IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDRE BOGGERTY, et al., Appellees-Below, Appellants,	:	No. 489, 2010
v.	:	Court Below: Superior Court of the State of Delaware
DAVID STEWART, et.al., Appellants-Below, Appellees.	:	In and For Kent County Hon. James T. Vaughn, P.J.

APPELLANTS' MOTION FOR REARGUMENT

1. Appellants respectfully move for reargument because (1) on four legal issues not raised below or briefed in this Court the Opinion changes the law, repeatedly creating unprecedented hurdles for meritorious civil rights claims, and (2) the Opinion states and relies on factual characterizations of the record that have no support.

2. **Legal Issues.** ***First,*** the requirement that Complainants "introduce[]" "specific affirmative evidence" to show pretext, Op. 19-20 citing *Schuler v. Chronicle Broadcasting Co., Inc.*, 793 F.2d 1010, 1011 (9th Cir. 1986), rather than rely on cross-examination and the fact finder's perception of the witnesses for that purpose, (1) replaces the existing standard for post-hearing review of agency decisions with the standard *Shuler* used in reviewing a denial of summary judgment, (2) allows a defendant to defeat a *prima facie* case by a defense consisting solely of testimony the fact finder determines is false, (3) *sub silentio* rejects the United States Supreme Court's determination that one may prove *McDonnell Douglas* pretext "by showing that the [defendant's] proffered explanation is unworthy of credence," *Texas Dept. of Comm. Aff. v. Burdine*, 450 U.S. 248, 256 (1981), and (4) contradicts this Court's recognition that evidence of inconsistencies can be evidence of pretext, Op. 18. ***Second,*** the

reliance on *Jaramillo v. Colo. Jud. Dept.*, 427 F.3d 1303, 1310 (10th Cir. 2005), to require that Complainants "'undermine the [defendant's] credibility to the point that a reasonable jury could not find in its favor'" and show "that a jury could find that [the] defendant lacks all credibility'" to raise an inference of pretext, Op. at 17 quoting *Jaramillo*, 427 F.3d at 1310, is misplaced because (1) *Jaramillo* states that rule only for when a plaintiff cites testimony on one issue to show a defendant "should not be believed as to other issues," *id.*, (2) *Jaramillo*, like the opinion cited with it, was a *de novo* review of a summary judgment decision, not a post-hearing review of an agency decision, and (3) adoption of the *Jaramillo* language overrules *sub silentio* the rule that this Court does not determine questions of credibility when it reviews agency decisions. ***Third***, by comparing the treatment of Complainants with the treatment of non-African-Americans in the audience, and ruling there was no disparate treatment because everyone in Complainants' audience heard the announcement (Op. 13-14), rather than comparing the treatment of the 95% minority audience with the treatment of white or "mixed" audiences, the Court rejects *sub silentio* important civil rights law.[1] ***Fourth***, given Stewart's testimony

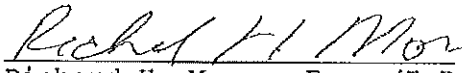
[1] *E.g.*, *Powell v. Ridge*, 189 F.3d. 387, 394-95) (3d Cir. 1999) (allegation that school districts with high proportion of white students received on average more revenue than districts with high proportion of non-whites stated a discrimination claim), *cert. denied*, 528 U.S. 1046 (1999), *overruled on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275 (2001). *See, also, Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (statute intending to disenfranchise blacks was an equal protection violation although it also disenfranchised poor whites); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F. 2d 1283, 1294 (7th Cir. 1977) (that "conduct complained of adversely affected white as well as nonwhite people" didn't bar claim), *cert. denied*, 434 U.S. 1025 (1978).

that "teenagers generate the most complaints for talking, cell phone use, and throwing things .... Just create disruption in general," Tr. 300; A49, and the absence of any contention that African-American adults misbehave similarly, the Court's reliance on Stewart's having given the announcement at the teenage movie "Halloween" to support its rejection of Complainants' pretext argument, Op. 19, suggests the Court has rejected the bedrock principle that the focus of an equal protection analysis starts with determining whether those "similarly circumstanced," *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), or "similarly situated," *Doe v. City of Butler*, 892 F.2d 315, 319 n. 2 (3d Cir. 1989), are treated alike.

3. **Characterization of Record**. ***First***, the statement that the Commission "did not identify any inconsistencies in Stewart's or Bridgman's testimony," Op. 18, overlooks that in finding pretext the Commission supported its finding that Stewart's testimony on the key factual issue "was *neither consistent* nor credible," *Decision* at 52, by identifying five inconsistent descriptions by Stewart of the announcement policy and practice. *Id.* at 52-55. The Commission's finding that Stewart only made the announcement at one movie in Dover prior to Complainants' movie and never made it after Complainants' movie during his remaining year at the theater, *id.* at 53-54, and the absence of the announcement at the nine more popular movies in 2007, Tr. 330; A56, provide additional inconsistencies with Stewart's assertion that he made the announcement because of company policy and not because of the racial composition of the audience. ***Second***, while the Opinion states that "[a]ll the Appellants could point to as proof

of 'pretext' were their own subjective beliefs," Op. 19, Complainants' briefing addressing pretext never mentions a subjective belief of any Complainant and only references Complainant testimony to show the rarity of both the announcement and the security guard's presence at the individual theater door. Op. Br. at 27-29, Rep. Br. at 12-17.

4. The damages claim is not frivolous. It is hard for one who has lived a life of respect to see the announcement as anything other than an inoffensive effort to get patrons not to disturb others during the movie. But the Commission, which heard all the testimony, recognized the pain caused by that announcement to people who, because of the color of their skin, have been frequently disrespected, and who knew from prior experience at the Carmike theater that the announcement wasn't given to mixed audiences. Thus, having found liability, the Commission concluded that compensation for humiliation was appropriate.[2] *Cf.* Op. Br. 21-23. Precedent and 29 *Del. C.* § 10042(d) require respect for the Commission's application of its "experience and specialized competence" in this matter. Thus, for the foregoing reasons, Complainants respectfully request reargument.



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Dated: March 3, 2011

[2] Complainants' pain is, of course, no reason to affirm the Commission's ruling that DEAL was violated. The reason for affirming is that substantial evidence supported the conclusion that Stewart made the announcement because he saw a room full of African-Americans and was concerned that they would misbehave. The Court may not agree with the Commission, but it did not commit reversible error.