.2d at 247 (holding that the plaintiff could add a claim of gender discrimination because the facts in her original charges supported such a claim, but the plaintiff *could not* amend her complaint to include a claim for sexual harassment because the facts alleged in the original charge did not support such a claim.); see also *Sanchez v. Standard Brands, Inc.*, 431

F.2d 455, 462 (5th Cir.1970) (“[T]he crucial element of a charge of discrimination is the factual statement contained therein.”).

As these cases make clear, the allegations asserted by Petitioner for the first time in the Amended Charge can only relate back to the Original Charge if they “cure technical defects or omissions,” “clarify and amplify” the initial allegations, or involve acts that relate to the subject matter of the original charge. However, even if the new allegations satisfy these requirements, they are not timely if they assert entirely new theories of recovery. Petitioner’s Amended Charge satisfies none of the requirements that permit it to relate back. More importantly, his claims for retaliation and wrongful termination are entirely new theories of recovery which arose prior to the filing of his Original Charge, and Petitioner elected not to assert them or reference them when he filed his Original Charge.

Petitioner has admitted that the allegations in his Amended Charge do not relate back to the timely filed charge of discrimination. In this Amended Charge, Petitioner stated that the Original Charge “is amended to include **additional allegations**.” These “additional allegations” do not “cure technical defects or omissions” nor do they “clarify and amplify” the original allegations. Most importantly, these “additional allegations” do not arise from the same facts. Instead, they assert entirely new claims and causes of action based upon entirely new facts.

In the Original Charge, Petitioner alleged that he was subjected to disparate treatment due only to two events, both of which occurred between February 7-17, 2011.

These events related only to work Petitioner performed as an operator of equipment in February 2011. In the Amended Charge, he added allegations that relate to an entirely new event, his termination, more than one month **after** the last event that caused him to file his Original Charge. This new event is unrelated to the prior events described by Petitioner and, instead, refers to a new and distinct event which did not form the basis for or relate in any way to Petitioner's claims of disparate treatment asserted in his Original Charge. Therefore, they do not "clarify or amplify" the allegations in his Original Charge and cannot relate back to the timely filing of the Original Charge.

Similarly, Petitioner's Amended Charge does not involve events that relate to the subject matter of the original charge. Instead, it attempts to raise two entirely new theories of recovery. Specifically, Petitioner's Amended Charge seeks for the first time to assert claims of wrongful termination and retaliation based upon entirely new events. These new theories of recovery are based upon events relating solely to Petitioner's violations of company policy. These new violations do not relate to his original allegations and instead are based upon multiple allegations which Petitioner did not include or even allude to in his Original Charge. They involve Petitioner's violation of company policy by standing too close to an open excavation, his driving record, and seeking to be paid as a superintendent. Petitioner does not allege that he suffered disparate treatment as a result of these new allegations. Instead, he alleges only that he was wrongfully terminated and retaliated against due to these violations of company policy. Petitioner did not include any of these allegations in his Original Charge,

made no reference to violations of company policy in his Original Charge, and made no reference to retaliation or wrongful termination in his Original Charge. In fact, when given the opportunity to allege a claim for retaliation by simply checking a box in his Original Charge, Petitioner consciously elected not to do so. (ROA 228-229).

These claims are considered new theories of recovery because the Petitioner must prove different facts and satisfy a different legal test from the disparate treatment claim which formed the sole basis for Petitioner's Original Charge. See *Simms*, 165 F.3d at 1327 (holding that the plaintiff's amended charge did not relate back under § 1601.12(b) because the original charge alleged only race discrimination, while the amended charge included **retaliation** which is "a new theory of recovery"). Therefore, the claims for retaliation and wrongful termination do not relate back to the Original Charge, are untimely, prescribed before Petitioner filed suit, and were properly dismissed by the District Court.

#### **V. THE GRANTING OF THE PETITION FOR CERTIORARI WILL NOT CHANGE THE OUTCOME OF THIS CASE**

Petitioner asserted multiple discrimination claims in this case. Each of these claims was dismissed because Petitioner either could not carry its ultimate burden of producing evidence establishing that he was discriminated against because of his protected class or because the claim did not fall under Title VII's protections. The lack of evidence precludes the Petitioner from succeeding in the district court regardless of the test applied to his wrongful termination claim or if his retaliation claim were allowed to proceed. Therefore, even if this Court

granted Petitioner's petition for review of the lower courts' decisions, this Court would be forced to affirm the lower courts' rulings based on a complete lack of evidentiary support for Petitioner's claims.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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