OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ROGER REEVES, Petitioner v. SANDERSON PLUMBING PRODUCTS, INC.

CASE NO: 99-536 c.2

PLACE: Washington, D.C.

DATE: Tuesday, March 21, 2000

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IN THE SUPREME COURT OF THE UNITED STATES

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ROGER REEVES, :

Petitioner :

v. : No. 99-536

SANDERSON PLUMBING PRODUCTS, :

INC. :

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Washington, D.C.

Tuesday, March 21, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:15 a.m.

APPEARANCES:

JIM WAIDE, ESQ., Tupelo, Mississippi; on behalf of the Petitioner.

PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

TAYLOR B. SMITH, ESQ., Columbus, Mississippi; on behalf of the Respondent.

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P R O C E E D I N G S

(11:16 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 99-536, Roger Reeves v. Sanderson Plumbing Products, Inc.

Mr. Waide.

ORAL ARGUMENT OF JIM WAIDE

ON BEHALF OF THE PETITIONER

MR. WAIDE: Mr. Chief Justice, may it please the Court:

When the United States Court of Appeals for the Fifth Circuit threw out this jury verdict and found the facts differently from what the Fifth -- from what the jury found them, the court of appeals offended fundamental principles that this Court has announced time and again.

This Court time and again has said that -- that not only the facts, but the inferences to be drawn from the facts is a jury question. Over and over again from old decisions, new decisions, as recently as 1999 in the Hunt case in as colorful a language as the Chief Justice said in the Aikens case when the Chief Justice said that the state of a man's mind is as much a fact as indigestion.

In Justice O'Connor's decisions, when she said again and again that when you eliminate all reasonable

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explanations in a -- for a employer's decision, then an inference can be rationally drawn that discrimination was the real reason.

Your Honor, in this case there was a rational inference. In fact, the business --

QUESTION: Excuse me. Why --

MR. WAIDE: Yes, Your Honor.

QUESTION: Why is that?

MR. WAIDE: I'm sorry, Your Honor?

QUESTION: Why is that?

MR. WAIDE: Why is this rational, Your Honor?

QUESTION: Why, when you eliminate all -- all rational reasons, the only other irrational reason is discrimination? I mean, there -- there could be -- or age discrimination or race discrimination. There could be other irrational reasons. I just don't like the way you comb your hair.

MR. WAIDE: Yes. Your Honor, there could be, but in this -- but -- but this Court has said again and again that we leave it to the jury. There could be any reason. That's true of any factual question. Anything could have happened, but --

QUESTION: We normally -- we normally don't let a jury flip a coin. We -- we normally do say that, you know, there has to be some -- some basis for your

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conclusion.

MR. WAIDE: Yes, sir. And, Your Honor, in this case, this was a long way from a coin flip. In this case what happened was we had a man that's 57 years old, that's worked at the same plant for -- the same place for 40 years. He's replaced by people in their 30's who, according to the employer, are less efficient. According to the employer, they're less efficient.

In addition to that, we introduced evidence that the -- the younger supervisor and the older supervisor are treated far differently.

In addition to that, we introduced evidence that the man that's making the decisions had absolute power, according to our evidence.

QUESTION: Well, Mr. Waide, you presented three rather specific questions.

One is whether the prima facie proof of age discrimination, coupled with evidence sufficient to support a finding that the employee was not offered a true reason for an adverse employment action, is sufficient to sustain a jury verdict.

Then the second one is whether on passing from -- passing on a motion for judgment of law under Federal Rule of Civil Procedure 50, the court can consider all the evidence or just the evidence favoring the non-moving

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party.

And then, three, whether the standard for granting summary judgment under rule 50 is the same as that for granting -- rather, judgment as a matter of law under rule 50 is the same as summary judgment.

May -- are -- are you addressing each of those in turn, or is this kind of a general --

MR. WAIDE: Your Honor, this first one addresses the first issue; that is, what evidence is necessary to take the case to the jury. That's the first one, but they do all blend together, Your Honor.

QUESTION: Yes, but don't blend them too much because some of us may think they're separate.

MR. WAIDE: Thank you, Your Honor.

QUESTION: If you prevail on the first one, do you need to go any further?

MR. WAIDE: Your Honor, we think it's very important that we do because this -- this test that the Fifth Circuit has of all evidence -- what it's resulted in is the -- is the judge is accepting as true the evidence that the jury didn't believe.

QUESTION: But it has to be in the light most favorable to the non-movant.

MR. WAIDE: It's supposed to be, Your Honor, but in practical effect, when they start considering all the

evidence, when they say, for example, in this case we say that Mr. Chestnut -- this is a fellow that wrote his supposed boss, the one they claimed was his boss, and said, wake up and learn to do your job. We think the jury was entitled to believe that, but on the other hand, the Fifth Circuit, because they consider all the evidence, they say, oh, no, Ms. Sanderson made the decision. That's where we get into problems.

QUESTION: Well, then, maybe they applied that standard incorrectly, but if the standard -- does it make a whole lot of difference whether it's all the evidence, just the petitioner's evidence, just the plaintiff's evidence, so long as you must draw every inference, you must read every piece of testimony in the light most favorable to the non-movant?

MR. WAIDE: Your Honor -- Your Honor, I do -- respectfully, I do believe that it makes a difference because whenever you say all the evidence, that leaves you open to take evidence the jury didn't believe. Now, there -- I know it's got the other phrase in it which seems to me to be inconsistent with it, in the light most favorable to the non-moving party. But we need to get rid of this phrase of all the evidence. That's what's causing the problem.

Your Honor, I'm not smart enough to come up with

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a test, but Professor Wright, which is quoted in my -- in my brief, has got -- to me has got the sensible test. We eliminate the evidence that's contradicted, and otherwise -- or impeached. This is page 35 of my brief, Your Honor. We should take the non-movant's evidence, together with any evidence from the other side that's unimpeached, that's reliable evidence.

QUESTION: So, it does go beyond just the plaintiff's evidence?

MR. WAIDE: Yes, ma'am. The test that Professor Wright -- Professor Wright studied all these cases, Your Honor. I'm not smart enough to figure all this. But he studied all this, and he's taken all the courts of appeals' decisions and he said that is too broad. And the trouble with it in this case -- and time and again, the court of appeals takes the evidence that the jury didn't believe. That's not consistent with -- with the right to a jury trial, Your Honor.

And Your Honor just said in this Weisgram case you talked about 2 weeks ago, where the appeals -- court of appeals should be constantly alert to the trial judge's firsthand knowledge of the witnesses, the decision maker's feel for the case. We ought to be giving deference to the jury. We ought to be -- we ought to be paying attention to what they found. That's what the right to a jury trial

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means.

So, yes, Your Honor, I think that test needs to be done away with. That's the source of the problem. That's why --

QUESTION: What about -- what -- what's your position on evidence produced by the moving party that is not impeached or contested?

MR. WAIDE: I think Your Honor has already settled that, that would have to be accepted, Your Honor. Your Honor's already -- Your Honor has already settled that question.

QUESTION: What about --

QUESTION: Well, how did -- when did we settle it and how?

MR. WAIDE: Your Honor, you settled it in this Lesage summary judgment case, which I think the standards are the same, and in the Lesage summary judgment case, there was evidence that this applicant -- he was saying it was race discrimination. They had conclusive evidence he was like 50th down the line. He never would have gotten into school anyway. So -- so, Your Honor --

QUESTION: So --

MR. WAIDE: -- conclusive evidence --

QUESTION: So then, you would agree that the summary judgment standard is the same as the rule 50

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standard?

MR. WAIDE: With only one exception, Your Honor. When we get to the appeals court level -- when we get to the appeals court level, in the summary judgment standard, there's a de novo review. We review de novo. That's appropriate because it's on the -- it's on the record. It's on the papers.

But in this case, Your Honor, he -- we've got a jury that sat here and listened to the witnesses one by one. A trial judge, very experienced trial judge, good trial judge listened to the witnesses one by one. He says there's enough evidence. There ought to be deference given to that determination.

QUESTION: I think you're wrong there, if I may say so, that the -- the trial -- at this stage, when you're talking about judgment as a matter of law, you're not supposed to be evaluating the truthfulness or the veracity of the witnesses.

MR. WAIDE: You're not supposed to, but -- Your Honor, but in fact they are. That's what has to have happened. There's no other way this verdict could have come --

QUESTION: Well, shame on them. I -- I don't know why we should -- we should validate that by giving it some special -- special manner of review. They're

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supposed to be doing it as a matter of law.

MR. WAIDE: Well, Your Honor, it -- it's called a matter of law, but in fact it's an evaluation of evidence. It's called a matter of law to make it appealable, but -- make it a question of law for appeal. But in fact it's an evaluation of the evidence.

QUESTION: I think you're confusing a motion for a new trial where we do -- where the appellate court is supposed to give some deference to the district court, where the judgment as a matter of law which, as you say, is de novo.

MR. WAIDE: Yes. Your Honor, if the Court please, I -- I know Your Honors have said, as a matter of constitutional law, they have to give deference when they're reviewing a motion for a new trial, but I believe that the same rationale applies because, Your Honor, the jury and the trial judge heard the witnesses. They -- they heard the witnesses. Therefore, we should give the deference to what they thought about the testimony.

QUESTION: Mr. Waide, is it -- is it your position that a plaintiff is always entitled to get to the jury in a case like this if he establishes that the employer's stated, articulated reason for the employment action is false?

MR. WAIDE: Your Honor, I hate to say, as

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Justice Scalia said in a Law Review article I just wrote, I hate to say never. You know, I can't say there's not some extreme case to everything. So, I can't say that we can't come up with some extreme case.

QUESTION: There might be a third unarticulated, valid reason for the action conceivably.

MR. WAIDE: Your Honor, all I can say is if we have a situation like we have in this case, where we've disproved -- we've -- we've done all we -- I mean, Justice Scalia says, well, maybe they just didn't like him. Well, Your Honor, the jury saw Mr. Reeves. He's one of the most likeable fellows I ever met. He's worked there for 40 years. What do they mean they didn't -- that the jury might have said that they just didn't like him? The jury didn't believe that. They saw him. How could anybody not like Mr. Reeves?

So, that is a -- that is an inference that the jury was entitled to draw, that he's a very likeable fellow, and the reason they fired him was account of his age. And he made those age comments corresponding with about the time they started this investigation, which I believe -- which the jury believed -- doesn't matter what I believe -- was a big line of hoax. And that's what the jury was entitled to find.

And it's very rational, Your Honor, to say that

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we proved he's 57, we proved he's worked there 40 years, we proved you replaced him with people you admit that are less efficient. It's very rational to say, well, you fired him on account of his age, especially when you start lying about who made the -- who made the decision. And the real decision maker was the fellow that made the age comments.

Your Honor, this case -- this case --

QUESTION: When you say lying, I mean, you know, all it requires is that the jury think it more likely than not that the employer's explanation was not -- was not the true one. It might be close and the jury says, well, you know, on balance I think probably that's not the correct explanation. And your position is that so long as a prima facie case has been made, no matter how weak that prima facie case, once the jury rejects the -- the -- as pretextual the -- the employer's explanation, the verdict has to go for the --

MR. WAIDE: No, Your Honor. I -- I believe we have to introduce evidence not only -- we get beyond a mistake in business judgment. We introduced evidence that they lied about it, not that they had some disagreement or some business judgments Mr. Smith caused, and as District Judge Senter correctly instructed the jury, not that they just had a disagreement about whether -- whether he was

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making these falsifications of time records or not, we -- we introduced evidence to find it was all a big hoax. It was a lie.

And once they find it's a lie and once we introduce evidence that points to age, such as age statements, and they don't introduce anything else -- they never came in and gave any explanation about why they lied, and they were caught lying time and time again -- then it's rational for the jury to infer that it was age. Your Honor --

QUESTION: But you're saying --

QUESTION: Well, you -- you -- I take it your answer is that in this case you introduced more than simply the prima facie case --

MR. WAIDE: We --

QUESTION: -- and you introduced more than simply showing that the pretext -- or that the employer's alleged reason was false. You say that --

MR. WAIDE: We did, Your Honor.

QUESTION: But our question is, as a matter of law, may you go to the case if you have just a prima facie case and a showing that the employer's asserted reason is not true?

MR. WAIDE: Yes, sir, so long as it's a showing not -- that it's -- that it's -- that has mendacity. I

call it lies because I'm not -- we got to show that they lied about it. I think, Your Honor, as a general rule that would be sufficient to go to the jury.

QUESTION: So, then it depends -- it depends on the -- on the strength

of --

MR. WAIDE: No, sir.

QUESTION: -- your reputation of the employer's asserted reasons?

MR. WAIDE: As long as a plaintiff introduces evidence of it, Your Honor. Of course, the court can't waive the evidence and say, you know, they still claim they weren't lying, that they were telling the truth. But we introduced evidence that they were.

QUESTION: Mr. Waide, may I clarify one thing because Justice Scalia asked a question?

MR. WAIDE: Yes, ma'am.

QUESTION: Are you claiming that if you have the prima facie case and you have discredited the employer's proffered reason, that you win? I didn't take you to be saying that. I thought what you were saying was then you have a right to go to the jury --

MR. WAIDE: Yes, ma'am.

QUESTION: -- with that. You may lose before the jury.

MR. WAIDE: Sure, we may lose.

QUESTION: The jury could go either way.

MR. WAIDE: Your Honor -- Your Honor, when Justice Scalia wrote the opinion in just -- everybody thought -- they told the plaintiffs' lawyers, well, that's a very bad opinion for you all, isn't it? I said, actually I think that's a great opinion because it lets the jury decide. You know, everybody was patting Justice Souter on the back and saying we should have gone with him, but it was -- this was the opinion that lets the jury decide. We decide whether or not there was discrimination. So, we -- we prove it's false and then it's a jury question.

Your Honor, Justice Scalia asked a while ago is there anything left, any limits on interstate commerce? I'd like to ask is there any limits on what -- anything left the jury is to do? Are they just figureheads? Do they have anything they can do?

The Fifth Circuit in this case drew inferences in the defendant's favor. They take the evidence favoring the defendant such as, well, you had three people because they believed it was three people involved, and they were also -- we just draw the inference that it wasn't age discrimination. That's just totally contrary to the Seventh Amendment.

Your Honor, if Your Honors have no further questions, I will reserve the rest of my time.

QUESTION: Very well, Mr. Waide. You're reserving your --

MR. WAIDE: Yes, Your Honor.

QUESTION: Ms. Millett.

ORAL ARGUMENT OF PATRICIA A. MILLETT

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MS. MILLETT: Mr. Chief Justice, and may it please the Court:

It is the province of the jury to draw permissible inferences from conflicting evidence presented at a trial, and the only question in this case is whether the jury's inference of age discrimination was permissible. It was.

As the --

QUESTION: Well, that isn't exactly how the question was phrased, unfortunately. I mean, if we were just reviewing the verdict, you might be right. But it says basically whether the defendant is entitled to judgment as a matter of law when the plaintiff only produces evidence of a prima facie case of discrimination and that the legitimate nondiscriminatory reason articulated by the employer is false.

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MS. MILLETT: Yes.

QUESTION: Bare bones.

Now, actually the petitioner says more evidence was introduced than that, and therefore, there was plenty of evidence for the jury to legitimately find as it did. And how do we extract from the question presented the result that you -- you ask us to achieve?

MS. MILLETT: Yes. We think even -- even if -- if the additional evidence wasn't here, the outcome would be the same for purposes of the question of whether the case gets to the jury. And that is, if -- if a prima facie case has been made out -- that is, if the -- if the employee has demonstrated that the most likely reasons for the discharge in this case were -- are eliminated, and if the employee also shows that the employer in a court of law, in the face of an accusation of age discrimination and with control over the relevant information about the decision, comes forward with a false reason for the action --

QUESTION: Well, now you -- you say false, but isn't what you mean a sufficient basis for the jury to determine falsity?

MS. MILLETT: That --

QUESTION: Or it must be demonstrably false?

MS. MILLETT: I'm sorry. I do mean -- I do mean

that a reasonable jury could infer that it is false. And when they come forward with that --

QUESTION: You mean the jury can -- did not conclude that it was true. If the jury was in equipoise, the jury would be free to disbelieve it or not to give it effect. I mean, it's not -- not as though the employer has been accused -- has been convicted of lying.

MS. MILLETT: Absolutely not, but you -- in employment -- I'm sorry.

QUESTION: Or even that the -- that the jury has found it more likely than not that this is not the real excuse. The jury has simply failed to find it more likely that this was the real excuse. You know, that's not a whole lot.

MS. MILLETT: Well, it seems to me that in finding it more likely than not it was age, they have also found it -- unless you're talking about mixed motives. They have not found by a preponderance of the evidence -- and they don't have to.

QUESTION: Oh, okay.

MS. MILLETT: But if the other explanation is --

QUESTION: That's -- that's fair.

MS. MILLETT: -- is the -- is the correct one, outside the mixed

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motives --

QUESTION: So, then under your view only if in the case where the employer comes up with a purportedly nondiscriminatory reason for the discharge, only if that is unchallenged by the plaintiff does the defendant get judgment as a matter of law.

MS. MILLETT: Yes. If -- if the defendant does not -- I'm sorry -- if the employee, the plaintiff, does not put in evidence not only that's unchallenged -- they could challenge it but not put in enough evidence that would allow a reasonable jury to disbelieve or to reject that explanation.

QUESTION: And they could challenge it just by cross examination I suppose, could they not?

MS. MILLETT: That's exactly what this Court said in Burdine, that a prima facie case, accompanied by cross examination, may be sufficient to establish pretext for discrimination.

QUESTION: You know, it -- it makes it sound all plausible and quite reasonable when you use -- use the expression, a prima facie case, which in the law generally means, you know, enough evidence to -- to make it more likely than not, without any other evidence, that a certain thing is true.

But in this area what we have called a prima facie

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case is really something that is not very probative at all, simply the fact that you're -- you know, you're within the protected age category and someone younger is hired to replace you. Do you really think that that makes it probable, more likely than not, that your age was the reason for your dismissal?

MS. MILLETT: What -- first of all --

QUESTION: I mean, you could call it a prima facie case, but in the -- is it really?

MS. MILLETT: The prima facie case also includes the requirement that the plaintiff show that the most likely explanations for the employment action have been eliminated, and I think as Justice O'Connor said in Price Waterhouse, there's -- at that point you have made a -- almost a statistical showing, assuming silence by the employer, that the more likely explanation is discrimination.

And it's also important to keep in --

QUESTION: Excuse me. I was not aware. The -- the plaintiff has to show that the more -- it's his burden to show that the more likely explanations for the firing are eliminated?

MS. MILLETT: Ultimately at the end. And certainly there's really even no reason to be discussing a prima facie case here. But --

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QUESTION: May I just make a suggestion here? Aren't you -- isn't your argument depending on the -- on the requirement for the prima facie case that it be shown that the employee who was fired is, in fact, competent to do satisfactory -- he's doing satisfactory work. That's -- that's --

MS. MILLETT: There -- there are two things. They have to show they are qualified -- that is another prong of a prima facie case -- and that the position remains open outside the RIF context.

QUESTION: But qualified doesn't necessarily require him to come in and show that he was doing a good job. It's just that he has qualifications for the job. Isn't that right?

MS. MILLETT: Yes. The prima facie -- and we're -- we're not here to say that once -- once an -- and this is the case when the employer has spoken and has given an explanation -- that the prima facie case, all by itself without calling into question in a way a jury could -- that would support a jury verdict -- the employer's explanation -- the prima facie case in isolation gets you to a jury. There's a mandatory legal presumption when the defendant is silent, but when they aren't, then we have to look at the ultimate question of whether there's evidence from which one could infer discrimination.

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In that process, there -- there are two things in this case that make it a reasonable inference, not the only inference, but a reasonable inference: certainly the falsity or the discrediting of the employer's explanation, but also the fact that the employee is, as shown, unqualified for this job. There -- the job was still there, and it is not irrelevant that the -- the statutes -- the Age Discrimination Act and title VII -- involve a showing that you have a characteristic that employers historically have used. It's now prohibited, but historically and pervasively have used to make employment decisions.

QUESTION: Ms. Millett --

QUESTION: Well, if we decide -- if we decide the case on the basis that you're talking about, we really didn't need to grant certiorari. I mean, it would seem rather clear that perhaps the case should have gone to the jury. But the -- the question -- the first question is a more specific one than that, without the additional evidence you're talking about.

MS. MILLETT: No. I think the -- I think I -- I think I mean to be talking about the first question and that is in which there is a conflict in the circuits, and that is whether what is called the prima facie case -- the proof underlying the prima facie case, combined with the

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proof demonstrating the falsity of the employer's explanations --

QUESTION: Is enough.

MS. MILLETT: -- those two alone are sufficient to create a reasonable inference -- to permit a reasonable inference by a jury. And that's what this Court said --

QUESTION: And isn't the difference that the prima facie case -- if the employer puts in no defense at all, then it is judgment as a matter of law for the plaintiff. Once the employer comes up with a reason, then -- and then the plaintiff casts doubt on that reason, still the ultimate burden of showing discrimination is with the plaintiff, but ordinarily, I think you said in your brief, that's enough. You have -- you can draw an inference in favor of the plaintiff -- you can; you don't have to -- on the basis of the prima facie case, plus the rebuttal of the defendant's justification.

MS. MILLETT: That's -- that's absolutely right. We agree with that.

And what's extraordinary here is that --

QUESTION: But if you take that rule, together with the rule that the jury is always free to disbelieve a witness, then you can go to the jury every time.

MS. MILLETT: That's not true because this Court has said in Crawfordell and Bose Corporation v. Consumers

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Union and Anderson v. Liberty Lobby a plaintiff cannot just sit back and, at summary judgment or judgment for matter of law stage, and say, I've done nothing, but the jury could disbelieve the defendant's witnesses. They have to cross examine. They have to put in counter-evidence.

But what's important here is --

QUESTION: I'm not sure we said it can get to the jury no matter what other evidence there is.

I mean, suppose there is the prima facie case. He was qualified. He was within the age covered and -- and the younger man was hired. Suppose, however, it is shown and uncontroverted that at the same time a younger man was also dismissed and replaced by someone who's even older than this plaintiff.

MS. MILLETT: That --

QUESTION: And -- and then you mean to say that despite that uncontroverted evidence, all we look to is simply the prima facie case. We look to nothing on the other side at all? I -- I'm not sure about that.

I agree if there's nothing to counterbalance the prima facie case, I think you have to say the prima facie case is enough to support a jury verdict. But when there's significant uncontroverted evidence on the other side, is that necessarily true?

MS. MILLETT: That significant uncontroverted evidence is an excellent argument to make to the jury and it may be the inference that the jury draws. But one single hiring decision is not sufficient basis for knowing how this particular decision was made. And this Court has said --

QUESTION: And the jury -- the jury is free to disbelieve even uncontroverted -- a witness whose testimony is not controverted just because they think he might be telling -- telling a lie I think.

MS. MILLETT: They are certainly free to do that. My only point was that at a summary judgment stage, you cannot simply respond with a assertion that it may be disbelieved.

But what's important to keep in mind here is we're not -- we're talking about -- I'm sorry. Thank you, Your Honors.

QUESTION: Thank you, Ms. Millett.

Mr. Smith, we'll hear from you.

ORAL ARGUMENT OF TAYLOR B. SMITH

ON BEHALF OF THE RESPONDENT

MR. SMITH: Mr. Chief Justice, and may it please the Court:

The respondent today would like to revisit three issues to the Court.

Number one, we desire very briefly to discuss the standard which the appellate court and this Court must use in determining whether or not, under the sufficiency of the evidence test, a matter should have been submitted to the jury.

Secondly, we want to revisit and explain respondent's position as to its interpretation of the meaning of this Court's opinions in Hicks and Hazen Paper.

Third and finally, it is the position of respondent that regardless as to whether this Court accepts what respondent contends Hicks and Hazen represent, or even if we accept what we think is clearly the erroneous interpretation of -- of petitioner and, in some respects, the Solicitor General as to the meaning of Hicks, still in this particular case, wherein Your Honors have held in other cases demand individualized proofs, assessment that there is still no jury issue. To go to --

QUESTION: You're going to deal with each of the three questions --

MR. SMITH: Yes.

QUESTION: -- presented in your oral argument?

MR. SMITH: Yes, Your Honor. Yes, Your Honor.

With respect to point one, the standard of review under the sufficiency of the evidence test, briefly

this Court, since at least 1872 and going through a month ago today, has held and reaffirmed that a court such as the district court under a rule 50 motion, the appellate court on review, must look at all of the evidence but in the light most favorable to the non-movant.

Now, we ask why is that. The purpose of that is in the Improvement Company v. Munson case, cited in the product liability counsel's brief filed in support of respondent. That was one of the first cases where the Court held that the mere fact that there may be some evidence that's introduced does not necessarily mean that the quantum is there to warrant the jury determination. And the Court held there in Improvement Company v. Munson that it was the function -- there was a preliminary question for the judge to determine whether or not, under the substantive law involved, there was sufficient evidence to warrant a jury determination.

I think, Your Honor, in -- in the case of Anderson v. Bessemer City, actually cited by petitioner in his brief on another point, is very determinative of the fact because there, in that case, the Court held that in determining, under the sufficiency of the evidence, that there were certain general principles which must be reviewed and which Your Honors stated derived from our cases, one being --

QUESTION: That was -- those were bench -- Anderson v. Bessemer City was a bench trial, was it not?

MR. SMITH: It was, Your Honor. But this same theory has -- has imbued in all of the cases with regard to what evidence -- what is the standard, what evidence is reviewed to determine. In that case, as well I believe in the Pennsylvania v. Chamberlain, the Court held -- and Anderson v. Liberty Lobby, the Court held that a court must review all the evidence in conjunction with the substantive law to determine if on the entire evidence -- and I repeat those two words have been -- have been stated in almost all of your decisions -- on the entire evidence -- the court, the reviewing court, is left with the definite and firm conviction that a mistake has been committed.

QUESTION: Well, but that's the clearly erroneous rule. That -- that has nothing to do with jury trials.

MR. SMITH: Well, I think it does, Your Honor. I think in all of the cases in which you've held that, as well as all of the circuits -- and I don't think there's any disagreement among the circuits -- that in order to determine if a reasonable and fair jury could find in favor of the party having the burden of producing the evidence, the court must review all of the evidence.

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QUESTION: Yes, but -- okay. What you just said makes sense. What you said a moment ago I think is contrary to our cases where you say you're convinced that a mistake has been made. That's the clearly erroneous rule for reviewing a bench trial findings by a district court.

MR. SMITH: I think, Your Honor, that the -- the rule meshes with respect to the function of an appellate court in determining under the substantive law is there sufficient evidence that would warrant a fair jury in reaching a result in favor of a party having the burden. In --

QUESTION: Mr. Smith, would you agree that what the judge is supposed to ask on a motion for judgment as a matter of law is, I have to look at this evidence and I must draw every inference possible in favor of the non-movant? If I draw every inference in favor of the non-movant, is there a jury question?

MR. SMITH: Justice Ginsburg, I would agree with that with one caveat, and that is when we've used the word inference, the inference must be based on the evidence not on speculation and surmise and not a inference upon an inference.

QUESTION: Drawing every inference from the evidence. In other words, if a defendant could be

believed or disbelieved, you disbelieve the defendant for purposes of making that assessment, that you must draw every inference from the evidence favorable for the plaintiff. That means whenever it could go either way, you must assume in favor of the plaintiff.

MR. SMITH: Yes, Your Honor, if it's a he-said/she-said, and the reviewing court cannot determine which one is telling the truth or which one is to be determined, the fact finder must do that.

QUESTION: It's just -- just he said and -- and she doesn't -- doesn't deny it. I think what Justice Ginsburg is saying is in -- in the hypothetical I -- I alluded to earlier, you can simply disbelieve that the -- that the employer in fact hired older people even though it's totally noncontroverted. Do you -- you think that's --

MR. SMITH: No. No, Your Honor, I do not because Your Honors held in 1931 in Chesapeake & Ohio Railroad v. Martin that while a jury has the function of determining the credibility of the witness, a -- a jury may not arbitrarily disregard undisputed testimony when there is no reason for that. So, I do not think --

QUESTION: And that's built into the test that Professor Wright -- that -- that your friend quoted -- Justice -- Professor Wright.

MR. SMITH: Yes, Your Honor.

QUESTION: And did you have any quarrel with that articulation of the test?

MR. SMITH: No. No, I do not.

QUESTION: So, then you're both -- you're in agreement. That's great. On that one question, you're both in agreement on what the standard is.

QUESTION: You agree with her. But you agree with Justice Ginsburg's statement of it if she had said reasonable inference. You can't draw an unreasonable inference.

MR. SMITH: Exactly.

QUESTION: All right. With that modification, then we have --

QUESTION: So, then we can take what it says in Wright and Miller and that's it, and pass on to other questions in the case.

MR. SMITH: All right.

Your Honor, let us now review and revisit, if you will, the respondent's interpretation of the teachings of this Court in Hicks and Hazen Paper.

Initially, to back up before Hicks and revisit Hazen, we know that the court there stated quite clearly that with respect to age discrimination, there's no disparate treatment if the reason is a factor other than

age. These are some general principles I think it important to revisit.

In Hazen, we also discussed the fact that there the mere fact that an employer maybe violated ERISA and/or, I think in the opinion of the Court, may have -- may have violated in -- in another instance in an hypothetical title VII with respect to race was not evidence or an indication that age was the deciding factor.

With that, I think we have to go forward then to Hicks and initially remember what were the general principles, as I read Hicks, to stand for.

Number one, that no court may substitute for the required finding of the particular discrimination in issue here, age, the much lesser and different standard of simply disbelief of the employer's reason. The Court time and time again in Hicks stated that there must be evidence both that the employer's reason was untrue and that age or -- in this case age was the motivation.

QUESTION: But then doesn't Hicks also say -- and indeed, doesn't the Fifth Circuit say in other cases -- that ordinarily what you have is the prima facie case? And in addition, you know one other thing. The lawyer wasn't telling -- the employer wasn't telling the truth when he gave his reason.

Now, what I thought Hicks said and what I thought that Reeves said is, well, in the Fifth -- Rhodes I guess -- in the Fifth Circuit, is in -- in most cases, that's the end of it. Of course, the jury could -- could infer from those two things that there was discrimination.

Now, we concede there's a weird case, really weird. It was a pretext. But it was a pretext because the employer was an embezzler and he had been found out by the employee. And I grant you in such a case it is a pretext, but not for discrimination. So, that's why there's always this qualification.

But you have a case where the Fifth Circuit said, one, there's a prima facie case; two, the jury could -- may well have found a pretext; but three, it couldn't come to the conclusion of discrimination, at which point one wants to shout why? Why not? I mean, after all, your employer client was not an embezzler. There's no evidence here that it's a weird case.

So -- so, therefore, I thought perhaps this decision of the Fifth Circuit, though not Rhodes, is inconsistent with Hicks, with Rhodes, and with a lot of other things. And that's what the SG says. So, I'm very interested in your answer.

MR. SMITH: Justice Breyer, I think first we

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must visit the decision of the Fifth Circuit. The Fifth Circuit made a -- a statement, Reeves may well be correct on this, something of that nature. But still, there's no evidence of -- of age.

Now, what was the Fifth Circuit talking about when they -- when they made that statement? About two or three sentences before that statement in their opinion, the Fifth Circuit said Reeves alleges there's pretext because, number one, I attempted to be careful in my record keeping. Number two, well, these errors were made by my boss, Russell Caldwell. And three, Sanderson could not really quantify the amount of money that may have been lost on this.

I submit that's what the Fifth Circuit said the evidence of pretext was, and I think consistent with Rhodes v. Guiberson, the Eighth Circuit's decision, the Second Circuit in Fisher v. Vassar College, the numerous other circuits, the Eighth Circuit decision in Rothmeier v. Individual Investors, that the Fifth Circuit was stating and complying with what Your Honors said in Hicks when you stated there may be instances -- I paraphrase, of course -- when the prima facie case, when -- and coupled with evidence of disbelief of the employer's reason, especially if accompanied by mendacity, may -- may be sufficient without more.

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What I envision Hicks is saying there and what the -- I think the Fifth Circuit in Rhodes, the Eighth Circuit, the Sixth -- not the Sixth -- the Fourth Circuit and the Second read that to mean is it depends what is the prima facie case. We know, as set forth by Your Honors in Hicks, and as the Second Circuit Fisher case had a good, I think, discussion in a footnote, that there were over 100 cases at quick blush --

QUESTION: If I could -- if I could bring you back just one second for my -- the precise --

MR. SMITH: Yes.

QUESTION: -- response I was looking for. And if -- if the Fifth -- if in your -- the opinion in your case, the Fifth Circuit had only said what you started out by saying, we wouldn't be here today. I mean, if they had said there wasn't enough evidence of pretext. But that isn't what they said.

What they said is a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual. Reeves on this point very well may be right.

So, what I want to know is how -- if they found it was pretextual and you had the prima facie case, how conceivably could there not have been discrimination, let alone a jury question? I mean, as I said, your employer

was not a suddenly discovered embezzler. There is no evidence it was a pretext for something else. So, how could it have both been a pretext and yet in your case -- I'm not thinking of a statement of law. I want to know in your case how could it have both been a pretext and he wasn't fired for discrimination.

MR. SMITH: Justice Breyer, the -- the statement by the Fifth Circuit found that there may be pretext for disbelief of certain things that the Fifth Circuit pointed out that Reeves contended. If -- if -- I beg the Court to -- to bear with me a second.

I think if you -- if you digest that with Hicks, we have to decide, as I was beginning to say earlier and I think will -- will answer your question -- the prima facie case is a procedural device which enables a plaintiff to shift the burden of production to the defendant. If the prima facie case comes out in that skeletal form only, the one-two-three-four test at McDonnell Douglas, and if after the defendant articulates a non-age reason, the plaintiff then only -- only introduces evidence where that's not true. Mr. Sanderson Plumbing, you didn't quantify the amount. Mr. Reeves said that his boss made those errors even though his boss was terminated too. If that's all that's present, I submit that Hicks says that is not enough because that does not show any evidence of age

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discrimination.

On the other hand, if the petitioner's prima facie case does more, reaches out and gathers more than the -- than the skeletal one, two, three, four of McDonnell Douglas, then coupled with evidence of disbelief of the employer's reason, there may be a jury question. Here, as I was going to say earlier, point three delves into that.

What -- what was the -- the petitioner's prima facie case first? They stated Mr. Reeves was over 40, contention that he was doing his job satisfactory. At this stage we don't worry too much whether that was -- the prima facie was made or not because Your Honors have held in Aikens at this point it doesn't matter. But in any -- and he was terminated and that he was replaced by a younger person.

Now, this evidence also was undisputed that these younger people who replaced petitioner, in their 30's, were also terminated at a later date. Also, the evidence showed that Mr. Caldwell, who was also terminated, was replaced by an older person. So, we have that flimsy, weak, mechanical procedural prima facie case only.

What else did -- did the petitioner submit? Mr. Chestnut made two, as the petitioner says, age-related

statements. What were they?

One, supposedly, you must have come over on the Mayflower. Some -- more -- more than 2 months before the termination. He was unable to quantify it, but much more than 2 months.

The second, when Mr. Reeves was working on a piece of machinery, Mr. Chestnut supposedly said, because he couldn't get the machine going, you're too damned old to do that job.

Now, Your Honors have held and the circuit courts -- every circuit has held that if a remark, number one, is not made by a decision maker -- and I submit the evidence is uncontradicted.

QUESTION: Well, but isn't there a conflict in the evidence about whether this man really did make the decision? Isn't that one of the things that's in dispute?

MR. SMITH: Your Honor, I think not, and let me point out why, if I may, Justice Stevens.

QUESTION: Is he -- am I correct that he was married to the person who owned the company?

MR. SMITH: He -- he -- at the time of the termination, Mr. Chestnut was married to the president of the company.

QUESTION: Right.

MR. SMITH: At the time of the termination, he

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was director of manufacturing.

Now, the evidence is -- remember, it's uncontradicted. Even though Mr. Reeves says, I think he was the absolute power, that testimony of Mr. Reeves has to do with the fact, as director of manufacturing, certainly out on the plant floor, this man was. But the evidence --

QUESTION: Mr. Smith, it was not just Mr. Reeves. Wasn't it the young man who -- who also said that as long as he's been with the company, something to the effect that Sanderson was the top boss?

MR. SMITH: Yes, Justice Ginsburg. You're exactly right. That was Mr. Oswalt, the 33-year-old gentleman who made the same errors, less errors than the petitioner, who quit before he could be discharged.

Well, let's talk about what he said. He stated that Mr. Reeves sometimes was hollered at by Mr. Chestnut, was mistreated by him in that manner. He also said on the same pages of the record, pages 82 and 83 of the transcript, that additionally he, Mr. Chestnut, hollered at me some and he hollered at Mr. Caldwell, Mr. Reeves' manager, and that he was very rude to these people. And there was a lot of noise on the plant floor because of Mr. Chestnut.

I mention that because, quite frankly, that's an

evidence of the petitioner opening up a reason other than age: dislike by Mr. Chestnut. A good example -- a good case for that is the Eighth Circuit case in Rothmeier v. Individual Investors where the plaintiff --

QUESTION: You didn't put on that defense that Sanderson disliked -- you didn't make that --

MR. SMITH: No. No, I did not, Your Honor.

But just in the Rothmeier case, the defendant did not put on the defense, if I may, that this man was terminated because he was going to report the company to the Securities and Exchange Commission rather than age. And there they held -- the petitioner there demonstrated a clear reason other than age.

Here, the testimony of Mr. Oswalt gives a very sufficient basis for the allegation that he, Mr. Reeves, was mistreated. He may have been.

QUESTION: But you could argue -- you could argue that to the jury, but Mr. Oswalt said here I was doing the same thing with the records. We all were, and I got yelled at some, but boy, they really gave it to this man that they had told, when he was trying to fix up a machine, you're too old to do the job.

Nobody is suggesting that this is a case for summary -- for summary disposition in favor of the plaintiffs. The only question is could the jury find --

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make inferences from that evidence that the reason was age discrimination.

MR. SMITH: Justice Ginsburg, with all deference, I think that's a perfect example of when the jury could not because what evidence did they have? The two statements, by your own decisions and every circuit, was totally disconnected --

QUESTION: Yes, but how can you say totally disconnected if the man who made the decision to fire him 2 months ahead of that time said, you came over on the Mayflower and you're too old for the work? Can't -- I mean, I'm not saying it proves anything, but could the jury infer that age had something to do with the decision?

MR. SMITH: Under the decisions of this Court, as well as every circuit, no, you could not. It's a stray remark. It has no probative value, just as any other comment about someone being unkind or mistreating someone for some other reason.

QUESTION: So, it literally should have been excluded from evidence. That testimony should have been kept out then.

MR. SMITH: And that effort was made at the lower court. It could have been.

But the point is --

QUESTION: You say the jury can do nothing with

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it. It should have been kept out.

MR. SMITH: Well, it -- it -- Justice Souter first and then Justice Ginsburg.

The evidence was insufficient to bridge the gap in -- in either the prima facie case or the disbelief of the employer's reason because it simply was not probative under the substantive law that's been created as evidence of age discrimination. That -- that's the position of the respondent on this.

QUESTION: But the -- it's competent. I mean, your -- I think what you're arguing is that a statement or those two statements standing alone, with nothing else in the case, would be insufficient to support a verdict. But it's a very different thing to say that that evidence is inadmissible, and it's a very different thing to say that that evidence is incompetent in the sense that it may not even be considered in the context of the whole case in deciding whether ultimately there was or was not age discrimination.

And I think you're arguing the second point. I will -- I will concede the first point, that standing alone maybe it's not enough, but I think you're arguing the second point, that it is -- that it is incompetent evidence. Am I right that that's your argument?

MR. SMITH: Yes, Your Honor. Justice Souter, I

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am. I'm saying that those two statements, when digested with the entire evidence that the court is required to review, does not indicate pretext for discrimination because the statements have no place in the termination decision or even the investigation decision of the audit.

Remember this, Your Honors. Mr. Reeves, contrary to his counsel's argument in the brief, never disputed or contested the accuracy of the audit, which revealed numerous errors on his part, numerous errors on Mr. Caldwell's part, and numerous errors on Mr. Oswalt. He didn't contest that. Instead, he went off on things like, well, they never could figure out the total amount of it, or well, I think Mr. Chestnut really was the one who -- who -- he's the power. He must have been the one who terminated him.

But -- but the evidence is to the opposite.

QUESTION: Well, if you're right, then there was no pretext.

MR. SMITH: There was -- pardon, Your Honor?

QUESTION: Then it wasn't a pretext. If you are right about this, it wasn't a pretext.

MR. SMITH: That's correct, Justice Breyer.

QUESTION: But, of course, the -- the Fifth Circuit said the opposite. So, what are we supposed to do about that?

MR. SMITH: The Fifth Circuit, in finding that Reeves may well be right on three points, I -- I repeat --

QUESTION: It didn't say that. It said -- it said that they could have found -- a reasonable jury could have found that Sanderson's explanation was pretextual.

MR. SMITH: Yes --

QUESTION: And then it said -- that's what's claimed, and it said Reeves may very well be correct.

MR. SMITH: Yes, Justice Breyer, you're exactly right. That's what the court said, but right before that, what they were talking about as pretextual were the three things I've mentioned which, together with the weak, skeletal procedural prima facie case here, does not show pretext for discrimination.

Let -- let me add that even if we -- as I wanted to say earlier, even if we jump to the -- to the petitioner's conclusion, which is not supported by the Solicitor General, in their brief that each and every instance of mere disbelief of the employer's reason is sufficient, I cited in our brief the Sixth Circuit decision of Manzer v. Diamond and -- and showed that some of the other circuits that I think erroneously have followed Hicks have stated that, well, even then if we're going to show pretext to show that if the reasons are not

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true -- true -- three things have to be proven.

Number one, that the reason advanced is baseless, didn't exist. Well, there's no doubt here. There's no evidence. There's not even surmise here, and Mr. Reeves had a lot of surmise. There's no surmise here that the audit was not correct. There is no evidence that it was fabricated. It led to the discharge of two and would have led to the discharge of three had he been here.

Number two, were the reasons sufficient to motivate the discharge? Well, obviously they were. They led to the discharge of Mr. Caldwell and would have led to the discharge of Mr. -- of Mr. Oswalt.

QUESTION: Mr. -- Mr. Smith, you're arguing evidence. There was other evidence that you're not including in the picture. For example, Reeves was first accused of having dealt falsely with one particular employee. Well, it turned out Mr. Reeves was in the hospital on the days when she was supposedly written up incorrectly.

There was also evidence that these time clocks didn't work so well, and that it was standard operating procedure just to put down 7 o'clock when somebody was at the work station at 7 o'clock.

So, you are picking out pieces of the evidence that tend in your favor, a great jury speech. You are

ignoring evidence on the other side.

And that's the problem with this case. It looks like it's a jury case.

MR. SMITH: Justice Ginsburg, the -- the points you've mentioned were repudiated by uncontradicted testimony. Mr. Reeves made a general statement. I tried to be careful. Sometimes the time clocks didn't work. I'm going into specifics here. But the evidence --

QUESTION: Let's take my first point. Was that woman who was -- the first -- the first explanation that Sanderson gave is you put her down for being there and she wasn't. Was Mr. Reeves in the hospital when that occurred?

MR. SMITH: Mr. Reeves went to the hospital later in that day, but he was present when -- when the attendance records were made by the supervisor, Mr. Reeves, that day on her.

Secondly --

QUESTION: Is that established in -- I thought that Mr. --

MR. SMITH: Yes. That was the testimony.

QUESTION: -- Mr. Reeves was contending he was --

MR. SMITH: I'm sorry.

QUESTION: -- he was not the one, that he was

not the one who did that, that Caldwell in fact did that.

MR. SMITH: No. Mr. Reeves testified that he was there the first day that she went to the hospital and that he also came back before the week was over -- Mr. Reeves. And it was his duty, if you will recall, to review the weekly records and make sure there was no error. He did and he still listed her --

QUESTION: So, you're saying there was nothing in the evidence that it was Caldwell who did it and not Reeves.

MR. SMITH: No, Your Honor. No, I -- I do not think so. In fact, Mr. Caldwell is the one who caught it on the monthly report and corrected it and after Mr. Reeves had reviewed the weekly reports.

There -- there are many things that Mr. Reeves has stated, based on his surmise and suspicion, but it's -- it's -- in all deference, Your Honors, it's not evidence. It's -- it's his dislike of the reasons. I don't think I should have been terminated, or maybe Sanderson made a mistake. Well, we know that a mistake does not equate under decisions from every circuit to age discrimination.

So, I submit, as I was finishing, in the one-two-three standard in Manzer, the pretext -- I use the word pretext on it, and it's not a good term to use --

circuit -- that under that standard, if we adopt that standard that the petitioner wants us to use today, there is no evidence of a jury question.

There were two other people who were either terminated or would be terminated. There were two other people -- think about this -- independent of Mr. Chestnut who independently reviewed these records and made the recommendations to the -- to the president that Mr. Reeves be terminated. There is no inference, no suspicion that these two were in any way connected with these two statements.

So, I guess I get back, Your Honors, to the very beginning of my argument when I stated that when you boil all of the evidence together -- that's not a good way to say it, but I think that's one way to study the sufficiency of the evidence -- that under the standard I think is correct, there is no evidence.

QUESTION: Thank you, Mr. Smith.

MR. SMITH: Thank you --

QUESTION: Mr. Waide, you have 6 minutes remaining.

REBUTTAL ARGUMENT OF JIM WAIDE

ON BEHALF OF THE PETITIONER

MR. WAIDE: Thank you, Your Honor. May it please the Court:

Your Honor, Mr. Smith's argument demonstrates why this is a jury question, Your Honor. The jury hears the witnesses one by one over a 4-day trial. Mr. Smith comes in and tries to tell this Court, which is accepted in the court of appeals, what the facts were in the case. There's no way to do it. There's no way that a court of appeals can understand the facts of the case the way a jury can when it's heard the case, heard the witnesses one by one.

I want to point out just a few of the things, Your Honors, that he said are just blatantly wrong. It's not true. It's not what the jury found.

And just the thing is most -- that's most striking about this case, when they had the man that made the age statements, Mr. Chestnut, they made this totally fabricated effort to say that he wasn't the man making the decision. And we introduced a letter. Here's a letter we put in evidence that the jury had time to sit there and read and digest and consider the significance of this. He writes his boss a letter. Supposed to be his boss. And he uses curse words. I'm here before the United States Supreme Court so I won't purport to say what he said, but he said when are you going to wake up and learn to do your job. That's what he's telling his boss.

And two people, not just Mr. Reeves, but the

young supervisor said he's the absolute power. You have to please him to keep your job. The jury, Your Honor, is entitled to draw the inference that Mr. Chestnut is running the show, that he's in charge.

The jury saw them both on a witness stand. She sat up there. He quotes her at length. It is like she had memorized her testimony. She's a meek, mild person. He gets up there and he's like the tyrant. The jury sees that. They can understand who's running the show. They're in the best position to make that decision. They had that -- they had that within their discretion to make that decision.

This business -- the first thing he said was, the fact is he answered those questions wrong, Justice Ginsburg. If Your Honor -- when Your Honor reads the record, you'll see that's not right. It's not the attorney's testimony as to what -- what's in the record. It's the jury's decision to make. And the testimony I believe you'll find is uncontradicted to the contrary, that in fact, Mr. Caldwell wrote Mr. Reeves a note and told him to give this lady the credit for these 2 days she was in the hospital. He acted based on the note that Caldwell told him, and the company knew that.

And, Your Honor, in answer to these questions about, well, they fired Caldwell, we don't know why they

fired Caldwell. We didn't try the Caldwell case. Caldwell's wife works at the plant. I can tell you a hundred reasons. They might have -- and Your Honors -- courts may be estranged to this, but juries that work in factories know what happens all the time. They tell the supervisor, you fire Jones and if you don't fire him, you're fired. We don't know what happened. We didn't -- we weren't there. We didn't try that case. That question -- we can't just say, well, you -- that's just another thing the jury can consider.

Mr. Smith can argue that to the jury. He can say, well, they fired Caldwell, so it must not have been age. Caldwell was only 45. He can argue that. Let the jury decide that.

And Judge Senter told the jury -- Judge Senter -- further, in order for the plaintiff to prevail, he bears the burden -- this is on page 7 of the transcript of the jury charge -- he bears the burden of proving, by a preponderance of the evidence, that the reasons offered for terminating him were not the true reasons but rather a pretext for age discrimination. That's what he told them that they had to prove.

This jury charge is a model. Judge Senter's jury charge ought to be given by every district judge. It's a model of what this Court said you have to prove,

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especially in the St. Mary's case.

They had every opportunity to prove that they were telling the truth, and the jury believed they were lying.

The report they made up, Your Honor -- if you study that -- and it takes some time to go through all those records. The court of appeals judge doesn't have time to do that. They are busy with more important things. They don't have time to study those records, but you study them and --

QUESTION: The jury -- the jury charge here says that the plaintiff can prove pretext by showing, one, that the stated reasons were not the real reasons for the discharge and, two, that age discrimination was the real reason.

MR. WAIDE: Yes, sir.

QUESTION: You didn't -- you didn't --

MR. WAIDE: I agree with that a hundred -- I mean, I know it's the law --

QUESTION: Must you have number two as well?

MR. WAIDE: I'm sorry, Your Honor?

QUESTION: Why isn't number one sufficient under your view of the case?

MR. WAIDE: Because, Your Honor, he's -- there has to be facts introduced sufficient to allow the jury to

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infer age discrimination. We don't have to have direct evidence to come in and say, I'm firing you because of your age, but the jury has to find from the circumstantial evidence that age was the reason.

QUESTION: I thought you were going to say it has to be a pretext for age discrimination.

MR. WAIDE: It has to be a pretext for age discrimination.

QUESTION: It can't be a pretext for hiding embezzlement or something.

MR. WAIDE: If -- if he had come in there -- Mr. Sanderson had come in there -- and said, actually what I think it is, I think Mr. Reeves has been going with my wife and that's the reason I fired him, then we'd have a different case. But they didn't produce any evidence of that.

We just -- we just had the -- the evidence that they fired the young -- it's not just a bare bones case. Less efficient. They got every company employee said these young guys that they replaced, one after one, they put one 30-year-old, he couldn't do the job, they'd move another one in there, then another one. And less efficient. A training curve. It's going to cost the company money to put these 30-year-olds in there. That's what the jury believed.

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And when the company got up there and said this has something to do with the union contract because the workers don't like -- don't like a supervisor being lenient, I thought the jury was going to laugh out loud. It can only be made seriously to a court that's not there and hasn't heard the witnesses.

I ask Your Honors to --

QUESTION: Mr. Waide -- Mr. Waide, I don't understand. I mean, in light of what -- what all you've said, I don't understand why question one is even presented in this case.

MR. WAIDE: Your Honor, it's presented because -- because the Fifth Circuit -- that's what the Fifth Circuit said, that you've got to go further and prove something beyond. That's what the Fifth Circuit --

QUESTION: Well, you said -- you said it's been proved. You said you -- you have evidence of discriminatory intent, unless you're relying on the word direct evidence of discriminatory --

MR. WAIDE: Your Honor, I'm just trying to give the Court all the facts about my case. But the Fifth Circuit did say that it's not enough to prove pretext, and we think there is.

If we had never had these age statements, it was still enough because the jury is supposed to draw the

inferences. The jury draws the inferences. Does the jury believe, well, it must not have been age because Mr. Caldwell was also -- I'm sorry, Your Honor.

QUESTION: I thought you said you agreed with the statement that -- that the charge to the jury was correct, that you have to show that this was not the reason and the age discrimination was. Now you're telling me it's enough to show that this was not the reason.

MR. WAIDE: All right. Your Honor, I think I'm getting a little -- I'm saying the jury had defined age was a reason. I'm saying we don't have to prove direct evidence. Nobody has to say it's age, but the jury does have to find age discrimination is a reason, like Your Honor said in St. Mary's. Your Honor said, Justice Scalia -- Your Honor said, exactly what we're saying, in St. Mary's, that the jury, the fact finder has to find it was age discrimination, and they did. That's the jury role. Your Honor gave the jury a great role in St. Mary's. You decide whether it was age discrimination or not. The court doesn't decide --

QUESTION: Thank you, Mr. Waide.

MR. WAIDE: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:15 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

ROGER REEVES, Petitioner v. SANDERSON PLUMBING PRODUCTS, INC.
CASE NO: 99-536

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY: Dona M. May
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