TEXAS YOUTH & GOVERNMENT

THE SUPREME COURT OF THE UNITED STATES

UNITED STATES

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from

The 15th Court of Appeals

Attorney Brief Book

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IN THE SUPREME COURT OF

THE STATE OF TEXAS

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Brief for Petitioner

Ashlyn Dodson

Alexis Boehmer

Keller High School

Statement of Case

James O'Callahan filed a lawsuit against the Continental Catering Consolidated Company (4C's) under the Age Discrimination in Employment Act. 4C's motioned for and was granted summary judgement. O'Callahan appealed the initial court's ruling, presenting

Statement of Facts

James O'Callahan (O'Callahan) sued former employer Continental Catering Consolidated Company (4C's) claiming said company terminated him in violation of the Age Discrimination in Employment Act (ADEA). Prior to trial, 4C's filed was granted Motion for Summary Judgement by the initial court, claiming that O'Callahan's evidence was not sufficient in supporting the accusation of age discrimination being involved in his termination.

O'Callahan provided affidavits of 4C's employees and performance evaluation memoranda in his response. O'Callahan alleged that statement made by Mr. Williams' were derogatory. However, the court still granted 4C's summary judgement. O'Callahan appealed the court's initial ruling. The 4C's appeals the first appellate court's ruling.

Counterpoint Number One: There is no material issue of fact in O'Callahan's case.

To remove clutter from the docket, the initial court granted summary judgement to the 4C's in accordance with City of Houston v. Clear Creek Basin Authority 589 S.W.2d 671 1979. The court came to this conclusion based on O'Callahan's failure to provide material issue of fact and 4C's sufficiency in meeting the

burden-shift requirement outlined in (McDONNELL DOUGLAS CORP. v. GREEN, 1973 No. 72-490).

To prove the existence of direct evidence, the O'Callahan must establish a "prima facie" case proving that he was (i) 40 years or older (ii) qualified for the position (iii) subject to adverse employment decision (iv) replaced by someone outside the protected class. Without meeting all of these prerequisites, O'Callahan cannot negate the initial ruling for summary judgement, as established by McDonnell Douglas v. Green and reiterated in ST. MARY'S HONOR CENTER et al. *v.* HICKS 1993. O'Callahan did not establish a prima facie case because he did not fulfill all four prongs of this doctrine. O'Callahan was in the protected class, and subject to an adverse employment decision. However, 4C's determined that he was not qualified for the position, and furthermore, he was not replaced by someone outside the protected class.

In refutation to O'Callahan's claim that he was qualified for the position, 4C's offers performance evaluations showing O'Callahan's lacking performance. His performance ratings had dropped, and he had problems with certain accounts. Because the 4C's was consolidating its districts, the position O'Callahan was terminated from would have been over a larger district than what he had been managing. An employee other than O'Callahan was chosen to take over the position of regional manager because O'Callahan was not up to the company's standards in a smaller district, so the company did not want to put him over a larger and more challenging district. Additionally, O'Callahan fails to fulfill the fourth prong because his position was not taken over by someone outside of the protected class. Ted Finnell, who became

regional manager in place of O'Callahan, was 40 when 4C's placed him in his position, making him within the protected class of 40 years and older.

In addition to O'Callahan's failure to meet his burden under McDonnell Douglas v. Green and St. Mary's Honor Center v. Hicks, the 4C's has met its burden by providing a legitimate, non-discriminatory reason for O'Callahan's termination, a precedent set in (Reeves v. Sanderson Plumbing Products, Inc.1973). The 4C's sufficiently met this burden by showing that O'Callahan's was due only to lacking performance ratings and problems with certain accounts.

O'Callahans claim that Mr. Williams' remarks on his age prove age discrimination was involved in his termination is also invalid. In order for Williams' remarks to suffice as evidence, they must have been (i) related to the protected class (ii) proximate to termination (iii) made by a person of authority over employee (iv) related to employment decision, according to Brown vs. CSC Logic 1996.

Again, O'Callahan does not meet all requirements outlined above. Williams' comments did not all relate to the protected class, with comments such as "All employees reach the peak of efficiency," directly stating that it applied to all employees. O'Callahan only provided any sort of time frame for one of Williams' comments, which was two days before his termination. However, this comment was made in a casual setting, and considering all of Williams' other comments did not have a time frame, this small relation in proximation is not enough to raise a genuine issue concerning the proximity of Williams' comments and O'Callahan's termination. Secondly, Williams, although in a higher position than O'Callahan, was not directly involved in the process of terminating him. According to the affidavit of Allison Young, Williams had not been O'Callahan's supervisor since the end of 2011. As O'Callahan

was terminated in August of 2012, Williams was not even n a position of authority over O'Callahan in a time proximate to his termination. It was the company's president, Mr. Ted Arts, not Williams, who began the consolidation process that ultimately led to O'Callahan's termination. Lastly, O'Callahan failed to prove that Williams' comments were directly related to the 4C's employment decision, and the court regarded his comments as "stray remarks". Stray marks cannot be used to show pretext or direct evidence (BROWN and Robert T. Davis v. CSC LOGIC, INC., No. 94-11124. 1996). Because O'Callahan failed to fulfill all four prongs of this doctrine, he did not present a material issue of fact.

In the case of Gross v. FBL Financial Services, 557 U.S. (2009), the "but-for" doctrine was established, which requires the employee to prove that but for their age, they would not have been terminated. The case also required the former employer to prove that the employee would have been terminated regardless of age. O'Callahan failed to prove his termination was only due to his age, and even if O'Callahan could prove that age played a part in his termination, that does not negate the fact that his lacking performance was a factor, and the ADEA does not authorize alleged "mixed-motives" age discrimination claims. Due to O'Callahan's failure to meet his burden, and the 4C's proved that O'Callahan would have been terminated regardless of age, O'Callahan's age discrimination claim does not stand.

Conclusion

Because the 4C's has met its burden and O'Callahan's evidence does not prove discrimination, the first court was correct in granting summary judgement.

Prayer

We pray this court reverses the findings of he first appellate court and upholds those of the initial court.

Point of Error 2: **Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.**

The comments made by Mr. Williams do not qualify as direct evidence since they don't meet the requirements set by Brown, 82 F.3d at 655. (3) Mr. Williams was in charge of O'Callahan but Mr. Ted Arts was the one to make the decision about downsizing the company and could make the final decision over any employment decision, and were not made by his direct supervisor.(4) The comments made were not related to the issue at hand because they did not discuss O'Callahan's inability to do his job. Since the comments do not meet these two requirements they cannot qualify as direct evidence.

These comments cannot qualify as circumstantial evidence because there was no real malice in them and and they are merely stray comments. On August 7th, 2012, Mr.Williams, O'Callahan, Alan Hunter and Phillip Dennis were in a car on their way to lunch when the topic of Alan's upcoming 57th birthday came up. Mr.Williams made the remark, " isn't getting old a pain...I am sure glad i am not as old as you guys". This comment cannot be considered discrimination for many reasons. First the environment of them all being on their way to lunch gives off a clear impression that they are all friendly acquaintances at the very least who can joke around with one another. Second, by his comment "isn't getting old a pain" he implies that he knows

the struggle of getting older and even considers himself to be older; thus making it a joke. Third when he says "I am sure glad I am not as old as you guys" based on the previous sentence he clearly is saying this to poke fun which is something people do with friends just to joke around. To take this comment as direct evidence would mean to make people tiptoe around any possibly discriminatory subject to the point where people could not even mention age or mess around with friends which is not what the ADEA is for. O'Callahan made this type of speech the norm by making comments about his own age, proving the subject. O'Callahan made the comment, "I wish I was as young as you and had your energy..I'm just getting too old for this job." The comments made by Mr.Williams cannot be considered as legally sufficient evidence when O'Callahan made similar comments regarding his age. O'Callahan is also trying to use the fact that Mr.Williams goes to the gym with a few co-workers as evidence for discrimination, when this has nothing to do with age preference. Mr.Williams likes to stay physically fit and uses that to get to know other co-workers who also enjoy it. Wanting to stay physically fit has nothing to do with age given that there are people in their 60's still running marathons. The belief that the ability to stay physically fit only lies within the young reflects badly on O'Callahan not Mr.Williams because it implies that O'Callahan is the one that believes that with age comes uselessness and is now trying to use his age to excuse his shortcoming which is not why the ADEA is in place. Another misconstrued comment made by Mr.Williams is when he said, "all employees sometime reach their peak in efficiency." which is a comment that had nothing to do with age. Mr.Williams is saying is that everyone reaches a peak in their productivity where there is no more room to go up, this can happen to someone whether they are 19 or 90 and has no relation with age. This is more related to a person's drive and creativity. O'Callahan is grasping at straws trying to prove age discrimination where it

doesn't exist. The comments are merely "stray comments."In Price v. Marathon Cheese Corp. (5th Cir. 1997) a supervisor made the statement that he wanted to "get rid of the older employees" and hire "young blood" these were classified as stray remarks and are much more incriminating than Mr.Williams's comments.

If the court finds in favor of O'Callahan then it is paving the way for a world where mentioning possibly delicate subjects is illegal. This court would create a world where everyone must be emotionless and without simple hobbies for fear of offending others.

Conclusion

The court was in fact not provided with legally sufficient circumstantial evidence.

Prayer

4C's prays that the Appellate court reverse the verdict of the previous appellate court .

Respectfully submitted,

Alexis Boehmer

Ashlyn Dodson

Attorneys for Petitioner

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O'Callahan provided affidavits of 4C's employees and performance evaluation memoranda in his response. O'Callahan alleged that statement made by Mr. Williams' were derogatory. However, the court still granted 4C's summary judgement. O'Callahan appealed the court's initial ruling. The 4C's appeals the first appellate court's ruling.

Counterpoint Number One: The initial court erred in not recognizing the material issue of fact in this case.

The summary judgement granted by the trial court was unjust because it ~~removed the rights of~~ disregarded both direct and circumstantial evidence presented by O'Callahan that established "material issue." This is harmful error and violates the purpose of granting summary judgement as outlined in The CITY OF HOUSTON,

Petitioner, v. CLEAR CREEK BASIN AUTHORITY, Respondent. No. B-8084. (1979), in which it was established that summary judgement should only be granted to remove clutter from the docket if the petitioner's case did not raise a material issue of fact, which is not true in this case. Summary judgement should not have been granted to the 4C's because the information O'Callahan provided alone should have been sufficient to establish "material issue," which meant that the trial court should have allowed the case to proceed. According to Nixon v. Mr. Property Management 690 S.W.2d 546 (1985), all information favorable to employees, like O'Callahan, is to be taken as true in determining whether the case has met the burden of "material issue."

Furthermore, as seen in Dean HUCKABEE, Petitioner, v. TIME WARNER ENTERTAINMENT COMPANY L.P., Respondent. No. 98-1018. (2000), material issue of fact exists if evidence viewed in the most favorable light to the petitioner is presented to the trial court ~~exists~~. Considering the statements made by Mr. Ed Williams and affidavits provided that support O'Callahan's case, he has met this burden. Because of this, summary judgement should not have been granted as outlined in the above case (Huckabee v. Time Warner 2000).

In these types of cases where direct evidence is especially difficult for the petitioner to procure, the court has established a burden-shifting doctrine in applying the statutes of the ADEA, which O'Callahan followed, to prevent the system from always working in favor of companies, as established by the court McDONNELL DOUGLAS CORP. v. GREEN, (1973) No. 72-490 and subsequently applied in ST. MARY'S HONOR CENTER ET AL. *v.* HICKS (1993) No. 92-602. Both of these cases establish that in order to prove existence of direct evidence, the employee must establish a "prima facie" case. For a prima facie case to be established, the employee

must prove that he/she was: (i) Within the protected class (In this case, 40 years of age or older.) (ii) Qualified for the position (iii) Subject to adverse employment decision (iv) Replaced by someone outside the protected class.

O'Callahan was within the protected class at the time of his termination, being well into his 50s. He was also qualified for the position, as proved by his performance evaluations and the affidavits of Allison Young and Phillip Dennis. O'Callahan was certainly subject to an adverse employment decision, considering he was terminated from his position of more than two decades. Ted Finnell, who replaced O'Callahan as regional manager, was allegedly 40 at the time of his placement. However, as seen in Brown vs. CSC Logic needs full citation, O'Callahan still fulfills this requirement because he was "replaced by someone outside the protected class, someone younger, or was otherwise discharged because of his age." Brown v. CSC Logic As O'Callahan has provided direct and circumstantial evidence that he was terminated due to his age, the fact that his replacement was within the protected class holds no sufficient value in proving that discrimination did not play a role in O'Callahan's termination.

O'Callahan provided evidence of both comments and actions taken by people in authority. These comments cannot be considered "stray remarks." In order to be seen as evidence of age discrimination, the comments must be: (i) Related to protected class (ii) Proximate to termination (iii) Made by a person of authority over employer (iv) Related to employment decision. According to Brown v. CSC Logic.

The remarks O'Callahan provided all portrayed aging as negative and directly related to deteriorating ability in and out of the workplace, which fulfills the first prong of comments being related to the protected class. Additionally, these comments were made by Ed Williams, who had the power to reassign the territories of regional

managers and therefore was in a position of authority over O'Callahan. He was also O'Callahan's supervisor in 2011 and at that time in charge of O'Callahan's performance ratings. His remarks were all related to the protected class, with each one relating older age to deteriorating ability. Additionally, each comment was made within a few months of O'Callahan's termination. In fact, one comment made by Williams, in which he said "isn't getting old a pain… I am sure glad I'm not as old as you guys," was made only two days before O'Callahan's termination on August 9, 2012.

O'Callahan met these requirements, which is sufficient to establish "material issue" alone. Having established "material issue" the burden shifts to the 4C's to provide a legitimate, non-discriminatory reason for O'Callahan's termination. The 4C's alleged that O'Callahan's termination was due to lacking performance evaluations. However, the only evidence of such performance was shortly before O'Callahan's termination, giving the court reason to believe that the 4C's reason was not legitimate and simply a cover for pretext. These requirements are outlined in No. 99—536 ROGER REEVES, PETITIONER *v.* SANDERSON PLUMBING PRODUCTS, INC, 2000 in which strikingly similar comments were made. For example, in *Reeves*, one employee of authority over another told the employee that he was "too damn old to do [his] job," which is nearly identical to Williams' comment toward O'Callahan in which he stated that O'Callahan was "too damn old for this kind of work." This case ultimately ended in a ruling that favored the former employee and sets a clear precedent for this case.

The 4C's is required to show evidence, if believed by trier of fact,

of proper, non-discriminatory procedures. Although very briefly discussed in the affidavit of Ted Arts, no official procedural process was provided by the 4C's, and thus it cannot be fully determined if proper procedures were followed. In fact, there is

evidence to the contrary. In her affidavit, Allison Young, whose "job responsibilities included providing input into all hirings, firings, promotions, and demotions" said that Mr. Williams did not ask for copies of O'Callahan's performance ratings at any time prior to his termination, which contradicts the 4C's claim that O'Callahan was fired due performance evaluations.

O'Callahan further rebuts the 4C's claim of non-discriminatory termination by providing the circumstantial evidence in the comments made by Williams. These comments established pretext because they met the requirements outlined earlier in Brown vs. CSC Logic.

Because the O'Callahan's evidence was sufficient in proving that there was a material issue of fact in his case and that the Continental Catering Consolidated Company failed to meet its burden by providing a legitimate reason for his termination, the motion for summary judgement should not have been granted.

If summary judgment is as easy to receive as it was for the 4Cs, companies could act with impunity and provide pretextual "lies" in order to remove employees at their whim. This would create a dangerous environment where companies would wield an unfair power in the lives of their employees. The court cannot allow this case to be decided by summary judgment, especially since our client has met his burden.

Prayer

For these reasons, we pray the court upholds the findings of the first appellate court.

Point of Error 2: **Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.**

The comments made by Mr. Ed Williams qualify as direct evidence since they meet the requirements set by Brown, 82 F.3d at 655. (1) The comments relate to the protected class at issue given that they are derogatory comments about age, some directed at O'Callahan and others more broadly directed at all of the older workers. (2) The comments were made within three months of when O'Callahan was fired. (3) The comments were made by Mr.Williams who did have power over the decision of O'Callahan's termination. (4) The comments were related to the employment decisions at issue because the referred to old age being an issue which shows age discrimination.

There were plenty of comments all inappropriate given the environment. Some comments directed specifically at O'Callahan include Mr.Williams walking into O'Callahan's office and saying something to the effect of, "O'Callahan, you are too damn old for this kind of work and that you should retire.", this statement shows that Mr.Williams believes that age should be a determining factor in when someone should retire over skill or work ethic. On August 7, 2012, two days before O'Callahan was terminated, during a discussion about a coworkers upcoming 57th birthday Mr.Williams made a comment saying, "isn't getting old a pain...I am sure glad i'm not as old as you guys", this comment shows Mr.Williams has an aversion to getting old. In mid-June 2012 O'Callahan stated that he didn't think he could walk and play 18 holes of golf five days in a row, a lighthearted jokingly made comment that Mr.Williams responded to

by saying, "that's obvious, you're too damn old," Mr.Williams turned a comment that had nothing to do with age into a chance to insult O'Callahan on his age showing that Mr.Williams first reaction to any lack of ability is to blame it on age. Mr.Williams was heard on multiple occasions making comments to the effect of "the division's future lays in it's young." and "all employees sometime reach the peak of their efficiency." implying that as they age employees lose their worth. On two occasions Mr.Williams basically out right admitted that O'Callahan was fired due to his age. The first being on August 8, 2012 Allison Young asked Mr.Williams why O'Callahan was being fired and he responded that the company needed some young blood to create a new image. Second the day after O'Callahan was fired Philip Dennis asked Mr.Williams why O'Callahan had been fired and Mr.Williams replied "that all of them were getting too old, that Jim was getting old,and that there were three other persons around the office who were turning fifty." Both of these comments were made in response to employees asking why O'Callahan had been fired and are direct evidence of age discrimination.

Mr.Williams's actions also line up with the comments he made. In June, 2012 he asked for a list of all the employees dates of births and when asked why he said they were going to be giving special birthday bonuses, this never happened and the time he asked for the list was in June 2012, only about three months before O'Callahan was terminated. Also having a "Gold Club", where he and Mr.Arts go to the gym with the younger more fit employees, one of which being Mr.Finnell. Mr.Finnell being younger and apart of the "Gold Club" was the one chosen to manage instead of O'Callahan.

Even if the court denies that these statements qualify as direct evidence, they at minimum qualify as circumstantial evidence in a "burden-shifting" doctrine established

by the court in McDonnell Douglas v. Green. The comments given prove that the reason given by 4C's as to why O'Callahan was fired were merely a pretext for discrimination. The statements very clearly show that Mr.Williams, who had control over O'Callahan's termination, was discriminatory to those of the protected class. The statements cannot be labeled as stray comments such as Bodenheimer v.PPG Indus. (5th Cir. 1993) where statements were labeled as stray comments.. In that case Bodenheimer principally relies on a comment made by Hartman to Bodenheimer regarding retirement benefits when the employee was terminated. Bodenheimer notes, and PPG does not deny, that Hartman stated, "Cliff, I hope when I get to your age, somebody does the same thing for me." While in that case there was only one comment and it was regarding benefits in this case there were multiple comments over all of which directly negatively portray old age. This case also cannot be compared to Price v. Marathon Cheese Corp. another case where comments were labeled as stray comments. Price stated that Trace once commented that he wanted to get rid of the older employees and hire "young blood" , but this comment was made two years before Price was fired whereas in this case all of the comments were made within a few months of when O'Callahan was fired. The comments made by Mr.Williams fits the entire criteria with none of the flaws the comments in other cases had. Since these comments at the very least qualify as circumstantial evidence the court was indeed provided with enough circumstantial evidence to support O'Callahan's claim.

By favoring 4C's the court allows companies all over the country to bully, mistreat and unjustly fire their employees without any repercussions. This will set our country up for a law system that does not protect those that are being discriminated

against because those that are discriminatory are able to hide behind false smiles and pretext.

The Respondent did meet the requirements of the burden of proof and the court was provided with sufficient circumstantial evidence.

Prayer

James O'Callahan prays that the court would confirm the decision of the lower court.

Respectfully Submitted By:
Alexis Boehmer
Ashlyn Dodson
Attorneys for Respondent

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THE STATE OF TEXAS

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JAMES O'CALLAHAN

Respondent

On Appeal from The 15th Court of Appeals

Brief for Petitioner

Tarek Arouse

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Statement of the Case

Appellant James O'Callahan filed a lawsuit against his former employer, Petitioner, Continental Catering Consolidated Company (4C's), seeking damages under the provisions of the ADEA (Age Discrimination in Employment Act). In O'Callahan's original petition, O'Callahan claimed that 4C's terminated his employment based upon his age. Prior to O'Callahan's case reaching trial, the trial court granted Summary Judgement to 4C's subsequent to 4C's motion, and dismissed O'Callahan's claims.

Statement of the Facts

The lawsuit was filed in the 222nd district court, Travis County, Texas, the Honorable Justice Sophia presiding. Judge signed a summary judgement in favor of 4c's on December, 2017. O'Callahan appealed the judgement to the 15th Court of Appeals. O'Callahan was the appellant, and 4c's was the appellee. The panel that decided the case was composed of Sophia, Henry, and Clyde. The Court of Appeals rendered its judgement and issued an opinion on September 15th, 2017. Justice Clyde dissented. James O'Callahan, age 56, was originally hired to 4 C's as a salesman and later promoted to the position of general manager of the north region and ending his tenure at 4 C's as manager of the smaller south region. O'Callahan sued under the age discrimination in Employment act after company restructuring led to his termination. O'Callahan claims that he was terminated due to his age and not company restructuring. 4 C's claimed that the evidence presented by Callahan does not support the claim of

age discrimination.

Issues On Appeal

Point of Error One: **Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan**

Even viewed in a light favorable to O'Callahan, the alleged statements from the affidavits constitute nothing more than "stray comments" that cannot be used as direct evidence to establish discrimination. The precedent set in *Price v. Marathon Cheese Corp., 119 F.3d 330, 337 (5th Cir. 1997)* acknowledges that affidavits alone are not a sufficient form of direct evidence to remand a summary judgement. Betty Price stated that her employer Trace once commented that he wanted to get rid of the older employees and hire "young blood", this was held in court as nothing more than Price's subjective belief that she was fired because of age and the case was dismissed. O'Callahan similarly presented comments made by Williams as a basis for direct evidence, but as proven in *Price V. Marathon Cheese Corp alt* stray remarks have "no determinative influence on the employer's decision-making process" of whether or not to let an employee go and as such can't be held as competent evidence to establish direct evidence. Supporting this further is the case of in *Mereish v. Walker, 2004 WL 318471 (4th Cir. Feb. 20, 2004)*, in which the Fourth Circuit affirmed the district court's grant of summary judgment to the defendants. The court held "that general comments by supervisors referring to generational changes, made in the context unrelated to the plaintiffs' inclusion in a reduction in force, were not sufficient evidence of age discrimination."

Furthermore as stated by both 4 C's and O'Callahan in the affidavits , the decision to consolidate the company which lead to O'Callahan's termination was actually made by Ed William's boss Ted Arts. Thusly, the decision to consolidate the company was in no way directly related to James O'Callahan. The precedent set in

Reeves v. Sanderson Plumbing Prod., Inc., 120 S.Ct. 2097, 2106 (1973) says that "plaintiff's prima facie case of discrimination, combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, may be adequate to sustain a finding of liability for intentional discrimination under the ADEA." So similarly O'Callahan failed to sufficiently meet requirements of prima facie that Reeves failed to meet, specifically in O'Callahans situation "was subjected to an adverse employment decision of the employer" . Arts was the one who authorized the company consolidation that occurred at the time of O'Callahan's termination. This point is solidified by the cases of In *McMillan v. Massachusetts Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 301 (1st Cir. 1998)* ,in which the court noted that, while stray remarks may be relevant to pretext, "their probativeness is circumscribed if they were made in a situation temporally remote from the date of the employment decision, or if they were not related to the employment decision in question, or if they were made by non decision makers." and the case of *Watkins v. Hospitality Group Mgmt., 2004 U.S. Dist. LEXIS 4037 (D.N.C. Feb. 11, 2004)*, the Court held that remarks were "stray" only where the speaker was not principally responsible for the employment decision .Therefore Williams comments are not pertinent because he is not the "decision maker" in question to consiladte the company . Also as established in *Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)* is that "the employer is not liable if it can show by clear and convincing evidence that it would have made the same employment decision in the absence of discrimination." Ann Hopkins was not awarded full damages because "[the court was] persuaded that the better rule is that the employer must make this showing by a preponderance of the evidence." So similarly O'Callahan would then have to prove beyond question that the 4 C's company consolidation that led to his termination occurred wouldn't have

happened if the "discrimination" in question hadn't occurred. Adding to that point made in Price Waterhouse v Hopkins *alt ,* an appellate court will affirm the trial court's fact determinations unless, based on a review of the entire record, it is "left with the definite and firm conviction that a mistake has been committed." *Pullman Standard v. Swint, 456 U.S. 273, 284-85 n.14 (1982)* . And when reviewing the case , there is no overwhelming argument that discrimination lead to his release. Moreover, as similarly established in *Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996)* the appeals court affirmed the district court's grant of summary judgment in favor of the defendant CSC Logic stating that Brown and Davis could not present enough evidence to support their claim that CSG Logic had released them for reasons beyond the economic reasons presented by CSG logic. Also this case solidifies the earlier point that Williams' remarks do not qualify as direct evidence of discrimination because again , Mr. Arts was the person with the authority over the employment decision at issue, signifying Williams' comments do not satisfy the third prong of the test under *Brown v. CSG logic alt* "(3) made by a person with authority over the employment decisions in question"

Point of Error Two: **Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.**

The affidavits alone are not a sufficient form of circumstantial evidence to remand a summary judgement, this case was similar to the current case because the petitioner in *EEOC v. TIN, Inc., No. 08-16749* determined that reversing the summary judgement would be insufficient because of a lack of the truth. Like in our case,

employees of TIN INC. claimed to be victims of ageist comments like "your bald spot blinds me" and "you're an old worthless bastard" also TIN INC. was facing their own reduction-in-force. There were six affidavits for the case, three of them being the three employees that were asked to leave, Neal, McGraw, and Vanecko and the other three being the supervisors, Garza, Mishurda, and Juarez. There was a clear bias in the affidavits with the executives and the friendly coworkers defending their own. Similarly, there are six affidavits in the current case with clear bias within O'Callahan, Philip Dennis, and Allison Young, and with Ted Arts, Ted Finnell, and Ed Williams. Even though a case is suppose to be viewed in a light most favorable to the victim because of this clear bias it was deemed futile to remand the summary judgement to the lower courts, for the search for the truth would be infinite. The bias affidavits do not serve as sufficient circumstantial evidence to remand a summary judgement.

Secondly, in the case of *Equal Employment Opportunity Commission v. Resource Residential, Case No. 4:10-cv-00230* a precedent was set that affidavits must be proximate to be considered as circumstantial evidence. Three management-level employees were asked to leave the company because the company wanted to radiate a "young blood" image according to the affidavits of Chandler, Thompson, and Smith, the employees who were asked to leave. They were asked to leave on the date of April 19, 2002, but the discriminatory comments they claim were made against them were all at least ten months from the date they were asked to leave, and with that comment being "Happy Birthday, old man you're more than halfway done with life" when Smith had turned 54. Similarly, when watching a televised golf tournament at the office of 4C's, O'Callahan stated that he couldn't play 18 holes of golf for five consecutive days and to that Ed Williams responded with "That is obvious, you're too damn old" and when O'Callahan turned 57 years old, Ed Williams made a remark of "Isn't getting old

a pain?". Most of the quote-unquote ageist comments made to the employees are truthfully playful banter that brings humor while it is occurring, and most of us have an acquaintance of the group who is comedically offensive, Ed Williams is that acquaintance. These comments were made a substantial amount of time before the process of letting go Mr. O'Callahan occurred. The affidavits and the derogatory comments made in them are not in proximity to the case for circumstantial evidence, so the summary judgement must be upheld.

Thirdly, in the cases of *Wunder v. Elettric 80, Inc., No. 5:2013cv04014* and *Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991)* the affidavits of the petitioner and of the respondent were ignored because "Conclusory and self-serving affidavits are not sufficient" to show disputed material facts." Affidavits in the Wunder case and the Hall case conflict each other with the incidents involving the petitioner. The disputed affidavits were not able to be used to reach a conclusion for the case. Similarly, he ageist claims of Phillip Dennis, Allison Young, and James O'Callahan contradict the claims of there not being any ageist comments and discrimination by Ed Williams. Due to the disputed material fact the affidavits must be ignored and without the affidavits there is no question of discrimination making the summary judgement an efficient decision.

Conclusion

The court did not err in its decision to pass summary judgment in favor of 4'Cs due to O'Callahans failure to display that his age had any determinative effect on his employment decision. James O'Callahan fails to prove that the statements made were anything more than stray remarks because they have no direct influence on his release from the company. Furthermore he also could not prove beyond a reasonable doubt the remote notion that the whole of the company consolation was actually a pretext for

discrimination. In addition, the conflicting affidavits are not in proximity for discrimination and the affidavits should not be considered. There is not enough circumstantial or direct evidence to raise a question of discrimination against the respondent. Finally, conflicting affidavits from the sides of the petitioner and respondent must be ignored due to the disputed material fact. There is no question to be raised for discrimination, so the summary judgement granted to 4C's was necessary.

Prayer

For these reasons, we pray the court reverses the judgement of the lower court of Appeals and uphold the trial court's decision to grant summary judgement to 4 C's. Amen.

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from The 15th Court of Appeals

Brief for the Respondent

Tarek Arouse

Arturo Rolon

Cleburne High School

Joshua YMCA

Statement of the Case

Appellant James O'Callahan filed a lawsuit against his former employer, Petitioner, Continental Catering Consolidated Company (4C's), seeking damages under the provisions of the ADEA (Age Discrimination in Employment Act). In O'Callahan's original petition, O'Callahan claimed that 4C's terminated his employment based upon his age. Prior to O'Callahan's case reaching trial, the trial court granted Summary Judgement to 4C's subsequent to 4C's motion, and dismissed O'Callahan's claims.

Statement of the Facts

James O'Callahan worked for Continental Catering Company, a vending and food service company, as a General Manager of 4C's South Region. During July 2012 4 C's parent company, Cayman corporations began a restructuring process that involved the removal and compression of many branches and assets that led to O'Callahan's eventual termination. The area previously managed by O'Callahan, 4C's South Region, was combined with Cayman Corporation's South Carolina operations, and assumed by Mr. Ted Finnell, age 40. O'Callahan was terminated at that point, and was 56 years old at the time of his termination. In his pleadings, O'Callahan sued 4C's under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623, et seq., claiming that his age served as a motivating factor in 4C's decision to terminate his employment. 4 C's filed a claim for summary judgement. According to 4C's, O'Callahan was not terminated due to his age, but instead his position was eliminated due to corporate restructuring., O'Callahan, relying on affidavits contended that at a very minimum, the evidence raised a genuine issue of material fact on the issue of discrimination. Nevertheless, the trial court granted summary judgment in favor of 4C's and dismissed O'Callahan's claims prior to trial.

Point of Error One: **Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan**

The trial court committed a reversible error by dismissing his claims. The precedent set in *Reeves v. Sanderson Plumbing Prod., Inc., 120 S.Ct. 2097, 2106 (1973)*, acknowledges that affidavits are sufficient direct evidence to grant a summary judgement. Both Reeves' and O'Callahan ,who both had administrative duties, argued that their work met set standards and that their employers explanation of termination was a pretext of discrimination, and like O'Callahan, originally when reviewing if Revees presented sufficient evidence for discrimination the "Court of Appeals ignored the evidence supporting petitioner's prima facie case and challenging respondent's explanation for its decision". Regardless of the review of said evidence, the Court of Appeals eventually concluded that Reeves had not presented sufficient evidence to sustain a finding of age-based discrimination stating that "based on this evidence, the Court of Appeals concluded that the petitioner "very well may be correct" that "a reasonable jury could have found that [respondent's] explanation for its employment decision was pretextual." 197 F. 3d, at 693". Nonetheless, that even though that the court held that this showing, standing alone, was insufficient to sustain the jury's finding of liability, the precedent set was "plaintiff's prima facie case of discrimination, combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, may be adequate to sustain a finding of liability for intentional discrimination under the ADEA". Following this precedent set, O'Callahan has clearly met and established both prima facie and has brought forth sufficient evidence in the form of not only circumstantial, but direct evidence in the form of discriminatory comments made by his direct supervisor Ed Williams. James

O'Callahan's prima facie case and evidence of proximate discriminatory remarks made by his superior such as "That's obvious, you're too damn old." and "the company needed some young blood around here to create a new image.", does not only make an "adequate" finding of discrimination, but prompts an overwhelming argument for liability to the former employer 4C's. Supporting this precedent is the case of *Clancy v. Preston Trucking Co., 967 F. Supp. 806 (D. Del. 1997)*, where a supervisor's statement referring to the plaintiff as "older than dirt," was not considered a mere stray remark because it was related to the supervisor's statement that he intended to make her quit. This shows that the remarks made to O'Callahan are far from being "stray" , but raise a question of material fact. Also it's not the job of the appeals court to determine if the comments were discriminatory, but rather to determine if it raises a question of material fact . This protocol for determining discrimination made by an employer is seen in the case of *Tooson v. Roadway Express, Inc., 47 Fed. Appx. 370, 375 (6th Cir. 2002)* where the court held that in order to be admissible evidence of discriminatory intent, "the jury is required to find that the statement was that of a decisionmaker." so it would then be necessary to overturn the summary judgement to be able to have this determination made

Secondly, when looking to see if the court erred in its decision to pass summary judgement to 4C's, it did so when it failed to review O'Callahan's evidence in a light most favorable to him. In *PATEL v. MANAGEMENT ENTER | 988 So.2d 960 (2007)* Patel, like O'Callahan's arguments on appeal, argued that the Court of Civil Appeals erred in affirming the summary judgment in favor of the MEDS parties because, he argues, the Court of Appeals (1) did not review the evidence in the light most favorable to him as the nonmovant, and (2) did not resolve all reasonable doubts regarding the evidence in his favor. Instituting that the "[the appellate court] must

review the record in the light most favorable to the nonmoving party and must resolve all reasonable doubts against the movant." O'Callahan's evidence was not reviewed in a light most favorable for him since he has statements from Williams that provide evidence of direct discriminatory intent. Further establishing this protocol for reviewing evidence is the case of *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)*The district court improperly granted the summary judgment in favor of the Japanese companies that were being sued by the American companies . The Court held "that all inferences drawn in a motion for summary judgment must be construed in the light most favorable to the side opposing the motion ." Id .

Point of Error Two: **Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.**

Affidavits are a sufficient form of circumstantial evidence to remand the summary judgement, this case was similar to our current case because the respondent in *EEOC v. Hawaii Healthcare Professionals, Inc. a/k/a Hawaii Professional HomeCare Services, Inc., Case No. CV-10-00549 BMK* was a then 54 year old woman, Debra Moreno, working for HHP as an office coordinator. Moreno was said to be a "thorough and efficient worker" by her manager, but that same manager, Frutoz-De Harne, ordered Moreno to be fired. De Harne fired her on claims that "'[she] looks old', 'sounds old on the telephone', and is 'a bag of bones'". Similarly, O'Callahan was asked to leave the company after Ed Williams told O'Callahan the following: "'That's obvious you're too damn old', "You're too damn old… you should consider retiring', 'Isn't getting old a pain', and 'the company needed some young blood around here'" The

EEOC found that Debra Moreno was a victim of age discrimination in her workplace with those comments serving as sufficient circumstantial evidence. The precedent set in *EEOC v. Hawaii Healthcare Professionals, Inc. alt* is that derogatory comments about age are not allowed to be said by employers, therefore the derogatory comments said by Williams to O'Callahan should and need to be enough circumstantial evidence to remand the summary judgement and raise the question of discrimination. Moreno also stated that when she found out that the reasons for her firing were because of her age she felt embarrassed and demoralized. It can also be inferred through the affidavit of Phillip Dennis, the brother in-law of O'Callahan, that he and O'Callahan had similar feelings like Moreno when they found out about the age discrimination. Dennis even states in his affidavit that he is "to afraid to do anything" related to his job. The case of *Crawford v. Medina General Hospital (6th Cir. 1996) 96 F3d 830* a precedent was set that derogatory comments actually hinder workflow and work proficiency. This is due to the feelings the victim receives when they are discriminated against. Mary Ann Crawford was the victim of ageist comments at Medina General Hospital by her supervisors, Darla Kermendy, Kenneth Milligan, and Rex Slee. Kermendy, Milligan, and Slee said comments to Crawford such as, "'you're too old for this' 'your skin's dryer than the sahara' and 'did you forget your walker today'". This created a hostile environment for Crawford, who worked at the company for 27 years, and was always given the highest rating of a 100, until the ageist comments started. O'Callahan was one of the best in his line of work, but the derogatory comments led to his rating lowering to a commendable minus. As seen in *Crawford v. Medina General Hospital* and in O'Callahan v. 4C's, ageist comments deteriorate work proficiency, this leads to more discrimination causing a vicious cycle of discrimination making the employee leaving inevitable.

Finally, the precedent set in *O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996)* states that there is enough circumstantial evidence to raise a question of discrimination to remand a summary judgment. James O'Connor was asked to be let go by his company, Consolidated Coin Caterers Corp (4C's). O'Connor at the time was 56 years old and was subject to ageist comments like "you're too damn old for this job", he was let go by his company and replaced with a 40 year old coworker. Although the replacement was in the protected age limit "It prohibits discrimination against those protected employees on the basis of age, not class membership. "That one member of the protected class lost out to another member is irrelevant, so long as he lost out because of his age. The latter is more reliably indicated by the fact that his replacement was substantially younger,"" Similarly, the same occurrence happened to James O'Callahan, he was replaced by someone who was substantially younger than him. It is not just the affidavits that provide the circumstantial evidence, but it is also the hiring process. Since he was replaced by someone much younger than him, a question of discrimination is raised, needing the summary judgment to be remanded and the case must be sent back to the trial court in front of a fair jury.

Conclusion

O'Callahan has brought multiple points of error in the trial court . His evidence based on the discriminatory statements by Ed Williams alone serves as a genuine fact of discrimination . With that the court also erred in failing to review the evidence in a light most favorable to O'Callahan as the non-movant , prompting the necessity to overturn the summary judgement . Stray comments in the affidavits are pretext for discrimination, and the stray comments could lead to dysfunctionality in the workplace. Finally, the hiring process provides enough circumstantial evidence for the summary judgment to be remanded since the replacement was a substantial amount your than

O’Callahan. The summary judgment must be remanded and this case must be sent back to the trial courts for a jury to decide a demand.

Prayer

For these reasons, we pray the court upholds the judgement of the lower appellate court

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IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from The 15th Court of Appeals

Brief for Petitioner

Caleb Barkman

Tim Hill

Cleburne High School

Joshua YMCA

Statement of the Case

Appellant James O'Callahan filed a lawsuit against his former employer, Petitioner, Continental Catering Consolidated Company (4C's), seeking damages under the provisions of the ADEA (Age Discrimination in Employment Act). In O'Callahan's original petition, O'Callahan claimed that 4C's terminated his employment based upon his age. Prior to O'Callahan's case reaching trial, the trial court granted Summary Judgement to 4C's subsequent to 4C's motion, and dismissed O'Callahan's claims.

Statement of the Facts

James O'Callahan worked for Continental Catering Company, a vending and food service company, as a General Manager of 4C's South Region. Beginning in or about July 2012, 4C's and its parent corporation, Cayman Corporation, began major restructuring of their respective operations in North Carolina and South Carolina. The restructuring eventually resulted in consolidations of business operations conducted by the two companies in those regions. The area previously managed by O'Callahan, 4C's South Region, was combined with Cayman Corporation's South Carolina operations, and assumed by Mr. Ted Finnell, age 40. O'Callahan was terminated at that point, and was 56 years old at the time of his termination. In his pleadings, O'Callahan sued 4C's under the Age Discrimination in Employment Act claiming that his age served as a motivating factor in 4C's decision to terminate his employment. Prior to trial, 4C's filed its Motion for Summary Judgment under Tex. R. Civ. P. 166a and 166a(i). In its motion, 4C's claimed that the evidence, even when viewed in a light most favorable to O'Callahan, did not support a claim of age discrimination as a matter of law. According to 4C's, O'Callahan was not terminated due to his age, but instead his position was eliminated due to corporate restructuring. In support of its motion, 4C's attached the pretrial affidavits obtained from O'Callahan, Allison Young, Phillip Dennis, Ted Art's,

Edward Williams, and Mike Kiser. In his response, O'Callahan also relied upon those affidavits, as well as performance evaluation memoranda, to contend that, at a very minimum, the evidence raised a genuine issue of material fact on the issue of discrimination. In particular, O'Callahan relied upon several oral statements attributed to Mr. Ed Williams, who was the vice-president of 4C's and also one of the vice-presidents of Cayman Corporation. According to O'Callahan, Mr. Williams' statements were derogatory towards O'Callahan's age, and thus provided direct evidence of his discriminatory intent. O'Callahan also argued that, at a very minimum, the statements served as circumstantial evidence demonstrating that the reasons stated by 4C's for its termination of O'Callahan were merely a pretext for its discrimination against him due to his age. O'Callahan also claimed that other facts raised circumstantial evidence of discrimination on behalf of 4C's. Nevertheless, the trial court granted summary judgment in favor of 4C's and dismissed O'Callahan's claims prior to trial.

Point of Error One: **Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan**

In *Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993)* the case states that after a non-movant has appealed a Motion for Summary Judgement that the defense "must rebut by giving a legit reason showing otherwise." 4C's clearly does this by giving a valid explanation pertaining to the termination of the Respondent and there would have been no sufficient reason for the trial court not to have taken this as evidence. Ted Art's affidavit states that the reason for the consolidation of 4C's and Cayman corp. was to "Cut costs and make the management system more streamlined." Previously, O'Callahan had his responsibilities shrunk due to an error on

his part, this misstep was seen as reason for a person of equal merit to be selected for the new management positions rather than O'Callahan. This led to Kiser being selected, due to his comparable performance review and O'Callahan's recent mistakes when handling large accounts. Looking at all these facts, any reasonable factfinder would see that 4 C's stated reasons for the consolidation of the company were legitimate.

The respondent will undoubtedly try and use some of William's irrelevant stray remarks to prove that the trial court should have seen them as sufficient direct evidence but as stated in *Jaso v. Travis Co. Juvenile Board, 6 S.W.3d 324 (Tex. App.--Austin 1999, no writ),* "Stray remarks are not evidence that would allow a jury to reasonably infer a discriminatory intent." This means the random remarks made about O'Callahan's age by Williams are not strong enough to be counted as evidence. Also there is a contention on whether the comments were ever made, since three people claim to have heard the stray remarks and three claim to have not heard them. This conflict of stories and absence of clear truth should serve as evidence of a bias that the individual's providing affidavits hold loyalty too. With this being considered it's clear that a jury would not have enough evidence to even raise the question of discrimination had the court gone to trial. As such the trail court at the summary judgement stage did the only reasonable thing.

Furthermore *Price v. Marathon Cheese Corp., 119 F.3d 330, 337 (5th Cir. 1997)*, also states that stray remarks not regarding the direct employment decision cannot be used to establish direct evidence. To conclude this point, it is clear that the respondent has no clear evidence of age discrimination, "even when viewed in a most favorable light". O'Callahan is simply wasting this court's time and the taxpayers money by

trying to slander the name of a company that made a choice based on performance not based on any type of age related bias.

O'Callahan was fired due to a consolidation of the company not because of the reasons he claims. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)sets the precedent of the employer not having to prove the employee wrong, but the employee having to supply the actual evidence to prove material fact, but O'callahan has failed to bring up any true evidence that Ted art's asked o'callahan to step down on anything other than corporate level. While I agree that every person has the right to have their pleas heard, this does not mean however that the court is required to hear a case past its point of legitimacy. To bring this case to trial is a waste of time and taxpayers money. It is clear O'Callahan is upset for losing out of a position that he was unqualified to receive.

After all of these facts it is reasonable to assume that a trial court would confirm a summary judgement, and allow this trial to be put to rest. This case simply does not present enough facts and cannot be allowed to further extend the process.

Point of Error Two: **Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.**

Employment discrimination laws such as those proposed by the ADEA are "not intended to be a vehicle for judicial second-guessing of employment decisions nor ... to transform the courts into personnel managers." *EEOC v. Louisiana Office of Community Services, 47 F.3d 1438, 1448 (5th Cir. 1995)*. The ADEA was never intended to permit employees to use their age to excuse shortcomings in their performance, or to hold

employers liable when their employees simply discuss the effects of age. O'Callahan failed to bring forward any evidence to suggest that two corporate entities decided to consolidate their business operations simply to discriminate against him due to his age. Even the idea of such a thing is insipid. Why would an entire company lay off many jobs and shrink their business size simply to discriminate against an employee that they didn't even technically fire, he was asked to resign and did so on his own free will.

The respondent has provided very little true evidence and as stated in the 1963 amendment to *FED. R. Civ P 56(e)* advisory committee's note, summary judgement cannot be appealed if there is not enough evidence, and in the trial courts it was determined there was not in fact enough evidence.

Matsushita Electric Industrial Co. v Zenith Radio Corp., 14 also states that summary judgement should be more readily granted if the opposing parties claim, seems implausible. And in this case the idea of a company consolidating its assets simply to fire one man seems very implausible. This case once again is simply trying to slander the name of an honest hard working company.

Conclusion

O'Callahan failed to bring up any relevant information to the case that can actually prove he was discriminated against in a matter that affected his employment status, according to *Price v. Marathon Cheese Corp., 119 F.3d 330 (5th Cir. 1997).* If O'callahan failed to bring up any relevant information, he cannot simply pursue a case past it's point of legitimacy. He fails the prima facie test, failing to confirm his evidence as anything more than coworkers bantering. O'callahan has run out of legs to stand on and therefore this ruling should be upheld.

Prayer

For these reasons, we pray the court reverses the judgement of the lower court of Appeals and uphold the trial court's decision to grant summary judgement to 4 C's.

IN THE SUPREME COURT OF THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from

The 15th Court of Appeals

Brief for Petitioner

Name Adelaide Zink

Name Graham Wolfe

Fort Worth/Benbrook YMCA

Ladies and Gentlemen of the Texas Supreme Court:

Statement of the Case: Plaintiff James O'Callahan filed a lawsuit against Defendant Continental Catering Consolidated Company, hereinafter referred to as 4C's, for violation of the Age Discrimination in Employment Act. The District Court granted summary judgement. Appellant O' Callahan appealed to the Appellate Court and the decision was reversed. Petitioner 4C's appealed to Supreme Court. The decision of summary judgment made in District Court should be kept.

Statement of the Facts: O' Callahan, age 56, worked as general manager for 4C's North. His rating improved from a competent minus to a commendable plus, the second highest rating an employee can receive. 4C's South was not performing as well as 4C's North. According to vice president Edward Williams, O' Callahan requested that he be transferred to 4C's South. As Edward Williams said: "O' Callahan stated that he could turn that region around in no time. All it needed he said was a good General Manager at the helm and he was the man." Edward Williams warned him: "I told O' Callahan that 4C's South was a completely different region and that he could not rely on his laurels for the successes in 4C's North in this region." O' Callahan still wanted to be moved, so Edward Williams assigned him general manager of 4C's South. There was a problem with the delivery trucks after O' Callahan was moved that he could have handled better. As Williams stated: "I discovered that O'Callaghan had failed to respond timely to a problem involving the delivery of food in unrefrigerated trucks. I was also informed that several of his accounts were complaining about O'Callahan's lack of attentiveness to their needs." Edward Williams reduced O' Callahan's territories he oversaw. Shortly after, 4C's was reconstructed, and O' Callahan's position was eliminated. He was not assigned to a new position, because there were other qualified candidates who were not having issues managing accounts.

Edward Williams was accused of not giving O' Callahan eighteen (18) months to improve 4C's South. As Mr. Williams says: "I do not recall O' Callahan telling me that he expected it would take him about 18 months to make 4C's South profitable. I do remember a discussion regarding the need to have 4C's South as profitable as soon as possible because it was losing too much money for the company." Edward Williams was also accused of making discriminatory statements on the basis of age against O' Callahan. These statements included:

(1) O' Callahan stated that he could not play 18 holes of golf during 5 days. Williams supposedly said: "That's obvious, you're too old" He also mentioned that if O' Callahan went to the gym then he would be in better shape.

(2) "O' Callahan you are too old for this kind of work and I think you should consider retiring," said Williams after coming into his office uninvited.

(3) While on company business, an employee said that he was close to turning 57 and Williams said: "Isn't getting old a pain?... I sure am glad I am not as old as you guys."

(4) An employee asked Williams why O' Callahan was fired and Williams allegedly replied "the company needed some young blood around here to create a new image."

"I have never heard any employee or officer of this company ever make any comments about an employee's age", says Mike Kiser, an employee at 4C's. Edward Williams does not recall ever making any discriminatory statements. He said: "If any comments were made, they were made in a joking manner, between friends. O' Callahan is trying to take a friendly joking between colleagues and turn it into a case for illegal discrimination. The simple fact is that O'Callaghan had performance problems; did not

make the south region profitable and was not qualified for the new position. The only person he should blame for his termination is himself; not me or the company." The reason we are here today is because a few joking comments were supposedly said by the vice president of 4C's.

Issues on Appeal:

Issue 1: Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age- related discrimination alleged by James O' Callahan; and

Issue 2: Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Argument Issue 1: There are three points that prove that there is no direct evidence of material fact that O' Callahan was discriminated against. First, O' Callahan was not performing well and therefore cannot establish a prima facie case. Second, due to restructuring O' Callahan's job was eliminated. Three, the statements made by Mr. Williams are irrelevant to this case.

First of all O' Callahan is unable to establish a prima facie case. As laid out in McDonnell-Douglas Corp. v. Green, a Plaintiff must prove 4 things before establishing a prima facie case:

(1) He is 40 years of age or older when he was discharged, and so is within the class of workers protected against age discrimination
(2) He was discharged or demoted

(3) At the time of discharge or demotion, he was performing his job at a level that met his employer's legitimate expectations

(4) Following his discharge or demotion, he was replaced by someone of comparable qualifications who is younger (McDonnell)

O' Callahan cannot establish a prima facie case because he cannot prove that he met his employer's legitimate expectations. He failed to resolve problems with food deliveries in unrefrigerated delivery trucks. Several of his accounts complained of lack of inattentiveness to their needs. Seeing as how he earned a commendable minus in 2011, he did not meet William's expectations in 2012. O'Callahan's performance dropped significantly, and would have continued to do so had they not fired him. On the other hand, Mike Kiser and Ted Finnell, the two men who were given the new district positions, were meeting their employer's expectations.

Secondly, due to restructuring, not old age, was O'Callahan's job was eliminated. Since the new jobs available would mean even more responsibilities for him, and Finnell and Kiser were not having performance problems, there was not a job available for O' Callahan, and so he was terminated. In Brown v. CSC Logic Inc., Donald R. Brown and Robert T. Davis were terminated due to changes in the company. However, the district court decision of summary judgement was affirmed. CSC Logic needed to fire some employees, and Brown and Davis were terminated. Brown and Davis' jobs were not eliminated as they are in this case, they were actually fired because the company needed to reduce the staff to save money; the evidence there is more discriminatory than the evidence here. But the court still ruled that the district court decision be affirmed. Likewise, it should be recognized

that 4C's underwent employment changes, and due to his performance problems, O' Callahan was terminated.

Thirdly, the statements made by Mr. Williams are vague and irrelevant to his case. As good friends, it can be assumed that they will play around with each other sometimes. The statements made by Edward Williams were a joke, not a direct hit against O' Callahan. In Brown, statements were made to Brown and Davis as well. Kimzey, Chief Executive Officer and the terminator of Brown and Davis made several discriminatory statements. To Brown he said:

(1) That the employees were "getting long in the tooth"
(2) That Brown needed "hiring lessons; that you can hire a pretty one and teach them the job, but you can't hire an ugly one and make them pretty."
(3) He also told Brown many times that Davis was old. (Brown v. CSC Logic)

The court ruled that the statements made to Brown were vague, and the first two were not even related to age. The district court decision of summary judgment was affirmed. The same must be applied here. In fact, O' Callahan agreed that he was getting old. Mike Kiser says: "On one occasion, as I was leaving the office to go to the gym, O' Callahan said to me 'I wish I was as young as you and had your energy… I'm just getting too old for this job' It was no secret that O' Callahan was slowing down and thinking about retiring soon." In Price v. Marathon Cheese Corp, Price states that Trace, plant manager and the employer that fired Price, once commented that he wanted to get rid of the older employees and hire "young blood". Price also said that she felt that she was treated differently than the younger employees. However, the Court affirmed the district court decision of summary judgment because they were stray remarks remote in time to the

termination. (Price v. Marathon Cheese Corp) Also, in Bodenheimer v. PPG Industries, Hartman, the Regional Manager who terminated Bodenheimer, said to Bodenheimer following his termination: "Cliff, I hope when I get to your age, somebody does the same thing for me". The court ruled that "taken by itself, Hartman's comment proves only that Hartman desires a similar retirement package upon his retirement. The comment sheds absolutely no light on the central issue before us: whether Bodenheimer's age was a factor in Hartman's decision to terminate him. We agree with the district court's decision characterization of the comment as a casual, facially-neutral remark" (Bodenheimer v. PPG Industries) Likewise, William's comment proves that in O' Callahan's shoes, Mr. Williams would consider retiring. As Mr. Williams states: "If any comments were made, they were in a joking manner, between friends. O' Callahan is trying to take a friendly joking between colleagues and turn it into a case for illegal discrimination. The simple fact is that O'Callaghan had performance problems; did not make the south region profitable and was not qualified for the new position. The only person he should blame for his termination is himself; not me or the company." We should follow the precedent set by Brown, Price, and Bodenheimer, and dismiss these statements as irrelevant to our case.

Issue #2:

Summary of the Argument

Mr. O' Callahan has failed to provide sufficient circumstantial evidence that the stated reasons for his termination -- company restructuring and Mr. O'Callahan's poor work performance -- were pretextual. Mr. O'Callahan attempts to show age

discrimination by simply offering a few age-related "stray remarks" by 4C's President and Vice President. These statements, when properly understood, are insufficient to show age discrimination.

In support, I'd like to discuss three points:

1. The age-related statements of Edward Williams and Ted Arts were merely "stray remarks."

2. Mr. O'Callahan's position was terminated because of a necessary company restructuring.

3. Mr. O'Callahan was an underperforming manager.

Discussion

1. The age-related statements of Edward Williams and Ted Arts were merely "stray remarks."

Under the *McDonnell Douglas* burden-shifting analysis, the presumption of discrimination fades if the employer provides a legitimate, non-discriminatory reason for its decision. If it does so, the plaintiff, here Mr. O'Callahan, must prove by a preponderance of the evidence that the employer's articulated reason is a *pretext* for unlawful discrimination. To establish pretext, a plaintiff cannot merely rely on his subjective belief that discrimination has occurred; rather, he has the ultimate burden of persuasion in proving intentional discrimination throughout the case. The plaintiff must prove that age "actually played a role in" and "had a determinative influence on" the employer's decision-making process.(*McDonnell Douglas v. Green 93 S.Ct. 1817)* Pretext can be shown by, among other things, age-biased comments. Age-related remarks are relevant to determining whether age discrimination has occurred;

however, mere "stray remarks" such as "a younger person could do faster work" or calling an employee an "old fart" have been held to be insufficient to establish discrimination.(Price v. Marathon Cheese Corp., 119 F.3d 330 (5th Cir. 1997).

In *Price v. Marathon Cheese Corp.*, the Fifth Circuit held that an employer's comment that he wanted to get rid of the older employees and hire "young blood," accompanied by the fact that the employee was replaced with younger employees amounted to "little more that [the employee's] subjective belief the she was fired because of age."

The *Price* case is similar to the case at hand. There were a few statements that the Respondent uses for their case, each to be easily refuted.

1. That's obvious, you're too old." in this comment, they are referring to playing golf, not to getting work done. This may be insensitive, but it is not discriminatory.
2. "O'Callahan you are too old for this kind of work and I think you should consider retiring." Now while Williams has a say in the hiring and firing process, that power ultimately resides the the President of the company (Ted Arts)Thus this statement fails the 4 point test established in Brown v. CSC Logic Inc. In this test the one in charge of hiring and firing must be the one to issue the statements. Also, it is normal for employees to discuss their retirement plans.
3. "Isn't getting old a pain?, I sure am glad I am not as old as you guys." This statement is a mere jest, not meant to be discriminatory in any way. It is universally agreed that nobody likes to get old.
4. "The company needed some young blood around here to create a new image." First, this comment could be referring to new ideas. However,

even if one takes this in a negative light, Price v. Marathon Cheese Corp had a similar comment "He wanted to get rid of older employees and hire young blood." The comments are almost exactly the same; therefore, we need to follow the precedent set by Price v. Marathon Cheese Corp. This comment was recognized by the court as a stray comment.

2. Mr. O'Callahan's position was terminated because of a necessary company restructuring.

[explain the background and need for restructuring][weren't others fired?]

During the year 2012, Ted Arts ordered a consolidation of 4cs and Caymen. This consolidation resulted in the restructuring of 4C's. During this the manager's districts were geographically changed. The number of managerial positions changed and because of O' Callahan's recent performance, he was not a contender for the job. In the end, two entities, combined, and O'Callahan did not benefit by it. Those types of decisions had to be made, there were better people for the job.

Under *McDonnell Douglas* burden shifting analysis, after the employee establishes a prima facie, a non-discriminatory reason must be given by the employer as to why the termination was made. After the that, the initial assumption of discrimination falls away and the plaintiff must prove their case. O' Callahan can't prove that. He under performed during the restructuring of the company, thus he was not a contender for the job.

3. Mr. O'Callahan was an underperforming manager.

O'Callahan, before his south district assignment, performed quite well. If 4'Cs was prejudiced against older employees, then they wouldn't give them a 37,000 dollar bonus. However, after his south district assignment, his

performance deteriorated. His past laurels did not help his current job since his current job was far different than his past one. O' Callahan had problems with his delivery trucks, and his accounts. Edward Williams reduced his territory for this very reason. Then after that, the consolidation of the company happened, and since Ted Finnel and Mike Kiser had no such performance issues, they remained, and O' Callahan was let go.

Conclusion:

Mr. O' Callahan was not discriminated against. If he was, 4C's would not have given him such high performance ratings and a 37,000 dollar bonus. 4C's valued Mr. O' Callahan, they believed that he was a good employee. However, the company saw better men for the job. And, at the time, O'Callahan was not up to par with current work standards, thus he was terminated, and better men replaced him. 4C's does not have an animus against older employees, in fact they believe that their kind of work experience is normally required for managerial roles. The Respondent will say that 4C's was discriminatory, they were not, there is a plethora of evidence to support this. If the Court rules in favor of the Respondent, any "stray comments" could be used as a case for discrimination. The ADEA was not intended for employees to excuse their failings. This is exactly what Mr. O'Callahan is trying to do.

Prayer:

With all of this in mind the Petitioner prays that this court reverse the decision of the Appellate Court and uphold the District Court's ruling.

Graham Wolfe

Adelaide Zink

Fort Worth Benbrook YMCA

Christian Life Preparatory School

Signed: Graham Wolfe

Signed: Adelaide Zink

IN THE SUPREME COURT OF THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from

The 15th Court of Appeals

Brief for Respondent

Adelaide Zink

Graham Wolfe

Fort Worth/Benbrook YMCA

Ladies and Gentlemen of the Texas Supreme Court:

Statement of the Case: Plaintiff James O'Callahan filed a lawsuit against Defendant Continental Catering Consolidated Company, hereinafter referred to as 4C's, for violation of the Age Discrimination in Employment Act. The District Court granted summary judgement. The Appellant O' Callahan then appealed to the Appellate Court and the decision was reversed. Petitioner 4C's appealed to Supreme Court. The Appellate Court decision of reversing the District Court decision of summary judgment should be kept.

Statement of the Facts: O' Callahan, age 56, worked as general manager for 4C's North. His job performance rating improved from a competent minus to a commendable minus in 2011, the second highest rating an employee at 4C's can receive. 4C's South was not performing as well as 4C's North. Edward Williams talked to O' Callahan about taking over 4C's South. As O' Callahan stated: "Mr. Williams felt I could do for the South region what I did for the North Region." He also said: "Because the south region was in such bad shape and had been so poorly managed, I told Mr. Williams that I expected it would take me about 18 months to make 4C's profitable." After O' Callahan transferred and it had been but a few months, Williams decreased his territory, and never told O' Callahan why. O' Callahan mentioned that there had been some problems with delivery trucks, but once he was informed he "took steps to get the trucks fixed". According to O' Callahan, Mr. Williams said he "made progress with individual accounts and 4C's South made improvements". On August 9, 2012, O' Callahan was fired, even though he had not been given the full 18 months.

O' Callahan accused Williams of several discriminatory statements before his termination. These included:

(1) O' Callahan stated that he could not play 18 holes of golf during 5 days. Williams said: "That's obvious, you're too old" He also mentioned that O' Callahan would be in better shape if he went to the gym.

(2) "O' Callahan you are too old for this kind of work and I think you should consider retiring," said Williams after coming into his office uninvited.

(3) While on company business, an employee said that he was close to turning 57 and Williams said: "Isn't getting old a pain?... I sure am glad I am not as old as you guys."

(4) An employee asked Williams why O' Callahan was fired and Williams replied "the company needed some young blood around here to create a new image."

Seeing that there is a genuine issue of material fact, the appellate court decision of reversing the District Court decision of summary judgement must be kept.

Issues on Appeal:

Issue 1: Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O' Callahan; and,

Issue 2: Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Argument Issue 1: There are three points that prove that there was direct evidence of age discrimination. One, the statements made by the president and vice president suggest age discrimination. Two, employees not in the popular gym club were discriminated against. Three, it would benefit the company to fire O' Callahan.

First, the statements made by Edward Williams suggest age discrimination. In Turner v. North American Rubber Inc., the court ruled that statements can be sufficient evidence of age discrimination if the statements are:

(1) Age related

(2) Proximate in time to the terminations

(3) Made by an individual with authority over the employment decision at issue

(4) Related to the employment decision at issue

Edward Williams statements were:

(1) Related to O'Callahan's age

(2) Made the summer of O' Callahan's termination

(3) Made by the vice president of 4C's

(4) Related to retirement and firing

Seeing as all 4 of the requirements are met, Edward Williams' statements are direct evidence of age discrimination. Some would argue that we should follow the precedent set by Price; however, the statements made to Price were made two years before her termination. The statements did not meet all 4 requirements. (Price v. Marathon Cheese Corp) Since O' Callahan was possibly discriminated against, he should be given deference, and his day in court.

Second, O' Callahan was discriminated against because he was not in the "Gold Club". In his affidavit, Ted Arts, the president of 4C's, says: "I am 42 years old. I am an avid athlete and believe a sound and strong body is essential to having a successful career, regardless of what career a person chooses. I work out everyday at the gym during lunch with some fellow coworkers, Ed Williams, Mike Kiser, and Ted Finnell." Edward Williams said: "I believe that the more physically fit an individual is the more

productive the individual is." According to the ADEA: "It shall be unlawful for an employer to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age". Everybody in the gym club was at least 14 years younger than O' Callahan. The members of the gym club segregated the other employees because they were older. Arts and Williams deprived O' Callahan of the new district positions by hiring younger and more athletic employees. The fact that the two employees who replaced O' Callahan were younger, part of the Gold Club, and athletic, should be considered in trial court. Since only young people were part of the gym club, it suggests but does not prove that these people were given deference when deciding who got the new positions.

Thirdly, 4C's may have fired James O'Callaghan and Allison Young, two older employees, because older people cost companies more. First, since they are more experience and often have been with the company longer, they are generally paid more. Second, health insurance gets more expensive the older one gets. Third, if O' Callahan and Allison continued with the company and retired with them, they would likely have to give them retirement packages. It should also be noted that many employees felt that the company was trying to develop a new 'youth image'. Since 'new' is often translated as 'better' the company probably knew that they would do better by making their 'youth image'. As Allison says: "It is my opinion that James O' Callahan was run out of this company because of his age; he did not fit the new corporate image of the company. I guess I didn't fit that image either." This 'youth image' of the company violates the ADEA. It classifies the employees into ones that fit the youth image, and ones that do not fit the youth image. The ones that did not fit

got fired. This possibility must be considered in trial court. It would benefit the company to fire O' Callahan, however this is discriminatory and must not be tolerated.

Summary of the Argument

To prevail today, O'Callahan must simply show that a genuine issue of material facts exists as to any of his claims. This low burden is easily met.

4Cs viewed O'Callahan's age as a financial liability and fired him. O'Callahan, a 56 year-old man, was a excellent employee, but was replaced with younger employees. The President and Vice President of 4Cs made several age-related statements showing discriminatory intent in their firing of O'Callahan. 4Cs argues, however, that these statements were merely meaningless, and that they fired O'Callahan because of poor work performance. These are pretextual reasons. The circumstantial evidence in this case raises a genuine issue of material fact, and this case should proceed before a jury.

In support, I'd like to make three arguments:

1. O'Callahan was fired because of his age, not because he was a subpar employee.

2. Statements made by 4Cs's President and Vice President, when viewed *collectively*, are circumstantial evidence of discriminatory intent.

3. 4Cs's attempts to provide non-discriminatory reasons for firing O'Callahan are not to be believed because the President and Vice President lack credibility.

Discussion

In *City of Houston v. Clear Creek Basin Authority*, the Court explained that summary judgment is not intended to deprive litigants of their right to a trial. For summary judgment to be granted, 4Cs is required to show that no genuine issue of material fact exists with respect to any element of O'Callahan's claims. 4C's can't meet this burden. This burden can only be met if there is no genuine issue of material fact.

If all facts are taken in a light most favorable to O' Callahan, a reasonable fact finder can indeed decide that discrimination exists. *Nixon v. Mr. Property Management Co*., 690 S.W.2d 548, 549 (Tex. 1985). The circumstantial evidence in this case clearly establishes a genuine issue of material fact.

1. O'Callahan was fired because of his age, not because he was a subpar employee.

4C's, says that the consolidation of 4C's and cayman, and Mr. O'Callahan's performance led to Mr. O'Callahan's termination. This claim contains no merit. First off, all evidence presented by the original plaintiff must be taken as true. This holding was found by Nixon v. Mr. Property Management Co. In this case they said that the movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. In deciding whether there is a disputed material fact issue precluding *549 summary judgment, evidence favorable to the non-movant will be taken as true.

3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. Thus being said, O'Callahan's story of the events before his firing, must be considered as true. 4C's says that before his termination, O'Callahan's performance was subpar, however O'Callahan possesses an incredible job performance. In the year of 2011, he received the rating of Commendable minus, the second highest rating in business. That same year, he also earned a 37,000 dollar bonus. Clearly, O'Callahan was not an underperforming employee. With this in mind, the claim of sublimity, loses credibility. According to O'Callahan's story, the story the trier of fact must adhere to, O' Callahan asked for 18 months to turn the south region around. Also, O'Callahan said that he addressed any problems in his district in a

timely manner. 4C's denies both of these. The fact that O' Callahan was an excellent employee, directly defeats the company's claim.

2. Statements made by 4Cs's President and Vice President, when viewed collectively, are circumstantial evidence of discriminatory intent.

The statements made by 4C's upper management display their discriminatory intent. As discussed in Brown, statements can qualify as evidence, direct or circumstantial. The four points for how statements qualify: Remarks may serve as sufficient evidence of age discrimination in violation of ADEA if offered comments are: (1) age related; (2) proximate in time to terminations; (3) made by individual with authority over employment decision at issue; and (4) related to employment decision at issue. All the statements fit this model. There are other cases such as Jaso v. Travis Co Juvenile that are mentioned in the dissent brief. These cases however only have one statement upon which the plaintiff bases their claim of discrimination. However, in this case, there are a plethora of statements. "That's obvious you're too old," "You are too old for this kind of work, and I think you should consider retiring," isn't getting old a pain?... I sure am glad I am not as old as you guys," "The company needed some young blood around here to create a new image." All of these statements are applicable to the intentions of the employers. One statement that sums up the intentions of the employer is a statement by Ted Arts, the president of 4cs. He says, "I am an avid athlete and believe a sound and strong body is essential to having a successful career, regardless of what career a person chooses." Ted Arts, the head of the company, believes that you have be fit to be successful in business. O'Callahan, age 56, could not hold this vision of youth. 4C's said they fired O'Callahan for his performance, which has been shown to be false. The statements made by Williams and Ted Arts prove 4C's true reasons for the termination of O'callahan's job.

3. 4Cs's attempts to provide non-discriminatory reasons for firing O'Callahan are not to be believed because the President and Vice President lack credibility.

The president and vice president of 4C's, lack credibility. The President and Vice President of 4cs are the only ones who can speak as to the intentions of 4C's. Both Ted Arts and Edward Williams have a questionable background. Ted Arts, was charged with tax evasion by the IRS. His claims were illegitimate. Also, Not only Williams's statements show his disdain for older people, but his actions do as well. In December 2012, Williams was the guardian of his grandfather. His grandfather was injured falling down some stairs, as well as not having his basic needs met. Williams was put on probation for two years. Obviously the Court system did not view William's claims as legitimate, they disregarded them. Ted Arts will do anything for money, and if Williams allowed his grandfather to be injured, what's to say that he has no bias against the elderly. O' Callahan says in his affidavit that the "company would hire younger employees and pay the lower salaries: and the fact that I did not fit the company's new "Youth" Image. O'Callahan believes that the company fired him The background of the two heads of 4C's reveals the true reasons for O'Callahan's termination.

Conclusion: Seeing as how O' Callahan must be given deference, and all facts that he presents must be taken as true, the evidence presented to the court is sufficient to hold a trial. The plethora of statements made by Edward Williams meet the criteria laid out in Turner v. North American Rubber Inc., and, taken collectively, Mr. Williams' and Mr. Arts' statements are circumstantial evidence of discriminatory intent. Also, evidence suggests that O' Callahan was discriminated against because he was not in the "Gold Club" , and adds proof that younger employees at 4C's were given deference. Finally, seeing as how the president and vice president are the only

employers who can answer to O'Callahan's termination, and they both lack credibility, nondiscriminatory reasons made by them should not be believed. The legitimate proof O'Callahan has to offer must be given more attention than the biased opinions of Mr. Williams and Mr. Arts.

Prayer: For the reasons, your honors, we pray that you find in favor of the Respondent and uphold the decision of the court of appeals.

Graham Wolfe

Adelaide Zink

Fort Worth Benbrook YMCA

Christian Life Preparatory School

Signed: Graham Wolfe

Signed: Adelaide Zink

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

Vs.

JAMES O'CALLAHAN

Respondent

On Appeal From

The 15th Court of Appeals

Brief for Petitioner

Shishira Bhavimane

Jana Peoples

Keller High School

Statement of the Case

James O'Callahan, the employee, sued the Continental Catering Consolidated Company, the employer under the claim that he was wrongfully terminated and the company violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 et seq.

Statement of the Facts

James O'Callahan, 56 years old, was a valued employee for 27 years at the 4C's. When the company underwent restructuring and O'Callahan's performance reviews dropped significantly, he was let go and replaced by 40 years old, Ted Finell.

Argument

The petitioner believes that there were two points of error made when reversing summary judgement. The first is that the statements made by Edward Williams did not serve as direct evidence of age discrimination. The second point of error was that other comments did not add up to be enough circumstantial evidence to provide a pretext for discrimination.

Point of Error 1

The purpose of summary judgement is to permit a trial court to promptly dispose of cases that involve unmeritorious claims or untenable defences (City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979)). The case presented by James O'Callahan had no rightful claim of discrimination because it failed to meet a series of requirements needed to deny summary judgement. The 4C's is required to show there was no genuine issue of material fact (Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 509 (Tex. 1995)). It is the court's duty to determine if material fact

exists (Huckabee v. Time Warner Entertainment Co., 19 S.W.3d 413, 421-22 (Tex. 2000)). If direct evidence is provided, then the court must deny summary judgment and have a trial on the merits (TransWorld Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)). In this case, O'Callahan has not provided sufficient direct evidence. The four prongs needed in order for evidence to classify are as follows: (1) related to the protected class at issue, (2) proximate in time to employment decisions, (3) made by a person with authority over the employment decisions in question, (4) related to the employment decisions at issue (Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996); Heim v. State of Utah, 8 F. 3d 1541 (16th Cir. 1993)). O'Callahan argued that the following comments should classify as direct evidence:

1) O'Callahan mentioned that he would not be able to play 18 consecutive days of golf. Mr. Edward Williams, the vice-president of the company, replied, "That's obvious, you're too damn old." He then continued to say that O'Callahan might be in better shape if he started to work out. This does not amount to direct evidence because it does not meet the four prongs set by Brown. While this comment was related to the protected class at issue, this was not proximate in time to the decision to terminate Mr. O'Callahan. There was no mention of any time when this comment was made. It was also not made by a person with any authority over the employment decision. Ted Arts, the president of the company, had the final say in the decision to firing Mr. O'Callahan. The statements were made by Edward Williams, who did not make the decision; therefore, did not have authority making these comments unqualified to be direct evidence. Finally, this comment does not meet the fourth prong because

the comment about not being in well enough shape to play golf has nothing to do with Mr. O'Callahan being fired.

2) Williams came into O'Callahan's office and said, "O'Callahan, you are too damn old for this kind of work and I think you should consider retiring." This too does not qualify to be direct evidence because it does not meet the requirements set by Brown. The first prong was the only prong that was met: this was related to the protected class at issue. There was, again, no mention of any time when this occurred, making this not proximate in time to the employment decision. This comment was not made by a person with authority over the decision and it was not related to the employment decision at hand. When Williams said this, he did not explicitly say that age was a factor in the decision to fire O'Callahan. This comment was regarding age and retirement, not age and termination. It is a fact that when one comes to a certain age, one should consider retiring. Mr. Williams was simply stating his concern for O'Callahan because he was doing laborious work at an old age, which could possibly impact his health. Although there was no discrimination in this comment, if the court sees that there is, it still does not qualify as direct evidence because Mr. Williams had no authority in the decision. It does not matter whether this comment was discriminatory or not because ultimately, the opinion of Williams had no effect on the decision to fire Mr. O'Callahan.

3) When someone mentioned that O'Callahan's 57th birthday was coming up, Williams replied, "Isn't getting old a pain? … I sure am glad I am not as old as you guys." This does not meet the requirements set by Brown to be classified as direct evidence. Although this was related to the protected class, it was not proximate in time to the termination of O'Callahan. Mr. Williams had no

authority over the decision so this comment did not change or show the decision to terminate O'Callahan. This comment was not related to the employment decision at issue. Mr. Williams was simply stating his desire to stay young, something that most people wish for. Mr. Williams did not relate the issue of termination and getting older.

4) When Mr. Williams was asked why Mr. O'Callahan was fired, he responded, "the company needed some young blood around here to create a new image." While this was related to the employment decision and proximate in time, Mr. Williams had no authority over the decision, which implies that he did not know the true reason, for he had not made the decision. Ted Arts would be the only person to know why O'Callahan was fired. This comment was also not related to the protected class at issue. When Williams said "the company needed young blood," he was not referring to age. He was referring to the number of years worked at the company. The fact that he talked about creating "a new image" supports that idea because it shows that O'Callahan was not fired because of his age. It shows that the company no longer wanted a certain image and O'Callahan, being stuck to the old image, would not be able to adapt to the company's changes.

These comments had multiple prongs that were not met to be classified as direct evidence under Brown. They were all said my Williams, who had no authority over the decision, so none should be direct evidence. According to TransWorld Airlines, because no direct evidence was provided, summary judgement does not have to immediately be denied. Since there was no direct evidence, the court must switch to the "burden-shifting analysis" set forth by multiple cases (St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); McDonnell-

Douglas Corp. v. Green, 411 U.S. 792 (1973); Price v. Marathon Cheese Corp., 119 F.3d 330, 336-37 (5 Ih Cir. 1997); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 992 (5th Cir. 1996)). This analysis was created because finding direct evidence to support discrimination is very challenging. The concept of it is that the burden of proof shifts from O'Callahan to the 4C's rather than 100% of the burden of proof being on O'Callahan. The analysis is as follows: (1) employee must establish a prima facie case, (2) employer must provide a legitimate, non-discriminatory reason for termination, (3) circumstantial evidence that reasons offered by employer were a mere pretext for discrimination. In order for the burden to shift, the burden of proof must first be met. Because there was no direct evidence, the court must move to the burden- shifting analysis by Brown and McDonell-Douglas. First, the employer, O'Callahan, must establish a prima facie case. The requirements for establishing a prima facie case were set by McDonell-Douglas and are as follows: (1) employee must be 40 years of age or above, (2) employee must be qualified for the position, (3) employee must be subjected to an adverse employment decision, (4) either replaced by someone outside the protected class, younger, or discharged based solely on age. Mr. O'Callahan was 40 years of age, subjected to an adverse employment decision, and replaced by someone younger, but he was not qualified for the position. While he received a performance review that was stellar, it was given one year before termination. That means that it had virtually no impact on the decision at hand. In the year following that review, he had significantly dropped in performance. He made the company lose a lot of money, failed to keep his promise to make the southern branch of the 4C's profitable, made many careless mistakes with delivery, and failed to fix those mistakes effectively.

These things add up to Mr. O'Callahan not being qualified to hold the position. This shows that a prima facie case has not been established by O'Callahan; therefore, according to McDonell-Douglas, the burden does not shift to the employer and the court must rant summary judgement. The case should end here because the employee has not met their burden of proof, but if the court finds that a prima facie case was established, then the burden of proof shifts to the employer to provide a legitimate, non-discriminatory reason for the termination of O'Callahan. There are multiple reasons why Mr. O'Callahan was fired, all of which have nothing to do with his age. First, the company was undergoing restructuring, eliminating Mr. O'Callahan's position. The revised position was filled by a more qualified employee, Ted Finell. Since there was no position to put Mr. O'Callahan in, he was let go. Another reason he was terminated was that he was not doing well in the position he already had. He made many mistakes and was slow in fixing them. There was not a single mistake that could have been forgiven. These mistakes were occurring much too frequently. O'Callahan had done well for 26 years of working there, which had been recognized by the company, but he was fired when his performance started to decline exponentially. Now that the we have met our burden of proof of providing multiple non-discriminatory reasons for termination, the burden shifts back to the employee to provide circumstantial evidence that shows a pretext for discrimination.

Point of Error 2

The second point of error that the court made in reversing the summary judgement was that the circumstantial evidence provided was not sufficient enough to be a pretext for discrimination. Comments suggesting a bias towards

the protected class can be used to demonstrate pretext (Ramirez v. Allright Parking El Paso Inc., 970 F.2d 1372, 1378 (5th Cir. 1992); Chacko v. Texas A&M Univ., 960 F. Supp. 1180, 1191-92 (S.D. Tex. 1997), affd, 149 F.3d 1175 (5th Cir. 1998)). By McDonell-Douglas, the burden has shifted back to the employee to provide circumstantial evidence to show pretext for discrimination. With the comments made by Williams, there was no bias against the protected class. These comments showed that Mr. Williams enjoys being young and active and does not look forward to the pain of getting older. That does not show that Williams has a bias towards the protected class. It merely shows that Mr. Williams, like most others including members of the protected class, wants to stay young for as long as possible. Similar comments were made in Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993) and Jaso v. Travis Co. Juvenile Board, 6 S.W.3d 324 (Tex. App.--Austin 1999, no writ) and the court regarded those comments as stray; therefore, the court should uphold the precedent set by these cases and regard Mr. William's comments as stray as well. These comments added up do not show any discriminatory intent against O'Callahan on the basis of age. O'Callahan believes that the reasons provided by the employer for his discrimination were not legitimate because he was an outstanding employee a year before he was terminated. Performance reviews from a year ago do not have any impact on the termination of an employee in the present. While O'Callahan's performance was applauded when it was good, when it is suffering, the natural response is to fire the person who is not doing well right now instead of basing the decision off of how well the employee was doing a year ago. Mr. O'Callahan has provided inadequate circumstantial evidence that shows a pretext for discrimination, but there is also lots of

circumstantial evidence that shows that Mr. O'Callahan was not discriminated against. When O'Callahan was 55 years old, only a year younger than he was when he was fired, he was given a $30,000 bonus for his hard work. If the company was so biased against elderly people, then they would not have given O'Callahan the largest bonus given in the history of the company. O'Callahan has not met his burden of proof of providing circumstantial evidence that shows pretext for discrimination; therefore; summary judgement should be granted.

Conclusion

O'Callahan was not able to meet any burden of proof and failed to provide direct evidence; therefore, the court should grant summary judgement.

Prayer

We pray that the court rule in favour of the 4C's and uphold the original judgement of the trial court.

Respectfully submitted,

Shishira Bhavimane
Jana Peoples
Attorneys for Petitioner

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

Vs.

JAMES O'CALLAHAN

Respondent

On Appeal From

The 15th Court of Appeals

Brief for Respondent

Shishira Bhavimane

Jana Peoples

Keller High School

Statement of the Case

James O'Callahan, the employee, sued the Continental Catering Consolidated Company, the employer under the claim that he was wrongfully terminated and the company violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 et seq.

Statement of the Facts

James O'Callahan, 56 years old, was a valued employee for 27 years at the 4C's. When the company underwent restructuring and O'Callahan's performance reviews dropped significantly, he was let go and replaced by 40 years old, Ted Finell.

Argument

There were two points of errors in the original judgement by the trial court to grant summary judgement. There are that there was a genuine material issue of fact and that there was circumstantial evidence that showed a pretext for discrimination.

Point of Error 1

The purpose of summary judgement is to permit a trial court to promptly dispose of cases that involve unmeritorious claims or untenable defences (City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979)). The case presented by James O'Callahan does have a genuine issue of material fact and should not be a dismissed. O'Callahan is only required to show there was a genuine issue of material fact (Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 509 (Tex. 1995)). It is the court's duty to determine if material fact exists (Huckabee v. Time Warner Entertainment Co., 19 S.W.3d 413, 421-22 (Tex. 2000)). If direct evidence of discrimination is provided, then the court must immediately deny summary judgement

and a trial on the merits must be done (TransWorld Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)). All evidence must be looked upon in favor of the employee (Nixon v. Mr. Property Mgmt. Co., 690 S.W.2d 548, 549 (Tex. 1985)). In order to be classified as direct evidence, the evidence must meet 4 prongs: (1) related to the protected class at issue, (2) proximate in time to employment decisions, (3) made by a person with authority over the employment decisions in question, (4) related to the employment decisions at issue (Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996); Heim v. State of Utah, 8 F. 3d 1541 (16th Cir. 1993)). There are multiple statements made by Mr. Edward Williams, the vice president of the company, that are direct evidence that shows discrimination on the basis of age. They are as follows:

(1) Williams came into O'Callahan's office and said, "O'Callahan, you are too damn old for this kind of work and I think you should consider retiring." This qualifies as direct evidence because it meets all four prongs. It is related to the protected class at issue because it deals with retiring at an old age. It is proximate in time because the comment was made when Mr. O'Callahan was at an older age. If comment was made at an earlier time, it only shows that if Williams thought O'Callahan should have retired then, then he is more inclined to believe that he should retire now stronger than before. This was made by a person with authority over the decision because while Williams did not have the final say, it is unreasonable to think that the vice president of the company and the supervisor of the person getting fired had no input in the decision. Also, comments made by an employer's representative can be used to demonstrate pretext (Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996); Heim v. State of Utah, 8 F. 3d 1541 (16th Cir. 1993)). The vice president of the

company, Williams, can definitely be seen as a representative of the company. The fourth prong was also met because this was related to the employment decision at hand. When Williams implied that O'Callahan should not be working there because he is too old, that directly shows that he was being discriminatory based on age.

(2) When Mr. Williams was asked why Mr. O'Callahan was fired, he responded, "the company needed some young blood around here to create a new image." This comment should also be classified as direct evidence because it too meets the requirements set by Brown. It is related to the protected class because it deals with the termination of an employee within the protected class. It is proximate in time because the statement was made a short time after O'Callahan was terminated. It is made by a person with authority over the decision because William is a representative of the company as stated in Brown. It is also related to the employment decision at hand because he is directly answering the question why O'Callahan was fired.

Both of these comments meet all of the required elements to be classified as direct evidence. Under TransWorld Airlines, the case should end here and immediately go to a trial on the merits. If the court decides that the evidence is not sufficient enough to be direct, then the court must switch to a "burden-shifting analysis" that shifts the burden of proof from the employee to the employer in order to give a fair chance to the employee (St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Price v. Marathon Cheese Corp., 119 F.3d 330, 336-37 (5 Ih Cir. 1997); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 992 (5th Cir. 1996)). This analysis was created because finding direct evidence to support

discrimination is very challenging. The concept of it is that the burden of proof shifts from O'Callahan to the 4C's rather than 100% of the burden of proof being on O'Callahan. The analysis is as follows: (1) employee must establish a prima facie case, (2) employer must provide a legitimate, non-discriminatory reason for termination, (3) circumstantial evidence that reasons offered by employer were a mere pretext for discrimination. This analysis is only needed when direct evidence is not provided by TransWorld Airlines. We have provided multiple examples of direct evidence so summary judgement should be denied, but we will provide our burden of proof if the court decided that the evidence does not classify as direct. The burden of proof starts with us proving that we have established a prima facie case for O'Callahan. O'Callahan meets all four requirements to establish a prima facie case. He is 56 years of age so he is in the protected class. He received many high-performance reviews, a $30,000 bonus for all of his great work, and he was a loyal employee for 26 years. All of this shows that he was qualified for the position. Although he made a few minor mistakes, none of those affected his ability to do the job. Lastly, he was replaced by Ted Finell, a 40-year-old, making O'Callahan replaced by someone younger. This shows that O'Callahan has provided all of the requirements to establish a prima facie case. Now, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for the termination of O'Callahan. The reasons provided were that the company underwent restructuring and that O'Callahan did not perform well enough to keep his job. These reasons are not legitimate reasons and were only said to avoid a lawsuit. It is true that the company underwent restructuring, but there was a total of three people who that affected (James O'Callahan, Ted Finell, Mike Kiser). If the position was

eliminated resulting in the termination of O'Callahan, then why was O'Callahan the only person who was fired of the three of them? The restructuring was just an excuse to fire O'Callahan because he was too old. That does not imply that the reason the company was restructured was to fire O'Callahan. It simply means that with the restructuring of the company, they saw a way to terminate O'Callahan. Mr. O'Callahan was a very good employee. He had turned the northern region of the 4C's to very profitable and was on his way to doing the same thing for the southern region, but was fired. The few minor mistakes do not add up to a legitimate reason to put a man out of a job. Because the employer was not able to articulate a legitimate, non-discriminatory reason for firing O'Callahan, the court must deny summary judgement and do a trial on the merits. While the employer did not meet their burden of proof and summary judgement should be denied, if the court decides that the employer provided a legitimate, non-discriminatory reason for the termination of O'Callahan, then the burden of proof shifts back to O'Callahan to provide circumstantial evidence that demonstrates a pretext for discrimination.

Point of Error 2

Now that the burden has shifted back to the employee, O'Callahan must provide circumstantial evidence that demonstrates a pretext for discrimination. The comments made by Williams show that he is biased towards the protected class. Comments suggesting a bias toward the protected class can be used to demonstrate a pretext for discrimination (See Ramirez v. Allright Parking El Paso Inc., 970 F.2d 1372, 1378 (5th Cir. 1992); Chacko v. Texas A&M Univ., 960 F. Supp. 1180, 1191-92 (S.D. Tex. 1997), affd, 149 F.3d 1175 (5th Cir. 1998)). Mr. William, a representative of the company, showed multiple times that he

does not believe that elderly people are fit to work efficiently. That proves that the reasons provided by the company were simply a pretext for discrimination.

The company had shown hatred to those of the protected class to multiple employees including Philip Dennis and Allison Young. These shows a reoccurring pattern of discrimination towards the protected class. If the court rules in favor of the company, then the precedent set will show the country that companies can get away with firing an employee just because of age, throwing away the American mindset that hard work defines who you are and what you do.

Conclusion

Because direct evidence was provided, the court should immediately deny summary judgement, but even with the use of the burden shifting analysis, we have demonstrated a genuine issue of material fact.

Prayer

We pray that the court finds in favor of O'Callahan and reverses the summary judgement of the initial trial court.

Respectfully submitted,

Shishira Bhavimane

Jana Peoples
Attorneys for Petitioner

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2016

Consolidated Continental Catering Company,

Appellant

v.

James O'Callahan,

Appellee

On Appeal from The 15th Court of Appeals -

Brief for Appellant

Simon Pena

Joanna Boyer

Creekview High School

Introduction

James O'Callahan is a former employee of Continental Catering Consolidated Company or 4C's. Mr. O'Callahan was terminated from his position after a consolidation of 4C's south Carolina territories. Mr. O'Callahan sued contending that 4C's terminated him for his age therefore violating the Age Discrimination in Employment Act or ADEA. The 222nd District Court of Travis County Texas granted summary judgement in favor of 4C's.

Statement of the Case

Appellee was seen before the 222nd District Court of Travis County, Texas which granted summary judgement in favor of 4C's. Appellee appealed to the Court of Appeals for the 15th District of the State of Texas which reversed the decision of the District Court. 4C's has now appealed to the Supreme Court of the State of Texas which has granted Certiorari to hear oral arguments on the issues presented.

Statement of the Facts

James O'Callahan, the appellee in the case before the court is a former employee of Continental Catering Consolidated Company or 4C's. Mr. O'Callahan was employed by 4C's for 22 years from 1990 to his termination on August 9, 2012. Mr. O'Callahan was 56 years old at the time of his termination from 4C's. Mr. O'Callahan was the General Manager of "4C's North" a region of 4C's. Under Mr. O'Callahan's management these regions showed a marked increase in customer satisfaction, and profit as well as other factors. However, after requesting to be moved to a less profitable region Mr. O'Callaghan's performance in his management duties dropped significantly, and he was unable to make this new region profitable in a timely manner. Because of this drop Mr. O'Callahan's regions were reduced, eventually becoming a factor is his termination.

Mr. O'Callahan sites multiple sources to prove that he was a victim of age related discrimination including statements from relatives, and one co-worker who was fired for stealing money from the company.

Mr. O'Callahan has appealed to this court under two points of error.

Point of Error 1: The district court has not erred in entering summary judgement as the evidence does not raise a genuine issue of material fact concerning any direct evidence of age-related discrimination as James O'Callahan alleges.

The *Age Discrimination in Employment Act*, or *ADEA*, provides that "it shall be unlawful for an employer to discharge any individual because of such individual's age." and there are two kinds of discrimination that the *ADEA* protects against; direct discrimination and circumstantial discrimination. In order to qualify as direct discrimination *Brown v. CSC Logic Incorporated* requires that the comments used to prove the existence of direct discrimination be: 1). Related to the protected class at issue 2). Proximate in time to the employment decisions or alleged discrimination at issue 3). Made by a person with authority over the employment decisions in question, and 4). Related to the employment decision at issue

When the evidence presented is "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgement might reach different conclusions" than discrimination the court should not grant a motion for judgement as a matter of law. *Boeing Company v. Shipman.*

The evidence presented in this case, even when viewed in favor of Mr. O'Callahan, is persuasive enough for a fair-minded man to reach a conclusion besides discrimination because the statements presented do not meet the requirements imposed by the *Brown supra*. The remarks as issue were made by Mr. Williams, and

include "that's obvious, you're too damn old," "Mr. O'Callahan you're too damn old for this kind of work and I think you should consider retiring," "Jim was getting old," "the company needed some young blood around here to create a new image," and finally "isn't getting old a pain? Im glad im not as old as you guys."

Beginning with the first prong, the statements are not related to the protected class spelled out in the ADEA which protects employees from being discriminated against because of their age. However in the case before the court today the statements made are merely general comments made in response to comments made by others, which does not constitute discrimination because "Stray" or "Derogatory remarks" do not constitute direct discrimination "if such remarks are isolated and ambiguous statements that are too abstract, in addition to being irrelevant and prejudicial" *Jaso v. Travis County Juvenile Board* ;*Gagne v. Northwest.* Mr. Williams comments "isn't getting old a pain? I'm glad I'm not as old as you guys." and "that's obvious, you're too damn old" were made in response to comments made by Mr. O'Callahan's and his coworker and ha nothing to do with Mr. O'Callahan's performance or position at work.

Those statements and others brought up by the appellee like "Mr. O'Callahan you're too damn old for this kind of work and I think you should consider retiring," and "that's obvious, you're too damn old" were not made proximate in time to the employment decision because the appellee can provide no specific date for when those comments were made. Furthermore if this court finds that the broad classifications of "mid-June" and "sometime in July" are specific enough to consider, they were made more than a month prior to the employment decision at issue, well before the company began to even consider consolidation.

None of the statements were made by a person with authority over the employment decisions in question. Mr. Williams, the vice president of 4C's, was the only one that made the statements at issue and he does not have the authority required to make the employment decision. While he was the manager of Mr . O'Callahan at the time of his dismissal it was Mr. Arts, the president of 4C's, that made the decision to consolidate the companies and to make Mr. O'Callahan "not a contender for the consolidated management jobs" which makes him the person in authority for this employment decision, not Mr. Williams who merely carried it out.

Finally, "Unless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of a discriminatory discharge." *McCarthy v. Kemper Life Insurance*. However, the remarks were not related to the employment decision because the decision was made in response to Mr. O'Callahan's failure to handle an increased territories, making them unprofitable, and his slow responses to individual issues such as the unrefrigerated trucks. None of the statements made near the time of the dismissal indicated that his supervisors believed these failures were because of his age. The statements provided by the Appellee fails to meet the requirements imposed by the *Brown supra* because they were stray remarks made well before the employment decision, by someone who was not a person of authority, and are not related to the actual employment decision there is no direct evidence of discrimination.

Point of Error 2: The district court has not erred in entering summary judgement as it was presented with legally sufficient circumstantial evidence to support Mr. O'callaghan's contention that the stated reasons for his termination were a pretext for age-related discrimination under the ADEA.

In determining the presence or absence of age related discrimination one must look to the burden shifting analysis set forth in *St. Mary's Honor Center v. Hicks* *McDonnell-Douglas Corp. v. Green* and *Trans World Airlines Inc. v. Thurston* this test has three portions First, the employee must establish a *prima facie* case which essentially determines if there is any type of legitimate contention under the age discrimination in employment act. To determine a *prima facie* case the employee must prove four things We do not contest prongs 1 and 2 of this section; however, Mr. O'Callahan does not meet prongs 3 and 4. Beginning with prong 3, this requires that "at the time of discharge or demotion, he or she was performing his or her job at a level that met his or her employer's legitimate expectations." it is a reasonable expectation of an employer to have an employee do what they said they would do. According to Mr. Williams, Mr. O'Callahan stated that he could turn the 4C's South region around in "no time" and despite Mr. Williams objections insisted that "All [the region] needed… was a good General Manager at the helm…" and that "he was the man." However, Mr. O'Callahan was unable to turn the region around in "no time" as he said he was able to. 4C's south remained a non-profitable region, and in fact after Mr. O'Callahan was installed in this new position more problems arose; such as customer complaints, and missing trucks. Mr. O'Callahan's utter failure in turning the region around like he said he was able to is most certainly a violation of a reasonable employers expectation.

Even if Mr. O'Callahan was terminated because of an unreasonable employer's expectation, Mr. O'Callahan still does not meet the fourth prong, which states That following his or her discharge or demotion he or she was replaced by someone of comparable qualifications who is younger. And as he was not replaced, but rather the position he held was terminated through the consolidation process that 4C's went

under. The memo's sent by Mr. Williams to All Employees clearly show three managers on January 10th, 2012 and January 3rd, 2012 but only two managers in August of 2012. Mr. Williams terminated a position, which then caused the weakest link in the chain of General Managers to be eliminated.

Therefore, Mr. O'Callahan does not even satisfy the four pronged test required to move into the second prong of the burden shifting analysis.

Moving to the second section. The burden shifts from the Individual to the company who then must offer some other possible reason for termination. Mr. Williams and Mr. Arts both state that it was due to Mr. O'Callahan's decrease in performance from "commendable minus" to "Competent minus" which by Mr. O'Callahan's own account is a significant decrease.

Therefore if Mr. O'Callahan does satisfy the first section of the burden shifting analysis, and shifts the burden onto us, we contend that we have satisfied the second section of the burden shifting analysis, and shift the burden back to Mr. O'Callahan.

Moving on, the last section of the burden shifting analysis states that the individual must "then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination" It was stated in *Texas Department of Community Affairs v. Burdine* that there are two ways a plaintiff may prove that the stated factors for termination were a pretext for intentional age related discrimination. 1. "Directly by persuading the court that a discriminatory reason more likely motivated the employer" or 2. "Indirectly by showing that the employer's explanation is unworthy of credence" .

Beginning with the first means of proving this Mr. O'Callahan has been unable to prove that a discriminatory reason more likely motivated Mr. Williams and Mr. Arts. It

is evident when looking at the statements made by Mr. Williams and Mr. Arts that there was no discriminatory reason for terminating Mr. O'Callahan's position at 4C's. Williams and Mr. Arts both stated that the reason for the termination of Mr. O'Callahan was because despite his previous statements he was unable to keep up with the workload required by the increase in territories given to him by Mr. Williams at his insistence. They show this by citing the multiple phone calls received from customers complaining of Mr. O'Callahan's performance, and an incident with a delivery truck that was not dealt with by Mr. O'Callahan.

Therefore, Mr. O'Callahan fails to prove that a discriminatory reason more than likely influence the termination of his position at 4C's.

Further, Mr. O'Callahan also fails to show that his termination is a pretext for age related discrimination indirectly by showing that the explanation holds no credence. Mr. O'Callahan himself speaks of the incidents in his affidavit that Mr. Arts and Mr. Williams cite as the reasons for termination. If these reasons are confirmed by Mr. O'Callahan himself, there is no rational way that he may be able to prove that the explanation holds no credence.

Therefore, Mr. O'Callahan does not meet the burden of persuasion required by the last prong of the burden shifting analysis set forth in *St. Mary's supra. McDonnell-Douglas supra.* and *Trans World Airlines supra.* and even if he does The factfinder is not required to find in favor of Mr. O'Callahan simply because he establishes a *prima facie* case and shows that the employer's proffered reasons are false. The position of Mr. O'Callahan in this instance is analogous to the situation of the plaintiff in *Anderson v. Baxter* where a court held that even if the proffered reason was false, the termination of the employee still further a non-discriminatory purpose. In that case it was cutting wages, and in this case it is increasing customer satisfaction.

Mr. O'Callahan has the burden to first establish a *prima facie* case, which he fails to do, as multiple prongs under that test are not met by the facts presented, then the burden shifts to 4C's who must provide some other explanation for the termination of Mr. O'Callahan's position to which we presented that the reason for the termination of Mr. O'Callahan's position

Conclusion

We have shown today that the trial court did not commit reversible error by granting summary judgement because the evidence presented before the court does not raise a genuine issue of material fact concerning direct evidence of discrimination and because there is no circumstantial evidence that shows that the reasons for Mr. O'Callahan's dismissal as stated by 4C's were merely a pretext for age related discrimination. Employment discrimination laws are "not intended to be a vehicle for judicial second-guessing of employment decisions nor to transform the courts into personal managers" *EEOC v. Louisiana Office of Community Services.*

Prayer

It is for these reasons that we pray that this court not act as personal managers by second guessing the employment decisions of 4C's by ruling in favor of Consolidated Continental Catering Company, the appellant in today's case, and reversing the decision of the lower court

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2016

Consolidated Continental Catering Company,

Appellant

v.

James O'Callahan,

Appellee

On Appeal from The 15th Court of Appeals -

Brief for Appellee

Simon Pena

Joanna Boyer

Creekview High School

Introduction

James O'Callahan is a former employee of Continental Catering Consolidated Company or 4C's. Mr. O'Callahan was terminated from his position after a consolidation of 4C's South Carolina territories. Mr. O'Callahan sued with the contention that 4C's terminated him for his age, therefore, violating the Age Discrimination in Employment Act or ADEA. The 222nd District Court of Travis County Texas granted summary judgment in favor of 4C's.

Statement of the Case

Appellee was seen before the 222nd District Court of Travis County, Texas which granted summary judgment in favor of 4C's. Appellee appealed to the Court of Appeals for the 15th District of the State of Texas which reversed the decision of the District Court. 4C's has now appealed to the Supreme Court of the State of Texas which has granted Certiorari to hear oral arguments on the issues presented.

Statement of the Facts

James O'Callahan, the appellee before the court today, is a former employee of the consolidated continental catering company and worked for that company for 22 years, from 1990 to 2012, during which he turned 56 years old. From 1990 to 2011 he was the general manager of the North Carolina branch and Mr. Williams, his supervisor, and vice president, stated that there was a significant improvement in its financial performance because of O'Callahan's management and awarded O'Callahan a commendable minus, the second highest evaluation rating available, and an incentive bonus of $37,000 for his hard work. In December 2011 Mr.Williams offered to transfer him to the southern region which had not been performing well under the management

of Mike Keiser, one of the managers chosen to manage one of the two regions after the consolidation. O'Callahan agreed to the transfer and estimated that it would take eighteen months to make his new religion profitable. Before this time period had passed Mr. Williams transferred a portion of O'Callahan's territory to the northern region without telling him an official reason, though rumors state that the reason was the mishandling of certain problems within the region, problems that Mr.. Williams said did not identify to O'Callahan. In mid to late July Mr. Williams approached O'Callahan recommending that he retire because he was "too damn old for this kind of work." Later that same month Mr. Williams received the order from the company president, Ted Arts, to consolidate the North and South Carolina operations. Two days before O'Callahan was terminated Mr.Williams made another derogatory remark about the age of O'Callahan by saying that "isn't getting old a pain…I am sure glad I am not as old as you guys." On August 9th, 2012 James O'Callahan who was 56 years old, was terminated.

Mr. O'Callahan sites multiple sources to prove that he was a victim of age-related discrimination including statements from relatives, and one co-worker who was fired for stealing money from the company.

Mr. O'Callahan has appealed to this court under two points of error.

Point of Error 1: Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan

The Age Discrimination in Employment Act, or ADEA, provides that "it shall be unlawful for an employer to discharge any individual because of such individual's age."

and there are two kinds of discrimination that the ADEA protects against; direct discrimination and circumstantial discrimination. When determining whether either of these kinds of discrimination exists *Nixon v. Mr. Property Management* held that "All evidence favorable to the appellee as the non-movant, must be taken as true ad all reasonable inferences are to be indulged in his favor".

Comments made by an employer's representative can, in certain circumstances, provide direct evidence of discrimination *Brown v. CSC logic* incorporated; *Heim v. state of Utah*.

In order to qualify as direct discrimination *Brown v. CSC Logic Incorporated* requires the comments provided by Mr. O'Callahan be: 1). Related to the protected class at issue 2). Proximate in time to the employment decisions or alleged discrimination at issue 3). Made by a person with authority over the employment decisions in question 4). Related to the employment decision at issue

The remarks at issue were made by Mr. Williams, the vice president of continental catering consolidated company, and include "that's obvious, you're too damn old," "Mr. O'Callahan you're too damn old for this kind of work and I think you should consider retiring," and in response to the question why Mr. O'Callahan was fired Mr. Williams replied that "Jim was getting old" and that "the company needed some young blood around here to create a new image."

Beginning with the first prong, the protected class at issue before the court today was created by the Age Discrimination in Employment Act, or ADEA provides that "it shall be unlawful for an employer to discharge any individual because of such individual's age." In doing so the ADEA has defined the age of an employee as a

protected class. The statements made by Mr. Williams is related to this protected class because they specifically single out not only the ages of the employees as a whole but several instances single out Mr. O'Callahan age for derogatory remarks and discrimination, including Mr. Williams remark that Mr. O'Callahan was "too damn old" and "should consider retiring."

Such remarks were also proximate in time to the discriminatory employment decision because Mr. Williams remark that Mr. O'Callahan was"too damn old" to be a sale manager and should "consider retiring" was made a month before Mr. O'Callahan was fired; the reason given to Mrs. Young for Callaghan's dismissal was made one day prior to the dismissal in which Mr. Williams said that "the company needed some young blood around here to create a new image"; Finally, Mr. Denis confronted Mr. Williams as to why Mr. O'Callahan was fired a day after his dismissal and Mr. Williams responded that "Jim was getting old." with discriminatory remarks ranging from a month prior to the days before and after, it is clear that they were proximate in time to the decision to fire O'Callahan.

The statements were made by a person with authority over the employment decisions because Mr. Williams was not only vice president and Mr. O'Callahan's supervisor, he was also the person in charge of the consolidation. That authority was given to him by the highest authority in the company, Mr. Arts the president, who gave Mr. Williams the sole discretion on how to rearrange the companies.

The remarks are related to the discriminatory employment issue at hand. Brown vs CSC logic held that remarks were discriminatory if they were directed at the plaintiff, clearly age-related, and made in a close time to the employment decision. The statements are directed towards Mr. O'Callahan because the discriminatory

statements mention Mr. O'Callahan by name or were created in response to the question of why he was getting fired. Each statement also spoke about Mr. O'Callahan's age; one even going so far as saying that O'Callahan was "too damn old" which leave no doubt that the statements are age-related. Many of these statements, as previously addressed, were made within a day of Mr. O'Callahan's dismissal and they were all made within two months of that decision which shows that the statements wear made near the time of his termination. These statements go beyond the mere stray comments allowed in cases like *Jaso v. Travis* county juvenile board and *Price v. Marathon Cheese Corporation* because they are multiple accounts of the supervisor referring specifically to O'Callahan's age in a derogatory manner, and for two instances as a reason for his dismissal.

Because the statements made by Mr. Williams are related to the protected class at issue, proximate in time to the discriminatory employment decisions, made by a person with authority over the employment decisions in question, and related to the employment decision at issue, they do qualify as direct evidence of discrimination.

Point of Error 2: Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination

It is evident that when looking at the evidence presented in the light most favorable to Mr. O'callaghan, as is required by multiple precedents, that the stated reasons for O'Callahan's termination were simply a pretext to disguise age-related discrimination.

The purpose of the Age DEA to protect average and even below-average workers against being treated more harshly than than would be the case if they were inside of a different age group but it has difficulty achieving this goal because it is easy to concoct a plausible reason for firing a worker who is not superlative *Riordan v. Kempiners*. For this reason, the task of the fact finder is to sort through various pieces of circumstantial evidence from which a discriminatory motive may be inferred. In this instance, the fact finder's disbelief of the reasons put forward by the defendant may, together with the elements of the prima facie case, suffice to show intentional discrimination *Rhodes Island v. Guiberson Oil Tools*

Neither side in the case before the court contests the existence of a prima facie case which is the first requirement that we must prove according to the burden-shifting analysis set forth in *St. Mary's Honor Center v. Hicks McDonnell-Douglas Corp. v. Green and Trans World Airlines Inc. v. Thurston*. This burden-shifting analysis requires that the plaintiff (O'Callahan) prove first that a prima facie case exists. This section serves to essentially show that the petition is filed is valid and that the protections of the ADEA apply to the plaintiff. From there the burden shifts to the defense (4C's) to offer some other viable reason for the employee's termination. To this effect, the Appellee has offered that Mr. O'Callahan's performance in the new section dropped significantly. From there the burden of persuasion passes back to the plaintiff in showing that the reasons offered by the company are merely a pretext for age-related discrimination. There are two ways to show this, directly and indirectly.

Beginning with the direct approach, it was stated in *Texas Department of Community Affairs v. Burdine* that a plaintiff can prove this "directly by persuading the court that a discriminatory reason more likely motivated the employer." The primary

reason for Mr. Callahan's termination was his age. We have already shown that Mr. Williams was biased in his treatment of younger employees that exercised with him. There have been accounts by Mr. Williams personal assistant that he asked for employees birthdays for no apparent reason, as the policy that he mentioned were being instated were never mentioned again. As well as accounts by multiple employees expressing their feeling that they were or are being discriminated against for their age.

These accounts show at the very least, that it is reasonable to find that there is some evidence of age-related discrimination. However, should this court find that we have not shown that a discriminatory reason for Mr. O'Callahan's termination, the court may still rule in favor of the appellee on this issue, as Mr. O'Callahan's situation does satisfy the second way that we might prove that the reasons are merely a pretext.

The second way that we can show this "indirectly by showing that the employer's explanation is unworthy of credence." This is shown through multiple reviews that Mr. O'Callahan received from Mr. Williams during the course of his employment, such as "Competent minus" and "Commendable minus." The reasoning that was stated by Mr. Williams and Mr. Arts was that Mr. O'Callahan had not met expectations in his job, however if the score of "Competent minus" is not acceptable, then the men that had replaced Mr. O'Callahan would not be working at 4C's either, as they had received scores of "Competent plus" as well. Again, the purpose of this act is to protect any employee from age-related discrimination. If the rankings stated are true, which we must assume they are as we must view the evidence in the light most favorable to the plaintiff as stated in Nixon supra. Then there is no reason for Mr. O'Callahan to have been terminated over the other two managers.

It is through these performance reviews that we can see stark evidence of age-related discrimination.

Conclusion

We have shown today, that when looking at the evidence presented in the light most favorable to Mr. O'Callahan as required by Nixon supra the trial court erred in passing summary judgement, as there is evidence presented to the court that raised a genuine issue of material fact concerning direct evidence of age-related discrimination, as well as because there is circumstantial evidence that shows that the reasons that were stated by 4C's for Mr. O'Callahan's termination were merely a pretext for age-related discrimination.

Prayer

It is for these reasons that we respectfully pray that this court refuses to allow a judge to abuse their discretion in granting motions for summary judgment and to allow for the eldest among us to be properly, and fairly represented. And to do this by ruling in favor of Mr. James O'Callahan, the appellee in today's case, and upholding the decision of the appellate court.

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

APPELLANT

V.

JAMES O'CALLAHAN

APPELLEE

On Appeal from

The 15th Court of Appeals

BRIEF FOR APPELLANT

Evan Miller

Daniel Baldizon

Creekview High School

Introduction

After multiple years of working for 4C's, James O'Callahan, a 56 year old salesman, was terminated following from his position as General Manager of 4C's South Region following a lack of effort and a lower job performance evaluation. His region was combined following a corporate restructuring and he was let go due to his position being lost in the restructuring.

Statement of the Case

The appellant, Continental Catering Consolidated Company, was brought to the court by James O'Callahan who, after being terminated from his work due to a shift in management, is seeking damages under the Age Discrimination in Employment Act. The appellant is claiming the termination was done due to his age and not his performance, as stated by President Ted Arts. The case was filed at the 222nd District Court of Travis County who granted C.C.C.C. a Motion for Summary Judgement, which greatly affected the outcome of the case. The trial court for the 15th District of the State of Texas reversed the judgement, ruling in favor of the appellee. C.C.C.C. has brought this case before the present court.

Issues Presented

(1) Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan; and

(2) Whether the trial court was presented with legal sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Statement of the Facts

O'Callahan was hired by C.C.C.C. as a salesman, being promoted to General Manager of the company's North region. He was later reassigned to the South Region, due to his high performance and efficiency in the North Region. In 2012, C.C.C.C. began a major restructuring of its company, combining the region managed by James O'Callahan with the the region managed by Ted Finnell. O'Callahan's position was removed from the company and he was terminated.

James O'Callahan was also given annual performance evaluations. His 2011 evaluation was Commendable Minus, one of the highest evaluations given in the company's history. The following year, his evaluation was Competent Plus, a significant drop in performance and efficiency.

Argument

First Point of Error: The Trial Court erred in summary judgment since William's statement was direct evidence of discriminatory intent

Mr. Williams's statements do not serve as direct evidence because it does not directly correlate with an intent to harm or cause mistreatment to the appellee. In fact,

Mr. William's statements discuss the efficiency of the company and employee evaluations stating, "O'Callahan's performance problems had led to a significant reduction of his territories," referencing the the effects of his shift from the Northern Region into the Southern Region.

Mr. Williams says the the court that "the simple act is that O'Callahan had performance problems; did not make the south region profitable and was not qualified for the new position." The Trial Court's decision to allow summary judgment is valid due to their lack of direct evidence through Mr. Williams's statement.

Second Point of Error: Williams's statements and other facts serve as circumstantial evidence to prove that 4C's explanation for the reasons of his termination were a pretext for discrimination

The statements provided create no reasonable basis for a discrimination argument. Any references by Mr. Williams and his associates concerning advancing age were to be taken lightly as playful banter amongst co-workers rather than a deciding factor in the termination of an elder employee such as O'Callahan. In order to establish a prima facie case before the court, O'Callahan would have to prove all four prongs of the test by the A.D.E.A., which he cannot do.

In order to create an age discrimination case, the employee must prove (1) they were 40 years of age or older when fired, (2) they were discharged or demoted, (3) they were performing the job at a level an employer would be reasonably satisfied with at the time they were terminated, and (4) their position was replaced with someone younger with comparable qualifications. O'Callahan's position was scrapped in the

restructuring. The fourth prong cannot be completed and an age discrimination case cannot be established merely on the passing mention of age.

Conclusion

As shown in the argument above, James O'Callahan is mistaken in his belief that his termination was due to this advancing age, but rather his termination was based on the corporate restructuring of a company looking for a way to improve efficiency in their multiple regions and subsides. The Age Discrimination Employment Act doesn't apply here due to its four pronged test and the lack of evidence to create a basis for this case is unavoidable.

Prayer

We pray that this Court rules in favor of the appellant, Continental Catering Consolidated Company, and reverse the ruling of the lower court and by doing so prevent the courts from being turned into personal managers for minor situations. Thank you.

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

APPELLANT

V.

JAMES O'CALLAHAN

APPELLEE

On Appeal from

The 15th Court of Appeals

BRIEF FOR APPELLEE

Evan Miller

Daniel Baldizon

Creekview High School

Introduction

After many years of working for Continental Catering Consolidated Company, 56 year old James O'Callahan was terminated and swiftly replaced by the younger Ted Finnell. Many statements made by his superior, Mr. Ed Williams, lead O'Callahan to believe that he was wrongfully terminated under the Age Discrimination in Employment Act, and has brought this matter to the court.

Statement of the Case

The appellant, Continental Catering Consolidated Company, was brought to the court by James O'Callahan who, after being replaced by a younger individual, is seeking damages under the Age Discrimination in Employment Act. The appellee claims to have based O'Callahan's termination on performance, despite the discriminatory remarks made by Ed Williams. The case was filed at the 222nd District Court of Travis County who granted C.C.C.C. a Motion for Summary Judgement, which greatly affected the outcome of the case. The trial court for the 15th District of the State of Texas reversed the judgement, ruling in favor of the appellee. C.C.C.C. has brought this case before the present court.

Issues Presented

(1) Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan; and

(2) Whether the trial court was presented with legal sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Statement of the Facts

James O'Callahan was initially hired at C.C.C.C. as a salesman, and, after a number of years, worked his way up the ranks until finally being promoted to General Manager of the South Region. After several discriminatory oral statements given by Mr. Ed Williams, O'Callahan was terminated under the reasoning of "corporate restructuring." He was promptly replaced by a younger man (Ted Finnell), although he had continuously received higher performance ratings than both Kiser and Finnell (aside from one performance review in 2012).

Argument

First Point of Error: The Trial Court erred in summary judgment since William's statement was direct evidence of discriminatory intent.

Brown vs. CSC Logic, Inc. states that comments made by an employer's representatives can, under certain circumstances, provide direct evidence of discrimination. The requirements which define said direct evidence, as stated under Brown, are that the comments must be: (1) related to the protected class at issue; (2) proximate in time to the employment decisions or discrimination at issue; (3) made by a person with authority over the employment decisions in question, and (4) related to the employment decisions at issue. The comments made by Mr. Ed Williams are almost all directed at O'Callahan's age ("..you're too damn old," "..you are too damn old for this kind of work and I think you should consider retiring," "Isn't getting old a pain?", etc.). Because they are directed at O'Callahan's age, the first point of criteria has been met. The second point has also been met, as many of the statements were made within weeks, even days of O'Callahan's termination, and at least one of the discriminatory statements was uttered within a day of said firing. The third point is

clearly met, as each of the discriminatory statements provided are directly from Mr. Ed Williams, O'Callahan's superior who was responsible for his termination. Lastly, the fourth point was met, as it is the contention of the appellee that James O'Callahan was terminated based on his age. In other words, age was the leading factor in O'Callahan's termination, not O'Callahan's performance, as the appellant has claimed. Since each of the four factors have been met, the statements support the appellee's claim of discrimination, as they prove to be direct evidence of discrimination.

Second Point of Error: Williams's statements and other facts serve as circumstantial evidence to prove that 4C's explanation for the reasons of his termination were a pretext for discrimination.

Rhodes v. Guiberson states that "circumstantial evidence must be such as to allow a rational factfinder to make a reasonable inference that age was a determinative reason for the employment decision." If the evidence as a whole: (1) creates a fact of issue as to whether each of the employer's stated reasons was what actually motivated the employer, and (2) creates a reasonable inference that age was a determinative factor in the actions of which O'Callahan complains, then O'Callahan has the option to avoid summary judgement. The evidence before us (statements made by Mr. Williams) shows at the very minimum that the reasons behind O'Callahan's termination were not entirely based on his performance reviews. Instead, O'Callahan's termination was at least partly based on his older age. Further, because O'Callahan has continued to earn good performance reviews, the contention that appellant found O'Callahan's work "unsatisfactory" is unlikely. This satisfies the first requirement of circumstantial evidence, as Mr. William's reasons for terminating O'Callahan are not very compliant with the given evidence. Secondly, the statements from Williams show that age was *at*

least on his mind around the decision-making process of whether or not to terminate O'Callahan. These statements, along with the positive performance reviews written of O'Callahan, show that age was a determinative factor in appellee's termination, thus satisfying the second point. Because both points are satisfied, circumstantial evidence is present to show that 4C's reasons for O'Callahan's termination are pretext for discrimination.

Conclusion

As shown above, 4C's claim that O'Callahan was terminated due to his performance are insufficient, and are merely a pretext for discrimination under the ADEA. The statements made by Mr. Ed Williams are direct evidence of discrimination under the ADEA, and show that age was a determinative factor in the termination of Mr. O'Callahan.

Prayer

It is for the reasons stated above that we respectfully pray this court uphold the decision of the lower court by ruling in favor of the appellee, James O'Callahan.

IN THE SUPREME COURT OF
THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

Vs.

JAMES O'CALLAHAN

On Appeal from
The 15th Court of Appeals

Samantha Watkins

Alexis Phan

Introduction

This brief is written on behalf of the Petitioner, Continental Catering Consolidated Company. This is directed to the Texas Supreme Court.

Statement of the Case

The trial court granted summary judgement in favor of 4C's and thus dismissed O'Callahan's claim of age discrimination. O'Callahan appealed to the Supreme Court of Texas based off the two points of error made by the trial court. The Supreme Court has accepted the appeal.

Statement of the Facts

O'Callahan was originally a salesman with 4C's and was promoted to the position of General Manager of the North Region then General Manager of the South Region. Edward Williams was his supervisor as well as the Vice-President of 4C's. O'Callahan held a great employee performance record; rising from a competent minus to commendable minus. 4C's began major reconstruction and led to the merging of O'Callahan's branch and another. This led to the termination of O'Callahan. O'Callahan sued 4C's for age discrimination.

Issues Presented

1. Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan;

   AND

2. Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Argument

Point of Error One: The summary judgement evidence did not raise an issue of fact.

James O'Callahan took all the comments out context

"Supervisor's statement that he wanted to get "get rid of employees" and hire "young blood" were stray remarks, and not evidence of discriminatory intent" ***Price v. Marathon Cheese Corp., 119 F.3d 330, 337 (5th Cir. 1997).*** When he is discussing this he is not directly talking about him personally.also they could just need a fresh face for the company this has been done in many incorporations now days. ""I hope when I get your age, someone with do the same thing for me" ; held to be stray mark and not competent evidence of pretext".***Bodenheimer v. ppg indus., inc., 5 f .3d 955, 957 (5th cir. 1993) .*** Also with Philip Dennis is james O'Callahan brother in law and there is no actual proof that he said this to him. Also they take phrases that they heard from around the office those cannot be used as direct evidence it is stated in ***Transportation Ins. Co. V. Moriel, 879 S.W.2d 10, 24-25 (Tex. 1994)*** "Simply because a piece or pieces of evidence are material in the sense that they make a 'fact this is of consequence to the determination of the action more … or less probable' does not render the evidence legally sufficient." as shown in this case all the stuff that was submitted by O'Callahan is not able to be used.

Point of Error Two: The evidence was not legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

The statements made by Williams are nothing more than general statements and does not have any mention of the effects of age on one's work. Thus, under *Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996)* these, "remarks do not qualify as direct evidence of discrimination under the test" in Brown that requires the comment to specifically relate to the employment decision.

So, under the burden shifting analysis to be used in discrimination cases *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973)*. The employee has to set up a prima facie case of discrimination *Reeves v. Sanderson Plumbing Prod., Inc., 120 S.Ct. 2097, 2106 (1973)*. And once the employee establishes this, the employer must show a nondiscriminatory reason for why the employee was terminated *Reeves v. Sanderson Plumbing Prod., Inc., 120 S.Ct. 2097, 2106 (1973*). If the employer states a legitimate, non-discriminatory reason for the termination, then employee is then required to demonstrate by circumstantial evidence that the reasons offered by the employer were merely a pretext for discrimination *Reeves v. Sanderson Plumbing Prod., Inc., 120 S.Ct. 2097, 2106 (1973*).

It is my contention that the employer did not show a discriminatory action because O'Callahan's evidence did not support age discrimination. Williams, the alleged discriminator, actually gave O'Callahan a favorable review over a younger employee. There is also no evidence in the record to indicate that others: Alison Young and Alan Hunter - were subjected to discrimination. These facts prove that there was no

discriminatory action by 4C's and O'Callahan's evidence fails the burden shifting analysis. Because of this, the evidence brought up by O'Callahan is not legal.

Conclusion:

Due to the above arguments, we have shown that the summary judgement evidence did not raise an issue of fact and that the evidence was not legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Prayer:

We pray that this court rule in favor of Appellee and vote in favor of our summary judgement.

Samantha Watkins

Alexis Phan

YMCA: Dallas/Palestine

Creekview High School

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

Vs.

JAMES O'CALLAHAN

On Appeal from

The 15th Court of Appeals

Samantha Watkins

Alexis Phan

Introduction

This brief is written on behalf of the Appellant, James O'Callahan. This is directed to the Texas Supreme Court.

Statement of the Case

The trial court granted summary judgement in favor of 4C's and thus dismissed O'Callahan's claim of age discrimination. O'Callahan appealed to the Supreme Court of Texas based off the two points of error made by the trial court. The Supreme Court has accepted the appeal.

Statement of the Facts

O'Callahan was originally a salesman with 4C's and was promoted to the position of General Manager of the North Region then General Manager of the South Region. Edward Williams was his supervisor as well as the Vice-President of 4C's. O'Callahan held a great employee performance record; rising from a competent minus to commendable minus. 4C's began major reconstruction and led to the merging of O'Callahan's branch and another. This led to the termination of O'Callahan. O'Callahan sued 4C's for age discrimination.

Issues Presented

1. Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan;

   AND

2. Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Argument

Response to Point of Error One: The summary judgement evidence did raise a genuine issue of material fact with direct evidence of age-related discrimination.

1. **Williams of his comments of O'Callahan**
   a. In passing Mr. Williams made numerous comment around Mr. O' Callahan. That implied that he was old.

"O'Callahan, you are too damn old for this kind of work and I think you should consider retiring" Williams stated as he walked into his office "Isn't getting old a pain? … I sure am glad I am not as old as you guys." Williams said after someone mentioned O'Callahan's birthday. "The company needed some young blood around here to create a new image" Williams said when he was asked why he was being fired . all of these where said while either Mr. O'Callahan was near him or around someone close to him

2. **CCCC didn't give definite reasons for termination of workers**

a. . In although Mrs. Young was told that she was old she was fired 3 days after her 50th birthday and the company never gave her a real reason for her termination. Mr. Dennis also states in his affidavit that he thinks he will be fired once the lawsuit is finished.

3. **They treated their older workers differently**

a. In Mr. Dennis talks about how most of the original workers have been fired or are disliked by Mr.Arts, even though he is over the age of 40 too. If the workers were not in shape or didn't look they way Mr.Arts wanted them to look he would be treat them differently.

Response to Point of Error 2: There was sufficient circumstantial legal evidence to support O'Callahan's age discrimination

According to *Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996)* and *Heim v. State of Utah, 8 F. 3d 1541 (16th Cir. 1993)*, "comments made by an employer's representatives can, under certain circumstances, provide such direct evidence of discrimination." Furthermore, the comments have to be: "related to the protected class at issue, proximate in time to the employment discrimination in issue, made by a person with authority over the employment decisions in question and be related to the employment to the employment decisions in issue" *Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996)*. Meaning that the age discriminatory statements made by Ed Williams, the vice-president of 4C's, are valid under Brown and Hein.

The statements in question include: One, when O'Callahan mentioned that he could not play golf five consecutive days, Williams replied, "That's obvious you're too

damn old." Two, Williams also mentioned to O'Callahan that he was "too damn old for this kind of work and I think you should consider retiring." Three, when an employee mentioned his approaching 57th birthday, Williams replied, "Isn't getting old a pain? … I sure am glad I am not as old as you guys." And finally four, when asked about why O'Callahan was being fired, Williams stated that "the company needed some young blood around here to create a new image."

Altogether, these facts are legal circumstantial evidence under *Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996)* because it fulfills: one, that the statements were related to the protected class at issue, age discrimination.Two, that at least the fourth comment was close enough employment decisions because it was after firing O'Callahan. Three, that the comments were made by a person with authority because Williams was the Vice-President of 4C's. And finally four, that these comments were related to the employment decisions because they described Williams' opinions on aged persons and thus shows his motive in discrimination.

Overall, these statements are valid under the law because it meets the above criteria, the employee can establish a prima facie case. This paints a clear enough picture for a prima facie case of discrimination and allows the legal evidence to support O'Callahan.

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY, Petitioner

Vs.

JAMES O'CALLAHAN, Respondent

On Appeal from

The 15th Court of Appeals

Brief for Respondent

Joseph Bremer

Jack Durham

Introduction

James O'Callahan was a regional manager working for Continental Catering Consolidated Company and was terminated on August 9th, 2012 at age 56. O'Callahan filed a lawsuit claiming his employer violated the Age Discrimination in Employment Act. Continental Catering Consolidated Company is petitioning the Texas Supreme Court to reverse the decision made by the 15th Court of Appeals.

Statement of the Case

The Appellee, James O'Callahan, went before the 222nd District Court of Travis County, Texas, which ruled in favor of the Appellate, Continental Catering Consolidated Company (4C's). O'Callahan then appealed to the 15th Court of Appeals which reversed the Travis County ruling. 4C's has now appealed to the Supreme Court of Texas, which has accepted Certiorari to hear arguments on the issue.

Statement of the Case

The Appellee, James O'Callahan, went before the 222nd District Court of Travis County, Texas, which ruled in favor of the Appellate, Continental Catering Consolidated Company (4C's). O'Callahan then appealed to the 15th Court of Appeals which reversed the Travis County ruling. 4C's has now appealed to the Supreme Court of Texas, which has accepted Certiorari to hear arguments on the issue.

Issue 1: Whether the summary judgement evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O' Callahan; and

Issue 2: Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Issue 1

Mr. Callahan was terminated due to failures in the south region even though he said he would need more time to change it around. The year before Mr. O'Callahan was given a $37,000 bonus for his work at the company and a commendable minus compared to the year before's competent minus.

Issue 2

There is evidence of pretext age-related discrimination for example Ms. Young was fired 3 days after her 50th birthday with no prefix why she was being terminated. Also that employees where suppose to get birthday bonus but she never got one.

Conclusion

The respondent has shown in this brief that there is enough evidence here material fact evidence or circumstantial evidence to convict 4C's of age discrimination.

Prayer

We pray that the court rule in favor of the respondent in this case by reversing the decision of the Lower Appellate Court.

IN THE SUPREME COURT

OF THE STATE OF TEXAS

No. YAG-APP-2017

James O'Callahan,

Appellant

V.

CONTINENTAL CATERING

CONSOLIDATED COMPANY,

Appellee

On Appeal from the 15th court of Appeals

Brief for Appellant

Dylan Guynes

Makaylia Askew

Creekview high school

Introduction

Continental Catering Consolidated Company (4C's) is a vending and food services company being sued by James O'Callahan under the Age Discrimination in Employment Act [ADEA], 29 U.S.C I 623, et seq.They decided to end O'Callahan's employment because he had been having performance problems during the 9 month time span between his transfer to the South region of 4C's and the termination of his employment on August 9, 2012.

Statement of the case

Prior to trial 4Cs filed for a summary judgment and the trial court granted their proposal and decided to dismiss O'Callahan's claims of age discrimination. In support of the motion 4C's attached the pretrial affidavits of 6 of their employees. As movant on their summary judgment, 4C's was required to prove that no genuine issue of the facts existed with respect to any element of O'Callahan's claims.

Statement of the facts

James O'Callahan was hired by the Continental Catering Consolidated Company "4C's" in 1990 as the General Manager of 4C's northern district. Edward Williams was his supervisor and vice president of 4C's during the 9 month duration between his transfer and his termination. 4C's decided to terminate O'Callahan's employment because 4C's had to combine their South region with Cayman's South operation under Ted Finnell and Cayman's Greensboro-Raleigh operation and 4C's north regions were combined under Mike Kiser because of the fact that they thought that O'Callahan was slow when it came to responding in a timely manner to problems with food being

delivered in unrefrigerated trucks. His region was also losing money and no longer beneficial to the company.

Point of error 1: Whether the summary judgment evidence given by O'Callahan's side raised a genuine issue of facts concerning any direct evidence of age discrimination supposed by James O'Callahan.

4C's summary judgment does not raise any kind of issues concerning any evidence of age related discrimination towards O'Callahan around the time of his termination. The purpose of summary judgment is to permit a trial court to promptly dispose of cases that involve unmeritorious claims or untenable defenses. *City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979).* But the summary judgment is not intended to deprive litigants of their right to a trial, or to permit a trial by affidavits or deposition testimony. *Id.* Edwards Williams, who was the supervisor over O'Callahan and also the vice president of 4C's at the time, transferred O'Callahan to 4C's south region in 2011 as the General Manager because O'Callahan stated that he could turn the region around in no time. Since the South Region was not as profitable and it was losing too much money for the company. Even though O'Callahan was at the south region for 18 months was not able to make the region anymore profitable that it was before he was transferred. Edward discovered that while at the south region of 4C's, O'Callahan was enable to respond in a timely manner to any problems involving the food that was being delivered in un refrigerated trucks. Williams was also informed that several of O'Callahans accounts were complaining about his lack of attention towards their needs.

Also employment discrimination laws are "not intended to be a vehicle for judicial second-guessing of employment decisions nor… to transform the courts into

personnel managers." *EEOc v Louisiana Office of Community Services, 47 F.3d 1438, 1448 (5th Cir. 1995).* The Age Discrimination in Employment Act was never intended to permit employees to use their age as an excuse shortcomings in their performance, or to use their age to hold their employer liable when their employees simply discuss the effects of one's age. James O'Callahan failed to bring any evidence showing that his employer terminated his employment because of his age.

Point of error 2: whether the trial court was presented with legally sufficient circumstantial evidence in order to support the argument made by James O'Callahan that the stated reasons for his termination was a pretext of age related discrimination.

Appellant James O'Callahan has brought forth many pieces of circumstantial evidence including comments made by his supervisor, affidavits of other employees and that his performance ratings were much better than that of other employees in the 4C's company. This however can be proven to be false because of prior case law.

O'Callahan stated that his supervisor and vice president of 4C's Edward Williams made several comments to him about his age such as "isn't getting old a pain… i am sure glad i'm not as old as you guy's." or when O'Callahan stated that he didn't think that he could play 18 holes of golf five days in a row and Mr. Williams replied with "that's obvious, you're too damn old.". O'Callahan These statements made by Mr. Williams were nothing more than stray comments and not evidence of discriminatory intent as seen in *Price v. Marathon Cheese Corp., 119 F.3d 330, 337 (5th Cir. 1997)* and *Bodenheimer v. PPG indus., inc., 5 F.3d 955, 957.* (5th Cir. 1993) where upon making comments about their age around the time they were terminated.

James O’Callahan tried to come forth with circumstantial evidence to prove that the 4C’s company did have his age play a major part in his termination.

Conclusion

The Appellee Continental Catering Consolidated Company has shown in this brief that they did not in fact terminate James O’Callahan because of his age but because he was slow to responding to problems at the south region and was not able to respond in a timely manner when it came to major difficult situations.

Prayer

It for these reasons that we respectfully pray that this court rules in favor of the Continental Catering Consolidated Company in today's case.

Makaylia Askew

Dylan Guynes

Creekview High School

IN THE SUPREME COURT

OF THE STATE OF TEXAS

No. YAG-APP-2017

James O'Callahan,

Appellant

V.

CONTINENTAL CATERING

CONSOLIDATED COMPANY,

Appellee

On Appeal from the 15th court of Appeals

Brief for Appellee

Dylan Guynes

Makaylia Askew

Creekview high school

Introduction

James O'Callahan was a General Manager for Continental Catering Consolidated Company (4C's) until his employment was terminated on August 9th, 2012. He was 56 years old when he was fired. Mr. O'Callahan felt that 4C's had violated the Age Discrimination in Employment Act, (ADEA) claiming that his age served as a motivating factor in 4C's decision to terminate his employment.

Statement of the case

The trial court granted the summary judgment in favor of the Continental Catering Consolidated Company therefore dismissing O'Callahan's claims of age discrimination. O'Callahan has appealed to the Supreme court of the state of Texas based off of two points of error made by the trial court. The Supreme court of Texas has accepted the appeal there for reversing the summary judgement made by the trial court.

Statement of the facts

O'Callahan was terminated by 4C's based off of age discrimination. James O'Callahan started as a general manager of 4C's north district in 1990. During his employment leading up to his termination on August 9, 2012 Edward Williams was his supervisor as well as the vice-president of 4C's. Mr. O'Callahan was considered an exceptional employee due to his performance rating increasing from a competent minus in 2010 to an commendable minus in 2011 which is the second highest

performance rating an employee can get, because of this O'Callahan received an encouraging bonus of $37,000 from Mr. Williams and Mr. Ted Arts for his hard work in helping to better the company. In late 2011 Mr. Williams talked about the possibility O'Callahan being transferred to the South district as the General Manager because that district was not doing as well as the north district was. O'Callahan later accepted the transfer, and started his work as general manager of the south district in early 2012. In order to make 4C's south reigon a profitable business he told Mr. Williams that he would need around 18 months and Mr. Williams accepted this.

Point of error 1: The summary judgment evidence given by O'Callahan's side raised a genuine issue of facts concerning any direct evidence of age discrimination supposed by James O'Callahan.

Comments made by an employer's representatives can in certain cases provide direct evidence of age related discrimination. *See Brown v. CSC Logic, Inc.*82. F .3d 651, 655-57(5th Cir. 1996), Specifically, Mr. Williams comments reputed by Williams satisfy the elements set forth by *Brown*; *Heim v. State of Utah,* 8 F . 3d 1541 (16th Cir. 1993) In order to qualify as age related discrimination the comments must be [1] related to the protected class at issue [2] proximate in time to the employment decisions or discrimination at issue; [3] made by a person with authority over the employment in question, and [4] related to the employment decisions at issue. *Brown*, 82 F.3d at 655. In the event that the comments stated meet this criteria, the employee can established a prima facie case of discrimination even without implementing more-favorable treatment given to a member of a different class. Id.

In reference Williams had referred to the company needing "young blood to create a new image" when he was asked about the reasons for O'Callahan's termination. After O'Callahan's termination Mike Kiser became the general manager of the Northern region of 4C's. There are 4 elements in the prima facie of employment discrimination under ADEA . The employee must prove that he or she [1] is above the age of 40 or above [2] was qualified for the position, [3] was subjected to an unfavorable employment decision of the employer, and [4] either replaced by someone outside the protected class or someone younger, or otherwise discharged or discriminated against because of age. *Price v. Marathon Cheese Corp., 119 F.3d 330, 336-37 (5 Ih Cir. 1997); Rhodes v. Guiberson Oil Tools. 75 F. 3d 989, 992 (5th Cir. 1996).*

O'Callahan satisfies the first three elements of his prima facie case. He was 56 years old at the time. He was overqualified for his position because not only was he given the second highest rating the an employee could get at 4C's but he also was given an incentive bonus of $37,000, which also was the largest bonus awarded in the company that year. And after the termination of his employment Mike Kiser then became the general manager of 4C's North Region. Kiser was 35 years old when he became the manager of the north region.

Because O'Callahan successfully established his prima facie case the burden then shifted to 4C's to express a legitimate non-discriminatory reason for the termination of O'Callahans employment. Reeves v. Sanderson Plumbing Prod., Inc., *120 S.Ct. 2097, 2106 (1973)*. 4C's is simply required to present evidence that would support that unlawful discrimination was not the cause of the employment action. *St. Mary's Honor Center v. HIcks, 509 U.S. at 507*.4C's vice president ,Ed Williams, stated

that O'Callahan had been having performance problems that did not make 4C's south region anymore profitable than it was before O'Callahan transferred there. This burden shifting analysis ,however, does not need to be applied when direct evidence of discrimination exists. *See* *TransWorld Airlines, Inc.*, *469 U.S. at 121.*

First, Edward Williams, O'Callahan's supervisor at the time and vice president of 4C's at the time, made several comments about being too old before O'Callahans termination. He would talk about how he was glad that he wasn't O'Callahans age and asked if was a pain being that old. He also told O'Callahan that he was too old and that he should retire. Not only did he make comments to O'Callahan about his age, he also told Allison Young, the human resources manager, that O'Callahan was being fired because the company needed some more young blood around the company for their image. He has also commented on a co-employee making statement about approaching he 57th birthday. He replied to the statement saying, "Isn't getting old a pain? I sure am glad that I'm not as old as you guys."

And second, Phillips Dennis,a salesman with 4C's, spoke of how is was common knowledge around 4C's that William did not like older employees. Also when Allison Young, a human resources manager at 4C's, was asked by Williams to print out everyone at 4C's date of births, she had asked why and was immediately told that it was none of her business. Yet as soon Mr.Williams saw how Ms. Young he probably taken his response, he immediately told he that he was going to implement a new policy of giving special birthday bonuses. Yet when Ms. Young turned 50, 3 days before she was fired, she states in her affidavit that she never received this supposed birthday bonus.

Point of error 2: whether the trial court was presented with legally sufficient circumstantial evidence in order to support the argument made by James O'Callahan that the stated reasons for his termination was a pretext of age related discrimination.

Circumstantial evidence is evidence that can be described as facts that can tie into other facts in order to reach a conclusion. Circumstantial evidence in this case reached the requirements set by *Reeves v. Sanderson Plumbing prod., inc*., 120 S.Ct. 2097, 2106 (1973).

There are three major issues of circumstantial evidence in today's case. (1) that the statements made by Mr. Williams showed that he was discriminatory towards old people. (2) that no manager was over the age of 42. (3) after his transfer to 4C's south district O'Callahans turn around time was shortened dramatically.

1) the comments that were made by Mr. williams O'Callahan's supervisor and vice president of 4C's made several comments to him about his age such as "isn't getting old a pain… i am sure glad i'm not as old as you guy's." or when O'Callahan stated that he didn't think that he could play 18 holes of golf five days in a row and Mr. Williams replied with "that's obvious, you're too damn old." under *Chacko v. Texas A&M univ.,* 960 F. supp. 1180, 1191-92 (S.D. Tex. 1997) these comments made by Mr. williams raise a genuine issue of material fact that shows that he is discriminatory towards old people.

2) All of the high ranking employees are young fit individuals who do not exceed the age of 42. Edward Williams who is the vice president of the 4C's company is one of the youngest officers at age 39.

3) when O'Callahan was transferred to the southern district of 4C's. he was transferred to there because he had very high performance ratings

In order to establish pretext you must meet the requirements set forth in the third stage of *McDonnell-Douglas* There are two major points in throughout the many witness affidavits that are able to establish a pretext. (1) that O'Callahan had significantly higher scores than any other employee at the time of his termination. Therefor he was costing the company to much money. (2) the investigating by Mr. Williams into the birthdays of the 4C's employees. (3) the comments that were said to O'Callahan by Mr. Williams.

1) While O'Callahan was employed at 4C's he was considered an exceptional employee and in 2010 he received a job performance rating a commendable minus which is the second highest rating an employee can receive in the 4C's company. In response to this O'Callahan received a incentive bonus which is a signed contract stating that after reaching this rating he will receive a total of $37,000 more in his paycheck per year. This yearly payment to O'Callahan cost the company a lot of money and therefore could be seen as a reason to terminate him. This shows that there was a pretext discrimination.

2) Just two months prior to O'Callahan's termination Mr. Williams told Allison Young who was the human resource manager to print him off a list of the date of births of everyone in the 4C's company. Mr. Williams did this in order to find out who in the 4C's company is old.

3) In *Ramirez v. Allright Parking El Paso Inc.*, 970 F.2d 1372 (5th Cir. 1992) it states that comments suggesting a bias may be used to demonstrate pretext. The

comments that were made to O'Callahan about his age such as "isn't getting old a pain… I am sure glad i'm not as old as you guy's." or when O'Callahan stated that he didn't think that he could play 18 holes of golf five days in a row and Mr. Williams replied with "that's obvious, you're too damn old." these statements can be seen as a pretext.

Conclusion

The appellant James O'Callahan has shown in this brief that the Continental Catering Consolidated Company violated his rights by allowing his age to be a leading factor in the decision for his termination which is a violation of the Age Discrimination in Employment Act.

Prayer

It is for these reasons that we respectfully pray that this court rule in favor of the appellant, James O'Callahan, in today's case.

Makaylia Askew

Dylan Guynes

Creekview High School

IN THE SUPREME COURT

OF THE STATE OF TEXAS

No. YAG-APP-2017

James O'Callahan,

Appellant

V.

CONTINENTAL CATERING

CONSOLIDATED COMPANY,

Appellee

On Appeal from the 15th court of Appeals

Brief for Appellant

Balery Villalobos

Jessie Garcia

Creekview high school

Introduction

James O'Callahan, a 56 year old man who was general manager of the north region for 4 C's. Until he was terminated on August 9th, 2012. Mr. O'Callahan believes that the reason for his termination was because of age discrimination.,

Statement Of the Case

James O'Callahan, went before the 222nd District Court of Travis County, Texas, which ruled in favor of the CCCC. O'Callahan then appealed to the 15th Court of Appeals which reversed the Travis County ruling. 4C's has now appealed to the Supreme Court of Texas, which has accepted Certiorari to hear arguments on the issues before the court today.

Statement of the Facts

O'Callahan was originally hired as a salesman for 4C's and was later on promoted to the position of general manager. He went from managing the North Region to managing the Southern region. During the time of his employment, he got a commendable minus and was one of 4C's most valuable workers/employers. O'Callahan's region was combined with Ted Finnell;s Cayman corporations and the company underwent corporate reconstruction where they wanted "young blood".

O'Callahan was considered for the position Ed Williams took over, however ultimately that was decided against due to his difficulty managing his current territories, which had just been reduced. On August 9th, 2012, James O'Callahan was terminated. By this time O'Callahan's territory was taken away and given to other workers.

Issue 1;Whether the summary judgement evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan. There is clearly direct evidence of age discrimination towards Mr. O'Callahan

In order to be considered Direct Evidence of discrimination, the comments must be

related to the protected class, proximate in time to the employment decision, made by the person in authority, related to the employment decisions at issue; And clearly there is direct evidence from Mr.Williams from his comments. He would say such things as to protect the decision of O'Callahan's termination. Mr. Williams would make comments such as "

Reed V. Neopost USA, Inc. Holding that incidental or occasional age-based comments, including references to an employee like "old man" and "old fart" were insufficient to support an age-based hostile work environment claim.

Issue 2; Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Price v marathon cheese corp , 119 f. 3d 330, 337 (5th Cir. 1997)

(supervisor's statement that he wanted to"get rid of the older employees" and hire "young blood" were stray remarks. The burden shifting analysis under *Mcdonnell-Douglas Corp. V. Green, 411 U.S 792 (1973)* was to ensure that employees have their day in court, despite the absence of direct evidence of discrimination.

Bodenheimer v PPG Indus., inc., 5 f.3d 955, 957 (5th Cir. 1993)

(upon terminating employee, supervisor remarked, "I hope when I get your age, someone with do the same thing for me"; held to be stray mark and not competent evidence of pretext).

Your honor, there are three prongs to this test:

1. The employee is required to establish the "prima facie" case of discrimination.
2. Once it is established, the employer has to come up with a non-discriminatory reason for the employee's termination.
3. And if they do state that reason, employee is required to demonstrate by circumstantial evidence that the reasons offered were a pretext for discrimination.

Brown 82 F.3d at 655 Brown's case shows that even if O'Callahan was working in other jobs he could have been fine with CCCC like browns , 4C's argument is comments and assumptions , not supported by facts.

Conclusion;

This brief has shown that there is only such things that employees would say that would lead to Callahan's termination. All of our evidence adds up to Callahan's termination , there would be no other reason for his termination. Therefore it would all lead to 4C's of being guilty of age discriminating our client.

Prayer;

For such reason we respectfully pray that this court court may rule in favor of the appellant, by reversing the decision of the Lower Appellate Court.

IN THE SUPREME COURT

OF THE STATE OF TEXAS

No. YAG-APP-2017

James O'Callahan,

Appellant

V.

CONTINENTAL CATERING

CONSOLIDATED COMPANY,

Appellee

On Appeal from the 15th court of Appeals

Brief for appellee

Balery Villalobos

Jessie Garcia

Creekview high school

Introduction

Continental catering consolidated company claims that they did not terminate O'Callahan for his age. At the time of O'Callaghan's termination the company was going through changes. Continental terminated O'Callahan on august 9th. Continental has been accused of age discrimination. They believe that they had fired O'Callahan because of his age; which is not the case , but because the company had gone through various changes.

Statement Of The Case

James O'Callahan, went before the 222nd District Court of Travis County, Texas, which ruled in favor of the CCCC. O'Callahan then appealed to the 15th Court of Appeals which reversed the Travis County ruling. 4C's has now appealed to the Supreme Court of Texas, which has accepted Certiorari to hear arguments on the issues before the court today.

Statement Of Facts

4C's is being sued by O'Callahan under the Age Discrimination in Employment Act (''ADEA"), *29 U.S.C. I 623 et seq.* 66. James O'Callahan was hired by the Continental Catering Consolidated Company "4C's" in 1990 as the General Manager of 4C's northern district. Edward Williams was his supervisor and Vice President of 4C's during the 9 month duration between his transfer and his termination. 4C's decided to terminate O'Callahan's employment because 4C's had to combine their South region with Cayman's South operation under Ted Finnell and Cayman's Greensboro-Raleigh operation and 4C's north regions were combined under Mike Kiser because of the fact that they thought that

O'Callahan was slow when it came to responding in a timely manner to problems with food being delivered in unrefrigerated trucks. His region was also losing money and no longer beneficial to the company.

Issue 1; Whether the summary judgement evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan. Throughout and before O'Callahan's termination the company was having some changes that involved their employees , this does not necessarily mean that it applies to the case, but

In order for it to qualify as direct evidence of discrimination, the comments must be;

1. Related to the protected class
2. Proximate in time to the employment decision
3. Made by the person in authority
4. Related to the employment decisions at issue

Brown 82 F.3d at 655 Brown's case shows that he was working with the company and at the same period of time had various other jobs. This shows that even if O'Callahan was juggling with other jobs he could have been failing on this specific job which could have led to his termination. However your honor , the comments constitute nothing but "stray comments" that cannot be used as direct evidence to establish discrimination. These could and are just comments that have no proof of 4C's discriminating in any way shape or form. Williams case showed that the information the company was trying to get from there employees was for their safety as well as other questions.

Price v marathon cheese corp., 119 f.3d 330, 337 (5th Cir. 1997)

supervisor's statement that he wanted to"get rid of the older employees" and hire "young blood" were stray remarks, and not evidence of discriminatory intent)

Issue 2; Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination. It was not O'Callahan's termination from this company , guilty on why afterwards he could not be found in another job. His claims are not supported by evidence to prove that he was fired because of his age. Those were all just what if's and not statements. Throughout and before O'Callahan's termination the company was having some changes that involved their employees , this does not necessarily mean they were terminating their employees for unnecessary reasons such as age.

The burden shifting analysis under *Mcdonnell-Douglas Corp. V. Green, 411 U.S 792 (1973)* was to ensure that employees have their day in court, despite the absence of direct evidence of discrimination.

Your honor, there are three prongs to this test:

1. The employee is required to establish the "prima facie" case of discrimination.
2. Once it is established, the employer has to come up with a non-discriminatory reason for the employee's termination. And if they do state that reason, employee is required to demonstrate by circumstantial evidence that the reasons offered were a pretext for discrimination.

3. If the employer states a legitimate, non-discriminatory reason for the termination, then employee is then required to demonstrate by circumstantial evidence that the reasons offered by the employer were merely a pretext for discrimination.

This "burden-shifting" analysis may not need to be applied when direct evidence of discrimination exist. Which in this case Mr. O'Callahans evidence can be seen as coincidental statements made by Mr. Williams.

Conclusion

The Appellant here has shown that the company 4C's was and isn't guilty of age discrimination. Other cases have shown that there is multiple reasons for Mr.O'Callahan's termination on 4C's. As announced before O'Callahan's claim is not yet supported with sufficient evidence that could convict 4C's of age discrimination. O'Callahan just claimed he was terminated because of his age and didn't give another explanation on why he could have been terminated. In order to qualify as direct evidence of discrimination, the comments must be relevant and supported by facts and not just comments.

Prayer;

For such reason we respectfully pray that this court may rule in favor of the appellee, that the court will reverse the decision of the Lower Appellate Court.

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG - APP - 201 7

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O ’CALLAHAN

Respondent

On Appeal from

The 15th Court of Appeals

Brief for Petitioner

Wesley Banks (Attorney #1)

Brian Jones (Attorney #2)

The Episcopal School of Dallas

Statement of the Case

Appellant James O'Callahan filed this lawsuit against his former employer, Appellee Continental Catering Consolidated Company (4C's). Appeal was granted of the petition for review filed by Continental Catering Consolidated Company so that the court may hear and consider the issues raised by the record.

The issues before the Court are:

1. **Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan; and**
2. **Whether the trial court was presented with legally sufficient circumstantial evidence to support O'callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination**

Statement of Facts

O'Callahan was hired as a salesman with 4C's in 1990. Later one, due to outstanding work and reliability on him from the company, he was promoted to regional manager of the north region of the company. He then was transferred to the South Region in hopes that his skill would be able to help turn around that downfalling region. While preparing to have a turn around with this region, 4C's and Cayman Corporation began restructuring operations which resulted in business operations in the region. It was done by Ted Arts and Ed Williams as a way to maximize profits while also cutting costs at the same time.

Prior to the merger, O'Callahan noticed that many of his accounts slowly began to be taken away from in due to what the higher-ups claimed to be because of "lack of

profits". When O'Callahan questioned them, they were not specific as to why. 4C's South Region was then merged with Cayman Corps South Carolina Region. Once this merge of regions took place, it was all assumed by Ted Finnell which resulted in O'Callahan being terminated. After the termination took place,

O'Callahan sued 4C's since there was a clear action of age-discrimination. 4C's then filed a Motion of Summary Judgement stating that the evidence given does not support claims of age discrimination. The evidence being talked about would be the Affidavits of the co-workers of O'Callahan, the performance evaluations, and the comments that were made by O'Callaghan's direct supervisor and VP of Cayman Corp. Ed Williams which had discriminatory nature. O'Callahan was claiming that the those pieces of evidence showed that the termination of him was clearly due to his age, being 56 at the time. The Trial Court granted Summary Judgement to 4C's and dismissing the claims from O'Callahan. O'Callahan then appealed the verdict and the District Court of Appeals found that these statements and affidavits were compelling enough for there to be a trial. 4C then took a final attempt of granting the judgement by appealing it to this court.

Point of Error 1: **The summary judgement did not raise a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan**

With this appeal to the Motion of Summary Judgement, O'Callahan is making outlandish claims in a last-ditch attempt to get something to stick and get this case to go to trial. He is doing so in the hopes that if he can get it in front of a jury, the

evidence may seem more compelling. The problem is that the evidence isn't near valid enough for there to be a trial to begin with. In *Bodenheimer v. PPG Indus Inc.* it states that after a non-movant has appealed a Motion for Summary Judgement that the defense "must rebut by giving a legit reason showing otherwise." 4C's clearly does this by giving a valid explanation pertaining to the termination of the Respondent. Ted Arts, the person behind the merger itself, stated that the reason behind the consolidation of the different branches of 4C's and Cayman Corp. was to "Cut costs and make the management system more streamlined." And when it came to choosing the manager to run the newly made South Region, Mike Kiser was chosen instead of O'Callahan.

The Respondents would like for the court to believe that this decision was based off the age of Kiser along with comments made by Ed Williams showing that this was a discrimination of age. Both of these points are not true. First, the reason that Kiser was chosen was not because of his age, it was because of the fact that he was far more superior when it came to dealing with territories with bigger accounts. It would make sense that 4C's would chose the candidate that was handling many large accounts at once over another candidate that had just recently loss half of his territories due to not being able to handle the issues from those accounts. Along with that, Kiser was able to take those poor accounts from O'Callahan and make the profitable. Also, it is quite understandable that Ed Williams wouldn't want to go out on a limb again and trust O'Callahan with yet another big task after the failed attempts of his last one. O'Callahan went to Williams and requested that he be transferred to the South Carolina Region where he promised that he would make that area profitable. At the time, 4C's found it very important that this region become profitable as soon as

possible since it was starting to cost the company too much money to maintain. Respondent will claim that at this point, 4C's didn't give O'Callahan enough time to finish the project and make the South Region profitable being that O'Callahan had stated that he "needed about 18 months" in order to do so. Ed Williams stated in his affidavit that "he has no recollection of O'Callahan giving him a timeframe." and being that he needed the region to become profitable immediately it is quite easy to understand how the comments claimed to have been said by O'Callahan may have been false.

Along with this, it is quite evident that the allegations of the comments made by Ed Williams be discriminatory of age is also false. In *Jaso v. travis Co. Juvenile Board* it states that "Stray remark is not evidence that would allow a jury to reasonably infer a discriminatory intent." the alleged comments made by Williams wouldn't allow a jury to clearly see Age Discrimination taking place. This would be because of two reasons. One, there is discrepancy between whether or not the statement was made at all, and also the manner of which the comment was said *if* it was said. First, there is a split decision when it comes to the comments made by Ed Williams. 3 people claim it was said (O'Callahan, Young, and Dennis) and 3 say it was not (Williams, Kiser, Arts). With this you can also see the clear bias that each person has to the person they are defending. Young and Dennis both are very close to O'Callahan, being god-sister and brother-in-law respectively while Kiser and Arts are both very close friends with Williams. With this, one could see how a jury couldn't possible consider Age Discrimination being the case due to the fact that there is too much bias in trying to figure out what was really said. What helps the Petition in this case though is the fact

that Williams has stated that if he did happen to say it, he only meant for it to be in a joking matter. Not to be taken as illegal discrimination.

In Conclusion, it is evident that the Respondent does not have great enough evidence to disprove that this case should carry through with its Motion for Summary Judgement.

Point of Error 2: **The trial court <u>was not presented with legally sufficient circumstantial evidence</u> to support O'Callahan's contention that the stated reasons for his termination were a pretext of age discrimination**

As the Age Discrimination in Employment Act (ADEA) of 1967 reads, "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; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter." *29 U.S.C 623 (a)*.

In order to prove discrimination, the "burden-shifting" analysis was used. A process has been established for using such an analysis. First, the employee is required to establish a "prima facie" case. <u>Reeves v. Sanderson Plumbing Prod. Inc.,</u> 120 S.Ct. 2097, 2106 (1973). To establish a "prima facie" case for the ADEA, the employee must demonstrate that he or she (1)is 40 years or above, (2) was qualified for the position, (3) was subject to an adverse employment decision, and (4) either replaced by someone outside of the protected age class or someone younger, or

otherwise discharged or discriminated against because of age. Price v. Marathon Cheese Corp. 119 F.3d 330, 336-37 (5th Cir. 1997); Rhodes v. Guiberson Oil Tools 75 F.3d 989, 992 (5th Cir. 1996)

The second prong of this test, concerning qualification for position, is in no way satisfied. O'Callahan's declining performance was present, leading to reduction of territory even before Ted Arts began the consolidation that caused the termination of the respondent's career at Continental Catering Consolidated Company (4Cs). After the respondent's annual performance evaluation of 2011 displayed a "commendable minus," his performance deteriorated. He was consistently late on deliveries, and neglected the needs and complaints of his customers. When Mike Kiser received territories from O'Callahan's sector, those regions were not profiting from a financial standpoint, indicating failure of O'Callahan's financial policy and leadership. Due to the respondent's failures in both customer service and financial losses, it is clear that the respondent was no longer qualified for the position available to manage the position created after the restructuring of 4Cs.

Even after the court erred in presuming the respondent presented a "prima facie" case, the affidavit of Ed Williams, the employer of the respondent, provides a legitimate, non-discriminatory reason for the respondent's termination. Mr. William states "my reasons for reducing O'Callahan's territory was his performance as compared to Finnell's performance… his age played no part in the decision process."

After the transfer of territories from O'Callahan to Mike Kiser, Mr. Kiser turned these portions of the Southern Region "profitable." Mr. Kiser proved himself as superior for this position by accomplishing the profit the respondent could not. The respondent's

failures in the region and lack of qualifications give a legitimate and non-discriminatory reason for his replacement by a more successful officer of that region.

The respondent attempted to employ various alleged remarks made Williams as circumstantial evidence to prove that his termination was a pretext of discrimination. In order for a comment to qualify as direct evidence of discrimination, the comments must be (1) related to the protected class; (2) proximate the time to the employment decisions in question; (3) made by a person with authority over the employment decisions in question; and (4) relate to the employment decisions at issue. Brown vs. CSC Logic, Inc. 82 F.3d at 655. Even when viewed in light most favorable to the respondent, the alleged statements constitute solely "stray remarks," therefore not cannot be used as direct evidence.

The courts have demonstrated remarks such as 'get rid of older employees and hire young blood' are not enough to constitute direct evidence. Price. This directly correlates at the case at bar, where former human resources manager alleged that Ed Williams said "the company needed some young blood." Even if this statement was true (Ed Williams denied these allegations in his affidavit), this would still only be a "stray remark," following the example Price set for the law.

The court in Jaso v. Travis Co. Juvenile Board ruled a remark concerning retirement as insufficient as direct evidence. In relation to the case at bar, where Allison Young alleged Mr. Williams of saying to the respondent "something to the effect of 'O'Callahan, you're too damn old for this kind of work and that you should retire.'" Even though Mr. Williams responded "I cannot remember anything about his age" in his affidavit, this alleged comment, as proven in Jaso, does not constitute as direct evidence the respondent needed to prove his contention.

Furthermore, even if we abandoned the case law set forward, the respondent failed to satisfy the tests set forward by Brown to prove that these remarks served as circumstantial evidence.

Most prominently, these alleged remarks fail to satisfy the 3rd prong of the Brown test, because Ted Arts, President of 4Cs, eliminated the respondent's position. Because he eliminated the respondent's position in 4Cs, then Ted Arts, not Edward Williams, who is responsible for the respondent's termination of service. Because the comments came from Ed Williams, instead of the person with the appropriate authority over employment, any comments made by Mr. Willams cannot qualify as direct evidence.

As proven by the "burden-shifting" analysis, 4Cs did not violate the ADEA.

Conclusion

The evidence presented for summary judgement did not raise a genuine issue of material fact of the respondent's allegations of discrimination. The trial court was also not presented with legally sufficient evidence to support the respondent's contention that the reasons behind his termination were a pretext for age discrimination.

Prayer

Therefore, we pray that this court shall reverse the decision of the lower court.

Respectfully submitted,

Wesley Banks

Brian Jones

Attorneys for Petitioner

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG - APP - 201 7

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs

JAMES O ’CALLAHAN

Respondent

On Appeal from

The 15th Court of Appeals

Brief for Respondent

Wesley Banks (Attorney #1)

Brian Jones (Attorney #2)

The Episcopal School of Dallas

Statement of the Case

Appellant James O'Callahan filed this lawsuit against his former employer, Appellee Continental Catering Consolidated Company (4C's). Appeal was granted of the petition for review filed by Continental Catering Consolidated Company so that the court may hear and consider the issues raised by the record.

The issues before the Court are:

1. **Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan; and**
2. **Whether the trial court was presented with legally sufficient circumstantial evidence to support O'callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination**

Statement of Facts

O'Callahan was hired as a salesman with 4C's in 1990. Later one, due to outstanding work and reliability on him from the company, he was promoted to regional manager of the north region of the company. He then was transferred to the South Region in hopes that his skill would be able to help turn around that downfalling region. While preparing to have a turn around with this region, 4C's and Cayman Corporation began restructuring operations which resulted in business operations in the region. It was done by Ted Arts and Ed Williams as a way to maximize profits while also cutting costs at the same time.

Prior to the merger, O'Callahan noticed that many of his accounts slowly began to be taken away from in due to what the higher-ups claimed to be because of "lack of

profits". When O'Callahan questioned them, they were not specific as to why. 4C's South Region was then merged with Cayman Corps South Carolina Region. Once this merge of regions took place, it was all assumed by Ted Finnell which resulted in O'Callahan being terminated. After the termination took place,

O'Callahan sued 4C's since there was a clear action of age-discrimination. 4C's then filed a Motion of Summary Judgement stating that the evidence given does not support claims of age discrimination. The evidence being talked about would be the Affidavits of the co-workers of O'Callahan, the performance evaluations, and the comments that were made by O'Callaghan's direct supervisor and VP of Cayman Corp. Ed Williams which had discriminatory nature. O'Callahan was claiming that the those pieces of evidence showed that the termination of him was clearly due to his age, being 56 at the time. The Trial Court granted Summary Judgement to 4C's and dismissing the claims from O'Callahan. O'Callahan then appealed the verdict and the District Court of Appeals found that these statements and affidavits were compelling enough for there to be a trial. 4C then took a final attempt of granting the judgement by appealing it to this court.

Point of Error 1: **The summary judgement raises genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan**

4Cs filed a Motion for Summary Judgement (MSJ) stating that there was not enough conclusive evidence showing that the Company enacted on the discrimination of age when it came to the firing of the Respondent Jim O'Callahan. Instead, they

stated the termination took place due to "corporate restructuring". In order for Summary Judgement to be granted, 4Cs is required to show that no "genuine issue of material fact with respect to any element of O'Callahan's claims," *City of Houston v. Clear Creek Basin Authority*. But, there is evidence present that shows a clear use act of Age-Discrimination when it comes to the termination of the Respondent.

There were statements made by Phillip Dennis and Kaitlin Young about the VP and O'Callahan's direct supervisor that showed this Discrimination. Dennis states that there were comments made by Mr. Williams pertaining to the age of Jim O'Callahan. These statements included "Jim is getting old, he's fifty". While Young was present when Mr. Williams said that the Respondent was "Too damn old for this kind of work and [he] should retire." Which in her eyes, having taken extensive training as HR manager pertaining, is considered to be discrimination. It is quite evident that these comments made by Williams is a clear indication of Age-Discrimination. In *Nixon v. Property Management*, it states that "The movant of Summary Judgement has the burden of showing that there is no genuine issue of material of fact and that it's entitled to judgement as a matter of law." Both of these standards are not met by 4C's. There is an issue of material of fact due to there being a discrepancy on the legitimacy of the comments made by Mr. Williams. Along with that, being that these statements are present, these discriminatory comments would be entitled judgement due to them being signs of the age-discrimination that is taking place. In *Nixon*, it also states that "Evidence favorable to the non-movant will be taken as true." With this, the court would have to deem that the claims made by Dennis and Young about the comments made by Williams accurate. With these true statements, there would have

to be a trial enacted in the matters of discrimination due to the fact that 4C's has yet to show how these comments made show otherwise.

Along with showing that there were issues in the case present for there to be no MSJ, O'Callahan also followed the proper procedures needed in order for this appeal to be respected by the court. It was decided in *City of Houston* that it is required for the non-movant to "provide some assistance to the trial judge in narrowing issues to be decided." The Respondent clearly shows that there is one issue present within this case of his termination. That would be the fact that he was fired from his position due to his age. He brings vasts amounts of evidence to the courts proving this claim to be true which shows that he exhibits a great amount of assistance for the trial judge in showing the main issue of the suit. O'Callahan also is required to "define in writing" the issues and defects in the majority proof that would defeat the motion for Summary Judgement. He has all of the Affidavits of the witnesses that were under oath claiming the comments that are the issues raised in the suit.

Point of Error 2: **The trial court <u>was presented with legally sufficient circumstantial evidence</u> to support O'Callahan's contention that the stated reasons for his termination were a pretext of age discrimination**

As the Age Discrimination in Employment Act (ADEA) of 1967 reads, "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; (2) to limit,

segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter." *29 U.S.C 623 (a)*.

In order to prove discrimination, the "burden-shifting" analysis was used. A process has been established for using such an analysis. First, the employee is required to establish a "prima facie" case. Reeves v. Sanderson Plumbing Prod. Inc., 120 S.Ct. 2097, 2106 (1973). To establish a "prima facie" case for the ADEA, the employee must demonstrate that he or she (1)is 40 years or above, (2) was qualified for the position, (3) was subject to an adverse employment decision, and (4) either replaced by someone outside of the protected age class or someone younger, or otherwise discharged or discriminated against because of age. Price v. Marathon Cheese Corp. 119 F.3d 330, 336-37 (5th Cir. 1997); Rhodes v. Guiberson Oil Tools 75 F.3d 989, 992 (5th Cir. 1996).

O'Callahan established a "prima facie" case based upon these guidelines. At the time of termination, O'Callahan was 56 years old, satisfying the first prong.

Starting in the catering business in 1990 as the General Manager of "4C's North," he managed this region until late 2011. With over 20 years of managing experience with catering services in record, his qualifications for the position to manage 4Cs Carolinas best those of his replacement, Mike Kiser. Kiser, who replaced O'Callahan, was 35 years old and had worked in the catering business for only 3 years. O'Callahan earned plenty of high marks while serving as General Manager, marks higher than his replacement, Mr. Kiser. Based upon O'Callahan's experience and performance, he was qualified for the position, satisfying the second prong.

Termination of service is an adverse employment decision. O'Callahan experienced this employment decision, satisfying the third prong.

As previously established, Mike Kiser was 35 years old, much younger that O'Callahan, and outside the protected class. This choice of replacement satisfies the fourth prong.

After the "prima facie" case was established, the burden shifted to the employer to articulate a legitimate, non-discriminatory reason for the employee's termination. Reeves 102 S.Ct. at 2106. Edward Williams, the former employer of O'Callahan, stated in his affidavit "I can assure you O'Callahan's discharge was based upon reasonable factors and that his age played no part in the decision making process."

The "burden-shifting" analysis, however, does not need to be applied when direct evidence of discrimination exists. Transworld Arlines Inc. v. Thurston 469 at 121. In order for a comment to qualify as direct evidence of discrimination, the comments must be (1) related to the protected class; (2) proximate the time to the employment decisions in question; (3) made by a person with authority over the employment decisions in question; and (4) relate to the employment decisions at issue. Brown vs. CSC Logic, Inc. 82 F.3d at 655.

In mid-June of 2012, according to O'Callahan's affidavit, he and Williams were watching the US Open Golf Tournament in a conference room. O'Callahan stated "I didn't think I could walk and play 18 holes of golf 5 days in a row." In response, Mr. Williams stated "that's obvious, you're too damn old." This first comment is related to the protected class. It proximates the time of the termination in question. It was made by Mr. Williams, who decides who would manage the new position after the merger,

and subsequently the termination of O'Callahan. This comment relates the decision at issue because it demonstrates Mr. Williams attacking O'Callahan's age, signifying Mr. William's discrimination against the protected class detailed by ADEA.

In mid to late July of 2012, Mr. Williams came to O'Callahan's office and said to him "O'Callahan, you're too damn old for this kind of work and I think you should retire." This second comment also is related to the protected class. It also proximates the time of the termination in question. This comment was also made by Mr. Williams, who, as previously established, determines which person manages the new position. This comment relates to the decision at issue because it clearly depicts that Mr. Williams wants O'Callahan out of the company due to his age.

On August 7 of 2012, while traveling on company business, a co-employee made a statement of approaching his 57th birthday, to which Mr. Williams replied "Isn't getting old a pain?… I sure am glad I am not as old as you guys." This third comment also attacks the protected class, also proximates the time of the termination, and is also made by the decision maker, Mr. Williams. This comment demonstrates a sense of pity for the protected class, as if they are inferior to younger businessmen like himself.

On August 9 of 2012, the day of O'Callahan's termination, 4Cs Human resources manager for that time asked why O'Callahan was being fired, to which Mr. Williams replied "the company needed some young blood around here to create a new image." In relation to the protected class, proximating the time of termination, and made by Mr. Williams, it relates to the decision at question by providing the discriminatory reason for terminating O'Callahan.

Conclusion

The evidence presented for summary judgement did raise a genuine issue of material fact of the respondent's allegations of discrimination. The trial court was also presented with legally sufficient evidence to support the respondent's contention that the reasons behind his termination were a pretext for age discrimination.

Prayer

Therefore, we pray, on behalf of Continental Catering Consolidated Company, that this court uphold the decision of the lower court.

Respectfully submitted,

Wesley Banks

Brian Jones

Attorneys for Respondent

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY, Petitioner

vs.

JAMES O'CALLAHAN, Respondent

On Appeal from

The 15th Court of Appeals

Brief for Petitioner

Judah Powell (Attorney #1)

Anna Strohmeyer (Attorney #2)

The Episcopal School of Dallas

Statement of the Case

Respondent Continental Catering Consolidated Company filed a summary of judgement in a case where petitioner James O'Callahan filed a lawsuit against his former employers on the charge of being terminated due to his age. O'Callahan appeals this summary of judgement on two points of error relating to burden on summary judgement and age discrimination claims. O'Callahan petitions this court to reverse this summary of judgement on those grounds.

Statement of the Facts

James O'Callahan In July 2012, James O'Callahan was fired by Continental Catering Consolidated Company after working there as a manager for a number of years. His job was given to Ted Finnell who was 40 years old and was performing at a consistently worse level than O'Callahan. James O'Callahan then took issue with the firing because he believed that he had been discriminated against because of his age. The main evidence to support this is the ageist comments made by his superior Vice President Edward Williams, and the affidavit of a human resource manager. However, the Continental Catering Consolidated Company or 4C's denies this, and says his firing was due to the corporate restructuring of the Carolina's region.

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Issues on Appeal

Counterpoint 1: The summary court did not err in calling a summary court

Counterpoint 2: The summary court did not erred in finding Williams's statements as circumstantial evidence

Argument

Counterpoint 1: The summary court did not err in calling a summary court

The purpose of summary judgment is to permit a trial court to promptly dispose of cases that involve unmeritorious claims or untenable defenses. See City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979). However, summary judgment is not intended to deprive litigants of their right to a trial, or to permit a trial by affidavits or deposition testimony. Id. As movant on summary judgment, 4C's was required to demonstrate that no genuine issue of material fact existed with respect to any element of O'Callahan's claims, and as such, that 4C's was entitled to judgment as a matter of law. See Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 509 (Tex. 1995). All evidence favorable to O'Callahan, as the non-movant, must be taken as true, and all reasonable inferences are to be indulged in his favor. See Nixon v. Mr. Property Mgmt. Co., 690 S.W.2d 548, 549 (Tex. 1985). The trial court's only duty at the summary judgment stage is to determine whether a material question of fact exists. See Huckabee v. Time Warner Entertainment Co., 19 S.W.3d 413, 421-22 (Tex. 2000). In the event that the evidence, in a light most favorable to the non-movant, raises such a fact issue, then the trial court must deny the motion and permit the case to proceed to a trial on the merits. As it has stated a summary court is not intended to permit a trial by affidavits, and is about finding enough material evidence to allow the court to go to trial court. All of O'Callahan's evidence relies on affidavits, and therefore can not be considered material evidence of discrimination.

Counterpoint 2: The summary court did not erred in finding Williams's statements as circumstantial evidence

Under the ADEA, it is unlawful for an employer "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." 29 U.S.C. § 623(a)(1). One of the primary issues in any ADEA case concerns the manner in which the terminated employee attempts to prove the existence of discrimination. Very rarely does an employee have the benefit of being able to offer direct evidence of discrimination, such as when an employer actually admits to terminating the employee on the basis of his or her age. However, Comments made by an employer's representatives can, under certain circumstances, provide direct evidence of discrimination. See Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996); Heim v. State of Utah, 8 F. 3d 1541 (16th Cir. 1993). In order to qualify as direct evidence of discrimination, the comments must be (1) related to the protected class at issue; (2) proximate in time to the employment decisions or discrimination at issue; (3) made by a person with authority over the employment decisions in question, and (4) related to the employment decisions at issue. In the event that the comments meet these criteria, the employee can establish a prima facie case of discrimination even without establishing more-favorable treatment given to a member of a different class. However, none of Williams comments fall under all of these 4 catergories. First off, most of William’s statements were made before an the aproximate time of the empolyment decision. Furthermore, William did not have full authority over O’Callahan, and was not responible for firing him. James O’Callahan was fired by 4C’s presdient Ted Arts, and thus William did not have authority over the employment decision. Lastly, none of Willam’s comments are directly about the meployment decision at

issue. Thusly, William's comments should not be seen as direct evidence of discrimination.

Conclusion

James O'Callahan recieved a fair ruling in a summary court, because he only provided circumstancal evidence to the court.

Prayer

For these reasons we pray that this court would confirm the decision of the summary court

. IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY, Petitioner

vs.

JAMES O'CALLAHAN, Respondent

On Appeal from

The 15th Court of Appeals

Brief for Respondent

Judah Powell (Attorney #1)

Anna Strohmeyer (Attorney #2)

The Episcopal School of Dallas

Statement of the Case

Respondent Continental Catering Consolidated Company filed a summary of judgement in a case where petitioner James O'Callahan filed a lawsuit against his former employers on the charge of being terminated due to his age. O'Callahan appeals this summary of judgement on two points of error relating to burden on summary judgement and age discrimination claims. O'Callahan petitions this court to reverse this summary of judgement on those grounds.

Statement of the Facts

James O'Callahan In July 2012, James O'Callahan was fired by Continental Catering Consolidated Company after working there as a manager for a number of years. His job was given to Ted Finnell who was 40 years old and was performing at a consiently worse level than O'Callahan.

Point of Error 1: The summary court erred in even calling a summary court, because of the restirictions of said court.

The purpose of summary judgment is to permit a trial court to promptly dispose of cases that involve unmeritorious claims or untenable defenses. See City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979). However, summary judgment is not intended to deprive litigants of their right to a trial, or to permit a trial by affidavits or deposition testimony. Id. As movant on summary judgment, 4C's was required to demonstrate that no genuine issue of material fact existed with respect to any element of O'Callahan's claims, and as such, that 4C's was entitled to judgment as a matter of law. See Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 509 (Tex. 1995). All evidence favorable to O'Callahan, as the non-movant, must be taken as

true, and all reasonable inferences are to be indulged in his favor. See Nixon v. Mr. Property Mgmt. Co., 690 S.W.2d 548, 549 (Tex. 1985). The trial court's only duty at the summary judgment stage is to determine whether a material question of fact exists. See Huckabee v. Time Warner Entertainment Co., 19 S.W.3d 413, 421-22 (Tex. 2000). In the event that the evidence, in a light most favorable to the non-movant, raises such a fact issue, then the trial court must deny the motion and permit the case to proceed to a trial on the merits. However, one of the primary issues in any ADEA case concerns the manner in which the terminated employee attempts to prove the existence of discrimination. Very rarely does an employee have the benefit of being able to offer direct evidence of discrimination, such as when an employer actually admits to terminating the employee on the basis of his or her age. Because direct evidence of discrimination is rare, the United States Supreme Court has established a "burden- shifting" analysis to be applied in discrimination cases.See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The burden- shifting analysis under McDonnell-Douglas was designed to ensure that employees have their day in court, despite the absence of direct evidence of discrimination. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). However, as previously stated a summary court relies heavily on soild evidence, and only allows cases with soild evedience to pass. Therefore, they do not follow the regulations set by the United States Supreme Court. By that logic, it is unfair to try a discrimination case in a summary court, because its legally is not a defenseible postion.

Point of Error 2: The summary court erred in finding Williams's statements as circumstantial evidence as it fits all the criteria to be considered direct evidence of discrimination.

Under the ADEA, it is unlawful for an employer "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." 29 U.S.C. § 623(a)(1). One of the primary issues in any ADEA case concerns the manner in which the terminated employee attempts to prove the existence of discrimination. Very rarely does an employee have the benefit of being able to offer direct evidence of discrimination, such as when an employer actually admits to terminating the employee on the basis of his or her age. Because direct evidence of discrimination is rare, the United States Supreme Court has established a "burden- shifting" analysis to be applied in discrimination cases.See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The burden-shifting analysis under McDonnell-Douglas was designed to ensure that employees have their day in court, despite the absence of direct evidence of discrimination. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). The burden-shifting analysis can be summarized as follows:

(1) First, the employee is required to establish a "prima facie" case of discrimination. See Reeves v. Sanderson Plumbing Prod., Inc., 120 S.Ct. 2097, 2106 (1973). In order to establish a "prima facie" case under the ADEA, the employee must initially show

that he or she (1) is 40 years of age or above, (2) was qualified for the position, (3) was subjected to an adverse employment decision of the employer, and (4) either replaced by someone outside the protected class or someone younger, or otherwise discharged or discriminated against because of age.

(2) Once the employee has established a "prima facie" case, the burden then shifts upon the employer to articulate a legitimate, non-discriminatory reason for the employee's termination. At this stage, the employer is merely required to present evidence that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. St. Mary's Honor Center, 509 U.S. at 507.

(3) If the employer states a legitimate, non-discriminatory reason for the termination, then employee is then required to demonstrate by circumstantial evidence that the reasons offered by the employer were merely a pretext for discrimination. This "burden-shifting" analysis, however, does not need to be applied when direct evidence of discrimination exists. See Trans World Airlines, Inc., 469 U.S. at 121. Comments made by an employer's representatives can, under certain circumstances, provide such direct evidence of discrimination. See Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996); Heim v. State of Utah, 8 F. 3d 1541 (16th Cir. 1993). In order to qualify as direct evidence of discrimination, the comments must be (1) related to the protected class at issue; (2) proximate in time to the employment decisions or discrimination at issue; (3) made by a person with authority over the employment decisions in question, and (4) related to the employment decisions at issue. In the

event that the comments meet these criteria, the employee can establish a prima facie case of discrimination even without establishing more-favorable treatment given to a member of a different class. Id. William's last comment that "the company needed some young blood around here to create a new image" mets all of the criteria, and thus can be considered direct evidence of discrimination. His comment fit the criteria in the following ways.

1. His comment was against the protected group of people; It was specifically targeted at people over the age of 40.
2. The last comment was made a week before O'Callahan was fired. Which is in a proximate amount of time to the employment decision in question.
3. Williams was appointed by the President of 4C's to " to manage the consolidated 'Carolinas Region' and "to restructure the management responsibilities previously handled by Finnell and the three North Carolina district managers into a more streamlined organization". This gave Williams the authority to fire O'Callahan, as well as many other employees. It should also be noted that Williams was O'Callahan's direct superior for the majority of his career, and thus had always had the ability to fire O'Callahan.
4. The comment was to made to a Human Resources manager when they asked why O'Callahan was being fired. Thus, the comment is obviously related to the employment decision at hand, and counts as direct evidence.

Because of the previously listed reasons, William's comment fits all the criteria to be considered direct evidence of discrimination; thus O'Callahan did not have to establish a full prima facie case. Therefore, he had enough proof to allow for him to go to a full

trial court. Therefore, the summary court erred in their decision to not include Mr. William's statements.

Conclusion

The Respondent was denied a trial in actual court, despite a considerably amount of evidence.

Prayer

James O'Cahallan prays that this summary court reverse there decision, and allows him to have a full trial at an acutal court.

IN THE SUPREME COURT OF
THE STATE OF TEXAS

No. YAG-APP-2017

CONTIENENTAL CATERING CONSOLIDATED COMPANY

Petitioner

Vs.

JAMES O'CALLAHAN

Respondent

On Appeal from
The 15th Court of Appeals

Brief for Petitioner Continental Consolidated Catering Company

Kennedy Onic
Sebastiane Caballes
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STATEMENT OF THE CASE

The respondent, James O'Callahan, filed a lawsuit against his former employer and petitioner Continental Catering Consolidated Company (also referred to as "4C's"), seeking damages under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. I 623 et seq. In his Original Petition, O'Callahan claimed that 4C's terminated his employment based upon his age. Prior to trial, the trial court granted 4C's Motion for Summary Judgment and dismissed O'Callahan's claims. Two issues are presented on appeal.

STATEMENT OF FACTS

4C's is a vending and food services which James O'Callahan was employed in until his eventual firing. Initially hired as a salesman, O'Callahan filled numerous positions; General Manager of 4C's North Region and General Manager of 4C's South Region. A restructuring of operations around July 2012 between 4C's and Cayman Corporation resulted in the consolidation of the two companies business operations. The region previously managed by O'Callahan (4C South) was combined with Cayman's South Carolina Region with management then assumed by Mr. Ted Finnell, age 40. O'Callahan was then terminated from the company, aged 56 at the time of his termination.

O'Callahan then sued 4C's under the ADEA, claiming his age served as motivating factor in his employer's decision to fire him. Affidavits and performance evaluation memoranda were used by both 4C's and O'Callahan to support their respective claims. O'Callahan contended that this evidence, at the very minimum, raised a genuine issue of material fact on the issue of discrimination. An emphasis was placed on several oral statements attributed to Mr. Ed Williams, VP of 4C's as well as one of the VP's of Cayman Corporation. In O'Callahan's view these statements by Mr.

Williams' were evidence of discriminatory intent. O'Callahan also claimed that the reasons provided by 4C's for his release were mere pretext for its discrimination against him due to age. Nevertheless, the trial court granted summary judgement in favor of 4C's and dismissed O'Callahan's claims prior to a trial.

ISUUES ON APPEAL

Issue Number One: Whether the summary judgement evidence raised a genuine issue of material fact concerning any direct evidence of age related discrimination alleged by James O'Callahan.

Viewed individually with no regards to context, one could reasonably conclude that the evidence brought forth by Mr. James O'Callahan raises a genuine issue of material fact. However just because evidence are material in that they make a 'fact this is of consequence to the determination of the action more or less probably' does not render he evidence legally sufficient. Likewise, just because statements made by Mr. Ed Williams can be related to this case of age discrimination does not inherently make them sufficient enough to raise an issue of material fact. *Transportation Ins. Co. V. Moriel*, 879 S.W.2d 10, 24-25 (Tex. 1994). In addition, when determining whether evidence truly raises a genuine issue of material fact, the evidence must be viewed in a light most favorable to that of O'Callahan. *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 548, 549 (Tex. 1985).

When the evidence is viewed in the matter previously stated, it is impossible to conclude that a genuine issue of material fact should be raised. The statements made by Williams are nothing more than stray comments; which, cannot be used as direct evidence to establish discrimination. *Price v. Marathon Cheese Corp.*, 119 F.3d 330, 337 (5th Cir. 1997). Comments related to "getting rid of older employees" and the desire to hire "young blood" were dismissed as stray remarks in similar cases. *Id.* Thus

William's comments related to the general age of his employees should not constitute as evidence of discriminatory intent. Rather, they can be found to be just general comments regarding the effects of age on a person.

Furthermore, even if the court were to consider Mr. William's statements as direct evidence of discriminatory intent, it would not be admissible through the test articulated in *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655-57 (5th Cir. 1996). The consolidation process between 4C's and Cayman Corporation that led to the eventual termination of O'Callahan was initiated by Mr. Ted Arts rather than Mr. Ed Williams. Thus, it is irresponsible to place the blame on William's who was not the person who determined Mr. O'Callahan's future as an employee at 4C's. Additionally, O'Callahan fails to determine whether William's statements were in any proximate time to his release from 4C's. The failure to define a precise time that these statements were made do not support the contention made by Mr. O'Callahan that these statements were evidence of discriminatory intent. *Id.* Lastly, comments made by Mr. William's in proximate time to O'Callahan's firing are immaterial. As the consolidation of the company(ies), rather than any intent on William's part caused the eventual firing of O'Callahan. This coupled with the failure of Mr. William's statements to satisfy any of the articulated tests negate its role as direct evidence that could raise a general issue of fact within the case. *Id.*

Issue Number Two: Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Pretext is defined as false reasoning or claims, which are then used to effectively masquerade the true intent of a person(s) or groups actions. O'Callahan contended that Ed William's comments suggested a bias or animus against the protected class

defined in the ADEA and thus should constitute as evidence demonstrating pretext. *Ramirez v. Allright Parking El Paso Inc.*, 970 F.2d 1372, 1378 (5th Cir. 1992). However, as clarified in the previous issue, Mr. William's statements are nothing more than stray remarks related to age. *Price v. Marathon Cheese Corp.*, 119 5th Cir. at 330. Due to stray remarks being unusable as direct evidence of discrimination or as evidence to demonstrate pretext, William's statements do not allow for the possibility of these statements to support any claim of pretext. *Id.*

In addition, contentions made by Mr. O'Callahan that he was replaced by an employee younger than him, without regard to his superior performance in his position is false. *Brown v. CSC Logic, Inc.*, 82 5th. Cir at 651. As stated previously, the sole factor that brought forth the release of O'Callahan from 4C's was the consolidation of 4C's and Cayman Corporation. O'Callahan's position was also removed upon the consolidation of the both companies. Therefore reasoning that Mr. O'Callahan was unfairly released and replaced holds no ground, as his position was terminated after his firing. Therefore he could not have been replaced at his position by a younger employee. *Id.*

In further reasoning against O'Callahan's use of performance evaluation memoranda to support his claims. All of his evaluations were made by Mr. William's himself, to which O'Callahan received a commendable minus rating until his last evaluation which he received a competent minus. The reasoning for the minor dip in rating was clearly explained in the affidavits of William's as well as other employees at 4C's. Citing that O'Callahan's troubles with his newly assigned regions; falling behind on numerous accounts, as well as a problem with one of the companies transportation vehicles the reasoning behind the decision to him (O'Callahan) being given a competent minus rating. Therefore it is unreasonable to believe that Mr. William's held

any discriminatory intent against O'Callahan if he were so willing to give favorable rating to him previously.

Additionally, O'Callahan suggests that the affidavits of Mr. Alan Hunter and Ms. Allison Young describe the actions by Mr. Ed William's that serve as further evidence of age discrimination upon other employees. However beyond these affidavits, there is no further evidence from summary judgement that support any of the claims made Mr. Hunter and Ms. Young. O'Callahan also entertained the idea that Mr. William's simple request to have information regarding 4C's employees birthdates served as evidence of discriminatory intent. However no conclusive link can be made from that statement. Thus, we can conclude that there was indeed not enough evidence presented to suffice the claim made by Mr. O'Callahan that the reasons stated by 4C's for his firing were nothing more than pretext.

Thus upon thorough and careful evaluation of Mr. O'Callahan's presented evidence and his suggestions of pretext, it does not make sense to believe that there was enough evidence to prove the prevalence of pretext in regards to what O'Callahan believed to be discriminatory intent. Nor that pretext was actually a conclusion that could be made within the case itself. The categorizing of Mr. William's statements as stray remarks, the factors that affected O'Callahan's position post-consolidation, and the failure of O'Callahan to justify his use of affidavits as well as performance evaluation memoranda all support this conclusion.

CONCLUSION

The petitioner Continental Catering Consolidated Company was inaccurately accused of age discrimination due to the actions of Mr. Ed Williams. However they rightfully motioned for summary judgement upon which the lower court correctly ruled in favor off. The failure of O'Callahan to raise a genuine issue of material fact, and his

failure to demonstrate pretext further support the decision made by the lower court and their decision to rule in favor of 4C's and their motion of summary judgement.

PRAYER

Continental Catering Consolidated Company prays that this court rule in favor of the petitioner and uphold the order of summary judgement by the lower court.

Respectfully Submitted,

Kennedy Onic Sebastiane Caballes

Attorneys for Respondent

IN THE SUPREME COURT OF
THE STATE OF TEXAS

No. YAG-APP-2017

CONTIENENTAL CATERING CONSOLIDATED COMPANY

Petitioner

Vs.

JAMES O'CALLAHAN

Respondent

On Appeal from
The 15th Court of Appeals

Brief for Respondent James O'Callahan

Kennedy Onic
Sebastiane Caballes
Duncanville High School

STATEMENT OF THE CASE

The respondent, James O'Callahan, filed a lawsuit against his former employer and petitioner Continental Catering Consolidated Company (also referred to as "4C's"), seeking damages under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. I 623 et seq. In his Original Petition, O'Callahan suggested that 4C's terminated his employment based upon his age. Prior to trial, the trial court granted 4C's Motion for Summary Judgment and dismissed O'Callahan's claims. Two issues are presented on appeal.

STATEMENT OF FACTS

4C's is a vending and food services which James O'Callahan was employed in until his eventual firing. Initially hired as a salesman, O'Callahan filled numerous positions; General Manager of 4C's North Region and General Manager of 4C's South Region. A restructuring of operations around July 2012 between 4C's and Cayman Corporation resulted in the consolidation of the two companies business operations. The region previously managed by O'Callahan (4C South) was combined with Cayman's South Carolina Region with management then assumed by Mr. Ted Finnell, age 40. O'Callahan was then terminated from the company, aged 56 at the time of his termination.

O'Callahan then sued 4C's under the ADEA, claiming his age served as motivating factor in his employer's decision to fire him. Affidavits and performance evaluation memoranda were used by both 4C's and O'Callahan to support their respective claims. O'Callahan contended that this evidence, at the very minimum, raised a genuine issue of material fact on the issue of discrimination. An emphasis was placed on several oral statements attributed to Mr. Ed Williams, VP of 4C's as well as one of the VP's of Cayman Corporation. In O'Callahan's view these statements by Mr.

Williams' were evidence of discriminatory intent. O'Callahan also claimed that the reasons provided by 4C's for his release were mere pretext for its discrimination against him due to age. Nevertheless, the trial court granted summary judgement in favor of 4C's and dismissed O'Callahan's claims prior to a trial.

ISUUES ON APPEAL

Issue Number One: Whether the summary judgement evidence raised a genuine issue of material fact concerning any direct evidence of age related discrimination alleged by James O'Callahan.

The establishment of summary judgement is to allow a trial court to dispose of cases that contain unmeritorious or untenable defenses. *City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d. 671, 678 n.5 (Tex. 1979). Thus 4C's was required to demonstrate that no genuine issue of material fact existed in respect to O'Callahan's claims. In addition, evidence favorable to O'Callahan must be taken as true, and all reasonable inferences are to be indulged in his favor. *Nixon v. Mr. Property Mgmt. Co.,* 690 S.W.2d 548, 549 (Tex. 1985).

The evidence and statements provided by O'Callahan, when viewed favorably, indeed raise an issue of fact regarding 4C's alleged age discrimination against Mr. O'Callahan. On occasion, statements may be dismissed as "stray comments" if they do not directly indicate discriminatory intent towards an employee(s) age. *Price v. Marathon Cheese Corp.,* 119 F.3d 330, 337 (5th Cir. 1997). However, numerous statements made by Mr. William's towards O'Callahan were directly derogatory to his (O'Callahan's) age, most notably; "…you are too damn old for this kind of work and I think you should consider retiring." The string of remarks regarding O'Callahan's age led all the way up to a comment made by Mr. Williams just two days prior to O'Callahan's firing; "isn't getting old a pain…I am sure glad I am not as old as you

guys." This satisfies the component(s) articulated in *Brown v. CSC Logic, Inc.,* 82 F.3d 651, 655-57 (5th Cir. 1996). As these comments were made in proximity to the time that the termination of O'Callahan's contract occurred. In addition, Mr. Williams was responsible for the selection of the new manager's upon the consolidation of 4C's and Cayman. While Mr. Ted Arts did indeed begin the consolidation process, Mr. Williams determined the fate of his current employees. Thus satisfying another factor in regards to statements constituting as direct evidence. *Id.*

Beyond the statements made by Williams, a review of the performance evaluation memoranda shows that O'Callahan performed at an acceptable level prior to his termination. In addition Mr. O'Callahan's age (at the time of his termination; 56) and the age of his replacement Ted Finnell (40), satisfy the need of the fired employee being replaced by a younger one. *Price v. Marathon Cheese Corp.* 119 5th Cir. at 336. Viewed in its entirety, both a "prima facie" can be established as well as a genuine issue of material fact. Had the trial court not erred in granting the movant summary judgement, a trial would have been held on the basis of age discrimination.

Issue Number Two: Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

The pre-trial affidavits provided by Continental Catering Consolidated Company were relied upon by both James O'Callahan and 4C's for their respective arguments regarding 4C's motion for summary judgement. O'Callahan contended that the statements made by Mr. Ed Williams served at minimum, as circumstantial evidence that the reasons provided by 4C's for his release were pretext for discrimination through the elements set forth in the burden-shifting analysis.

Burden-shifting is a process upon which both the plaintiff and defendant exchange turns in providing evidence to support their claims on the issue of discrimination. The process through which burden-shifting analysis occurs is as follows:

1) The plaintiff has the burden of proving by the preponderance of the evidence a "prima facie" case of discrimination.
2) If the plaintiff succeeds in proving the "prima facie" case of discrimination, the burden shits to the defendant "to articulate or come forward with, some legitimate, non-discriminatory reason for the employer's action."
3) Should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).

O'Callahan provided sufficient evidence through the use of affidavits and performance evaluation memoranda to establish a "prima facie" for his case of discrimination. In addition the evidence is also sufficient to determine that the reasons stated by 4C's for O'Callahan's termination were nothing more than a pretext for age discrimination. As shown in the performance evaluation memoranda, O'Callahan performed at "competent minus" in the last evaluation done before his firing. This rating is a perfectly acceptable level of performance and thus negates the assertion that O'Callahan's low performance was the motivator to his firing. Furthermore, numerous discriminatory remarks made by Mr. Ed Williams were used by O'Callahan. The statement "…you are too damn old for this kind of work and I think you should consider retiring." directed at O'Callahan is a direct indication of both Mr. William's negative view of O'Callahan's age; also, it relates to William's eventual decision to

terminate O'Callahan's position at 4C's. Due to these comments having direct relation to the employment decision in question, they serve as justifiable evidence of discriminatory discharge. *McCarthy v. Kemper Life Ins. Co.,* 924 F.2d 683, 686-87 (7th Cir. 1991).

Claims made by Mr. Ed Williams that O'Callahan was fired due to the resulting effects of Mr. Ted Arts plans to consolidate the operations of both Cayman and 4C's hold no credence either. According to William's affidavit, O'Callahan was fired due to his subpar performance in comparison to his peers. Had O'Callahan indeed underperformed at his job, 4C's reason for a legitimate and non-discriminatory reason to release O'Callahan would have been sufficient in court. *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955 (5th Cir. 1993). Performance evaluation memoranda once again does not support this conclusion as Mr. O'Callahan consistently received "commendable minus" ratings prior to his last performance evaluation, which outperformed his eventual replacement Mr. Ted Finnell. Therefore asserting that O'Callahan was fired and replaced by a higher performing employee is unreasonable in regards to this case and the evidence provided.

The evidence relied upon by Mr. James O'Callahan indeed serve as justification of pretext in this case. As statements made by Mr. Williams suggest his bias and/or animus against employees of older age (O'Callahan was 56) thus demonstrating pretext. *Ramirez v. Allright Parking El Paso Inc.*, 970 F.2d 1372, 1378 (5th Cir. 1992). Supporting these claims are the performance memoranda evaluations which show O'Callahan's acceptable performance level. This evidence is sufficient to negate Continental Catering Consolidated Company's legitimate, non-discriminatory reason(s) for terminating O'Callahan's position at 4C's.

CONCLUSION

The respondent James O'Callahan filed a lawsuit against his former employer Continental Catering Consolidated Company on the basis of age discrimination. However due to a motion for summary judgement incorrectly being ruled in favor of 4C's as well as the failure to determine the evidence presented by O'Callahan as sufficient to determine pretext, O'Callahan did not receive a trial in court.

PRAYER

James O'Callahan prays that this court rule in favor of the respondent and reverse the order of summary judgement by the lower court and remand for a new trial, and for such other and further relief to which he may be entitled.

Respectfully Submitted,

Kennedy Onic
Sebastiane Caballes
Attorneys for
Petitioner

IN THE SUPREME COURT OF THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

Vs.

JAMES O'CALLAHAN

Respondent

On Appeal from
The 15th Court of Appeals

Brief for Petitioner

Daniela Padon-Castillo
Richel Seiko Murata
Ducanville High School

HONORABLE COURT OF APPEALS:

Comes now, the State of Texas, and files this appeals brief.

STATEMENT OF THE CASE

The petitioner, Continental Catering Consolidated Company, was charged with age discrimination in the Texas Supreme Court by the respondent, Mr. James O'Callahan, after he was fired by the company. The trial court disposed of the case due to summary judgement, but they reversed the judgement and remanded the case for a trail of the merits.

STATEMENT OF THE FACTS

James O'Callahan was a salesman with the 4C's, a vending and food services company. While he worked there, he was promoted to General Manager of the 4C's North Region, but was reassigned to General Manager of the South Region. Around July 2012, 4C's and its parent company, Cayman Corporation, began reconstruction of operations in North and South Carolina. During reconstruction the region that was managed by O'Callahan was merged with Cayman Corporations South Carolina operations and taken over by Mr. Ted Finnell, age 40. Since the company no longer needed Mr. O'Callahan's position, it was eliminated and he was fired.

ISSUES

Counterpoint Number One: Summary judgment evidence genuinely raised the issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan.

Counterpoint Number Two: The trial court was presented with legally insufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

ARGUMENT

Counterpoint Number One: Summary judgment evidence genuinely raised the issue of material fact concerning any direct evidence of age related discrimination alleged by James O'Callahan.The trial court's original decision to dismiss the case by the intentions of summary judgment on O'Callahan's contentions under the Age of Discrimination in Employment Act ("ADEA"), 29 U.S.C. I 623 et seq., since the evidence was filled with loose leaf comments, and they failed to present a genuine issue of material fact. "Simply because a piece or pieces of evidence are material in the sense that they make a 'fact this is of consequence to the determination of the action or more ...or less probable' does not render the evidence legally sufficient." Transportation Ins. co. v. Moriel, 879 S.W.D 10, 24-25 (Tex. 1994). Meaning, that even though O'Callahan may have presented evidence, they are no more than "stray comments" which, in fact, do not pose as direct evidence. Indirect evidence is deemed an easy-way to the disposal of the case. O'Callahan made allegations that during golf and gym entertainment, that Mr. Williams said that the petitioner was becoming too old for the job. In fact, he was accused of stating that the company was in need of some "young blood", yet,

> "Pretext can be shown by inter, alia, age based comments. Age related-remarks are relevant to determining whether age discrimination has occurred; however, 'mere stray remarks' such as 'younger people can do faster work' or calling an

employee an 'old fart' have been held to be insufficient to establish discrimination" Price v. Marathon Cheese Corp., 119 F.3d 330n (5th Circ. 1997), In this specific case law, the district court held that there was simply no probative evidence that age was determining factor in the decision to terminate Price. To add on, William's words did not satisfy the test conducted in Brown v Logic, Inc., 82 F.3d651, 655-57 (5th Cir. 1996).

Counterpoint Number Two: The trial court was presented with legally insufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

The sufficiency of the evidence needed to approbate Mr. O'Callahan's allegations is determined by whether the respondent can show the respondent's intent to terminate the employee due to age discrimination. According to the Seventh Circuit, "[u]nless remarks upon which the Plaintiff relies were related to the employment decision in question, they cannot be evidence of discriminatory discharge." McCarthy v Kemper Life Ins. Co., 924 F.2d 683, 686-87(7th Cir. 1991). O'Callahan's stray comments did not demonstrate the employer's demise to fire him according to old age. The Supreme Court established some requisites concerning proof for age prejudice:

1.) The plaintiff has the burden of proving the preponderance of evidence a prima facie case of discrimination.

2.) If the plaintiff succeeds in proving the prima facie case of discrimination, the burden shifts to the defendant to 'articulate or come forward with, some legitimate, nondiscriminatory reason for the employer's action.'

3.) Should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate

reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Department of Community Affairs v Burdine, 450 U.S. 248, 253-54 (1981).

Aside from O'Callahan's lack of proof, he also made statements concerning his age. On more than one occasion, the former employee of the 4C's commented that he wished he was younger, and the incremented age took a toll during employment. Furthermore, Mr. Williams, the one accused of being discriminatory, did not even possess the ability to extinguish the employee. In fact, it was Mr. Ted Arts whom eliminated the respondent from his position; the allegations did not disperse from the only person with the authority to fire an employee. Therefore, O'Callahan's claims are considered invalid.

CONCLUSION

The respondent did not present enough sufficient evidence to prove age discrimination by 4C's. The company simply terminated the position due to innocent company reconstruction, and age was not a determining factor. When the former employee was terminated, his position was eliminated since further use of it was not necessary.

PRAYER

The 4C's prays that the court upholds the trial court's original decision of dismissing O'Callahan's accusations due to summary judgment and insufficient evidence. If the court doesn't rule in favor of the 4C's, the courts will become flooded due to the obscurity regarding what is legitimate sufficient evidence to present age discrimination. Assent to the petitioner will grant clarity to the issues posed.

Respectfully Submitted By:

Daniela Padron-Castillo

Richel Seiko Murata

Attorneys for Petitioner

Duncanville High School

IN THE SUPREME COURT OF THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

Vs.

JAMES O'CALLAHAN

Respondent

On Appeal from
The 15th Court of Appeals

Brief for Respondent

Daniela Padon-Castillo
Richel Seiko Murata
Ducanville High School

TO THE HONORABLE TEXAS SUPREME COURT:

Comes now, the State of Texas, and files this appeals brief.

STATEMENT OF THE CASE

The petitioner, Continental Catering Consolidated Company, was charged with claims of age discrimination by their former employee, the respondent Mr. James O'Callahan, after he was fired by the company. The trial court disposed of the case due to summary judgement, but they reversed the judgement and remanded the case for a trail of the merits.

STATEMENT OF THE FACTS

James O'Callahan was a salesman with the 4C's, a vending and food services company. While he worked there he was promoted to General Manager of the 4C's North Region, but was reassigned to General Manager of the South Region. Around July 2012, 4C's and its parent company, Cayman Corporation, began reconstruction of operations in North and South Carolina. During reconstruction the region that was managed by O'Callahan was merged with Cayman Corporations South Carolina operations and taken over by Mr. Ted Finnell, age 40. O'Callahan was then terminated, and was 56 years old at the time of his termination.

ISSUE ON APPEAL

Counterpoint Number One: Whether summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan.

Counterpoint Number Two: The trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

ARGUMENT

Counterpoint Number One: Summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan.

In the Age Discrimination in Employment Act it states that in order to establish a prima facie case of age discrimination the respondent must show 4 things. First, he must show he was 40 years of age or older when he was discharged to show he is within the class of workers protected against age discrimination. Second, he must prove he was discharged/ demoted. Then he must show that during the time of discharge/demotion he was performing at a job level that met his employer's legitimate expectations. Lastly, he must show that following his discharge he was replaced by someone of comparable qualifications who is younger.

For the first point, Mr. O'Callahan fits this requirement because he was 56 years old at the time of his termination. For the second requirement, he also fits the standard because he was discharged, he did not resign or quit. For the third requirement, Mr. O'Callahan was not only performing at his job level but he was achieving at high rates, enough to in fact qualify him for a $37,000 bonus, the week before he was fired. For the last point, Mr. O'Callahan was replaced by younger workers, Mr. Kiser and Mr. Finnell, who received O'Callahan's territories.

Summary judgement was wrongly decided by the trial court in this case. The purpose of summary judgement is to permit a trial court to promptly dispose of cases that involve unmeritorious claims or untenable defenses. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979). These are for cases that have no argument, summary judgement is not intended to deprive people of their right to a trial. For this to be a proper case of summary judgement, 4C's must've

demonstrated that there is no genuine issue of material facts in any of O'Callahan's claims. This is not the case, however, seeing that O'Callahan has both direct and circumstantial evidence. The trial court's only duty at the summary judgement stage is to determine whether a material question of fact exists. Huckabee v. Time Warner Entertainment Co., 19 S.W.3d 413, 421-22 (Tex. 2000). If the evidence, in the light most favorable to the non-movant, raises such a fact issue, then the trial court must deny the motion and permit the case to proceed to a trial on the merits.

Counterpoint Number Two: The trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Mr. O'Callahan also claims that Williams' statements and other facts serve as circumstantial evidence to prove that the reasonings that the 4C's gave for his termination were in fact a pretext for discrimination. As stated in counterpoint number one, whether you count the statements as circumstantial or direct evidence, it is still legally sufficient to show that Mr. O'Callahan was in fact discriminated and fired because of his age.

Mr. O'Callahan also claims that the trial court erred in summary judgement since the statements made by Mr. Williams provided direct evidence of discriminatory intent. All evidence in favor of O'Callahan, as the non-movant, must be taken as true, and all reasonable inferences are to be indulged in his favor. Nixon v. Mr. Property mgmt. Co., 690 S.W.2d 548, 549 (Tex. 1985). Comments made by his supervisor, Mr. Ed Williams, provided direct evidence of discriminatory intent. Statements include "You're too damn old", "O'Callahan, you are too damn old for this kind of work and I think you should consider retiring", "Isn't getting old a pain?... I sure am glad I am not as old as you guys", and during the termination of O'Callahan stated "the company needed some

young blood around here to create a new image". These statements should qualify as direct evidence. In order to qualify as direct evidence of discrimination, the comments must be (1) related to the protected class at issue; (2) proximate in time to the employment decisions or discrimination at issue; (3) made by a person with authority over the employment decisions in question, and (4) related to the employment decisions at issue. Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996). These statements fit all four requirements, classifying them as direct evidence.

Even if the statements above are only classified as circumstantial evidence, the court must still follow a burden shifting analysis. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). O'Callahan was able to establish a prima facie, checking off the first step of the burden shifting analysis. The employer, 4C's, has in fact articulated a legitimate non-discriminatory reason for the employee's termination. However, as step three states, Mr. O'Callahan has sufficient proof to point that their reasoning was merely a pretext for discrimination.

The comments allegedly made by Mr. Williams satisfy the elements set forth in Brown, and thus qualify as direct evidence of discrimination. Other comments made by Mr. Williams were also relevant to the third stage of McDonnell-Douglas analysis. These can also fall under comments suggesting a bias or animus against the protected class may be used to demonstrate pretext. Ramirez v. Allright Parking El Paso Inc., 970 F.2d 1372, 1378 (5th Cir. 1982).

CONCLUSION

O'Callahan had enough sufficient evidence for his termination to be considered discriminatory of his age under the ADEA. There was also enough evidence to raise a genuine issue of material fact.

PRAYER

For these reasons, we pray that this court will reverse the lower court's ruling and remand for a new trial for Mr.O'Callahan.

Respectfully Submitted By:

Daniela Padron-Castillo

Richel Seiko Murata

Attorneys for Respondent

Duncanville High School

IN THE SUPREME COURT OF
THE STATE OF TEXAS

No. YAG-APP-2018

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from

The 15th Court of Appeals

Brief for Petitioner

Lance Belderol
Bryssa Rodriguez
Del Valle High School

TO THE HONORABLE SUPREME COURT OF TEXAS:

I. Statement of the Case

Employment discrimination laws are "not intended to be a vehicle for judicial second-guessing of employment decisions nor ... to transform the courts into personnel managers." **EEOC v. Louisiana Office of Community Services, 47 F.3d 1438, 1448 (5th Cir. 1995).** The ***ADEA Act*** was never intended to permit employees to use their age to excuse shortcomings in their performance, or to hold employers liable when their employees simply discuss the effects of age. O'Callahan failed to bring forward any evidence to suggest that two corporate entities decided to consolidate their business operations simply to discriminate against him due to his age.

II. Issues and Applicable Law

FACTUAL BACKGROUND

The trial court properly granted summary judgment on O'Callahan's claims alleged under the ***Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 et seq***., since the evidence wholly failed to raise a genuine issue of material fact on the central issue of age discrimination. "Simply because a piece or pieces of evidence are material in the sense that they make a 'fact this is of consequence to the determination of the action more … or less probable' does not render the evidence legally sufficient." ***Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 24-25 (Tex. 1994)***. When viewed in a light most favorable to O'Callahan, the evidence is simply insufficient as a matter of law to prove that age was a motivating factor in 4C's decision to restructure its business operations, which resulted in O'Callahan's separation of employment.

III. Issues and Applicable Law: Points Of Error

1. Whether the summary judgment evidence raised a genuine issue of material
fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan ;

First, the statements alleged by O'Callahan, from his former supervisor, Ed Williams, when viewed in the most favorable light, are nothing more than "stray comments" that cannot be used as direct evidence to establish discrimination, or circumstantial evidence to demonstrate pretext in discrimination cases. ***Jaso v. Travis Co. Juvenile Board, 6 S.W.3d 324 (Tex. App.--Austin 1999,***). Here a supervisor told employee that she would consider retirement if she also had worked for 30 years; held to be mere stray remark, and not competent evidence to demonstrate pretext. In our case Mr. O Callahan offered no specific proof to change this decision. In ***Price v. Marathon Cheese Corp., 119 F.3d 330, 337 (5th Cir. 1997***) a supervisor's statement that he wanted to "get rid of the older employees" and hire "young blood" were stray remarks, and not evidence of discriminatory intent. Mr. O' Callahan did not even offer any proof this this level- how could he claim that the comments where discriminatory? ***Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993)*** Here upon terminating employee, the supervisor remarked, "I hope when I get your age, someone with do the same thing for me"; held to be stray mark and not competent evidence of pretext. Rather than demonstrating any intent to discriminate on the basis of age, Williams' comments appear to be nothing more than general statements about the effects of age upon one's skills and physical capabilities. They were not documented and did not rise to the level of discrimination. In fact, one co-worker recounted an instance in which O'Callahan told him, "I wish I was as young as you and had your energy. . I'm just getting too old for this job." It is illogical for O'Callahan to characterize Williams' comments as evidence of a discriminatory intent,

when O'Callahan himself had made similar comments regarding the effects of age in the workplace.

Second, Williams' remarks do not qualify as direct evidence of discrimination under the test articulated in ***Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996).*** The affidavit of Mr. Ted Arts, president of 4C's and Cayman Corporation, established that he, and not Williams, was the person who decided to initiate the consolidation process that ultimately led to the elimination of O'Callahan's position. Because Mr. Arts was the person with the authority over the employment decision at issue, Williams' comments do not satisfy the third prong of the test under Brown. Second, O'Callahan failed to demonstrate that any of these remarks were proximate in time to the adverse employment decision at issue. According to Ms. Allison Young, Mr. Williams informed her about the decision to consolidate the North Carolina and South Carolina operations of Caymen Corporation and 4C's "sometime in July 2012." By failing to establish the date of this decision with any greater precision, O'Callahan was unable to demonstrate that any of Williams' comments were made in proximity to that decision.

O'Callahan had the burden of establishing a prima facie case of discrimination. He simply did not do it. Here, apply the 5th Circuit Court ruling in ***Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996).***- we see that Court has established four elements to a prima facie case of employment discrimination under the ***ADEA***. The plaintiff must prove that: 1) he was discharged; 2) he was qualified for his position; 3) he was within the protected class; and 4) he was replaced by someone outside the protected class, someone younger, or was otherwise discharged because of his age. Since all the evidence of the case has not proved any relevance to

O'Callahan being age discriminated against, he failed to satisfy the fourth prong of the Brown Test. Even if O'Callahan had been able to establish a prima facie case, 4 C's would then have had the burden of stating a legitimate, non-age-based reason for the adverse employment action. ***(Hersant, supra, at 1003, 67 Cal.Rptr.2d at 487)***. O'Callahan was purely discharged because of the parent company merging with 4C's, being a legitimate, non-age-based reason for the adverse employment action. Furthermore, even if 4C's had not met this burden, O Callahan would have had to produce substantial evidence demonstrating that 4C's justification was untrue or a pretext for discrimination. Nowhere in the evidence does this exist.

2. Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

At district court, 4Cs petitioned for a motion for summary judgement given that all of Mr.O'Callahan's claims lacked foundation and presented no evidence whatsoever to support to his claims of age-discrimination. Under **Tex. R. Civ. P. 166a (i),** a party may move for a no-evidence summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. In this case, since the district judge granted the motion, the burden fell on Mr.O'Callahan to prove the pretext was false and it was age-discrimination related. ***Tex. R. Civ. P. 166a (i)*** states, "The respondent is "not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements." And even under such low bar of expectations, Mr.O'Callahan failed to meet the burden. Even

with the extended time of discovery, Mr.O'Callahan was unable to produce evidence on had to rely on 4C's affidavits and presented material.

Cross applying ***Park Place Hosp. v. Estate of Milo (1995),*** in which the court ruled that summary judgment is not intended to deprive litigants of their right to a trial, or to permit a trial by affidavits or deposition testimony. It proves that the district judge was fully within his discretion and was not to allow a trial by affidavits as mentioned previously ,because that was the only material Mr.O'Callahan relied his claims on.

The Respondent will attempt to argue that 4C's did not meet a burden of evidence, a burden they did not have to meet cross apply **Moore v. K-Mart Corp (1998)** in which the court held that a no-evidence motion for summary judgement does not require supporting evidence. In addition, the non-movant has the entire burden of proof once the movant files a proper motion. **TRCP 166a(i).** The burden of proof in a summary judgement proceeding is on the same party who would bear the burden of proof at trial. Cross apply **Esco Oil & Gas, Inc v. Sooner Pipe & Sup.Corp.,962 S.W.2d 193, 197 n.3 (1998).** If the evidence presented at summary judgement was the same Mr.O'Callahan presented at trial court, then that means that Mr.O'Callahan had no real proof to demonstrate that age discrimination took place. Circumstantial or not, is no longer the question. The question is whether there was any evidence produced by Mr. O'Callahan, and the answer to that question is a no. The Respondent cannot have it both ways, it has kept the court on a waiting period in hope that something will come up along the way and help their case. But that is not how the law works.

The ADEA was never intended to permit employees to use their age to excuse shortcomings in their performance, or to hold employers liable when their employees

simply discuss the effects of age. Mr.O'Callaghan has brought this suit with no evidence eligible to rise to an issue of material fact. All claims no substance. Cross applying **Provident Life & Acc. Ins. Co. v. Knott, 128 S.W.3d 211, 216 (Tex. 2003)** Evidence is no more than a scintilla if it is "so weak as to do no more than create a mere surmise or suspicion" of a fact. Your honor that is all the Respondent has been able to bring forth. Not one iota of evidence has been produced by their part.

IV. CONCLUSION

The evidence presented on O'Callahan's side has not proven sufficiently in law and in this court, since the evidence does not at all meet the criteria set here today in order to be used or be evidence in the first place.

V. PRAYER

We pray that this overturns the Court of Appeals and reaffirms the decision of the District Court in this case.

Respectfully Submitted By:
Lance Belderol
Bryssa Rodriguez
Del Valle High School

IN THE SUPREME COURT OF
THE STATE OF TEXAS

No. YAG-APP-2018

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from

The 15th Court of Appeals

Brief for Respondent

Lance Belderol
Bryssa Rodriguez Muro
Del Valle High School

TO THE SUPREME COURT OF TEXAS:

I. Statement of the Case

Mr. James O'Callahan filed a suit after the illegal and discriminatory termination after 23 years of work for Continental Catering Consolidated Company (4C's). After a long campaign to force Mr.O'Callahan out of his job, the company ultimately opted for termination. In his original petition, O'Callahan claimed that 4C's terminated his employment based upon his age (56). Prior to trial, the trial court judge granted 4C's Motion for Summary Judgment. This was a grievous error in dismissing O'Callahan's claims. The Appeals Court agreed with this position and sent the case back to District Court for a trial.

II. Issues and Applicable Law

FACTUAL BACKGROUND

O'Callahan was originally hired as a salesman for 4C's, after twenty three years of service, O'Callahan was promoted to the position of General Manager of 4C's North Region. After high evaluations O'Callahan was re-assigned to become General Manager of the South Region. This started on July 10, 2012 and was done to force O'Callahan out of his job. The South region was in terrible condition when it was assigned to Mr. O'Callahan and it resulted in many hardships plus incidents credited to his name. In actuality he was given a real bad district and then was fired because he could not turn it around. O'Callahan sued under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623, et seq., claiming that his age served as a motivating factor in 4C's decision to terminate his employment. Mr. O'Callahan relied upon several oral statements attributed to Mr. Ed Williams, who was the vice-president of 4C's and also one of the vice-presidents of Cayman Corporation and the supervisor that re-

assigned Mr. O'Callahan to the South Region. Mr. Williams' statements were derogatory towards Mr. O'Callahan's age, and thus provided direct evidence of his discriminatory intent. The statements served as circumstantial evidence demonstrating that the reasons stated by 4C's for the termination of O'Callahan were merely a pretext for its discrimination against him due to his age. And opting for dismissal after failing to force Mr. O'Callahan under a stressful and dysfunctional work environment. Prior to trial, 4C's filed its Motion for Summary Judgment, consequently the trial court granted 4C's Motion for Summary Judgment and dismissed O'Callaghan's claims. Depriving Mr. O'Callahan of his right to a fair trial. This is why we address the following two issues on appeal today.

III. Issues and Applicable Law: Points of Error

(1) Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callaghan;

Mr.O'Callahan contends that the trial court erred in summary judgment since there was direct evidence of discriminatory intent. Mr.O'Callaghan also argues that statements from affidavits and other facts serve as circumstantial evidence to prove that 4C's reasons for termination were a pretext and that age discrimination is what took place. For these reasons, according to Mr.O'Callahan, the trial court erred grievously by dismissing his claims prior to trial. To begin with, the company 4C's petitioned a motion for summary judgment before setting a foot in trial court. Cross applying ***Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 509 (Tex. 1995),*** the court ruled that summary judgment is not intended to deprive litigants of their right to a trial, or to permit a trial by affidavits or deposition testimony. Your honor,

the exact opposite happened not only was Mr. O'Callahan deprived of a just and fair trial, but also, apart from two meager evaluations his case was revised on the rely of affidavits. Cross applying ***TEX. R. CIV. P. 166a(c)*** A motion for summary judgment must "state the specific grounds" upon which the judgment is sought. 4C's filed for summary judgement on the basis that the evidence, even when viewed in a light most favorable to O'Callahan, did not support a claim of age discrimination as a matter of law. However, cross applying ***Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995),*** To prevail on a traditional motion for summary judgment on an affirmative defense, the party asserting the defense must prove all elements of the defense as a matter of law .In ***McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 341(Tex. 1993)*** the court ruled that "the motion for summary judgement must stand or fall on the grounds expressly presented in the motion."

And applying the McDonnell Douglas standard, Mr.O'Callahan would have had to establish a prima facie case by showing **(1)** that s/he was an employee covered by the ADEA, **(2)** who suffered an unfavorable action by an employer covered by the ADEA, and **(3)** that age was a determining factor in the action in the sense that but for employer's intent to discriminate on the basis of age the plaintiff would not have been subjected to the employment action. Cross apply ***McDonnell Douglas v. Green, 411 U.S. 792 (1973).***

All of which were completed, meaning that the shift of the burden of evidence to prove otherwise would now fall on 4C's. Cross applying ***Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984),*** If the defendant wishes to assert an affirmative defense to the motion, he must urge the defense in his response and present sufficient evidence to create a fact issue on each element of the defense. Considering that 4C's

responded to the age discrimination claims by stating a lack of evidence, 4C's has effectively failed to meet the burden of proof, cross applying ***Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548–49 (Tex. 1985)*** in which the court ruled The standard of review for a traditional summary judgment is well established: **(1)** the movant for summary judgment has the burden of showing that no genuine issue of material fact exists and that it is therefore entitled to summary judgment as a matter of law; **(2)** in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and **(3)** every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in the nonmovant's favor. Demonstrating that, because 4C's failed to address the prima facie case presented at summary judgement, the evidence raises a genuine issue of material fact with the evidence presented at summary judgement.

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(2) Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Under the ADEA this is a case of disparate treatment. Cross apply ***Foley v. Univ. of Houston Sys., 355 F.3d 333, 340 (5th Cir. 2003)*** In a discrimination case, "[a]n adverse employment action means an ultimate employment decision, such as hiring, granting leave, discharging, promoting, and compensating." In order to qualify for disparate treatment we must look over the following: First, Mr.O'Callahan provided several statements made by his supervisor, Mr. Ed Williams, as proof direct evidence of discriminatory intent, cross apply ***Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 41 (5th Cir. 1996)*** where the court held that "Because plaintiffs in a

workforce reduction case are laid off and frequently unable to prove the replacement element, the Fifth Circuit requires "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue". Some of the comments Mr.O'Callahan provided demonstrated the intentions of his supervisor Mr.Williams against members of the protected class. Comments such as:

(1) At one point, Williams came into O'Callahan's office and stated "O'Callahan, you are too damn old for this kind of work and I think you should consider retiring."

(2) A human resource manager for 4C's asked Williams why O'Callahan was being fired, to which Williams reportedly replied, "The company needed some young blood around here to create a new image."

And more, the above-referenced statements of Williams, at a very minimum, served as circumstantial evidence under the burden-shifting analysis to demonstrate that the alleged reasons for his termination offered by 4C's were merely a pretext for discrimination. And cross applying ***Winters v. Chubb & Son, Inc., 132 S.W.3d 568, 576 (2004)*** A plaintiff need only produce more than a scintilla of evidence to raise a fact issue for the trial court's summary judgment to be reversed. With the amount of evidence presented at summary judgement, the evidence raised a genuine issue of material fact as argued previously, but it also amounts to enough circumstantial to disprove the company's allegations for Mr.O'Callahan's termination.

Under ***Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (1996)***, the circumstantial evidence presented shows age-based discrimination against Mr.O'Callahan. Comments made by Williams purportedly referred to the company needing "young blood" when asked by a co-employee about are also relevant under the third stage of the **MacDonnell-Douglas** analysis. Cross applying ***Ramirez v.***

Allright Parking El Paso Inc., 970 F.2d 1372, 1378 (5th Cir. 1992) comments suggesting a bias or animus against the protected class may be used to demonstrate pretext. Cross apply ***Quantum Chem. Corp. v. Toennies, 47 S.W.3d 473, 476 (Tex. 2001)*** Under the Texas statute, a plaintiff is not required to show the adverse employment action would not have occurred "but for" her age or sex; the statute requires only that she "show that discrimination was a motivating factor in an adverse employment decision". That being said, Mr.O'Callahan need not show any more. It is clear that the court made a grave error in granting the summary judgment motion. Cross apply ***Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981)*** The burden of establishing a prima facie case of discrimination is not onerous. Mr.O'Callahan has done nothing but comply with all of the legal requirements to prove his case. The same cannot be said for the company 4C's, who continuously evade and refuse to take responsibility for the harms against Mr.O'Callahan. We have shown that there is enough circumstantial evidence and more. 4C's contended reasoning of corporate reconstruction causing Mr.O'Callahan's termination is nothing more than mere pretext. Cross apply ***Ion v. Chevron, 731 F.3d 379 (5th Cir. 2013)*** where the court found that "Chevron's failure to conduct even the most cursory investigation, confront Ion about Peel's statements, or seek a second opinion under the FMLA calls into doubt Chevron's reasonable reliance and good faith on Peel's statements, and, at the very least, creates a fact issue as to whether it would have terminated Ion despite its retaliatory motive.". Like in our case, 4C's has not responded nor provided evidence to show that no age discrimination took place. Making the evidence presented by Mr.O'Callahan legally sufficient circumstantial evidence to support his contentions that the stated reasons for his termination were a pretext for age-related discrimination.

IV. CONCLUSION

This court should therefore and forthwith reverse the summary judgment of the trial court uphold the Appeal Court's decision to remands this case to the trial court for a trial on the merits. A fair trial is what is needed here for Mr. O'Callahan.

V. PRAYER

We pray that you uphold the Court of Appeals ruling and offer Mr. O'Callaghan justice for losing his position because of Age Discrimination.

Respectfully Submitted By:
Lance Belderol
Bryssa Rodriguez Muro
Del Valle High School

IN THE SUPREME COURT OF
THE STATE OF TEXAS

No. YAG-APP-2018

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from

The 15th Court of Appeals

Brief for Petitioner

Zachary Hicks
Anna Crawford
Del Valle High School

TO THE HONORABLE SUPREME COURT OF TEXAS:

I. Statement of the Case

The Continental Catering Consolidated Company (4C's) is a hard working company that focuses on vending and food services company. In July of 2012, 4C's and its parenting company Cayman Corporation team up together to work on the South Carolina region. Mr. Ted Finnel the president of the two companies made an executive order to replace Mr. O'Callahan with himself.

II. Statement of the Facts

The 4C's company have been a food and vending company for quite some time. The company has been always good at their job. On July 2012, 4C's decided to pair up with their parenting company Cayman Corporation to work on a major project that was happening in the South Carolina region. During the time that the two companies teamed up Mr. James O' Callahan was the supervisor for the Continental Catering. When the companies paired up, the President put himself as the supervisor for the project, which means that Mr. O' Callahan had to be let go. Mr. James O' Callahan filed suit that the company age discriminated against him.

III. Issues and Applicable Laws: Points of Error

1. Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O' Callahan

In law, a summary judgment is a court order ruling that no factual issues remain to be tried and therefore a cause of action or all causes of action in a complaint can be decided upon certain facts without trial. To better define the summary judgment, it's best to apply the **Federal Rules of Civil Procedure Title VII (c)** which states "(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Basically Title 7 is saying that summary judgment can be used if there is no evidence to prove that there was discrimination against the other party. This should apply to the company side due to the fact that there is no factual, physical evidence to prove that the company discriminated against him. In accordance with the age discrimination, underneath **EEOC v. Louisiana Office of Community Services (1995)** - "not intended to be a vehicle for judicial second-guessing of employment decisions nor ... to transform the courts into personnel managers." That

infers that when a person is laid off, they cannot be able to make an excuse to show that the company was at fault. Implying that, Mr. O' Callahan wasn't able to have proof that the company discriminated against him and a summary judgment was legal to create.

Not only do we see that Mr. O' Callahan has no proof that there was age discriminated, in **Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 2003)**, abrogated on other grounds by ***Reeves, 530 U.S. at 134*** (stating that, since the 58-year-old employee was fired by his 60-year-old employer, there is an inference that "age discrimination was not the motive"). The district court found that the summary judgment was reasonable enough under 166 A that there was a lack of evidence that Mr. O'Callahan was in fact age discriminated. With the lack of evidence to prove age discrimination, there was no need for a trial which will conclude with the summary judgment. In conclusion, Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. ***Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986); Ragas v.Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998).*** A dispute regarding a material factis "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. ***Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).*** When ruling on a motion for summary judgment, the court is required to view

all inferences drawn from the factual record in the light most favorable to the nonmoving party. ***Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986); Ragas, 136 F.3d*** . Further, a court "may not make credibility determinations or weigh the evidence" in ruling on motion for summary judgment. ***Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000); Anderson, 477 U.S. at 254-55.***

2. Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

The district court saw underneath ***166 A*** that it would be no evidence to prove age discrimination. The legal definition of age circumstantial evidence is whether Evidence directed to the attending circumstances ; evidence which inferentially proves the principal fact by establishing a condition of surrounding and limiting circumstances, whose existence is a premise from which the existence of the principal fact may be concluded by necessary laws of reasoning. This means that there must be some legal factual law that the courts can see as age discrimination. In this court case, there is no legally sufficient circumstantial evidence. To support this claim under **Mafrige V. Ross(1993).** A problem arises when a trial court's order does not expressly dispose of all issues and parties but includes a Mother Hubbard clause. "A Mother Hubbard clause generally recites that all relief not

expressly granted is denied." ***Mafrige, 866 S.W.2d at 590*** . Is the order final and appealable, which starts the appellate timetable running, or is the order interlocutory? In ***Mafrige v. Ross***, the trial court granted several of the defendant's summary judgment motions.. In each of the orders, the trial court used essentially the following language, "It is . . . therefore, ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment of Defendant . . . should in all things be granted and that Plaintiff . . . take nothing against Defendant." Id. (alteration in original). The plaintiffs appealed the summary judgments and argued that they were final orders because of the Mother Hubbard language. See id. The court of appeals held that the summary judgment orders were interlocutory because they failed to address one or more of the causes of action asserted by the plaintiffs. See id. Therefore, the court of appeals dismissed the appeal for want of jurisdiction. This supports our cause because Mr. O' Callahan was not able to have factual evidence at all. Even though Mr. Ed Williams told Mr. O' Callahan that he is too old to play golf, that's not actual evidence to prove that Mr. Williams was actually age discriminating against him. If there was no actual evidence to prove that there was age discriminated, we shouldn't be here in the first place. In summary we must view this like this, no evidence leads to summary judgment which leads to no Trial Court. **In In re Burlington Coat Factory Warehouse of McAllen, Inc.,** the Court found that a default judgment was interlocutory because it did not address the plaintiff's claim for punitive damages. ***167 S.W.3d 827 (Tex. 2005)***. Interestingly, the default judgment had statements about issuing writs and executing on the

judgment that would indicate it was intended to be a final judgment. But the Court found that this was not sufficient to make it final: "We cannot conclude that language permitting execution 'unequivocally expresses' finality in the absence of a judgment that actually disposes of all parties and all claims."

The judge ruled on Burlington Coat Factory saying that insulting somebody does not mean in act of discrimination toward a person.

IV. CONCLUSION

There are two stories to this case your honor. The first story is that 4C's and the parenting company Cayman Corporation was focused on the South Carolina region and they wanted to make this project the best one out of all the projects that they did. The President of the Cayman Corporation made an executive order to put himself in charge because he knew how the project should look like from his head to his toes. Yes, it is sad that in order for the project to be completed the way it looks like, they had to let go of Mr. O'Callahan because he had no idea how it actually looked like. Is the company sad? Yes the company was, however they knew it was normal procedure to let go of a man.

The second story is Mr. O'Callahan got fired, he got mad, and he threw a tantrum by arguing that he was discriminated toward. However, there is no evidence to actually prove that there was age discrimination. The only thing that the respondents have that the petitioners can agree was that he was fired. That was it. He was just fired. Under In **St.**

Mary's Honor Center v. Hicks, the Supreme Court considered a race discrimination under Title VII and resolved a circuit split referred to as the pretext-only v. pretext-plus debate. Specifically, the Court held that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination" and no additional proof of discrimination is required.

Under **Celotex Corp. v. Catrett,** Respondent brought suit against a number of named defendants including the Petitioner, alleging that her husband's death was facilitated by exposure to products containing asbestos that were manufactured by the Petitioner and defendants. At trial, Petitioner's summary judgment motion stated that Respondent could produce no evidence that Petitioner's products were the proximate cause of any injuries and further, that she could produce no witnesses to attest otherwise. Respondent then produced three documents which she claimed demonstrated a genuine material fact dispute. Respondent also argued the documents established the decedent had been exposed to the Petitioner's asbestos products. The documents included a deposition of the deceased, a letter from an official of one of the decedent's former employers, whom Petitioner planned to call as a trial witness and a letter from an insurance company to the Respondent's attorney. The Petitioner argued the documents were inadmissible hearsay and could not be presented in opposition to the summary judgment motion. The district court granted the motion. On appeal, the Court of Appeals held that Petitioner's summary judgment motion was defective since Petitioner

made no effort to show any evidence to support the motion. Petitioner appealed. The court ruled that yes the position taken by the Court of Appeals was inconsistent with the standard for summary judgment set forth in ***Rule 56(c)*** of the ***Federal Rules of Civil Procedure***. Reversed and remanded. Concurrence. United States Supreme Court (Supreme Court) Justice Byron White (J. White) concurred it was not enough for a defendant to move for a summary judgment motion without supporting the motion in any way or by concluding that the plaintiff had no evidence to prove his case. The Respondent in this case had the burden of showing that Petitioner had some hand in causing her husband's death and could only proceed with her claim upon some evidence of this. She was unable to meet this burden because the evidence she sought to present was inadmissible hearsay. Absent any other showing, Respondent could not prove that there existed any issues of triable fact. Petitioner's ability to show this would be a basis for the granting of a summary judgment motion.

This applies to our case because O' Callahan had the burden to show that there was age discrimination. Without meeting the burden, there was no need for a trial.

V. Prayer

The petitioner pray that this court upholds the district court ruling and see that there was a need for a summary judgment in the first place.

Submitted By
The Attorneys for The Petitioner
Zachary Hicks
Anna Crawford
Del Valle High School

IN THE SUPREME COURT OF
THE STATE OF TEXAS

No. YAG-APP-2018

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from

The 15th Court of Appeals

Brief for Respondent

Zachary Hicks
Ana Crawford
Del Valle High School

TO THE HONORABLE SUPREME COURT OF TEXAS:

I. Statement of Facts

James O' Callahan was originally hired thirty years ago as a salesman with the Continental Catering Consolidated Company(4C's). During Mr. O'Callahan's tenure of employment with the company, O'Callaghan was promoted to the position of General Manager of 4C's North Region, and then re-assigned to become General Manager of the South Region. In July of 2012, 4C's and its parent corporation, Cayman Corporation took a project in the North Carolina and South Carolina region. The northern section of the region was managed by James O' Callahan. At this time two regions were combined the General Manager duties were assumed by Mr. Ted Finnell, age 40. O' Callahan was then terminated at that point and was 56 years old when he was terminated. Mr. O' Callahan filed for suit because the company discriminated against him. When the company filed and was awarded a summary judgment they were denying my client his 6th amendment right to a fair trial, the equal protection of the 14th amendment and loss of a job improperly under **ADEA**.

II. Issues and Applicable Law

The issues upon this case are

1. **Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O' Callahan**
2. **Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.**

III. Legal Arguments

First, **whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O' Callahan** we must look at the real record**.** To understand the full effect of what needs to be done, the legal definition of a summary judgment is a final decision by a judge, upon a party's motion, that resolves a lawsuit before there is a trial. The party making the motion marshals all the evidence in its favor, compares it to the other side's evidence, and argues that there are no "friable issues of fact." Summary judgment is awarded if the undisputed facts and the law make it clear that it would be impossible for the opposing party to prevail if the matter were to proceed to trial. The opposing attorneys will try to argue that our side does not have evidence to prove that there was age discrimination. That's all cool fine and dandy. The only problem is that the burden is shifted to them. Here's why.

It was in **McDonnell *Douglas v. Green* No. 72-490, 1973** that the ability to formulate a burden-shifting analysis was introduced so that employees may utilize it to prove discriminatory treatment prohibited under Title VII – including retaliation and employment discrimination based on pregnancy, race, or some other protected category. Under this framework, a plaintiff must first state a *prima facie* case of discrimination, which entails a showing that the employee falls within a protected class, was qualified for the job, and suffered an adverse employment action. From there, the burden shifts to the employer to produce a legitimate, non-discriminatory reason for the adverse employment action. In the final stage, the burden reverts back

to the employee to show that the employer's reason was a pretext for unlawful discrimination.

This case is a landmark case of all age discrimination cases due to the fact that it shows that the employer not the employee has to show that there was no discrimination and the amount of evidence that the petitioners prove, they are showing to the judge that there was evidence to show age discrimination. Under ***Reeves v. Sanderson Plumbing*** **530 U.S. 133 (2000)** the Supreme Court reviewed and age discrimination claim under the Age Discrimination in Employment Act. There, the Court expanded upon its ruling in ***St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993),*** stating "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." The Court further stated that "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."

So the problem that we are facing is that is there material fact concerning any direct related age-discrimination. Aside from cases involving direct or "smoking gun" evidence, which is rare, proving an employment discrimination claim is often nuanced and accomplished through the use of circumstantial evidence. As the Supreme Court in **Rogers v. Missouri Pac. R. Co., 352 U.S. 500 (1957)** has long recognized, such evidence can even be the most powerful of the two: Circumstantial evidence is not only sufficient, but may also be more certain satisfying and persuasive than direct evidence. The court is saying that the circumstantial evidence is enough to prove that there was age related discrimination. The circumstantial evidence is enough to prove

that there was age related discrimination is what Mr. Williams said to my client, that he is too old to play golf.

Second,**whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.**

Under the ***Rogers*** case, it stated that circumstantial evidence is enough to prove that there was age related discrimination. In ***Bulwer v. Mt. Auburn 2016***, which involved a claim for wrongful termination based on race and national origin, the Massachusetts Supreme Court affirmed the Appeals Court's reversal of summary judgment and clarified the employee's burden of proof at the third stage. Specifically, the Massachusetts Supreme Court rejected the employer's contention that an employee must present evidence that the "reason for termination constituted a pretext concealing a discriminatory purpose" to defeat a motion for summary judgment. In doing so, the decision made clear that Massachusetts remains a pretext-only jurisdiction and that such a formulation "overstates the plaintiff's burden at the summary judgment stage." Rather, citing it's earlier ruling in ***Wheelock College***, an employee "need only present evidence from which a reasonable jury could infer that 'the respondent's facially proper reasons given for its action against him were not the real reasons for that action.'"

Also cross apply, the fact that since the summary judgment was ruled inefficient in the appeals court, the judge must have found circumstantial evidence to prove that there was age discrimination. With the evidence, there should have been a trial. Denying my client his trial interferes with his 6th amendment right.

In ***St. Mary's Honor Center v. Hicks*****,** the Supreme Court considered a race discrimination under Title VII and resolved a circuit split referred to as the pretext-only v. pretext-plus debate. Specifically, the Court held that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination" and no additional proof of discrimination is required. With that evidence the court had ruled that the only thing that is reasonable is the idea of a related discrimination toward that person.

Since the petitioners are arguing that there is no evidence for a trial, under the no-evidence for a summary judgment motion- Just as a traditional summary judgment movant must present its grounds in the motion, a no evidence movant must similarly raise any no evidence grounds clearly in the motion. If an appellate court determines that the motion did not adequately present the no-evidence ground to the trial court, the movant could waive that ground because of the lack of notice to the nonmovant. In ***Bean v. Reynolds Realty Group, Inc., 192 S.W.3d 856, 859 (Tex. App.—Texarkana 2006,*** the holding stated that the judges ruled, "there is no evidence to support the plaintiff's causes of actions and allegations" was ineffective. This meant that since there was no evidence, there still must be a trial. The Texas Court of Appeals 14th District Houston in **Vincent THOMAS, Appellant, v. CLAYTON WILLIAMS ENERGY, INC., Tom Fetford, Pete Saldana & Charles McCauley,** No. 14-98-00583-CV. ***September 23, 1999 V***incent Thomas, the appellant, appealed a summary judgment granted in favor of Clayton Williams Energy, Inc., et al. "CWEI" Thomas, one of CWEI's two African-American employees, worked for CWEI as a CWEI is an oil company active in exploring and drilling for oil and gas. The appellees, behaved in discriminatory and retaliatory action. According to Thomas, as a

consequence, he was diagnosed with clinical depression and remained under medical care for two years. Thomas alleged that beginning in the spring of 1993, CWEI supervisors initiated a campaign of racial harassment and discrimination against him, which caused him to suffer severe stress. An outdoor manual laborer, from January 1993 to June 1995. The court had ruled that as a result, we sustain Thomas's first two points of error. To the extent that the trial court granted summary judgment on CWEI's allegations regarding Thomas's failure to exhaust his administrative remedies, and Thomas's failure to raise genuine issues of material fact with respect to his race discrimination claims, we conclude that the trial court improperly granted summary judgment. CWEI moved for summary judgment on Thomas's race discrimination and retaliation claims on a number of grounds. If the court found that Mr. Thomas rights were indeed violated, shouldn't this apply to Mr. O'Callahan also.

Cross apply, **Ruby Lucille HALL,v. RDSL ENTERPRISES LLC d/b/a Jack in the Box.** Here, the appellant Ruby Lucille Hall presented a sole issue on appeal, contending that the trial court erred by granting summary judgment in favor of Appellee ***RDSL Enterprises LLC d/b/a Jack in the Box*** in her suit alleging a violation of section ***21.051 of the Texas Labor Code.*** Specifically, Hall contends that she established a prima facie case of age discrimination and therefore summary judgment was improper in this case. Under ***Texas Labor Code 21.051*** it state The general purposes of this chapter are to:

(1) provide for the execution of the policies of ***Title VII of the Civil Rights Act of 1964*** and its subsequent amendments (42 U.S.C. Section 2000e et seq.);

(2) identify and create an authority that meets the criteria under ***42 U.S.C. Section 2000e-5(c)*** and ***29 U.S.C. Section 633***;

(3) provide for the execution of the policies embodied in ***Title I of the Americans with Disabilities Act of 1990*** and its subsequent amendments (***42 U.S.C. Section 12101 et seq***.);

(4) secure for persons in this state, including persons with disabilities, freedom from discrimination in certain employment transactions, in order to protect their personal dignity;

(5) make available to the state the full productive capacities of persons in this state;

(6) avoid domestic strife and unrest in this state;

(7) preserve the public safety, health, and general welfare; and

(8) promote the interests, rights, and privileges of persons in this state.

In the Hall case the court ruled having sustained Hall's sole issue on appeal, we reverse the trial court's judgment granting RDSL's motion for summary judgment and remand this case back to the trial court for proceedings consistent with this opinion.

IV. Conclusion

In summary, we must picture this. Mr. O' Callahan has been working for the company for over 30 years. He has been a good/ working employee to get promoted to supervisor of a region. If the company can see Mr. O' Callahan be supervisor of that region, why didn't 4C's fight for their employee. The reason is because they knew that he was old and they knew that he wouldn't have enough stamina to do the job. Well your honors, they are wrong because my client has everlasting stamina to push himself because he wants the job done. The summary judgment is a slap in the face for him because it makes him look like nobody cares about him. The court should be ashamed and the companies should be ashamed for denying him his right for a trial.

V. Prayer

We pray that this court reversed the district court ruling and upheld the appeals court ruling. We pray that this court realized that this man should have stayed as the supervisor.

Submitted By
The Attorneys for the Respondent
Zachary Hicks
Anna Crawford
Del Valle High School

IN THE SUPREME COURT OF
THE STATE OF TEXAS

No. YAG-APP-2018

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from

The 15th Court of Appeals

Brief for Petitioner

Madison Adelstein
Adonis Birch-Franklin
Del Valle High School

TO THE STATE SUPREME COURT OF TEXAS

I. Statement of the Case

Beginning around the time of July 2012, 4Cs and its parent corporation, Cayman Corporation began merging, resulting in large amounts of reconstruction among the North Carolina and South Carolina business operations. The South Region was managed by O'Callahan, however, when it was combined with Cayman Corporations South Carolina, O'Callahan's position was no longer needed, resulting in his discharge. The issue went to the district courts where 4Cs filed for summary judgement and the District Court granted 4 C's this summary judgement.

II. Issues and Applicable Law

FACTUAL BACKGROUND

O'Callahan was hired as a salesman with 4C's, a vending and food services company, in 1999. Eventually, O'Callahan would work until he was promoted to the position of General Manager of 4C's North Region. When 4Cs began its merge into the Cayman Corporations during the July of 2012, O'Callahan was then re-assigned to become General Manager of the South Region. Beginning around the time of July 2012, 4C's and its parent corporation, Cayman Corporation, began their reconstruction of their operations in North Carolina and South Carolina. The restructuring of the two companies meant that there would be several changes in operations and employment between both 4Cs and Cayman Corporations. When the 4C's South Region, the location formerly managed by O'Callahan, was combined with Cayman Corporation South Carolina operations, O'Callahan's position was no longer needed, resulting in his discharge.

Upon being terminated due to a reduction in force, O'Callahan sued 4C's under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, et seq., claiming that his age served to be the main purpose for 4C's to terminate his employment. 4C's then filed a Motion For Summary Judgement under Tex. R. Civ. P. 166a and 166a(i), explaining that the evidence being presented to the court was minimal and circumstantial and should not be allowed to be used in the courts. O'Callahan relied on affidavits of O'Callahan, Allison Young, Phillip Dennis, Ted Arts, Edward Williams, and Mike Kiser, as well as his own performance evaluation memoranda. None of which could actually prove his claim of age discrimination.

Two Points of Law

(1) Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan; and

(2) Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

III. Issues and Applicable Law: Points Of Error

1. Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan ;

O´Callahan has brought two points of error in this Court. First, O'Callahan claims that the trial court erred in summary judgment in regards to the evidence being presented. O'Callahan believed that the minimal circumstantial proved his claim of discrimination. Second, O'Callahan contends that Williams' statements and other

facts serve as circumstantial evidence to prove that 4C´s explanation for the reasons of his termination were merely a pretext for discrimination. It was for these reasons that O´Callahan believes the trial court erred by dismissing his poorly claimed assertion of age discrimination. We will analyze each of these arguments below.

(1) Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan;

To begin with, the standard to petition for a summary judgement in the state of Texas requires that after an adequate time for discovery, a party that does not have the burden of proof at trial may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense. **See Tex. R. Civ. P. 166a(i)**. 4Cs did not at any time have the burden of proof, it has been the respondent's job since the beginning to prove the alleged age discrimination. Even when applying the burden shifting **McDonnell-Dougla**s analysis, this court can affirm that the respondent failed to meet all 4 prongs of the standard. The employee is required to establish a "prima facie" case of discrimination cross apply **Reeves v. Sanderson Plumbing Prod., Inc.**, 120 S.Ct. 2097, 2106 (**1973**).In order to establish a "prima facie" case under the **ADEA**, the employee must initially show that he or she (1) is 40 years of age or above, (2) was qualified for the position, (3) was subjected to an adverse employment decision of the employer, and (4) either replaced by someone outside the protected class or someone younger, or otherwise discharged or discriminated against because of age. In his claim to the court, O'Callahan never argued that his replacement was significantly younger. Nor did he produce any evidence to raise an issue before the court. Instead Mr.O'Callahan relied solely on the

company's provided material all of which was used against Mr.O'Callahan's allegations. So if this court were to once again review the evidence presented at summary judgement there can only be one conclusion, Mr. O'Callahan is using evidence that is disproving his contentions to support his claims. Contradictory? That is what we believe as well. Mr. O'Callahan did not produce even a scintilla of evidence as the standard under **TEX. R. CIV. P. 166a(i)** would hold. **TEX. R. CIV. P. 166a(i)** says that a a no-evidence summary judgment is improperly granted if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. If no evidence was produced then how could there be that scintilla? Even more incredulous is the Respondent's position that argues that direct evidence at summary judgement was presented.

(2)Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

As argued previously, Mr. O Callahan did not present any evidence at summary judgement. And the district judge rightfully granted summary judgement. Cross apply **Hahn v. Love, 321 S.W.3d 517,** To prevail on a no-evidence motion for summary judgment, the movant must establish that there is no evidence to support an essential element of the non-movant's claim on which the nonmovant would have the burden of proof at trial. The respondent may argue that Mr.O'Callahan was denied his due day at trial because of summary judgement, but considering the fact that summary judgement allows for as much evidence to support each side to be introduced as long as it follows court guidelines, the outcome would have been the same. For Mr.O'Callahan presented no evidence to endorse his claims. Had Mr.O'Callahan

presented enough evidence the burden of persuasion would have fallen of the company cross apply **Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 582 (Tex. 2006)** in which the court held that the burden of proof then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to each of the elements specified in the motion. 4C's simply exercised their right to ask for summary judgement due to the lack of evidence. If there was no actual evidence presented at trial and none presented at summary judgement, then the possibility of any circumstantial evidence presented is non-existent. Cross apply **IHS Cedars Treatment Ctr.of DeSoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 798 (Tex. 2004),** the court ruled that "A defendant who conclusively negates at least one of the essential elements of a plaintiff's cause of action is entitled to a summary judgment on that claim".

The issue we are addressing today focusses on the amount of evidence brought forth to court not the quality. We are not arguing for or against age discrimination, but whether a case can be made with the provided material. The standard when challenging the factual sufficiency of the evidence supporting an adverse finding upon which the appealing party did not have the burden of proof, the appellant must demonstrate there is insufficient evidence to support the adverse finding. Cross apply **McIntyre v. Comm'n for Lawyer Discipline, 169 S.W.3d 803, 806 (Tex. App.-Dallas 2005, pet. denied)**. A court is to consider, weigh, and examine all of the evidence for and against the finding, keeping in mind that the fact finder is the sole judge of the credibility of the witnesses and is entitled to accept or reject any testimony it wishes, as well as decide the weight to be given the testimony. **Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989)**. This means that the review of the evidence was up to the discretion of the judge, so unless Mr.O'Callahan

was planning to question the judge's discretion he has no real claim or issue in court today. If that is the case, Mr.O'Callahan has lost his position, for "if the trial court's order granting verity's no-evidence summary judgment motion does not specify the grounds upon which the trial court relied, appeals court must affirm the summary judgment if any of the grounds in the summary judgment motion are meritorious" Cross apply **FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 872–73 (Tex. 2000).** Mr. O'Callahan cannot win on today's appeal, under **FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 872–73 (Tex. 2000)** it has been stated that if trial court does not specify the grounds on which it ruled upon the appeals court must affirm the summary judgement regardless of anything. We have established that all evidence presented at summary judgement was the same presented at trial court and have come to only one conclusion. The evidence supports only one party, and that is 4C's the only ones to present any evidence at all to support our case. Unless Mr.O'Callahan is omitting that they have no evidence or that the only party to support their contention is the company 4C's then can we say that there is evidence in this case. That being said, Mr. O'Callahan's arguments are moot and have no standing nor logic

IV. CONCLUSION

For these reasons, it is our assertion that you overturn the lower court's decision and allow for the trial court's original granting of summary judgement to proceed. Do we need a justice system that is not just and based upon shifting sands? Do we need to look at every decision and appeal it simply because we can not because we should? If you answer no to both of these you must vote yes to uphold the lower court and the Judge's decision on the Summary Judgment.

V. PRAYER

`We pray that overturn the lower court's ruling due to the lack of evidence in this case today.

Submitted By
Madison Adelstein
Adonis Birch-Franklin

IN THE SUPREME COURT OF
THE STATE OF TEXAS

No. YAG-APP-2018

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from
The 15th Court of Appeals

Brief for Respondent

Madison Adelstein
Adonis Birch-Franklin
Del Valle High School

TO THE HONORABLE SUPREME COURT OF TEXAS:

I. Statement of the Case

O'Callahan was a General Manager of the 4Cs, a corporation that he had been faithful to for 22 years. At the age of 56, O'Callahan was terminated and replaced with Mr. Ted Finnel, a man 16 years younger than he. O'Callahan proceeded to sue 4Cs under Age Discrimination in Employment Act(ADEA), however, in district court, 4Cs was granted a summary judgement, halting O'Callahan's movement for justice. We are here in court today answering two points of error; (1)Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan; and

(2) Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

II. Issues and Applicable Law

Factual Background

O'Callahan was hired as a salesman with 4C's, a vending and food services company, in 1999. During the course of his employment, O'Callahan worked his way up for about 22 years until he was promoted to the position of General Manager of 4C's North Region, and then re-assigned to become General Manager of the South Region. Beginning around the time of July 2012, 4C's and its parent corporation, Cayman Corporation, began a merging of the two operations in North Carolina and South Carolina. When the 4C's South Region, the location formerly managed by O'Callahan, was combined with Cayman Corporation South Carolina operations, Mr. Ted Finnell, 40, was declared the new General Manager. It was at this time O'Callahan,56, was terminated from 4C's.

O'Callahan then proceeded to sue 4C's under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, et seq., explaining that his age served as the leading component in 4C's terminating his employment. 4C's then filed a Motion For Summary Judgement under both, ***Tex. R. Civ. P. 166a and 166a(i)***, explaining that the evidence, being presented to the court was circumstantial evidence, all of which could prove O´Callahanś statement of age discrimination. O'Callahan relied, not on their own evidence, but instead on the evidence that 4Cs presented to the district courts, including the affidavits of O'Callahan, Allison Young, Phillip Dennis, Ted Arts, Edward Williams, and Mike Kiser, as well O´Callahan´s December 2011 performance evaluation memoranda, to contend that, at a very minimum, the evidence raised a genuine issue of material fact on the issue of discrimination.

III . ARGUMENTS ON APPEAL

O´Callahan has brought two points of error in this Court. First, O´Callahan´s assertion that the trial court erred in summary judgment since the affidavits presented by 4Cś of provide direct evidence of discriminatory intent based upon his age. Second, O'Callahan petitions that Williams' statements and other facts serve as sufficient circumstantial evidence to prove that 4C´s explanation for the reasons of his termination were a pretext for discrimination. It is O´Callahanś contention that the district court committed reversible error by dismissing his claims and the evidence presented by 4Cś prior to trial. We will analyze each of these arguments below.

(1) Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan

First, the standard to petition for a summary judgement in the state of Texas requires that after an adequate time for discovery, a party that does not have the burden of proof at trial may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense. ***Tex. R. Civ. P. 166a(i)***. Although the petitioner at no time had the burden of proof, they provided the proof and evidence needed in order to establish a prima facie case under **Reeves v. Sanderson Plumbing Prod., Inc.**, 120 S.Ct. 2097, 2106 (**1973**) for the respondent. In order to establish a "prima facie" case under the **ADEA**, the employee must initially show that he or she (1) is 40 years of age or above, (2) was qualified for the position, (3) was subjected to an adverse employment decision of the employer, and (4) either replaced by someone outside the protected class or someone younger, or otherwise discharged or discriminated against because of age. The first prong, admittedly is not met, however it lack of it is made up by prong four. The **ADEA** states that is an individual was replaced by someone 7 years older or younger than he or she, that it is considered a significant difference. Ted Finnel was 40, making him 16 years younger than 56 year old James O´Callahan.

Second, not only that, but the affidavits only prove further that O´Callahan was being discriminated against due to his age. This can be seen upon cross applying the statements made by Williams, the president of both the parent company, and 4C´s. And comments made by an employer´s representatives can, under certain circumstances, provide such direct evidence of discrimination, applying **Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996)**; all comments made by Williams are against those of older age, providing direct evidence of age related discrimination. Prong three can be easily made true using the same analysis being used on prong four. Prong two can very easily be proved after cross applying O´Callahanś faithfulness to

the company for 22 years and his previous performance reviews, which can be found in the evidence that 4Cs presented at the district courts. May the court also be reminded that O´Callahan is relying on the evidence that 4C´s presented to the trial court. Evidence that does not shine good light onto the company. This does not mean that O´Callahan had no evidence, but rather that the company provided all the evidence that was needed to prove O´Callahan´s assertion of age discrimination. This can be proved after cross applying the affidavits of O'Callahan, Allison Young, Phillip Dennis, Ted Arts, Edward Williams, and Mike Kise. Let the court be reminded that in the event that the evidence, in a light most favorable to the non-movant, raises such a fact issue, then the trial court must deny the motion and permit the case to proceed to a trial on the merits, cross applying **Huckabee v. Time Warner Entertainment Co., 19 S.W.3d 413, 421-22 (Tex. 2000).** With that said, the burden of proof would be shifted back to the petitioner to prove their contention that there is or was no evidence that proved O´Callahanś assertion of age related discrimination.

(2)Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

IV. Conclusion

For these reasons, it is my assertion that you uphold the Appeals Court's ruling in allowing this case to go to trial. A trial your Honor, that is all that we are asking her here. Time to spend to see once and for all what took place at the 4 C's. A time to cross exam the company employees under oath. A time for truth and justice to come out in the open.

V. Prayer

We pray that you uphold the Appeals Court´s ruling due to the obvious. Only at this time can my client rest easy in the land of the Free and the Home of the brave.

Submitted By
Madison Adelstein
Adonis Birch Franklin

IN **IN THE SUPREME COURT OF THE STATE OF TEXAS**

No. YAG-APP-2018

CONTINENTAL CATERING CONSOLIDATED COMPANY,

Petitioner

vs.

JAMES O'CALLAHAN,

Respondent

On Appeal from
The 15th Court of Appeals

Brief for Petitioner

Heber Acuna
Vanessa
Barrera
Del Valle High
School

TO THE SUPREME COURT OF TEXAS

I. Statement of the Case

A former employee of the Continental Catering Consolidated Company filed a lawsuit against the catering company arguing that his termination violated the **Age Discrimination Employment Act ("ADEA"), 29 U.S.C. § 623.** Prior to trial, the trial court granted 4C's Motion for Summary Judgment and dismissed the case due to lack of proof and any sort of factual evidence.

II. Issues and Applicable Law
FACTUAL BACKGROUND

The trial court properly granted summary judgment to dismiss Mr. O'Callahan's claims alleged under the **Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 et seq.,** since the evidence wholly failed to raise a genuine issue of material fact on the central issue of age discrimination. "Simply because a piece or pieces of evidence are material in the sense that they make a 'fact this is of consequence to the determination of the action more …or less probable' does not render the evidence legally sufficient in this case." **Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 24-25 (Tex. 1994).** Even when viewed in a light most favorable to O'Callahan, the evidence presneted is simply insufficient as a matter of law to prove that age was a motivating factor in 4C's decision to restructure its business operations, which resulted in O'Callahan's separation of employment. It is not possible to overturn evidence with conjecture or assumptions you cannot prove.

III. Issues and Applicable Law:

1) **Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan; police as such statements were not made voluntarily**

In **Price v. Marathon Cheese Corp., 119 F.3d 330, 337 (5th Cir. 1997)** supervisor's statement that he wanted to "get rid of the older employees" and hire "young blood" were stray remarks, and not evidence of discriminatory intent. August 16, 2017, the Court in ***Merrick v. Hilton Worldwide, Case No. 14-56853, 2017 WL 3496030,*** held that "context is key when a plaintiff alleges age discrimination based on circumstantial evidence" **Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993)** A terminated employee, supervisor remarked, "I hope when I get your age, someone with do the same thing for me"; held to be stray mark and not competent evidence of pretext).

Rather than demonstrating any intent to discriminate on the basis of age, Williams' comments appear to be nothing more than general statements about the effects of age upon one's skills and physical capabilities. Cross apply ***Merrick***, one co-worker recounted an instance in which O'Callahan told him, "I wish I was as young as you and had your energy. I'm just getting too old for this job." It is illogical for O'Callahan to characterize Williams' comments as evidence of a discriminatory intent, when O'Callahan himself had made similar comments regarding the effects of age in the workplace.

Furthermore, Williams' remarks do not qualify as direct evidence of discrimination under the test articulated in **Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996).** First, the affidavit of Mr. Ted Arts, president of 4C's and

Cayman Corporation, established that he, and not Williams, was the person who decided to initiate the consolidation process that ultimately led to the elimination of O'Callahan's position. Because Mr. Arts was the person with the authority over the employment decision at issue, Williams' comments do not satisfy the third prong of the test under Brown. Second, O'Callahan failed to demonstrate that any of these remarks were proximate in time to the adverse employment decision at issue. The application of Brown here clearly points out that the Summary Judgment was the correct decision by the District Court.

(2) Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

According to Ms. Allison Young, Mr. Williams informed her about the decision to consolidate the North Carolina and South Carolina operations of Cayman Corporation and 4C's "sometime in July 2012." By failing to establish the date of this decision with any greater precision, O'Callahan was unable to demonstrate that any of Williams' comments were made in proximity to that decision. Any comments allegedly made by Williams at or near the time of O'Callahan's separation of employment from 4C's are immaterial, since the decision to consolidate the business operations of the two companies was the actual event that ultimately led to the elimination of his position. None of the remaining evidence relied upon by O'Callahan supports his allegation that 4C's stated reason for his termination was merely a pretext for discrimination. First, O'Callahan claims to have received a more favorable performance evaluation than a younger co-employee who was assigned a portion of O'Callahan's territories after the consolidation. This evidence, standing alone, hardly suggests that O'Callahan was the victim of age discrimination, especially in light of the fact that Mr. Williams—the

alleged discriminator—was actually the supervisor who gave a more favorable evaluation to O'Callahan. Second, O'Callahan suggests that other employees, Ms. Allison Young and Mr. Alan Hunter, may have also received adverse employment decisions from 4C's due to their age. However, nothing in the summary judgment evidence supports the inference that these other employees were subjected to discrimination. Finally, O'Callahan offered evidence that Mr. Williams once sought out information regarding the employees' birthdays; according to O'Callahan, this fact provides circumstantial evidence of Williams' intent to discriminate against employees on the basis of their age. Once again, no reasonable inference of discrimination can be made from this evidence.

IV. CONCLUSION

In summary, employment discrimination laws are not intended to be a vehicle for judicial second-guessing of employment decisions nor ... to transform the courts into personal agents. **EEOC v. Louisiana Office of Community Services, 47 F.3d 1438, 1448 (5th Cir. 1995). The ADEA** was never accused to allow employees to use their age to have an excuse in their presentation or to hold employers accountable when their employees just discuss the after effect of age. O'Callahan failed to provide a statement with evidence to influence that two corporate entities decided to agree their business operations just to discriminate against him due to his age. Since the trial court did not commit reversible error by allowing summary judgement, I strongly believe that the Appeals Court was mistaken and the District Judge was correct in his decision.

V. PRAYER

For these reasons we pray that this court would confirm the decision of the District Court and overturn the Appeals Court Decision.

Respectfully Submitted by:

Heber Acuna
Vanessa Barrera
Del Valle High School

IN THE SUPREME COURT OF THE STATE OF TEXAS

No. YAG-APP-2018

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from

The 15th Court of Appeals

Brief for Respondent

Vanessa Barrera

Heber Acuna

Del Valle High School

To The Honorable Supreme Court Of Texas

I. Statement Of The Case

O'Callahan was originally hired as a salesman with Continental Catering Consolidated Company, which is a vending and food services company. During the course of his employment, O'Callahan was promoted to the position of General Manager of 4C's North Region, and then re-assigned to become General Manager of the South Region. Then in 2012 after very good evaluations he was terminated and replaced by Mr. Ted Finnell, age 40. O'Callahan was 56 years old at the time of his termination.

II. Issues and Applicable Law

FACTUAL BACKGROUND

In his pleadings, O'Callahan sued Continental Catering Consolidated Company under the ***Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623***, et seq., claiming that his age served as a motivating factor in 4C's decision to terminate his employment. Prior to trial, 4C's filed its Motion for Summary Judgment under ***Tex. R. Civ. P. 166a and 166a(i).*** In its motion, 4C's claimed that the evidence, even when viewed in a light most favorable to O'Callahan, did not support a claim of age discrimination as a matter of law. According to 4C's,

O'Callahan was not terminated due to his age, but instead his position was eliminated due to corporate restructuring. In support of its motion, 4C's attached the pre-trial affidavits obtained from O'Callahan, It was O'Callahan assertion that Mr. Williams' statements were derogatory towards O'Callahan's age, and thus provided direct evidence of his discriminatory intent. O'Callahan also argued that, at a very minimum, the statements served as circumstantial evidence demonstrating that the reasons stated by 4C's for its termination of O'Callahan were merely a pretext for its discrimination against him due to his age.

III. Issues Of Applicable Law

POINTS OF ERROR

1) **Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan and**

2) **Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.**

First, The McDonnell Douglas burden-shifting analysis is applied when a plaintiff lacks direct evidence of discrimination. It takes its name from the US Supreme Court decision that created the framework, ***McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)***. Traditional McDonnell Douglas burden-shifting operates as follows:

The plaintiff has made out a prima facie case, which means demonstrating that:

- He is a member of a protected class (56 years old) ;
- He was qualified for and applied for an available position;
- Despite being qualified, he was rejected for the position; and
- The position remained available after the plaintiff's rejection, and the defendant employer continued to seek applicants from persons of plaintiff's qualifications.

The burden of production shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for the employment action. By producing enough evidence for the burden shift- the District Court should have never granted a Summary Judgement. By doing so the Judge actually took away the rights of James O'Callahan and it should have been the company- the plaintiff must then demonstrate that the employer's reason was pretext for discrimination.

Second, the respondent will produce evidence that they were poorly served by their trial court attorney. This attorney failed to object at the Summary Judgment to the motion. Courts of Appeal and Supreme Courts will not generally set aside a verdict or finding based on the erroneous admission of evidence unless the other party made a timely objection to such evidence that makes clear the specific ground of the objection. ***Evidence Code § 353(a)***. Likewise, an erroneous exclusion of evidence may not be reviewable

on appeal unless the proponent made an adequate offer of proof. ***Evid. Code § 354.*** A party also cannot assert misconduct by opposing counsel as a basis for appeal unless he or she objected to counsel's actions at the time. ***Jensen v. BMW of North America, Inc. (1995) 35 Cal.App.4th 112, 129-130.*** We find now that respondent in bad shape because of the mistakes made by his attorney in the District Court.

IV. Conclusion

The majority of this court thus reverses the summary judgment of the trial court below, and remands this case to the trial court for a trial on the merits.

V. Prayer

We pray that uphold the Court of Appeals ruling and offer Mr. O' Callahan justice for losing his position because of Age Discrimination.

Submitted By
Vanessa Barrera

Heber Acuna

Del Valle High School

IN THE SUPREME COURT OF
THE STATE OF TEXAS

No. YAG-APP-2018

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from

The 15th Court of Appeals

Brief for Petitioner

Jessica De loera
E'Leyah Trevino
Del Valle High School

THE HONORABLE SUPREME COURT OF TEXAS:

I. STATEMENT OF THE CASE

In summary, James O'Callahan, the struggling employee did not make up any proof or evidence on how the company showed age discrimination. The ADEA was never intended to permit employees to use their age to excuse shortcomings in their performance, or to hold employers liable when their employees simply discuss the effects of age. Callahan failed to bring forward any evidence to suggest that two corporate entities decided to consolidate their business operations simply to discriminate against him due to his age. Since the trial court did not commit reversible error by granting summary judgment, I strongly dissent from the majority opinion of this Court.

II. STATEMENT OF FACTS

The respondent was originally hired as a salesman with 4C's, which is a vending and food services company. During the course of his employment, the respondent was promoted to the position of General Manager of 4C's North Region, and then re-assigned to become General Manager of the South Region. Beginning in or about July 2012, 4C's and its parent corporation, Cayman Corporation, began major restructuring of their respective operations in North Carolina and South Carolina. The restructuring eventually resulted in consolidations of business operations conducted by the two companies in those regions. The area previously managed by the respondent,4C's South Region, was combined with Cayman Corporation's South Carolina operations, and assumed by Mr. Ted Finnell.

In his pleadings, the respondent sued 4C's under the ***Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, et seq***., claiming that his age served

as a motivating factor in 4C's decision to terminate his employment. Prior to trial, 4C's filed its ***Motion for Summary Judgment under Tex. R. Civ. P. 166a and 166a(i). I***n its motion, 4C's claimed that the evidence, even when viewed in a light most favorable to the respondent, did not support a claim of age discrimination as a matter of law. According to 4C's, the respondent was not terminated due to his age, but instead his position was eliminated due to corporate restructuring. In support of its motion, 4C's attached the pre-trial affidavits obtained from the respondent, Allison Young, Phillip Dennis, Ted Arts, Edward Williams, and Mike Kiser. The trial court granted summary judgment in favor of 4C's and dismissed the respondent's claims prior to trial.

III. ISSUES ON APPEAL

1)Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan; police as such statements were not made voluntarily

2) Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

IV. ARGUMENT

1. **Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan; police as such statements were not made voluntarily**

First, O'Callahan says that statements purportedly made by his former supervisor, Mr. Ed Williams, provided direct evidence of age-based discrimination. Even viewed the alleged statements constitute nothing more than "stray comments" or simply a joke and that cannot be used as direct evidence to establish discrimination, or circumstantial evidence to demonstrate pretext in discrimination cases. Furthermore, Williams' remarks do not qualify as direct evidence of discrimination under the test articulated in ***Brown v. CSC Logic, Inc***. Second, O'Callahan failed to demonstrate that any of these remarks were proximate in time to the adverse employment decision at issue. O' Callahan was unable to demonstrate that any of Williams' comments were made in proximity to that decision. Any comments allegedly made by Williams at or near the time of O'Callahan's separation of employment from 4C's are immaterial, since the decision to consolidate the business operations of the two companies was the actual event that ultimately led to the elimination of his position.

2. Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

None of the remaining evidence relied upon by O'Callahan supports his allegation that

4C's stated reason for his termination was merely a pretext for discrimination. First, O'Callahan

claims to have received a more favorable performance evaluation than a younger co-employee
who was assigned a portion of O'Callahan's territories after the consolidation. This evidence,
standing alone, hardly suggests that O'Callahan was the victim of age discrimination, especially
in light of the fact that Mr. Williams—the alleged discriminator—was actually the supervisor who gave a more favorable evaluation to O'Callahan. Second, O'Callahan suggests that other
employees, Ms. Allison Young and Mr. Alan Hunter, may have also received adverse employment decisions from 4C's due to their age. However, nothing in the summary judgment evidence supports the inference that these other employees were subjected to discrimination. Finally, O'Callahan offered evidence that Mr. Williams once sought out information regarding the employee's' birthdays; according to O'Callahan, this fact provides circumstantial evidence of Williams' intent to discriminate against employees on the basis of their age. Once again, no reasonable inference of discrimination can be made from this evidence.

V. CONCLUSION

The other comments attributed to Williams are also relevant under the third stage of the McDonnell-Douglas analysis, under which O'Callahan was required to prove that 4C's articulated reasons for its termination were merely a pretext for discrimination. 1998). Because Williams' purported comments alone raise a genuine issue of material fact on the issue of discrimination, the trial court erred in granting summary judgment and dismissing this case prior to trial. In light of our holding in

this regard, we need not address O'Callahan's remaining arguments concerning the other purported circumstantial evidence of discrimination raised by the witness statements and the evidence. In conclusion, the respondent did not have enough evidence for a trial and therefore the petitioner should be granted summary judgement.

VI. PRAYER

We pray that the court follows the law and upholds the legally received summary judgement correctly given to the company.

Respectfully Submitted By:
Eleyah Trevino
Jessica De loera
Attorneys for Petitioner
Del Valle High School

IN THE SUPREME COURT OF
THE STATE OF TEXAS

No. YAG-APP-2018

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from

The 15th Court of Appeals

Brief for Respondent

Jessica De Loera
E'leyah Trevino
Del Valle High School

THE HONORABLE SUPREME COURT OF TEXAS:

I. STATEMENT OF THE CASE:

James O'Callahan was hired as a salesman in a vending and food services company. Later O'Callahan was promoted to the position of General Manager of the North Region, and then re-assigned to become General Manager of the South Region. In about July 2012, the company and its parent corporation, Caman Corporation, began the restructuring of their respective operations in North Carolina and South Carolina. The problem began when the restructuring resulted in consolidations of business operations conducted by the two companies in those regions. The area previously managed by O'Callahan, 4C's South Region, was combined with Cayman Corporation's South Carolina operations, and assumed by Mr. Ted Finnell, age 40. O'Callahan was terminated at that point, and was 56 years old at the time of his termination.

II. STATEMENT OF FACTS:

O'Callahan sued 4C's under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623, et seq., claiming that his age served as a motivating factor in 4C's decision to fire him. Prior to trial, 4C's filed its Motion for Summary Judgment under Tex. R. Civ. P. 166a and 166a(i). 4C's motion claimed that the evidence, did not support a claim of age discrimination as a matter of law and that O'Callahan was terminated due to corporate restructuring. 4C's attached the pretrial affidavits obtained from O'Callahan, Allison Young, Phillip Dennis, Ted Art's, Edward Williams, and Mike Kiser. In response, O'Callahan also relied upon those affidavits, as well as performance evaluation memoranda, the evidence raised an

issue of discrimination. An example in which O´Callahan faced age discrimination was when Williams, one of the vice-president of 4C's, said a derogatory statement towards O'Callahan's age. These statements serve as served as circumstantial evidence demonstrating that age was the reason in which 4C´s terminated O´Callahan. That was not the only incident in which 4C´s discriminated O´Callahan based on age .Even will all the evidence presented,the trial court granted summary judgment in favor of 4C's and dismissed O'Callahan's claims prior to trial.

III. ISSUES ON APPEAL:

(1) Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan

(2) Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

IV. ARGUMENT:

(1) Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan;

O'Callahan's argued two points of error. First, O'Callahan claimed that the trial court erred in summary judgment since the statements of Mr. Williams provided direct evidence of discriminatory intent. According to O'Callahan, this evidence alone raises a genuine of fact regarding discrimination, thus precluding disposition of his claims by summary judgment. Second, O'Callahan contends that Williams' statements and other facts serve as circumstantial evidence to prove that 4C´s

explanation for the reasons of his termination were merely a pretext for discrimination. For these reasons, according to O'Callahan, the trial court committed reversible error by dismissing his claims prior to trial. We will analyze each of these arguments below.

(a) Burden on Summary Judgment:

The purpose of summary judgment is to permit a trial court to promptly dispose of cases

that involve unmeritorious claims or untenable defenses. C***ity of Houston v. Clear Creek Basin***

Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979). However, summary judgment is not intended to

deprive litigants of their right to a trial, or to permit a trial by affidavits or deposition testimony..

As movant on summary judgment, 4C´s was required to demonstrate that no genuine issue of

material fact existed with respect to any element of O'Callahan's claims, and as such, that 4C's was entitled to judgment as a matter of law. ***Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 509 (Tex. 1995)***. All evidence favorable to O'Callahan, as the non-movant, must be taken as true, and all reasonable inferences are to be indulged in his favor. ***Nixon v. Mr. Property Mgmt. Co., 690 S.W.2d 548, 549 (Tex. 1985).*** The trial court's only duty at the summary judgment stage is to determine whether a material question of fact exists. ***Huckabee v. Time Warner Entertainment Co., 19 S.W.3d 413, 421-22 (Tex. 2000)***. In the event that the evidence, in a light most favorable to the non-

movant, raises such a fact issue, then the trial court must deny the motion and permit the case to proceed to a trial on the merits.

(b) Age Discrimination Claims:

Under the ADEA, it is unlawful for an employer 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 ***29 U.S.C. § 623(a)(1)***. One of the primary issues in any ADEA case concerns the manner in which the terminated employee attempts to prove the existence of discrimination. Very rarely does an employee have the benefit of being able to offer direct evidence of discrimination, such as when an employer actually admits to terminating the employee on the basis of his or her age. Because direct evidence of discrimination is rare, the United States Supreme Court has established a "burden-shifting" analysis to be applied in discrimination cases. ***St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).*** The burden-shifting analysis under ***McDonnell-Douglas*** was designed to ensure that employees have their day in court, despite the absence of direct evidence of discrimination. The burden-shifting

analysis can be summarized as follows:

(1) First, the employee is required to establish a ¨prima facie¨ case of discrimination. ***Reeves v. Sanderson Plumbing Prod., Inc., 120 S.Ct. 2097, 2106 (1973)***. In order to establish a ¨prima facie¨ case under the ADEA, the employee must initially show that he or she (1) is 40 years of age or above, (2) was qualified for the position, (3) was subjected to an adverse employment decision of the employer, and (4) either replaced by someone outside the protected class

or someone younger, or otherwise discharged or discriminated against because of age. ***Price v. Marathon Cheese Corp., 119 F.3d 330, 336-37 (5 Ih Cir. 1997); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 992 (5th Cir. 1996)***. (2) Once the employee has established a ¨prima facie¨ case, the burden then shifts upon the employer to articulate a legitimate, non-discriminatory reason for the employee's termination. ***Reeves, 102 S.Ct***. . At this stage, the employer

is merely required to present evidence that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. ***St. Mary´s Honor Center, 509 U.S. at 507***. If the employer states a legitimate, non-discriminatory reason for the termination, the employee is then required to demonstrate by circumstantial evidence that the reasons offered by the employer were merely a pretext for discrimination. This ¨burden-shifting¨ analysis, however, does not need to be applied when direct evidence of discrimination exists. Comments made by an employer´s representatives can, under certain circumstances, provide such direct evidence of discrimination. ***Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996); Heim v. State of Utah, 8 F.***

3d 1541 (16th Cir. 1993). In order to qualify as direct evidence of discrimination, the comments must be

(1) related to the protected class at issue;

(2)proximate in time to the employment decisions or discrimination at issue;

(3) made by a person with authority over the employment decisions in question, and

(4) related to the employment decisions at issue. ***Brown, 82 F.3***d. In the event that the comments meet these criteria, the employee can establish a prima facie case of discrimination even without establishing more-favorable treatment given to a member of a different class. Id.

(2) Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

First, none of the remaining evidence relied upon by O'Callahan supports his allegation that

4C's stated reason for his termination was merely a pretext for discrimination. O'Callahan contended that both direct evidence and circumstantial evidence of discrimination existed. In many instances statements were made by Mr. Ed Williams, O'Callahan's supervisor. For example, "O' Callahan, you are too damn old for this kind of work and I think you should consider retiring.¨ These instances serve as circumstantial evidence under the burden-shifting analysis to demonstrate pretext for discrimination and that age was a constant reminder that O'Callahan was not going to be working at 4cs for long. Second,Not only did O'Callahan

present discriminatory statements that mr.williams made, but also presented various witness affidavits and evidence to establish pretext. Even 4C' s purported treatment of other employees over the age of 40. Third, based upon the foregoing, the evidence raises genuine issues of fact regarding 4C's age-based discrimination of O'Callahan. Specifically, the comments allegedly made by Williams satisfy the elements set forth in Brown and thus qualify as direct evidence of age discrimination. In particular, Williams purportedly referred to the company needing "young
blood" when asked by a co-employee about the reasons for O'Callahan's termination.

V. CONCLUSION

This court should reverse the summary judgment of the trial court below, uphold the Appeals Court's decision and remand this case back to the trial court for a fair trial on the merits.

VI. PRAYER:

We pray that you uphold the Court of Appeals ruling and offer Mr. O'Callahan justice for losing his
position because of Age Discrimination

Respectfully Submitted By:
E'Leyah Trevino
Jessica De Loera
Attorneys for
Respondent
Del Valle High School

Introduction

Statement of the case:

In the lower court, the Petitioner Continental Catering Consolidated Company (4C's) was charged for age discrimination in the case "Age before beauty" against Respondent James O'Callahan. 4C's appealed to this court to reverse the judgement made of the lower court. O'Callahan petitions this case in the Supreme Court in hopes that the decision is upheld.

Statement of the facts:

Issues on appeal:

1)Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan; and

2)Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Argument:

Issue One: In part 4 of 16 in case No.93-3316 Bodenheimer v. PPG Industries Inc.he has to be either (i) be replaced by someone outside the protected class(ii)replaced by someone younger or (iii)otherwise discharged because of his/her age; for these reasons no evidence was shown to prove that 4C's had done any of which is presented. James O'Callahan was not replaced but his branch was separated due to his termination between his co-workers.

Conclusion:

*

Prayer:

For these reasons we pray that this court would reverse the decision of the lower court.

Respectfully Submitted By:

Rosalinda D. Martinez

Isaiah D. Camarillo

Attorneys for Petitioner

Sam Houston High School

Introduction

*

Statement of the case:

In the lower court, the Petitioner Continental Catering Consolidated Company (4C's) was charged for age discrimination in the case "Age before beauty" against Respondent James O'Callahan. 4C's appealed to this court to reverse the judgement made of the lower court. O'Callahan petitions this case in the Supreme Court in hopes that the decision is upheld.

Statement of the facts:

*

Issues on appeal:

1)Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan; and

2)Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Argument:

Issue One: According to the Age Discrimination in Employment Act (ADEA) the Respondent James O'Callahan provided sufficient evidence supporting his age discrimination claims. His summary judgment consisted of five (5) Co-workers, all of which provided evidence of age bias.

To bring this case to the Appellate Court one should present the court with a prima facie. To do this they must prove that they are/were:

1) 40 years of age or older when discharged and within the class protected against age discrimination;
2) Discharged or demoted;
3) Performing their job at the level expected by the employer when they were discharged or demoted;
4) Following their discharge or demotion, they were replaced by someone younger with comparable qualifications.

Issue Two: Circumstantial evidence as defined for the court is evidence obtained by inferences based on the situation or circumstances at hand.

Conclusion:

*

Prayer:

For these reasons we pray that this court would uphold the decision of the lower court.

Respectfully Submitted By:

Rosalinda D. Martinez

Isaiah D. Camarillo

Attorneys for Respondent

Sam Houston High School

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY, Petitioner

Vs.

JAMES O'CALLAHAN, Respondent

On Appeal from

The 15th Court of Appeals

Brief for Petitioner

Joseph Bremer

Jack Durham

Introduction

James O'Callahan was a regional manager working for Continental Catering Consolidated Company and was terminated on August 9th, 2012 at age 56. O'Callahan filed a lawsuit claiming his employer violated the Age Discrimination in Employment Act. Continental Catering Consolidated Company is petitioning the Texas Supreme Court to reverse the decision made by the 15th Court of Appeals.

Statement of the Case

The Appellee, James O'Callahan, went before the 222nd District Court of Travis County, Texas, which ruled in favor of the Appellate, Continental Catering Consolidated Company (4C's). O'Callahan then appealed to the 15th Court of Appeals which reversed the Travis County ruling. 4C's has now appealed to the Supreme Court of Texas, which has accepted Certiorari to hear arguments on the issue.

Statement of the Facts

The Appellee, James O'Callahan, worked for Continental Catering Consolidated Company, whose employment began in 1990, and who was terminated in 2012. At the time of termination, he was 56 years old and under the control of the failing 4C's South District, covering the territories of Charlotte and Laurinburg. In December of 2011,Edward Williams, O'Callahan's supervisor and Vice President of 4C's, moved O'Callahan from the 4 C's North Region to the 4 C's South Region under O'Callahan's request. In July of 2012, Edward Williams reduced

O'Callahans territories from 6 to 3 because of "O'Callahan's slow response to problem accounts," and problems with food delivery in unrefrigerated trucks. O'Callahan claimed that his reduction in territories was the beginning of a "two step process that forced me out of my job." In late July 2012, the President of 4 C's, ordered Edward Williams to consolidate the 4 C's operations in North and South Carolina into a single region run by Williams. The number of manager positions was reduced from 4 to 2., which saved the company thousands of dollars. O'Callahan was considered for the position Ed Williams took over, however ultimately that was decided against due to his difficulty managing his current territories, which had just been reduced. On August 9th, 2012, James O'Callahan was terminated.

4C's Appealed to the Supreme Court on two issues.

Issue 1: Whether the summary judgement evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan.

Issue 2: Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

Issue One

To address my first issue: As stated in Transportation Institution. Co. v. Moriel "Simply because a piece or pieces of evidence are material in the sense that they are relevant, does not render the evidence legally sufficient." Even when the evidence is viewed in a light most favorable to the Respondent, there is simply not enough material fact evidence to prove that age was a motivating factor in the decision to terminate O'Callahan.

While comments can, under certain circumstances, be used as evidence, the comments made by Edward Williams do not qualify under the precedent set by Brown v. CSC Logic, Inc. In order to qualify as direct evidence of discrimination, comments must meet 4 requirements, those being, they must be (1) related to the protected class, (2) proximate in time to the employment, (3) made by a person with authority over the employment decisions at issue, and (4) related to the employment decisions at issue. Two of those requirements are not met by the respondent, those being the third requirement, made by a person of authority over the employment decisions in question, and the fourth, related to the employment decisions at issue." Brown v. CSC Logic, 82 F. 3d at 655(5th Cir. 1996).

On to my second point: The third requirement was not met because Edward Williams does not have authority over the employment decision in question, Mr. Ted Arts did. While Mr. Williams was the one who fired James O'Callahan, he did so under orders of the President, Ted Arts. In Ted Art's' affidavit, he states that "I instructed Ed WIlliams to consolidate all Cayman and 4C's operations," he then stated "I further informed Ed Williams that the North Carolina region would be consolidated with Cayman's South Carolina region." These statements are clear commands given by Arts to Williams, and Williams was instructed to execute them,

he didn't chose to. Edward Williams did not have the authority to terminate James O'Callahan, he only acted as Ted Arts' representative, therefore his comments do not meet the requirement that they be made by a person of authority over employment actions.

On to my third point: Throughout his affidavit Arts refers to "we" in statements like,"In making out management selections, we considered the capabilities of Finnell and Kiser, Hunter and O'Callahan," Respondents may argue that Art's language is a reference to himself and WIlliams, however there is no evidence that he was referencing Williams with the use of "we". In fact, just a paragraph later Arts stated, "We abide by the law and do not discriminate against any individuals," using we to describe himself and the company. There is no evidence even suggesting that Arts is referring to himself and WIlliams.

The fourth requirement, that the comments must be related to the employment decisions at issue, also is not met. None of Mr. William's comments apply to age affecting O'Callahan's job performance. Simply saying, "there's no way you could play 18 holes of golf," or " isn't getting old a pain," does not at all relate to the workplace. Even when Williams said, "O'Callahan, you are too damn old for this kind of work and I think you should consider retiring," is not evidence of discrimination based on the president set by Jason vs. Travis Co. Juvenile Board. The comments brought before the court as evidence do not meet the 4th prong.

Issue Two

Now I will now go into the four different prongs. The first prong was clearly met because he was older than 40 years of age . The second prong was whether he was qualified for the job but he wasn't qualified for the job. Due to his failures in the south region, even after lowering the number of regions he had from 6 to 3, he still had a slow response to the problem of accounts and unrefrigerated truck problem(cite why). The company didn't want Mr. O' Callahan to continue his employment because more failures to the company would come from him controlling a larger region with more accounts, employees and refrigerated trucks that could cause the company to lose more money for the company. In the third prong it states was the employe subject to an adverse employment decision by the employer, he was fired from 4C's. The 4th prong his job wasn't replaced his job no longer existed because during restructuring the he job no longer exist and why pay for four people to do a two man job. They were just trying to save the company some money and it so happens Mr. O' Callahan wasn't doing well so 4C's decided to let him go.

For the second part of burden shifting analysis Mr. O'Callahan didn't handle well with the accounts that he had and his failures in the south region

Conclusion

The Petitioner has shown in this brief that there is not enough either material fact evidence or circumstantial evidence to convict 4C's of age discrimination. The material evidence presented by the respondent is not meeting of the standard set by Brown v. CSC Logic Inc., and the circumstantial evidence proposed is not sufficient to prove any discrimination.

Prayer

_____We pray that the court rule in favor of the Petitioner in this case by reversing the decision of the Lower Appellate Court.

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY

Petitioner

vs.

JAMES O'CALLAHAN

Respondent

On Appeal from The 15th Court of Appeals ----------

Brief for Petitioner

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Statement of the Case

Appellant James O'Callahan filed a lawsuit against his former employer, Petitioner, Continental Catering Consolidated Company (4C's), seeking damages under the provisions of the ADEA (Age Discrimination in Employment Act). In O'Callahan's original petition, O'Callahan claimed that 4C's terminated his employment based upon his age. Prior to O'Callahan's case reaching trial, the trial court granted Summary Judgement to 4C's subsequent to 4C's motion, and dismissed O'Callahan's claims.

Statement of the Facts

James O'Callahan worked for Continental Catering Company, a vending and food service company, as a General Manager of 4C's South Region. During July 2012 4 C's parent company, Cayman corporations began a restructuring process that involved the removal and compression of many branches and assets that led to O'Callahan's eventual termination.

O'Callahan was originally hired as a salesman with 4C's, which is a vending and food services company. During the course of his employment, O'Callahan was promoted to the position of General Manager of 4C's North Region, and then re-assigned to become General Manager of the South Region. Beginning in or about July 2012, 4C's and its parent corporation, Cayman Corporation, began major restructuring of their respective operations in North Carolina and South Carolina. The restructuring eventually resulted in consolidations of business operations conducted by the two companies in those regions. The area previously managed by O'Callahan, 4C's South Region, was combined with Cayman Corporation's South Carolina operations, and assumed by Mr. Ted Finnell, age 40. O'Callahan was

terminated at that point, and was 56 years old at the time of his termination. In his pleadings, O'Callahan sued 4C's under the Age Discrimination in Employment Act claiming that his age served as a motivating factor in 4C's decision to terminate his employment. Prior to trial, 4C's filed its Motion for Summary Judgment under Tex. R. Civ. P. 166a and 166a(i). In its motion, 4C's claimed that the evidence, even when viewed in a light most favorable to O'Callahan, did not support a claim of age discrimination as a matter of law. According to 4C's, O'Callahan was not terminated due to his age, but instead his position was eliminated due to corporate restructuring. In support of its motion, 4C's attached the pretrial affidavits obtained from O'Callahan, Allison Young, Phillip Dennis, Ted Art's, Edward Williams, and Mike Kiser. In his response, O'Callahan also relied upon those affidavits, as well as performance evaluation memoranda, to contend that, at a very minimum, the evidence raised a genuine issue of material fact on the issue of discrimination. In particular, O'Callahan relied upon several oral statements attributed to Mr. Ed Williams, who was the vice-president of 4C's and also one of the vice-presidents of Cayman Corporation. According to O'Callahan, Mr. Williams' statements were derogatory towards O'Callahan's age, and thus provided direct evidence of his discriminatory intent. O'Callahan also argued that, at a very minimum, the statements served as circumstantial evidence demonstrating that the reasons stated by 4C's for its termination of O'Callahan were merely a pretext for its discrimination against him due to his age. O'Callahan also claimed that other facts raised circumstantial evidence of discrimination on behalf of 4C's. Nevertheless, the trial court granted summary judgment in favor of 4C's and dismissed O'Callahan's claims prior to trial.

Point of Error One: **Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan**

4Cs filed a Motion for Summary Judgement (MSJ) stating that there was not enough conclusive evidence showing that the Company enacted on the discrimination of age when it came to the firing of the Respondent Jim O'Callahan. Instead, they stated the termination took place due to "corporate restructuring". In order for Summary Judgement to be granted, 4Cs is required to show that no "genuine issue of material fact with respect to any element of O'Callahan's claims," *City of Houston v. Clear Creek Basin Authority 589 S.W.2d 671 (1979)*.But, there is evidence present that shows a clear use act of Age-Discrimination when it comes to the termination of the Respondent.

In the affidavits of Phillip Dennis and Kaitlin Young, they both defend the occurrence of derogatory remarks being made by then supervisor Edward William's.. These comments included, "That's obvious, you're too damn old." referring to O'Callahan saying he could not still play 18 holes of golf in one sitting. "O'Callahan, you are too damn old for this kind of work and I think you should consider retiring." This remark was made with no given agitation, William's just felt the need to come into O'callahan's office to let him know that he was old and expendable to the company. In *Nixon v. Property Management 690 S.W.2d 546 (1985)*, it states that "The movant of Summary Judgement has the burden of showing that there is no genuine issue of material of fact and that it's entitled to judgement as a matter of law." 4C's failed to meet any of these standards, It is clear from these quotes that we have satisfied the Burden Shifting Analysis and this

case should be at least heard in a trial of O'Callahan's peers. But to satisfy this court I will make one more point proving that the circumstantial evidence, if not completely damming, at least deserves to be debated in a trial court.

In the affidavits of Allison Young, Phillip Dennis, Mike Kiser, and Ted Finell all show clear bias in their defence of their respective interest. Allison and Philip will obviously go to their grave saying they heard the derogatory remarks to protect the interest of themselves and their friend James. While on the other side of the coin, Phillip, and Mike will go to their grave swearing that the remarks were never made. They will do this to defend their company and their paychecks, this clearly shows that the case should go to trial immediately to determine what truly happened behind closed doors, because if true, the remarks serve as a smoking gun to prove that O'Callahan was a victim of blatant age discrimination.

Point of Error Two: **Whether the trial court was presented with <u>legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.</u>**

Supreme Court in Anderson states that a judge may not weigh the evidence but instead just take it at its face value in a summary judgement appeal. The judge's job is to determine if there is enough evidence not if the evidence is good enough the Advisory Committee Notes to Rule 56 contain an explicit statement that the very mission of summary judgment is "to assess the proof in order to see whether there is a genuine need for trial. It is clear that the respondent has provided enough evidence for there to at least have the question raised if there was discrimination.

It's 4c's job to provide direct evidence that no discrimination took place to grant summary judgement as stated in Matsushita Elec. Indus. Co. v Zenith Radio Corp., 475 U.S. 574, 587 (1986). And it's clear that the petitioner cannot prove that the remarks did not take place, and with that said it raises the question. Which is the only point of this court, to prove that there was the uestion.question of whether or not discrimination took place.

Another crucial point in this case is the idea that "the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay - FED. R. EVID. 104(a) advisory committee's note (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 53, at 123 n.8 (1954)). This means that the appellate judge should not have any information withheld from him/her, thus nullifying the idea that certain affidavits or testimony should be thrown out because of what so and so case law states.

Furthermore this case follows the guidelines set for a prima facie discrimination test almost to the dot. It is clear that O'callahan was in the protected class giving his age. He was also qualified for the position given his favorable performance review.(Commendable Minus) O'callahan was also rejected for this position and promptly asked to resign. The only part of the prima facie that isn't clearly met is the age of O'callahan's replacement Ted Finell's which was 40 at the time of the switch. But in In Peel Law Assn. v. Pieters (2013 ONCA 396)
It is stated that a prima facie can be finished if the evidence is more probable than not. And in this case it is probable that O'callahan was fired for discriminatory reasons, but this is not the point of this court. We are here simply to raise the question.

Conclusion

It is clear that enough evidence has been provided to this court to reverse the summary judgement handed down by the trial court. This case could have tremendous effects if the summary judgement is confirmed. This would set the precedent that an employee cannot simply have his case heard if that employee feels as if they'd been discriminated against. This would be a travesty of the highest order and this court cannot allow people to be stripped of their basic human liberties.

Prayer

For these reasons, we pray the court reverses the judgement of the lower court of Appeals and reverse the trial court's decision to grant summary judgement.