No. 03-197

In the Supreme Court of the United States

ALFRED G. KING, PETITIONER

v.

DONALD RUMSFELD, SECRETARY OF DEFENSE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether testimony of petitioner's co-workers comparing their work to petitioner's work was insufficient to demonstrate that petitioner met the employer's legitimate job performance expectations.

2. Whether witnesses who testify about an employer's legitimate job performance expectations, or who compare the performance of different employees in light of such expectations, must be certified as experts.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 328 F.3d 145. The memorandum opinion of the district court (Pet. App. 29a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2003. The petition for a writ of certiorari was filed on August 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, the Department of Defense Dependent Schools hired petitioner to teach math and science to eighth and ninth graders at the E.J. King School in

Sasebo Japan. Pet. App. 2a, 29a. Petitioner was subject to a two-year probationary period. *Ibid.*

During his probationary period, petitioner's supervisors counseled him on numerous occasions for using profanity around the students and belittling them. Pet. App. 2a. For instance, in early November 1996, school principal Thomas Whitaker held a counseling session with petitioner to discuss a report that petitioner had used profanity on school grounds and had called his students "stupid." *Id.* at 31a. Whitaker went on medical leave after the fall term, and Douglas Carlson became acting principal. *Ibid.*

During his tenure as acting principal, Carlson also became concerned about petitioner's performance. Pet. App. 2a. For instance, petitioner left identical worksheets for three different classes at different grade levels when he had to be absent. *Id.* at 2a n.1. Carlson believed that petitioner's practice reflected inadequate preparation, and Carlson offered suggestions about how petitioner could improve his performance. *Id.* at 2a n.1, 3a. Carlson also met with petitioner to discuss reports that petitioner was smoking in front of students and was using inappropriate methods of discipline, such as forcing his students to put their nose in a circle on the blackboard. *Id.* at 32a.

On March 14, 1997, Carlson held a meeting where he informed petitioner that his performance put him at risk of being terminated. Pet. App. 32a. On the same day, petitioner contacted the Department of Defense Office of Complaint Investigations to discuss claims of discrimination. *Id.* at 34a.

In early April, after Whitaker returned from medical leave, Whitaker met with Carlson to discuss Carlson's concerns about petitioner's performance. Pet. App. 33a. As a result of the meeting, Whitaker began his own

independent investigation of petitioner, which included two regular observations and several unannounced visits to petitioner's class. *Ibid.*

During that process, Whitaker made recommendations to petitioner about his teaching methods and expressed concern regarding his use of profanity in the classroom. Pet. App. 33a. Ultimately, based on his own observations, Whitaker decided to terminate petitioner for unsatisfactory performance. *Ibid.* Petitioner received notice of his termination on May 29, 1997. *Id.* at 29a-30a.

2. Petitioner filed suit against Donald H. Rumsfeld (respondent), alleging that he was discharged on the basis of race and gender, and in retaliation for his complaints about discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), 2000e-3. Pet. App. 1a-2a. The district court granted summary judgment for respondent. *Id.* at 29a-38a.

The district court found that petitioner failed to submit sufficient evidence to establish a prima facie case of discrimination because he failed to submit sufficient evidence that his job performance was satisfactory at the time of his discharge. Pet. App. 35a. The district court also determined that petitioner failed to establish a prima facie case of retaliatory discharge. *Id.* at 37a-38a.

3. The court of appeals affirmed. Pet. App. 1a-28a. The court first held that petitioner failed to establish a prima facie case of discriminatory discharge because he had not introduced sufficient evidence that he was performing satisfactorily at the time of his discharge. The court of appeals observed that the government "offered substantial evidence that [petitioner] was not in fact meeting legitimate job performance expecta-

tions, chronicling [petitioner's] poor performance and his supervisors' numerous concerns." *Id.* at 5a. Petitioner's response, the court noted, "is limited to his own claim of satisfactory job performance and to testimony he elicited from his fellow teachers to the effect that his lesson plans were substantially comparable to their own." *Ibid.* The court concluded that "[n]either testimony can sustain a challenge to appellee's proffer that [petitioner] was not in fact meeting *appellee's* legitimate performance expectations." *Ibid.* Addressing the testimony of petitioner's co-workers, the court explained that "[p]roof that [petitioner's] performance was comparable to his co-workers' is *not* proof that [petitioner's] performance met appellee's legitimate job performance expectations. It is *only* proof that his work looked like that of his co-workers, a fact that, without more, does not bear on the critical inquiry." *Id.* at 6a.

The court rejected petitioner's contention that, if his evidence was insufficient to establish satisfactory performance, an employee would only be able to make that showing when an employer concedes satisfactory performance or the employee has positive performance reviews. Pet. App. 6a-7a. The court noted that "[f]or [petitioner] to establish that his work met appellee's legitimate job performance expectations he had only to offer qualified expert opinion testimony as to (1) appellee's legitimate job performance expectations and (2) analysis and evaluation of [petitioner's] performance in light of those expectations." *Id.* at 7a. The court concluded that it "is not inconceivable that [petitioner's] co-workers could qualify as expert witnesses to testify as to their employer's legitimate job performance expectations and as to their own analysis and

evaluation of [petitioner's] performance in light of those expectations." *Ibid.*

The court further explained that the co-worker testimony offered by petitioner "was limited to the fact observation that [petitioner's] lesson plans looked like theirs, and, arguably, to the fact that *they* believed [petitioner's] work met appellee's expectations." Pet. App. 7a. The court then concluded: "Failing to address what expectations of [petitioner] appellee could legitimately maintain and failing to analyze [petitioner's] work in light of such opined expectations, the co-workers' fact testimony cannot build a prima facie case for [petitioner]." *Ibid.*

The court of appeals next held that petitioner had submitted sufficient evidence to establish a prima facie case of retaliatory discharge. Pet. App. 9a. The court observed, however, that the government had proffered a legitimate, non-discriminatory motive for petitioner's discharge—"that [petitioner] was not meeting appellee's job performance expectations." *Id.* at 10a. The court further concluded that petitioner had failed to show that the government's proffered motive was pretextual. *Id.* at 10a-16a.

The court of appeals rejected petitioner's reliance on evidence that a white employee who engaged in misconduct was not fired, since petitioner did not rebut the government's showing that school officials believed that the other employee (unlike petitioner) had ceased his misconduct after receiving a warning. Pet. App. 10a-13a. The court found that petitioner's evidence regarding Carlson's alleged hostility to him was insufficient to overcome summary judgment, since it was Whitaker who fired petitioner after conducting his own independent investigation. *Id.* at 13a-14a. Finally, the court held that petitioner's co-worker testimony did not

show that he was treated differently from similarly situated individuals. *Id.* at 14a-15a. The court concluded: "For [petitioner] to prove that he was similarly situated to his colleagues in terms of his job performance would, in the absence of evidence to that effect from the employer or its job performance reviews, require an expert to form an opinion based on reasoned analysis as to how [petitioner] and the other teachers were performing and as to how their performances measured against one another." *Id.* at 14a.

Judge Gregory concurred in part and dissented in part. Pet. App. 17a-28a. He agreed with the majority that petitioner failed to establish a prima facie case of discriminatory discharge, but disagreed with the majority's holding that petitioner's evidence was insufficient to create a question of material fact on petitioner's claim of retaliatory discharge. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 11-19) that the court of appeals erred in holding that testimony from petitioner's co-workers was insufficient to establish that he met the employer's legitimate expectations. That contention is without merit and does not warrant review.

a. As the court of appeals explained, petitioner's coworkers' testimony was limited to their observation that petitioner's lesson plans looked like their plans. The co-workers did not address whether those plans met the employer's legitimate performance expectations or even what those expectations were. The court of appeals therefore correctly concluded that the testimony of petitioner's co-workers was insufficient to show that petitioner was performing his job satisfactorily.

Petitioner contends (Pet. 12) that the court of appeals held that *all* lay co-worker testimony is irrelevant to the existence of a prima facie case as a matter of law. The court's decision, however, rests on the narrower ground that co-worker testimony that does nothing more than compare one aspect of a plaintiff's performance with that of his co-workers—without reference to the employer's legitimate job performance expectations—is insufficient establish a prima facie case. See Pet. App. 6a ("Proof that [petitioner's] performance was comparable to his co-workers is *not* proof that [petitioner's] performance met appellee's legitimate job performance expectations."); *id.* at 7a (noting that "testimony as to the fact that [petitioner's] work looked like that of his co-workers, or even as to the fact that they believed his work met appellee's expectations, does not establish what expectations appellee could legitimately have"). That holding is sound and does not warrant this Court's review.

b. Petitioner errs in contending (Pet. 12-17) that the court's holding on the deficiency of his co-workers' testimony conflicts with decisions from other circuits. None of the cases cited by petitioner hold that testimony that compares the employee's work with that of his co-workers, without addressing the employer's legitimate expectations, is sufficient to overcome a motion for summary judgment.

Several of the cases cited by petitioner do not even involve co-worker testimony. One case held that long tenure at a position can be sufficient to establish satisfactory performance. *Damon* v. *Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1360 (11th Cir. 1999), cert. denied, 529 U.S. 1109 (2000). Another assumed arguendo that such a showing would be sufficient. *Young* v. *General Foods Corp.*, 840 F.2d 825,

829 n.3, 830 (11th Cir. 1988). Another case held that an employer's reasons for discharge should not be considered when analyzing whether the employee has established a prima facie case. *Siegel* v. *Alpha Wire Corp.*, 894 F.2d 50, 54 (3d Cir.), cert. denied, 496 U.S. 906 (1990). Another case held that the testimony of a customer, an employee's positive performance evaluations, and a previous supervisory recommendation were sufficient to establish an employee's satisfactory job performance. *Lyoch* v. *Anheuser-Busch Cos.*, 139 F.3d 612, 615-616 (8th Cir. 1998). One case did not explain the basis for its conclusion that the employee had established a prima facie case, but ruled for the employer based on evaluations made by the employer's president. *Valdez* v. *San Antonio Chamber of Commerce*, 974 F.2d 592, 596 (5th Cir. 1992). And several cases involved the extent to which an employee's own testimony may be used to establish that the employee satisfied the employer's legitimate performance expectations. See *Bullington* v. *United Air Lines, Inc.*, 186 F.3d 1301, 1316 (10th Cir. 1999); *Rush* v. *McDonald's Corp.*, 966 F.2d 1104, 1114 (7th Cir. 1992); *MacDonald* v. *Eastern Wyo. Mental Health Ctr.*, 941 F.2d 1115, 1119 (10th Cir. 1991); *Williams* v. *Williams Elecs., Inc.*, 856 F.2d 920, 923 n.6 (7th Cir. 1988); *Bienkowski* v. *American Airlines, Inc.*, 851 F.2d 1503, 1507 (5th Cir. 1988); *Yarbrough* v. *Tower Oldsmobile, Inc.*, 789 F.2d 508, 512 (7th Cir. 1986).

The decisions cited by petitioner that rely on co-worker testimony did not address whether co-worker testimony is sufficient when it fails to assess the employee's performance in light of the employer's legitimate expectations. That issue simply did not surface in those cases. The reliance on co-worker testimony in

those cases therefore does not conflict with the decision below.

Furthermore, the co-worker cases involved circumstances that are markedly different from the circumstances presented here. In *Kenworthy* v. *Conoco, Inc.*, 979 F.2d 1462, 1470 (10th Cir. 1992), the court accepted testimony from *supervisory* personnel on the plaintiff's qualifications. In *Campbell* v. *Dwyer Products Corp.*, No. 01-2134, 2002 WL 337324, at *2 (7th Cir. Feb. 27, 2002) (31 Fed. Appx. 916, 918 (unpublished order)), the prima facie case consisted of the plaintiff's record of "positive feedback" from the employer as well as testimony from co-workers that another employee was responsible for sub-standard work attributed to the plaintiff. And in *Taylor* v. *Philips Industries, Inc.*, 593 F.2d 783, 786 (7th Cir. 1979), in addition to co-worker testimony, there was evidence that the plaintiff performed the same duties as her successors, but was paid less.

Thus, none of the cases cited by petitioner establishes that co-worker testimony that compares the plaintiff's work with that of his co-workers, without regard to whether any of the work met the employer's legitimate expectations, is sufficient to establish the employee's satisfactory performance of the job. There is therefore no conflict between those decisions and the decision below.

c. Petitioner similarly errs in contending (Pet. 17) that the court of appeals' decision makes it impossible for a plaintiff to establish that he met the employer's legitimate expectations absent positive performance reviews or the employer's concession. Under the court of appeals' decision, a plaintiff can obtain information through discovery regarding the employer's performance expectations and tailor the presentation of

evidence to address those expectations. Indeed, in the present case the employer maintained a Performance Appraisal Plan outlining the standards each employee must meet. C.A. App. 1058. Because petitioner's witnesses failed to tailor their testimony to those standards, the court of appeals correctly concluded that their testimony failed to establish a prima facie case.

d. Certiorari is also unwarranted on the first question presented by petitioner because there is an independent basis for the court of appeals' affirmance of the grant of summary judgment. As the court of appeals correctly held, petitioner did not meet his burden of showing that the legitimate non-discriminatory reasons offered by the government for his dismissal were a pretext for discrimination.

The government proffered evidence that petitioner was discharged not merely for deficient lesson plans, but for improper conduct such as belittling students and smoking in front of them. As the court of appeals recognized, petitioner did not show that those reasons were pretextual. Petitioner's evidence that his lesson plans were similar to those of other teachers did nothing to show that the decision to fire him for belittling students and smoking in front of them was pretextual. Petitioner was not similarly situated to a white employee who engaged in misconduct because, unlike petitioner, that employee changed his behavior after being reprimanded. And petitioner's evidence that the acting principal did not like him did not demonstrate pretext because the official who fired him based his decision on his own independent investigation and did not rely on the testimony of the acting principal.

2. Petitioner contends (Pet. 20) that the court of appeals erred in holding that, absent an employer's

concession or successful performance reviews, a plaintiff can establish satisfactory job performance by introducing expert testimony. That contention reflects a misreading of the court's decision. The court of appeals did not hold that the *only* way to prove satisfactory job performance is through expert testimony. Rather, the court held that, when a plaintiff wishes to put on a witness to provide *an opinion* on whether the plaintiff met the employer's legitimate performance expectations, that witness should be certified as an expert. Employees remain free to put on evidence from employer manuals, bulletins, and other documents, to establish the employer's expectations.

The court's more limited holding does not warrant review. First, as discussed above, the court of appeals held that petitioner's co-worker evidence was deficient not only because it did not take the form of expert testimony, but also because it was not tailored to the government's legitimate job expectations. Because the latter holding is sufficient to sustain the judgment, this case is not an appropriate vehicle for addressing the court's holding with respect to expert testimony.

Second, the court's conclusion concerning the need for expert testimony does not raise any significant barrier to a plaintiff's ability to establish a prima facie case. To qualify co-workers as experts, a plaintiff need only show that the co-workers have a sufficient degree of knowledge of the employer's legitimate job performance expectations and that they are competent to offer an opinion as to whether the employee met those expectations. That requirement is hardly onerous. The court's conclusion that co-workers must be qualified as experts is therefore not of sufficient importance to warrant review by this Court.

Third, the court's holding does not conflict with a decision from any other circuit. While petitioner asserts that no other circuit has established such a requirement, he does not cite any case that affirmatively rejects such a requirement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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