ON PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 07-7054

JAMES E. GINGER, *et al.*,
Appellant,

v.

DISTRICT OF COLUMBIA, *et al.*,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING

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July 17, 2008

Rule 26.1 Corporate Disclosure Statement

The Metropolitan Washington Employment Lawyers Association is a professional association. It does not have any corporate parent. It does not have any stock, and therefore no publicly held company owns 10% or more of the stock of the association.

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Date

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Certificate as to Parties, Rulings and Related Cases

A. Parties and *Amici*

The Metropolitan Washington Employment Lawyers Association seeks to participate as *amicus curiae*. All other parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Appellant.

B. Rulings Under Review

One of the rulings at issue is this Court's prior decision in this case, *Ginger v. District of Columbia*, No. 07-70754 (D.C. Cir. June 10, 2008). References to any other rulings at issue appear in the Brief for Appellant.

C. Related Cases

The case on review was previously before this court, *Ginger v. District of Columbia*, No. 07-70754 (D.C. Cir. June 10, 2008). There are no other related cases currently pending in this court or in any other court of which counsel is aware.

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Jonathan C. Puth

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Authorities upon which we chiefly rely are marked with asterisks.

INTEREST OF *AMICUS CURIAE*

The Metropolitan Washington Employment Lawyers Association (MWELA) is the local chapter of the National Employment Lawyers Association, a national organization of attorneys, primarily plaintiffs' counsel, who specialize in employment law. MWELA has frequently submitted *amicus curiae* briefs in cases of interest to its 300 members, including in this Court, the Fourth Circuit, the District of Columbia Court of Appeals and the United States District Court for the District of Columbia.

MWELA is participating in this petition for rehearing because the panel used terminology suggesting that EEO plaintiffs must in some instances prove that unlawful discrimination was the "sole motive" behind the personnel decision challenged. This is not the law, and imposing a "sole motive" test would set an impermissibly high standard.[1]

SUMMARY OF ARGUMENT

In describing the parties' burdens under Title VII proof paradigms, the Court's opinion in this case employed shorthand that is inaccurate and could prove mischievous. In particular, the Court used the terms "single motive" and "sole motive" to distinguish cases that are not suited to a partial affirmative defense to damages, from those cases in which the defense may be asserted. In cases in which an affirmative defense is permitted, the employer has the burden of proving that the "same decision" would have been made in the absence of bias. Regardless of the availability of the defense, however, the plaintiff does not have – and never has had – the burden to prove that discrimination was the employer's "single" or "sole" motive. The Court's language choice could inaccurately be read to have altered the plaintiff's burden when attempting to prove an employer

[1]The parties have consented to the filing of this brief. Circuit Rule 35(f) bars *amicus* briefs in support of petitions for rehearing *en banc*, except by invitation of the Court, but there is no comparable prohibition for panel rehearing. *See* FRAP 40; Circuit Rule 40. This brief is half the length of the 15 pages permitted the parties and is being filed with seven days of the filing of the petition for rehearing. FRAP 29(d), (e).

discriminated "because of" race or another protected characteristic. *Amicus* respectfully urges this Court to revise its opinion to avoid reliance on the terms "single motive" or "sole motive" to describe cases where the "same decision" affirmative defense is unavailable.

DISCUSSION

> The basic Title VII causation standard is as follows:
> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2(a) (emphasis added). This "because of" causation standard embraces the likelihood that many motivations, legitimate and illegitimate, may prompt a job action. Nothing in the plain language of the Act suggests that discrimination be the only reason for the action, or that an employee be bound to prove the falsity of every reason asserted as legitimate by an employer.

This Court's use of the term "sole motive," however, cannot be reconciled with the long-standing interpretation that the "because of" standard of § 2000e-2(a)(1) allows a plaintiff to prevail despite other valid motivations for the employer's actions. One example is in the seminal case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), where the employer had asserted as its non-discriminatory reason the fact that the employee had engaged in illegal conduct, a reason the Court readily accepted as true and valid for refusal to hire the plaintiff. *McDonnell Douglas*, 411 U.S. at 803-04. Notwithstanding the presence of the valid reason, the Court held that the plaintiff was entitled to a trial to determine whether discrimination was also at issue. *Id*. at 804-05.

More pointedly, three years later in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), the Court more explicitly rejected the suggestion that a plaintiff must demonstrate that discrimination is the "sole cause" of the contested employment action under § 2000e-2(a). In

McDonald, the Court considered the case of three men who were charged with stealing from their employer, but the one African American among them was retained while the two white men were fired. *McDonald*, 427 U.S. at 276. Although the theft was taken as true (and is indisputably a valid reason), the Court held that the white plaintiffs were terminated "because of" their race under Title VII. *Id*. at 281-83. Relying on *McDonnell Douglas*, the Court in *McDonald* held:

> The use of the term "pretext" in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged *solely* on the basis of his race. . . as [*McDonnell Douglas*] makes clear, no more is required to be shown than that race was a "but for" cause.

McDonald, 427 U.S. at 282 n.10 (emphasis added)(citing *McDonnell Douglas*, 411 U.S. at 804).

Hence, Title VII is violated where discrimination is a but-for cause, even if other valid motives are present. Because of the presence of lawful and illegal motivations for the employer's actions, the term "single motive" to describe such a § 2000e-2(a) case, as opposed to "mixed motive" to describe a case where the "same decision" affirmative defense is available, is inaccurate; it fails to differentiate the case where the affirmative defense is available from one where it is not.[2]

The Court has also rejected the "sole cause" standard for the Age Discrimination in Employment Act, where it interpreted the prohibition "because of such individual's age" to mean that "the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993); 29 U.S.C. § 623(a)(1). In *Hazen Paper*, the plaintiff had prevailed on a theory under ERISA (which was not age-

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[2]For similar reasons, the Second Circuit notes the terms "pretext" and "mixed motive" are more accurately termed "'single issue motivation cases' [involving] only the single issue of whether an impermissible reason motivated the adverse action" and "'dual issue motivation cases' [where] the fact-finder must decide both the issue of whether the plaintiff has proved that an impermissible reason motivated the adverse action and the additional issue of whether the defendant has proved that it would have taken the same action for a permissible reason." *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 119-20 (2d Cir. 1997).

based), but the Court remanded the case to determine if age too could have been a determinative factor to entitle the plaintiff to an ADEA verdict as well. *Hazen Paper*, 507 U.S. at 612-14.

The question arises, then, as to the genesis of this Court's use in *Ginger* of the "sole motive" or "single motive" terms despite the established meaning of the "because of" causation standard. In fact, the terms appear to have arisen largely by convenience. In this case, this Court borrowed the language from its opinion in *Fogg v. Gonzales*, 492 F.3d 447 (D.C. Cir. 2007), and no further authority was relied upon to reach its conclusions with respect to the "single motive" language. *See Ginger v. District of Columbia*, No. 07-70754 (D.C. Cir. June 10, 2008), slip op. at 8-11. In *Fogg*, however, this Court gave no indication that its "single motive" dictum was anything more than shorthand for cases that were not "mixed motive" under Civil Rights Act of 1991. *See, e.g., Fogg*, 492 F.3d at 451 ("[T]he district court concluded the jury had found for Fogg on the 'single motive' or 'pretext' theory of discrimination, as provided in 42 U.S.C. § 2000e-2(a)(1), and not on a 'mixed-motive' theory under § 2000e-2(m)."). Importantly for this case, this Court in *Fogg* held that Congress did *not* intend to supplant the "because of" causation standard of § 2000e-2(a)(1) when it passed the Civil Rights Act of 1991. *Fogg*, 492 F.3d at 453 ("[W]e cannot infer from the addition of § 2000e-2(m) the implicit repeal of § 2000e-2(a) as the standard for establishing liability. . . .").

The *Ginger* decision, however, could be read to have elevated the "single motive" language to a standard at odds with established law. The Court explained:

> There are two ways of establishing liability in a Title VII case. A plaintiff may pursue a "single-motive case," in which he argues race (or another prohibited criterion) was the sole reason for an adverse employment action and the employer's seemingly legitimate justifications are in fact pretextual. *See* 42 U.S.C. § 2000e-2(a)(1). Alternatively, he may bring a "mixed-motive case," in which he does not contest the *bona fides* of the employer's justifications but rather argues race was also a factor motivating the adverse action. *See* 42 U.S.C. § 2000e-2(m); *Fogg v. Gonzales*, 492 F.3d 447-453 (D.C. Cir. 2007).

Ginger, slip op. at 9. This Court concluded that Plaintiffs proceeded under § 2000e-2(a) rather than § 2000e-2(m), but summary judgment was proper because race was not the *sole* reason:

> The officers might have had a compelling case had they argued that race was one of multiple motivating factors behind the reorganization, but they did not. Rather, they brought a single-motive case: According to the officers, race was the sole reason for the reorganization, and the MPD's nondiscriminatory justifications were mere pretexts.
>
> * * *
>
> In sum, the officers never contended this was a mixed-motive case, and no reasonable jury could conclude the District's justifications were pretextual, leaving race as the sole motivation for reorganizing the unit; therefore, the district court properly entered summary judgment for the District.

Ginger, slip op. at 9, 11.

The Court's chosen language cannot be reconciled with binding precedent that holds that a plaintiff can meet his burden of showing "but for" causation even if other true factors contributed to the decision. Consider an entity undergoing a reduction-in-force that identifies underperforming employees, but selects only the women from among that group for termination. Although there remains a true and a valid reason for the action, the women may state a claim under § 2000e-2(a) because they would not have been terminated "but for" their sex. In this regard, the Sixth Circuit employs a useful framework for the different ways in which pretext can be demonstrated:

> A plaintiff can refute the legitimate, nondiscriminatory reason articulated by an employer to justify an adverse employment action "by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000).

Johnson v. Kroger Co., 319 F.3d 858, 866 (6th Cir. 2003). Method numbers 2 and 3 deal with the possibility of multiple and valid causes, consistent with the statutory language and Supreme Court authority. In the hypothetical above, while the employees might admit performance was poor, the admissions would not end the analysis because a jury could find that poor performance, though true,

either did not motivate or was not sufficient standing alone to have caused the termination.

This same analysis applies to the decision to change the police shifts in *Ginger*. While the employer may have had some lawful motivations, that does not resolve the question of whether a jury could still find the decision was taken "because of" race. If the jury could find that the idea of rotating the plaintiffs' shifts had been floating around for years but was not implemented until the issue of racial composition was discussed, then a jury could find that particular decision would not have been made but for the racial consideration. The possibility of that inference should preclude summary judgment whether or not the "same decision" affirmative defense is available.

Hence, what are (mis-)labeled as "mixed motive" cases are simply a subset of cases where the issue of "but-for" causation is shifted to the employer to disprove under the "same decision" language of 42 U.S.C. § 2000e-5(g)(2)(B). The difference between Title VII "mixed motive" cases and all other cases has nothing to do with the number of motives, but rather whether the employer can invoke the "same decision" affirmative defense of § 2000e-5(g)(2)(B) at trial for a jury to determine if the plaintiff was damaged by the discrimination. To the extent that this Court's opinion can be mis-read as imposing on the plaintiff a burden of making an election regarding the "same decision" affirmative defense at summary judgment rather than the trial stage, that would be an unwarranted change in existing law that could cause confusion in the lower courts.

Moreover, the availability of a partial affirmative defense <u>to damages</u> does not alter the plaintiff's burden at summary judgment to show that there is sufficient evidence from which a jury could infer discrimination. This Court explained in its *en banc* opinion in *Aka* that such an inference can be drawn under § 2000e-2(a) not based solely on the falsity of the employer's explanation, but also on a host of available evidence, including the presence of direct evidence of discrimination. *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1289 (D.C. Cir. 1998)(*en banc*). *See also George v.*

Leavitt, 407 F.3d 405, 414 (D.C. Cir. 2005)("[A]n employer's reason need not be false in order to be pretextual.")

CONCLUSION

Amicus asks that the panel amend its opinion to clarify that a Title VII plaintiff need not prove that discrimination was the "sole motive" behind the challenged personnel decision. It would also be helpful if the panel were to explain that the term "mixed motive" is not precisely accurate but is a shorthand way of referring to the class of cases in which an affirmative defense may be asserted by the employer. Finally, the panel should remove any suggestion that the summary judgment stage, rather than trial, is the appropriate point to decide whether the employer is entitled to a assert an affirmative defense, assuming all other prerequisites for the defense have been met.

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29 and D.C. Cir. Rule 32(a)(4) because the brief is less than half the length permissible for the principal brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) and D.C. Cir. Rule 32(a)(1) because the brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 12 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of *Amicus Curiae* Metropolitan Washington Employment Lawyers Association was mailed, first class postage prepaid, to:

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