No. 13-7273

In The

Supreme Court of the United States

PAUL HESTER,

Petitioner,

v.

INDIANA STATE DEPARTMENT OF HEALTH,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES D. MASUR II
Counsel of Record for
Petitioner Paul Hester
ROBERT W. YORK & ASSOCIATES
7212 North Shadeland Avenue,
Suite 150
Indianapolis, IN 46250
jdmasur@york-law.com
Telephone: 317-842-8000

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court reverse the August 9, 2013 decision of the Seventh Circuit U.S. Court of Appeals with respect to Mr. Hester's Age Discrimination in Employment Act (ADEA) claim, where the Seventh Circuit impliedly affirmed the Summary Judgment granted to the Indiana State Department of Health ("ISDH") by the District Court, due to the Seventh Circuit impliedly affirming error by the U.S. District Court for the Southern District of Indiana on the issue of the application of *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000) in the removal context? The Seventh Circuit's Decision in this case is in conflict with other Circuit Courts of Appeals' decisions on the impact of an unqualified removal by a state entity defendant, when the defendant subsequently asserts immunity.

2. Should the Supreme Court reverse the August 9, 2013 decision of the Seventh Circuit U.S. Court of Appeals with respect to Mr. Hester's ADEA claim, due to the Seventh Circuit declaring its refusal to rule on the immunity issue presented to that Court for review?

3. Should the Supreme Court reverse the August 9, 2013 decision of the Seventh Circuit U.S. Court of Appeals affirming the District Court's grant of summary judgment with respect to Mr. Hester's ADEA claim, due to the Seventh Circuit impermissibly engaging in providing an advisory opinion to

QUESTIONS PRESENTED FOR REVIEW – Continued

ISDH with respect to the substantive merits of Mr. Hester's ADEA claim?

4. Should the Supreme Court reverse the August 9, 2013 decision of the Seventh Circuit U.S. Court of Appeals with respect to Mr. Hester's ADEA claim, due to the Seventh Circuit impermissibly assuming a fact-finder role, and, in furtherance thereof, incorporating a finding of an admission at the oral argument before the Seventh Circuit, when no such admission is of record?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14, and other applicable law and rule, Petitioner Paul Hester, through Counsel James D. Masur II, states the caption of the case contains all the parties.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Paul Hester, Appellant-Plaintiff below, by Counsel James D. Masur II, pursuant to Supreme Court Rules 10, 12, 14, and other applicable law and rule, hereby petitions the United States Supreme Court to exercise its jurisdiction with respect to the questions presented for review arising from the August 9, 2013 decision of the Seventh Circuit U.S. Court of Appeals, as delineated immediately following.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

Hester v. Indiana State Dept. of Health, 726 F.3d 942 (7th Cir. 2013).

Hester v. Indiana State Dept. of Health, 2012 WL 3779218 (S.D.Ind. August 30, 2012).

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

Pursuant to Supreme Court Rule 14, and other applicable law and rule, Petitioner Paul Hester, through Counsel James D. Masur II, states the following as the basis for jurisdiction of the Supreme Court:

1. The date of the judgment or order sought to be reviewed was entered August 9, 2013.

2. The statutory provision believed to confer jurisdiction on the Supreme Court to review on a petition for writ of certiorari of the judgment or order in question is Article III of the Constitution, and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes and Constitutional provisions involved are:

1. The Age Discrimination in Employment Act, ("ADEA"), as amended 29 U.S.C. § 621 *et seq.,* as amended, which, in pertinent part, at 29 U.S.C. § 623, states verbatim as follows:

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

2. 28 U.S.C. § 1291, which states verbatim as follows:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decision of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

3. 28 U.S.C. § 1331, which states verbatim as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

4. 28 U.S.C. § 1441(b), which states verbatim as follows:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served

as defendants is a citizen of the State in which such action is brought.

5. The Eleventh Amendment to the U.S. Constitution, which states verbatim:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

CONCISE STATEMENT OF THE CASE

The Indiana State Department of Health ("ISDH") unqualifiedly removed the captioned cause from state court. ISDH later asserted Mr. Hester's ADEA claim was barred by immunity, irrespective of the prior unqualified removal. The district Court's misapplication, in the removal context, of this Court's rule of law on immunity set forth in *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000), when the District Court granted summary judgment to ISDH on the ADEA claim, was impliedly affirmed by the Seventh Circuit. The Seventh Circuit committed further error by: (1) declaring it was refusing to rule on the immunity issue Mr. Hester brought to it for review, (2) providing ISDH an advisory opinion, and (3) making a finding of a dispositive admission by Mr. Hester's counsel at oral argument, which admission is nonexistent.

CONCISE ARGUMENT

Introduction

Paul Hester brought suit in state court in Indianapolis, Indiana, against the ISDH for violation of the ADEA, as amended 29 U.S.C. § 621 *et seq.,* Title VII of the Civil Rights Act of 1964, as amended, codified at 42 U.S.C. § 2000e *et seq.,* as amended, and the Civil Rights Act of 1991 codified at 42 U.S.C. § 1981a. Defendant ISDH removed the cause to the United States District Court for the Southern District of Indiana, unequivocally stating in its notice of removal as follows: "this case may be removed because it falls within the original jurisdiction of this Court founded on a claim or right arising under the constitution or laws of the United states. *See* 28 U.S.C. §§ 1331 and 1441(b)."

ISDH sought and was subsequently granted summary judgment on Mr. Hester's claims. With respect to the ADEA claim, ISDH sought, and the District Court granted, judgment solely on the basis of the claim being barred by sovereign immunity, citing to this Court's decision in *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000). *Kimel* was a case where removal was not sought by Defendant, as ISDH sought in the instant cause. In response to ISDH's motion for summary judgment, Mr. Hester advised the District court that *Kimel* was inapposite, in light of ISDH's removal, and cited to the controlling Seventh Circuit authority of *Board of Regents of the University of Wisconsin System v. Phoenix*

International Software, Inc., 653 F.3d 448 (7th Cir. 2011). In *Phoenix,* the Seventh Circuit stated that a state waives sovereign immunity once it voluntarily invokes the jurisdiction of a United States District Court, including through removal. In its reply brief as to the ADEA immunity issue, ISDH again asserted immunity from suit under *Kimel.* In its grant of summary judgment, the District Court: (1) misstated the rule of law set forth by this Court in *Kimel,* (2) expressly based its decision on its misstatement of the law, and (3) *sua sponte* embarked on a "liability immunity" analysis.

The Seventh Circuit compounded the reversible error of the District Court on Mr. Hester's ADEA claim in its decision, by: (1) impliedly affirming the erroneous misstatement of the law of immunity under *Kimel* and application of same by the District Court, and/or (2) refusing to rule on the immunity presented to that Court for review, and/or (3) providing an advisory opinion to ISDH, and/or (4) impermissibly engaging in a fact-finder role, and, in doing so, misstated as fact that Mr. Hester's counsel admitted a dispositive fact at oral argument, which finding of fact has no support anywhere in the record. Accordingly, Mr. Hester seeks certiorari to rectify the foregoing actions embodied within the Seventh Circuit's decision as to his ADEA claim, which are inimical to the administration of justice. A concise legal analysis of the rationale(s) for granting certiorari immediately follows.

Legal analysis

1. The Seventh Circuit committed reversible error by impliedly affirming the District Court's patently erroneous decision on Mr. Hester's ADEA claim.

In its ruling on ISDH's motion for summary judgment on Mr. Hester's ADEA claim (which ISDH advanced exclusively on the basis of this Court's "suit immunity" rule of law in *Kimel* rather than any substantive deficit), the District Court erroneously stated this Court's rule of law in *Kimel.* The District Court's misstatement was the opposite of the applicable law for cases which are removed by a defendant. *Kimel.* The District court based its grant of summary judgment on its misstatement of applicable law. Mr. Hester appealed the grant of summary judgment on his ADEA claim to the Seventh Circuit. He founded his appeal on the District Court's misstatement of this Court's rule of law in *Kimel* as applied to cases removed by a defendant, which misstatement was the opposite of the applicable law, and that Court's grant of summary judgment on the ADEA claim upon the misstated rule. He also took exception to the District Court's *sua sponte* engaging in a "liability immunity analysis," since it was not raised by Defendant, and, in any event, was also erroneous.

In its Seventh Circuit briefing, ISDH did not contest that the District Court erroneously stated this Court's rule of law in *Kinel* as applied to removed cases. ISDH also did not contest that the District Court's grant of summary judgment on Mr. Hester's

ADEA claim was premised upon the misstated rule of law.

The Seventh Circuit, likewise, in its decision, did not contest that the District Court erroneously stated this Court's rule of law in *Kinel* as applied to removed cases, nor that the District Court's grant of summary judgment on Mr. Hester's ADEA claim was premised upon the misstated rule of law. Instead, the Seventh Circuit impliedly affirmed the District Court's erroneous grant of summary judgment on Mr. Hester's ADEA claim, essentially by substituting witty repartee about elephants, rather than analyzing the appeal as presented. The implied affirmance of a patently erroneous ruling was improper. *Kimel*. The affirmance militates in favor of this Court's grant of certiorari. Granting of certiorari is also appropriate in that the District Court's embarking on a *sua sponte* "liability immunity" analysis was not only as fatally flawed as the *Kimel* analysis, but also a denial of Mr. Hester's due process rights.

Beyond that, as noted by the Seventh Circuit, there is a split among the Circuits as to the effect of the sort of unqualified removal by ISDH in this case, on a defendant's subsequent assertion of immunity under *Kimel.* Thus, granting certiorari will have the added benefit of resolving a split among various circuits. One of the splits is an apparent split of authority within the Seventh Circuit itself, given the implied affirmance of the District Court's erroneous decision in this case, vis-à-vis the rule of law previously announced by the Seventh Circuit. *Board of*

Regents of the University of Wisconsin System v. Phoenix International Software, Inc., 653 F.3d 448 (7th Cir. 2011); Supreme Court Rule 10(a).

2. The Seventh Circuit committed reversible error by refusing to rule on an issue presented to it for review.

Although it appears the Seventh Circuit affirmed the lower court's error, the entire latter half of the Seventh Circuit's decision is an extended *apologia* for opting not to decide the immunity issue presented to it for review on Mr. Hester's ADEA claim. However, it is axiomatic that the Circuit Courts of Appeals are obliged to decide final decisions presented to them for review, on an appeal of right, and may not demur on the assertion that a Circuit Court of Appeals has the authority to opt not to decide a case or controversy within the jurisdiction of the Court. 28 U.S.C. § 1291; *Catlin v. United States,* 324 U.S. 229, 233 (1945). Simply, the entire system of justice in the United States is premised on the idea of litigants being able to bring final decisions to duly-constituted Circuit Courts of Appeals for review. Any duly-constituted court's election to not decide issues legitimately presented to it jeopardizes the entire system of adjudication. The Seventh Circuit decision, undermining of the entirety of Federal jurisprudence, militates strongly in favor of granting certiorari. Supreme Court Rule 10(a).

3. The Seventh Circuit committed reversible error by issuing an advisory opinion.

In the oral argument, the transcript of which is set forth in its entirety in the Appendix, the Seventh Circuit repeatedly advised the counsel for ISDH that his better argument ("non cert-worthy kind of decision") was one based on what the Seventh Circuit perceived to be fact-specific rather than the immunity basis which had been exclusively advanced by ISDH regarding Mr. Hester's ADEA claim. App. 59, 67. The Seventh Circuit did so in spite of there being nothing in the record to show the District Court gave any consideration to that issue, nor anything in the record to indicate the ISDH ever raised any substantive defense to Mr. Hester's ADEA claim when it advanced its motion for summary judgment with respect to the ADEA claim. The Seventh Circuit based its decision to affirm the District Court's grant of summary judgment to ISDH on the ADEA claim on its *sua sponte* determination that the ruling below would have been able to be affirmed had ISDH based its motion on a substantive deficiency on the ADEA claim. By so doing, the Seventh Circuit improperly issued an advisory opinion, interposing itself as counsel for ISDH under, *inter alia, Medimmune v. Genentech,* 549 U.S. 118, 139 (2007). Its ruling goes against more than two centuries of American jurisprudence, by impermissibly issuing an advisory opinion. In that sense, the ruling below on the ADEA claim compels granting certiorari. Supreme Court Rule 10(a).

4. The Seventh Circuit committed reversible error by stating as fact that an admission was made at oral argument, which "admission" is devoid of record support.

In this case, on the ADEA claim, the Seventh Circuit inappropriately assumed a fact-finder role, and stated in its decision that counsel for Mr. Hester admitted a dispositive fact in oral argument. However, no such admission occurred. The stating of a fact, particularly of an admission by counsel that never occurred, is so inimical to the administration of justice that the Seventh Circuit's decision simply cannot survive any level of scrutiny. Certiorari should be granted on the basis that the fact-finding by the Seventh Circuit was *ultra vires.* Supreme Court Rule 10(a).

CONCLUSION

For the above and foregoing reasons, Petitioner-Appellant-Plaintiff Paul Hester respectfully submits his Petition for Writ of Certiorari should be granted in the instant cause.

Respectfully submitted,

JAMES D. MASUR II
Counsel of Record for Petitioner Paul Hester
ROBERT W. YORK & ASSOCIATES
7212 North Shadeland Avenue, Suite 150
Indianapolis, IN 46250
jdmasur@york-law.com
Telephone: 317-842-8000

726 F.3d 942

United States Court of Appeals,
Seventh Circuit.
Paul HESTER, Plaintiff-Appellant,
v.
INDIANA STATE DEPARTMENT OF HEALTH,
Defendant-Appellee.

No. 12-3207.
Argued June 6, 2013.
Decided Aug. 9, 2013.

James D. Masur, II, Attorney, York & Associates, Indianapolis, IN, for Plaintiff-Appellant.

Betsy M. Isenberg, Attorney, Office of the Attorney General, Indianapolis, IN, for Defendant-Appellee.

Before POSNER, ROVNER, and WOOD, Circuit Judges.

WOOD, Circuit Judge.

Until mid-2009, Paul Hester was employed by the Indiana State Department of Health (the Department). The Department was not satisfied with Hester's work, however, and so it terminated his employment. Hester believes that this action was motivated by his gender, race, or age. Initially, he sued the Department in Indiana state court, alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, and Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17, but the Department removed the action to federal court. The district court granted summary judgment for the

Department on all claims. It concluded that Indiana was immune from liability for private damages under the ADEA, and it found that Hester had failed to identify enough evidence to permit a trier of fact to find that the Department discharged Hester because of a protected characteristic.

We agree with the district court that Hester's evidence could not support a finding that the Department's action was motivated by race or gender. Hester conceded at oral argument in this court that the record contains no more evidence of age discrimination than of race or gender bias. His age-based claim has thus dropped out of the case. This means that we have no occasion to delve into the interesting questions of sovereign immunity that have occupied the parties in their briefing, although we outline them briefly.

I

Hester (who is white, male, and at the time he lost his job, in his mid-50s) began working as a microbiologist at the Department's immunology laboratory in 1994. It appears that his tenure was uneventful until 2007, when he was reprimanded for failing to report test results on time. Later that year, Hester applied for the position of Bench Supervisor. Lixia Liu interviewed him for that slot, but in the end she chose Rich DuFour, another white male, for the job. In 2008, Hester told DuFour (then his supervisor) that the lab was using an incorrect procedure for

syphilis tests. (Hester thought that the lab should be using a "moistened chamber" for conducting the tests, and it was not doing so.) While DuFour did not respond directly to Hester's complaint, it appears that the Department has since modified its standard operating procedure and now follows the protocol Hester had identified.

At the end of 2008, DuFour left the position of Bench Supervisor. Hester again applied for the position and was again interviewed for it by Liu. This time Liu awarded the position to a white female in her mid-twenties, Jessica Gentry, who had been working in the lab for four years. Liu explained that she chose Gentry for several reasons: Gentry was one of the top performers in the lab; Liu had more confidence that Gentry's test results would be returned on time; and Liu was concerned that Hester did not have a good working relationship with other employees.

In April 2009, Hester's supervisors met with him for a performance appraisal, at which he received a document entitled "Work Improvement Plan, Notice of Substandard Performance." The form listed a number of Hester's "performance deficiencies." In particular, it said, he "[did] not meet expectations"; he "need[ed] improvement" in "job knowledge"; and he had "competency in only one of four testing areas . . . due to hesitance in cross-training." It recommended that Hester "work to improve knowledge retention and putting new knowledge into routine use," develop "more thorough understanding of instruments . . . and . . . use of [standard operating procedures]," and

"embrace more opportunities for learning and . . . attain[ ] knowledge related to daily functions." Hester was also reminded that he had failed to satisfy the Department's request that he attend training to gain proficiency in hepatitis C and syphilis testing.

The Work Improvement Plan required Hester to demonstrate perfect accuracy in syphilis and Ortho ECi testing within 30 days, or else he would face termination. (Ortho ECi is a proprietary immunodiagnostic system. *See* http://www.orthoclinical.com/en-us/localehome/whoweare/Pages/OverviewHistory.aspx (last visited Aug. 8, 2013).) In May 2009, Hester passed the syphilis examination, but he recorded one sample on the Ortho ECi test inaccurately. A second performance appraisal report for the period between April 24 and May 24, 2009, found that Hester did not meet expectations in the areas of "job knowledge" and "communication." That report noted that Hester failed satisfactorily to complete the Ortho ECi testing "despite the fact that he was given extensive hands-on training[,] . . . much longer and more extensive training than anyone else in the Serology Lab required." It also noted he "displayed a reluctance to read or consult the written test procedures, and he refused to take notes or write down many key facts that he seemed to have a difficult time remembering." When he was instructed to take notes, he refused to do so because he did not want them to become a "crutch." On June 9, the Department provided Hester with a 30-day notice of the termination of his job.

Hester was a merit employee, and under state law he could be fired only for just cause. The State Employees Appeals Commission (SEAC) rejected Hester's challenge to the Department's action. He appealed to the Marion Superior Court, which initially remanded Hester's case, instructing SEAC to correct evidentiary and procedural errors in the proceeding. The Department filed a motion addressing these errors, and the Superior Court suspended the remand pending its decision on that motion. These proceedings were ongoing at the time of the district court's decision.

Meanwhile, Hester filed this parallel suit in state court alleging that the Department's decision not to promote him to Bench Supervisor and to fire him violated Title VII and the ADEA. The Department removed the suit to federal court. In granting summary judgment for the Department, the district court held that Indiana was immune from suit under the ADEA pursuant to *Kimel v. Florida Board of Regents,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). The court found that Indiana waived its immunity from suit by removing the case to federal court, but it found that the state could nonetheless assert immunity from liability in a private damages claim under the ADEA, as the state would have been immune from a comparable claim in state court. The court also concluded that Hester's suit could not survive summary judgment in any event, because he lacked evidence that race or gender, rather than shortcomings in performance, motivated the Department's

decisions. Even if the Department were mistaken in believing that it had cause to discharge Hester on competency grounds, that type of complaint is properly addressed through the wrongful termination proceedings ongoing in state court; it says nothing about unlawful discrimination once pretext is ruled out.

II

A

We review the district court's grant of summary judgment *de novo,* construing all evidence in the light most favorable to Hester. We will affirm if there are no genuine issues of material fact and, on the basis of the uncontested facts, the Department is entitled to judgment as a matter of law. Finally, "summary judgment may be granted based on any ground that finds support in the record, so long as the non-moving party had an opportunity to submit affidavits or other evidence and contest the issue." *Williams v. U.S. Steel,* 70 F.3d 944, 947 (7th Cir.1995); *see also Slaney v. The Int'l Amateur Athletic Fed'n,* 244 F.3d 580, 597 (7th Cir.2001) ("[A]n appellate court can affirm the district court's dismissal based on any ground supported by the record, even if different from the grounds relied upon by the district court.").

B

Rather than beginning with the Department's sovereign immunity defense, as the district court did,

we proceed directly to the points that we believe resolve this appeal in the most straightforward manner. We are entitled to do so because the state's sovereign immunity does not automatically destroy the subject-matter jurisdiction of the federal courts, particularly in a case (such as ours) that does not rest on diversity jurisdiction. *See Wis. Dep't of Corr. v. Schacht,* 524 U.S. 381, 389, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998). In order to move beyond summary judgment on his discrimination claims, Hester had to submit evidence showing that the Department's adverse actions were motivated by his gender, race, or age, rather than his unsatisfactory performance. "[T]he plaintiff one way or the other must present evidence showing that . . . a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any non-invidious reason." *Coleman v. Donahoe,* 667 F.3d 835, 863 (7th Cir.2012) (Wood, J., concurring); *Pitasi v. Gartner Grp., Inc.,* 184 F.3d 709, 714 (7th Cir.1999) (age discrimination claim); *Good v. Univ. of Chi. Med. Ctr.,* 673 F.3d 670, 674-75 (7th Cir.2012) (race discrimination claim). We consider first his allegations of race or gender discrimination.

Hester may prove this by evidence, direct or circumstantial, that would allow a trier of fact to find that he was in a protected group, that he suffered an adverse employment action, and that the adverse action was caused by his protected status. In the alternative, he may use the well-worn "indirect," burden-shifting method of proof recognized in

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), under which the plaintiff first establishes a *prima facie* case of discrimination, the employer responds by articulating a legitimate, nondiscriminatory reason for its action, and the plaintiff then has the opportunity to show that the employer's explanation is pretextual. *See Raytheon Co. v. Hernandez,* 540 U.S. 44, 49-50 & n. 3, 124 S.Ct. 513, 157 L.Ed.2d 357 (2003). If the plaintiff is not using the burden-shifting approach, however, then he is entitled to present any evidence he can muster to show that discrimination was the reason for the adverse action. An outright confession of discriminatory intent would suffice, but outside the world of fiction, one does not ordinarily see that kind of evidence. Short of that, examples of pertinent circumstantial evidence include suspicious timing, ambiguous statements or behavior directed at others in the protected group; and evidence that similarly situated employees outside the protected class were treated more favorably. *Good,* 673 F.3d at 675, 678.

Hester has not presented any evidence, no matter how characterized, that would cast doubt on the Department's decision not to promote him. His supervisors never mentioned either his race or his gender. This case is thus not like *Pitasi,* where the employer asked the employee "[w]hat would you think if we gave you early retirement, with some extra compensation because of your age?" 184 F.3d at 713. Nor was there a pattern of the Department's disfavoring males for the position of Bench Supervisor. Compare *Mills v.*

Health Care Serv. Corp., 171 F.3d 450, 457 (7th Cir.1999) ("Between 1988-1995, nearly all promotions at the office went to women, and at the time the challenged hiring decision was made, females dominated the supervisory positions in the relevant office."). To the contrary, the first time Hester applied for the position of Bench Supervisor, Liu gave the position to DuFour, another white male. Over the period in question, one man and one woman were promoted to the Bench Supervisor position. This shows gender balance, not gender bias.

As we noted earlier, Liu gave three neutral reasons for her decision to promote Gentry over Hester: Gentry performed her work in a timely manner; Gentry was a top performer; and Gentry got along better with other workers in the lab. None of those things could have been said about Hester. To the contrary, he was disciplined in 2007 for failing to submit a sample in time; his Work Improvement Plan reveals that the Department did not regard him as a "top performer"; and Hester's performance evaluation states that he fell short of expectations in communication because he did not follow directions well. Hester has provided no reason for suspecting that these negative assessments were pretextual.

Hester's effort to defeat summary judgment on his termination claim fares no better. Hester argues that three allegations in his affidavit would (if believed by the trier of fact) demonstrate that the Department subjected him to disparate treatment

based on his race or gender: (1) a male African-American employee, Douglas, had "serious performance deficiencies," but Douglas was reassigned rather than fired; (2) Gentry and four other female employees performed syphilis testing improperly, but the women were not fired or disciplined; and (3) another female employee, Espinosa, was permitted to retake the Ortho ECi test when she failed it, rather than being fired. (The district court excluded the last allegation from evidence because Hester failed to show that he had personal knowledge about Espinosa's situation and the evidence lacked foundation, including information about when Espinosa's failure and retake occurred. We mention it only because it would not have helped Hester even if the district court had taken it into account.)

Even if all of Hester's evidence were credited, it does not add up to a showing that he was treated differently because of his race or gender. None of these employees was comparable to him. None was placed on a Work Improvement Plan after unsatisfactory performance. None was required to pass an examination with 100% accuracy in order to remain employed. And none failed the test despite this condition. Hester suggests that employees who improperly conducted syphilis tests were comparable because they too made mistakes, yet the Department treated them more favorably because it did not fire them. But the Department explains that all employees at one point conducted syphilis tests "incorrectly" pursuant to its former operating procedure, which did not

involve the use of a moistened chamber. During the time when the five female employees performed syphilis tests improperly, the entire lab, including Hester, was doing the same thing. Since they were complying with the operating procedure in place at the time, the employees who incorrectly performed syphilis tests are not similarly situated to Hester. Only Hester continued to have performance problems so serious that the Department deemed his work unsatisfactory.

To support an inference that the Department treated similarly situated employees of a different race or gender more favorably, Hester needed evidence that employees of a different race or gender were put on a "Work Improvement Plan" with the same terms as Hester's, but allowed to continue working after failing one of the tests. He could also have shown that employees of a different race or gender received notices of unsatisfactory performance similar to Hester's, but were not placed on a "Work Improvement Plan." Hester did none of these things.

The fact that Douglas, an African-American male over the age of 50 who had been with the Department for 50 years, was not let go for poor performance cuts against Hester's allegations of age and gender discrimination. One would expect Douglas to have been fired if the Department were biased against male (or older) employees. Similarly, that the Department treated Gentry and several other white employees favorably undermines Hester's claim of race discrimination.

Hester finally urges that his firing must have been attributable to forbidden reasons because (he says) the Department mistakenly concluded that he failed the Ortho ECi exam. Indeed, he charges, Gentry fabricated his failure of the Ortho ECi exam and withheld information that would allow him to show he actually passed it. Even if this were so, and even if the Department was wrong in determining that Hester performed unsatisfactorily, nothing in this account points to discrimination as the real reason for the Department's action. Gentry and other supervisors may have treated Hester poorly out of personal animosity. That might violate the state's law prohibiting merit employees from being terminated without "just cause," but it does not leave gender or race as the only alternative explanation.

The district court thus properly concluded that Hester's evidence was insufficient to survive summary judgment on his claims of race and gender discrimination. While that court did not rule on the sufficiency of the age discrimination evidence, at oral argument Hester's counsel admitted that there is no more evidence that the Department was motivated by age than the evidence we have described here. Hester's ADEA claim could have been dismissed just as readily on the evidentiary shortcomings that prevent Hester's Title VII claims from going forward, and that ground is available to this court on our *de novo* review of the judgment.

C

Before concluding, we offer a few remarks about the elephant in the room: the district court's sovereign immunity ruling. As we noted earlier, the court found that by removing the case from the state court, the Department waived its immunity from suit, but not its immunity from damages liability under the ADEA. This implicates a question that we have not yet had occasion to answer, and that has divided our sister circuits: Does a state waive the immunity it would have in state court by removing a suit to federal court? In *Lapides v. Board of Regents of University System of Georgia,* 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002), the Supreme Court held that by removing the case to federal court, the state of Georgia waived immunity in a federal forum from state law claims from which it would *not* have been immune had the case stayed in state court. The Court stated that "removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum." *Id.* at 624, 122 S.Ct. 1640. The Court emphasized its concern that the state would gain an unfair advantage by removing to federal court if it could declare immunity in a federal forum that it would not have in state court.

The courts of appeals have interpreted *Lapides* differently: at least one court has read *Lapides* as suggesting that by removing to federal court, a state waives *any* immunity that it would have had in state

court. *Estes v. Wyo. Dep't of Transp.,* 302 F.3d 1200, 1206 & n. 1 (10th Cir.2002) (holding that the state waived immunity from suit under the Americans with Disabilities Act (ADA) even though the state would have been immune from the claim in state court). Other circuits have read *Lapides* as holding that, by removing to federal court, a state waives only its immunity from the jurisdiction of the federal forum, but it retains immunity as a defense to liability to the extent the defense would be available in state court. *Stroud v. McIntosh,* No. 12-10436, 722 F.3d 1294, 2013 WL 3790961 (11th Cir. July 23, 2013) ("We do not understand Lapides to require the state to forfeit an affirmative defense to liability simply because it changes forums. But the Lapides Court's reasoning supports the propositions that a state consents to federal jurisdiction over a case by removing and that it cannot then challenge that jurisdiction by asserting its immunity from a federal forum."); *Lombardo v. Pa. Dep't of Pub. Welfare,* 540 F.3d 190, 198 (3d Cir.2008) ("We hold that while voluntary removal waives a State's immunity from suit in a federal forum, the removing State retains all defenses it would have enjoyed had the matter been litigated in state court, including immunity from liability."); *Meyers ex rel. Benzing v. Texas,* 410 F.3d 236, 255 (5th Cir.2005) ("[W]hen Texas removed this case to federal court it voluntarily invoked the jurisdiction of the federal courts and waived its immunity from suit in federal court. Whether Texas has retained a separate immunity from liability is an issue that must be decided according to that state's law." (citation omitted)).

Several other courts have reached the same result by slightly different reasoning. These decisions hold that waiver-by-removal occurs only if, as in *Lapides,* the removing state stands to gain an unfair advantage by asserting immunity that it would not have enjoyed in its state courts. *Bergemann v. R.I. Dep't of Envtl. Mgmt.,* 665 F.3d 336, 342 (1st Cir.2011) ("Rhode Island's sovereign immunity defense is equally as robust in both the state and federal court. Consequently, there is nothing unfair about allowing the state to raise its immunity defense in the federal court after having removed the action. Simply put, removal did not change the level of the playing field."); *Stewart v. North Carolina,* 393 F.3d 484, 490 (4th Cir.2005) ("North Carolina had not consented to suit in its own courts for the relevant claims. . . . Therefore, by removing the case to federal court and then invoking sovereign immunity, North Carolina did not seek to *regain* immunity that it had abandoned previously. Instead, North Carolina merely sought to have the sovereign immunity issue resolved by a federal court rather than a state court." (citations omitted) (emphasis in original)).

The closest we have come to addressing this question is our holding that, by filing suit in federal court based on federal copyright law, Wisconsin waived immunity to the defendant's counterclaims under the same federal law, even though it would ordinarily be immune from suit in federal court. *Bd. of Regents of the Univ. of Wis. Sys. v. Phoenix Int'l Software, Inc.,* 653 F.3d 448 (7th Cir.2011). *Phoenix,*

however, does not answer the question we are discussing, because there we said nothing about whether the state would have been immune from the copyright claims in state court, nor did we address how this hypothetical state-court immunity would affect immunity in federal court. Since Wisconsin was the plaintiff asserting federal claims in federal court, albeit in an appeal from a federal agency decision, there was no need to reach those issues.

The case for waiver is significantly different here because Indiana was the defendant and in no way invoked federal law as a basis for any claims. The Department explains that it removed Hester's suit because it prefers to defend Title VII actions (which, because they rest on Section 5 of the Fourteenth Amendment, validly abrogate immunity, *see Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976)) in federal court, and it wanted to litigate those claims even while it asserted its immunity defense from ADEA liability pursuant to *Kimel*.

Kimel held that Congress was not empowered by the Fourteenth Amendment to subject the states to suits for private damages based on age discrimination. The Indiana Supreme Court has held that there is no private civil damages remedy under Indiana's state Age Discrimination Act, Ind.Code § 22-9-2-1, and thus (in that court's view) Indiana is under no obligation to recognize comparable claims under the federal ADEA. *Montgomery v. Bd. of Trustees of Purdue Univ.,* 849 N.E.2d 1120 (Ind.2006). Compare *Erickson v. Bd. of Governors of State Coll. & Univ.,*

207 F.3d 945, 952 (7th Cir.2000) (Illinois did open its courts to claims based on state law, including a prohibition against disability discrimination, and so state courts could not exclude such claims based on federal law).

These cases raise a number of interesting questions: is it correct to distinguish between immunity from suit and immunity from a forum? May a state court, consistently with *Testa v. Katt,* 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947), refuse to entertain a case based on federal law when the state has an analogous statute that differs only in the remedies afforded? Are the rules different when the state freely chooses the federal forum by removing? What if the state not only removes, but it files a counterclaim? To the extent that Hester might have been seeking injunctive relief, did the district court act too hastily in assuming that Indiana's sovereign immunity would also bar that aspect of his case, despite *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)? Rather than plunge into those delicate topics in a case where the answers ultimately do not matter, we are content to save them for another day.

* * *

We AFFIRM the judgment of the district court.

2012 WL 3779218

Only the Westlaw citation is currently available.

United States District Court,
S.D. Indiana,
Indianapolis Division.
Paul HESTER, Plaintiff,
v.
INDIANA STATE DEPARTMENT OF HEALTH,
Defendant.

No. 1:10-cv-1570-JMS-DML.
Aug. 30, 2012.

James D. Masur, II, Robert W. York & Associates, Indianapolis, IN, for Plaintiff.

Betsy M. Isenberg, Corinne T.W. Gilchrist, Indiana Office of the Attorney General, Indianapolis, IN, for Defendant.

ORDER

JANE MAGNUS-STINSON, District Judge.

Presently pending before the Court in this employment discrimination suit is Defendant Indiana State Department of Health's ("*ISDH*") Motion for Summary Judgment, [dkt. 40], which the Court grants for the reasons that follow.

I.

BACKGROUND

Paul Hester, who is Caucasian and 56 years old, began working for ISDH as a microbiologist in the immunology laboratory in 1994. [Dkt. 40-1 at 3-4.] In 2007, Mr. Hester received a written reprimand after certain test results were not timely submitted to the College of American Pathology. [*Id.* at 8, 23-24.] Mr. Hester disagreed with the reprimand, stating that he provided the results to his supervisor in a timely manner and that his supervisor was then responsible for submitting the results to the College of American Pathology. [*Id.* at 9.]

Also in 2007, Mr. Hester applied for the position of Bench Supervisor. [*Id.* at 5.] Lixia Liu conducted the interview process, ultimately hiring Rich Dufour for the position. [*Id.*] Mr. Dufour then became Mr. Hester's supervisor. [*Id.* at 6.] In September 2008, Mr. Hester discussed with Mr. Dufour what he perceived to be a deviation by ISDH from the appropriate standard operating procedure for administering syphilis tests. [*Id.* at 6-7.] Specifically, Mr. Hester believed that ISDH was not – but should have been – using a "moistened chamber" when conducting the tests. [*Id.*] Mr. Hester told Mr. Dufour of his concerns, but never heard anything further regarding the issue from Mr. Dufour. [*Id.* at 7.]

In December 2008, Mr. Hester again applied for the Bench Supervisor position after Mr. Dufour left ISDH. [*Id.* at 6.] Ms. Liu interviewed him, but the

position was given to Jessica Gentry. [*Id.*] Ms. Gentry is Caucasian, approximately in her mid-20s, and had been working for ISDH in the immunology lab for about four years at the time of her promotion. [*Id.*]

In April 2009, Mr. Hester met with Ms. Liu regarding his performance appraisal for the period February 2008 to December 2008. [*Id.* at 11.] At the meeting, Mr. Hester received a Work Improvement Plan, which required him to "gain competency" – or pass a proficiency test with 100% accuracy – in both syphilis testing and Ortho ECI (Hepatitis B and HIV) testing within thirty days. [*Id.* at 12.]

In May 2009, Mr. Hester took and passed his proficiency test for conducting syphilis tests, [*id.* at 12; 43-1 at 2], and then took the Ortho ECI proficiency test, [dkt. 43-1 at 2]. Shortly thereafter, Ms. Gentry (Mr. Hester's supervisor at the time) suggested to Mr. Hester that he had inaccurately tested one sample on the Ortho ECI proficiency test. [Dkts. 40-2 at 3; 43-1 at 3.] Mr. Hester claims that, in response to Ms. Gentry's suggestion, he reminded her and advised Ms. Liu that one of the test samples had been switched with another sample because of poor quality, and that this switch was not reflected on the excel spreadsheet where he recorded his results. [Dkt. 40-1 at 14, 44.] Accordingly, he claimed, the test result Ms. Gentry questioned was accurate. [Dkt. 43-1 at 3-4, 18.]

When the thirty-day deadline for completing his Work Improvement Plan passed, Mr. Hester did not

hear anything from Ms. Gentry or Ms. Liu regarding the Ortho ECI proficiency test until a predeprivation meeting on June 9, 2009. [Dkt. 40-1 at 13.] There, he learned for the first time that ISDH believed he had failed the Ortho ECI proficiency test and that he would be terminated effective July 9, 2009. [*Id.* at 14, 36.]

Mr. Hester argues that he was a merit employee and, as such, could only be terminated for "just cause." [Dkt. 43-1 at 1.] The State Employees' Appeals Commission ("*SEAC*") affirmed ISDH's decision to terminate Mr. Hester, and Mr. Hester appealed that decision to the Marion Superior Court. *In re: Hester v. SEAC,* No. 49D14-1007-PL-032056 (Marion Superior Ct.). On May 30, 2012, the Marion Superior Court remanded the matter to SEAC and ISDH due to:

> 1. Acknowledged non-compliance by SEAC with mandatory due process procedures;
>
> 2. The failure of [SEAC and ISDH] to provide [Mr. Hester] with relevant and material evidence prior to the SEAC hearing; [and]
>
> 3. Failure to prepare or preserve an adequate record.

[Dkt. 46-1.] On June 12, 2012, the Marion Superior Court stayed enforcement of the May 30, 2012 Order pending resolution of ISDH's motion to correct error. [Dkt. 49-3.]

Around the same time, Mr. Hester filed the instant parallel action in state court alleging claims

for racial and gender discrimination under Title VII and age discrimination under the Age Discrimination and Employment Act ("*ADEA*"). ISDH removed the matter to this Court. As violations of federal statutes are alleged, subject matter jurisdiction exists.

II.

STANDARD OF REVIEW

A motion for summary judgment asks that the Court find that a trial based on the uncontroverted and admissible evidence is unnecessary because, as a matter of law, it would conclude in the moving party's favor. *See* Fed. R. Civ. Pro. 56. To survive a motion for summary judgment, the non-moving party must set forth specific, admissible evidence showing that there is a material issue for trial. Fed. R. Civ. Pro. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

As the current version of Rule 56 makes clear, whether a party asserts that a fact is undisputed or genuinely disputed, the party must support the asserted fact by citing to particular parts of the record, including depositions, documents, or affidavits. Fed. R. Civ. Pro. 56(c)(1)(A). A party can also support a fact by showing that the materials cited do not establish the absence or presence of a genuine dispute or that the adverse party cannot produce admissible evidence to support the fact. Fed. R. Civ. Pro. 56(c)(1)(B). Affidavits or declarations must be made on personal knowledge, set out facts that would

be admissible in evidence, and show that the affiant is competent to testify on matters stated. Fed. R. Civ. Pro. 56(c)(4). Failure to properly support a fact in opposition to a movant's factual assertion can result in the movant's fact being considered undisputed, and potentially the grant of summary judgment. Fed. R. Civ. Pro. 56(e).

The Court need only consider the cited materials, Fed. R. Civ. Pro. 56(c)(3), and the Seventh Circuit Court of Appeals has "repeatedly assured the district courts that they are not required to scour every inch of the record for evidence that is potentially relevant to the summary judgment motion before them," *Johnson v. Cambridge Indus.,* 325 F.3d 892, 898 (7th Cir.2003). Furthermore, reliance on the pleadings or conclusory statements backed by inadmissible evidence is insufficient to create an issue of material fact on summary judgment. *Id.* at 901.

The key inquiry, then, is whether admissible evidence exists to support a plaintiff's claims or a defendant's affirmative defenses, not the weight or credibility of that evidence, both of which are assessments reserved for the trier of fact. *See Schacht v. Wis. Dep't of Corrections,* 175 F.3d 497, 504 (7th Cir.1999). And when evaluating this inquiry, the Court must give the non-moving party the benefit of all reasonable inferences from the evidence submitted and re-solve "any doubt as to the existence of a genuine issue for trial . . . against the moving party." *Celotex,* 477 U.S. at 330.

III.

DISCUSSION

ISDH challenges Mr. Hester's claims in two ways. First, it asserts his claim under the ADEA is barred because ISDH is immune from suit for that claim under the doctrine of sovereign immunity. It also argues that Mr. Hester has not presented any direct or indirect evidence of discrimination in connection with his Title VII claims. As discussed below, ISDH's motion is granted.

A. Analyzing ADEA Claim-Applicability of Doctrine of Sovereign Immunity

ISDH argues that the Eleventh Amendment to the United States Constitution provides it with immunity from private suit in federal court for violations of the ADEA, citing *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), for the proposition that Congress' abrogation of the states' sovereign immunity in the ADEA is not a valid exercise of power. [Dkt. 41 at 6-7.] Mr. Hester briefly responds that ISDH has waived its immunity by removing this matter to federal court. [Dkt. 43 at 6.] ISDH replies by again citing *Kimel,* and arguing that "[a] state would have immunity from suit under the ADEA regardless of whether the case was filed in state or federal court based on invalid abrogation." [Dkt. 49 at 5.]

Eleventh Amendment immunity includes both immunity from suit in federal court and immunity

from liability. *See Nanda v. Bd. of Trs. of the Univ. of Ill.,* 303 F.3d 817, 821 (7th Cir.2002). While state agencies do generally enjoy immunity under the Eleventh Amendment from being sued in federal court, that immunity does not bar claims where: (1) a state has waived immunity by consenting to suit in federal court; (2) Congress has "abrogate[d] the state's immunity through a valid exercise of its powers under recognized constitutional authority"; or (3) plaintiff seeks "prospective equitable relief for ongoing violations of federal law." *Tyler v. Trs. of Purdue Univ.,* 834 F.Supp.2d 830, 844 (N.D.Ind.2011). Mr. Hester argues only that ISDH has waived immunity from suit because it removed this case to federal court.

The Seventh Circuit Court of Appeals has held that a state waives its Eleventh Amendment immunity from suit in federal court when it removes claims to federal court, regardless of whether those claims are based on state or federal law. *See Bd. of Regents of the Univ. of Wis. Sys. v. Phoenix Int'l Software, Inc.,* 653 F.3d 448, 461 (7th Cir.2011) (noting that the Seventh Circuit "join[s] the majority of our other sister circuits in reading *Lapides [v. Bd. of Regents,* 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002),] to state a more general rule" that removal of either state or federal claims operates as a waiver of sovereign immunity because removal constitutes consent to suit in federal court); *see also Lombardo v. Pennsylvania Dep't of Public Welfare,* 540 F.3d 190, 198 (3d Cir.2008) ("We hold that the [state's] removal

of federal-law claims to federal court effected a waiver of immunity from suit in federal court"); *Meyers v. Texas,* 410 F.3d 236, 244 (5th Cir.2005) (state's removal of lawsuit to federal court waived sovereign immunity); *Embury v. King,* 361 F.3d 562, 564 (9th Cir.2004) (holding *Lapides* applied to action removed by state to federal court based on either state or federal law); *Estes v. Wyoming Dep't of Transp.,* 302 F.3d 1200, 1206 (10th Cir.2002) (same principle). Accordingly, the Court concludes that ISDH waived its immunity from suit in federal court by removing this action, [dkt. 1].

Albeit through scant argument, ISDH does assert that it is immune from suit under the ADEA regardless of forum. The Court recognizes there is a distinction between immunity from suit in federal court and immunity from liability. *Lombardo,* 540 F.3d at 193. A small number of courts have considered the issue of whether a state can waive its immunity from suit in federal court by removing an ADEA claim to federal court, but still retain its immunity from liability. Those courts have held that, while removal does constitute waiver of the Eleventh Amendment right of a state to be free from suit in federal court, removal does not operate to waive any defenses to liability – immunity included – which the state could assert no matter where the lawsuit was pending. *See, e.g., Lombardo,* 540 F.3d at 198 (state removed ADEA suit to federal court so waived Eleventh Amendment immunity from suit there, but retained any sovereign immunity it had to liability); *Clemmer v. State of*

Florida, 2005 U.S. Dist. LEXIS 35187, *3-4, 2005 WL 2656608 (N.D.Fla.2005) (state's removal of ADEA claim "waives any objection to litigation in federal rather than state court but does not waive immunity that would foreclose a claim in any court, state or federal. . . . [C]hoosing federal rather than state court [by removing] says nothing about a state's willingness to have the action go forward at all. [The state] thus has not waived its immunity from plaintiff's ADEA claim" (emphasis in original)).

The concept of waiving immunity from suit in federal court, but not waiving immunity from liability, has been recognized in other contexts as well. *See, e. g., Meyers,* 410 F.3d at 255 (state waived immunity from suit in federal court for Americans With Disabilities Act claim, but did not waive arguments regarding immunity from liability); *Anderson v. Board of Regents,* 822 F.Supp.2d 1342, 1355 (N.D.Ga.2011) ("[W]hen a state defendant properly removes an action to federal court, it does not lose the right it always would have had, in whatever court it might have been sued, to assert a sovereign immunity defense that potentially shields it from liability"); *see also* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment,* 52 Duke L.J. 1167, 1233-34 (2003) ("state sovereign immunity has two independent aspects: it is partly an immunity from suit in a particular forum (federal court) and partly a substantive immunity from liability" and "removal should be understood to

waive only forum immunity [i.e., immunity from suit in federal court]").

The United States Supreme Court in *Kimel v. Florida Board of Regents,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), addressed a state's immunity from liability for ADEA claims and held that, while Congress intended for the ADEA to apply to states and their agencies, this was not a proper abrogation of a state's immunity from liability under Section 5 of the Fourteenth Amendment. *Id.* at 73. Additionally, there is no indication, nor does Mr. Hester argue, that ISDH has waived its immunity from liability under the ADEA through statute or otherwise – only that it has waived its immunity from suit in federal court for ADEA violations. [Dkt. 43 at 6.] *See Montgomery v. Bd. of Trs.,* 849 N.E.2d 1120, 1126-28 (Ind.2006) (holding that Indiana's enactment of Indiana Age Discrimination Act did not constitute consent by state to be sued under ADEA and that states could only be sued in direct action for ADEA violation by individual for injunctive relief, or through direct enforcement by the EEOC).

Based on the foregoing, the Court finds that ISDH has not waived its immunity from liability under the ADEA. Accordingly, the Court grants ISDH's summary judgment motion on Mr. Hester's ADEA claim.

B. Analyzing Title VII Claims

1. Direct and Indirect Methods of Proof

Mr. Hester asserts racial and gender discrimination claims pursuant to Title VII of the Civil Rights Act of 1964, [dkt. 1-1 at 2-4]. To overcome summary judgment on a Title VII claim, Mr. Hester may either provide direct evidence of discrimination, *Rhodes v. Ill. Dep't of Transp.,* 359 F.3d 498, 504 (7th Cir.2004), or show indirect evidence under the burden-shifting analysis of *McDonnell Douglas v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

To avoid summary judgment under the direct method of proof, a plaintiff must either adduce direct evidence of discrimination or circumstantial evidence sufficient to create a "convincing mosaic of discrimination" based upon a protected factor such as race, gender, national origin, age or the plaintiff's participation in a protected activity. *Good v. University of Chicago Medical Center,* 673 F.3d 670, 674 (7th Cir.2012). Most often, such a "mosaic" will be pieced together with circumstantial evidence that falls into one of three categories:

> (1) Suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group;
>
> (2) Evidence, whether or not rigorously statistical, that similarly situated employees who do not share the protected characteristic receive systematically better treatment; or

> (3) Evidence that the employee was qualified for the job in question but was passed over in favor of, or replaced by, a person outside the protected class and the employer's explanation for the same is unworthy of belief.

Darchak v. City of Chicago Board of Educ., 580 F.3d 622, 631 (7th Cir.2009); *Troupe v. May Dept. Stores Co.,* 20 F.3d 734, 736 (7th Cir.1994). In any case where a plaintiff is relying solely on circumstantial evidence to prove discrimination using the direct method, that circumstantial evidence may not be teamed with conjecture or presumption to make the case; rather, the evidence must point directly to a discriminatory reason for the defendant's action. *Good,* 673 F.2d at 675; *Lim v. Trs. of Ind. Univ.,* 297 F.3d 575, 580 (7th Cir.2002). This threshold is very high, particularly in certain circumstances, such as appear in the case at bar, where reverse discrimination is claimed with respect to race and gender. *Good,* 673 F.3d at 676-77.

A plaintiff may also seek to avoid summary judgment utilizing the indirect method of proof. Under the burden-shifting analysis, Mr. Hester must first establish a prima facie case of discrimination by demonstrating that (1) he was a member of a protected class, (2) he adequately performed his employment responsibilities, (3) despite adequate performance, he suffered an adverse employment action, and (4) he received different treatment than similarly situated persons who were not members of the same protected

class. *See Boumehdi v. Plastag Holdings, LLC,* 489 F.3d 781, 790 (7th Cir.2007) (citation omitted). Where, like Mr. Hester here, a plaintiff is attempting to prove reverse discrimination with regard to race or gender, the first part of the *McDonnell Douglas* template is altered and requires that the plaintiff show either that the facts at hand seem particularly dubious or that there is something in the background of the employer that would demonstrate a reason or inclination to discriminate against Caucasians or males. *See Good,* 673 F.3d at 678; *Ballance v. City of Springfield,* 424 F.3d 614, 617-18 (7th Cir.2005). If Mr. Hester can make that showing, the burden shifts to ISDH to come forth with a "legitimate, non-discriminatory reason" for its actions. *Hill v. Potter,* 625 F.3d 998, 1001 (7th Cir.2010) (citation omitted). If ISDH can do so, it will prevail unless Mr. Hester can come forward with evidence that the proferred non-discriminatory reason is "a pretext for intentional discrimination." *Serednyj v. Beverly Healthcare, LLC,* 656 F.3d 540 (7th Cir.2011) (citation omitted).

2. Reverse Racial Discrimination Claim-Termination

Mr. Hester claims that ISDH discriminated against him based on his race by terminating him for supposedly failing the Ortho ECI proficiency test, but not terminating another ISDH employee, Mr. Douglas. According to Mr. Hester, Ms. Liu stated that Mr. Douglas had "serious performance competency deficiencies during his employment with ISDH . . .

necessitate [ing] closure of the ISDH Rabies Lab." [Dkt. 43-1 at 7.] While it is not clear whether Mr. Hester is proceeding under the direct or indirect method of proof in connection with his race discrimination claim, either way he has not met his burden.

a. Direct Method

The only evidence Mr. Hester sets forth in connection with his racial discrimination claim is that Mr. Douglas was not terminated even though he was allegedly not performing his job in the Rabies Lab competently. Mr. Hester does not put forth any evidence – circumstantial or otherwise – that ISDH's decision to terminate him and not Mr. Douglas had anything to do with race. Simply pointing to a member of another race who Mr. Hester perceives as being treated better than him is not enough to constitute direct proof of discrimination. *See Good,* 673 F.3d at 675 (identifying employees of another race who were treated better is not adequate direct proof of discrimination because it does not point to a discriminatory reason for the employee's decision; "[f]rom this evidence, one might guess or speculate that perhaps [the employee's] race might have made a difference in the decision, but guesswork and speculation are not enough to avoid summary judgment"). Mr. Hester has failed to present adequate direct evidence of racial discrimination.

b. Indirect Method

In order to prove reverse racial discrimination under the indirect method of proof, Mr. Hester must first show that the facts surrounding his termination are particularly dubious, or that ISDH has a history of or inclination to discriminate against Caucasians. *Ballance,* 424 F.3d at 617-18. In *Mills v. Health Care Serv. Corp.,* 171 F.3d 450 (7th Cir.1999), the Seventh Circuit Court of Appeals recognized that "it is the unusual employer who discriminates against majority employees." *Id.* at 456-57. Accordingly, the court found that there is a heightened examination of circumstances warranted when a member of the majority claims discrimination. *Id.* at 457. While such scrutiny in no way precludes a plaintiff with direct evidence of discrimination against the majority from bringing the claim, without an announced predisposition to favor a so-called protected class, the plaintiff must be able to adduce facts that would support such an inclination. *Id.* In *Mills,* the plaintiff met that burden by showing that, over a seven-year span at the defendant's office there was a disproportionate hiring pattern favoring females, women garnered almost all the promotions, and women came to dominate the supervisory positions at the office. *Id.* at 457-58. In another decision, the Seventh Circuit found the factual circumstances of a case "fishy" enough to support a reverse discrimination claim where the record included a city commissioned report, which revealed that the police chief took into consideration

minority race and female gender when hiring, assigning, promoting and disciplining officers. *Ballance,* 424 F.3d at 617-18.

The Court does not find ISDH's decision to terminate Mr. Hester and not Mr. Douglas "particularly dubious" or "fishy" so as to demonstrate reverse discrimination. Mr. Hester sets forth very little evidence regarding the circumstances surrounding Mr. Douglas' supposed deviation from ISDH standards and subsequent retention as an ISDH employee. Further, Mr. Hester has not presented evidence of any history or circumstance that could cause a factfinder to believe that ISDH – or Mr. Hester's superiors more particularly – tended to discriminate against Caucasians such as Mr. Hester. *See Phelan v. City of Chicago,* 347 F.3d 679, 685 (7th Cir.2003) (no indirect evidence of reverse racial discrimination where employee did not present evidence that superiors were inclined to discriminate against Caucasian men). Accordingly, Mr. Hester has not presented direct or indirect evidence of reverse racial discrimination and the Court grants ISDH's summary judgment motion as to that claim.[1]

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[1] Even if this case were reviewed without the heightened reverse discrimination standard, Mr. Hester has not presented admissible evidence showing that Mr. Douglas is a sufficient comparator. While evidence regarding Mr. Douglas is scant, he had approximately fifty years of experience as a microbiologist at ISDH compared with Mr. Hester's fifteen years. [Dkt. 40-1 at 4, 6, 20.] Additionally, he worked in the Rabies Lab, while Mr. Hester worked in the Serology Lab. [*Id.* at 4, 20.] Mr. Hester

(Continued on following page)

3. Reverse Gender Discrimination Claim – Failure To Promote

In connection with his reverse gender discrimination claim relating to his failure to be promoted to Bench Supervisor, Mr. Hester proceeds under both the direct and indirect methods of proof. [Dkt. 43 at 6.]

a. Direct Method

Under the direct method of proof, Mr. Hester argues that unlike him, Ms. Gentry had not demonstrated syphilis testing proficiency because she was performing the test outside of standard operating procedure, yet she still received the promotion. [Dkt. 43 at 7.] He also argues that any suggestion that he was unqualified for the Bench Supervisor position based on his alleged failure of the Ortho ECI test is "a fabricated contrivance" because he believes that he actually passed the test. [*Id.*]

argues that Ms. Lovchik decided to close the Rabies Lab based upon Mr. Douglas's ineptness, and also was the decision maker regarding Mr. Hester's termination. However, his assertion is supported only by his Affidavit, [dkt. 43-1], in which he "recaps" Dr. Lovchik's testimony during the SEAC hearing, [*id.* at 7]. ISDH points out that Mr. Hester cannot testify as to another individual's testimony, and could have provided that testimony but did not. [Dkt. 49 at 1-2.] The Court agrees, but even considering this testimony, it still does not show that Mr. Douglas is a sufficient comparator to Mr. Hester due to the other differences already discussed.

Again, Mr. Hester has not set forth any direct or circumstantial evidence suggesting that ISDH's decision to promote Ms. Gentry and not him was based on their different genders. Mr. Hester has not even shown that Ms. Liu, who Mr. Hester concedes made the decision to promote Ms. Gentry, [dkt. 40-1 at 6], knew about Ms. Gentry's alleged performance of the syphilis test outside of standard operating procedure. And his reliance on any issues with his failure to pass the Ortho ECI test misses the mark. Mr. Hester took the Ortho ECI test in question *after* he was passed over for the promotion, [dkts. 40-1 at 6; 43-1 at 2]. Therefore, his alleged failure of that test could not be the reason he did not get the promotion – nor is there evidence that ISDH ever proferred that as a reason. Mr. Hester has not provided adequate direct proof in connection with his claim that ISDH failed to promote him based on his gender.

b. Indirect Method

In arguing that he has indirect proof of gender discrimination related to ISDH's failure to promote him, Mr. Hester identifies Ms. Gentry as a similarly-situated comparator. But, like his racial discrimination claim, Mr. Hester cannot make the initial showing that the circumstances surrounding his failure to receive the promotion were particularly dubious, or that ISDH has a history of discriminating against males. *See Phelan,* 347 F.3d at 685. Because he fails to even set forth evidence that Ms. Liu knew of Ms. Gentry's alleged performance of syphilis tests outside

of standard operating procedure, and does not identify any other evidence, he has not shown that ISDH's actions were particularly dubious or "fishy," or, further, that ISDH had any history of preferring females over males. *See, e.g., Holmes v. Trs. of Purdue Univ.,* 2008 U.S. Dist. LEXIS 102624, * 18, 2008 WL 656263 (N.D.Ind.2008) (reverse gender discrimination claim failed where employee had not shown "any inclination of [employer] to discriminate against men" and "[t]he record [was] simply void of any so-called 'fishy facts'"). Accordingly, his reverse gender discrimination claim for failure to promote fails at the outset under both the direct and indirect methods of proof, and the Court grants ISDH's summary judgment motion as to that claim.

4. Gender Discrimination Claim – Termination

Finally, Mr. Hester claims that he was discriminated against because of his gender when he was terminated and five female employees, including Ms. Gentry, were not. [Dkt. 43 at 9-10.] He again claims he has proof of gender discrimination under both the direct and indirect methods. [*Id.*]

a. Direct Method

Mr. Hester relies on circumstantial evidence that five female ISDH employees administered the syphilis test outside of standard operating procedures and went "unpunished," [dkts. 43 at 9; 43-1 at 7], and that one woman – Erin Espinosa – failed the Ortho ECI

test and was allowed to take it again, [dkt. 43-1 at 7]. Mr. Hester's reliance on that evidence is flawed in several respects.

The five women who Mr. Hester claims incorrectly performed the syphilis test outside of standard operating procedure and were not terminated are irrelevant to his termination claim. Mr. Hester testified that he also performed the syphilis test outside of standard operating procedure before ISDH issued a directive to begin using a "humid chamber." [Dkt. 40-1 at 7-8.] He was ultimately terminated for his alleged failure to pass the Ortho ECI proficiency test – a matter wholly unrelated to the syphilis testing issue. Accordingly, he was treated the same as the five women who also allegedly performed non-compliant syphilis tests – *i.e.,* he was not disciplined.

That leaves Mr. Hester with Ms. Espinosa – the female that he claims failed the Ortho ECI test and was permitted to re-take it rather than being terminated. The only "evidence" Mr. Hester sets forth is a statement in his Affidavit that "Erin Espinosa was provided another chance to attain Ortho ECI [testing] proficiency after she failed the competency test, by being permitted to perform a second competency test." [Dkt. 43-1 at 7.] Mr. Hester's statements in his Affidavit must be based upon personal knowledge to be admissible. *Juarez v. Menard, Inc.,* 366 F.3d 479, 484 (7th Cir.2004) ("[A]ffidavits submitted in an attempt to thwart summary judgment must be based on personal knowledge as required by both Federal Rule of Civil Procedure 56(e) . . . and by Federal Rule

of Evidence 602"); *Box v. A & P Tea Co.,* 772 F.2d 1372, 1378 (7th Cir.1985) (statements in affidavit relating to employer treating male cashiers differently than female cashiers not based on personal knowledge, so not sufficient to defeat summary judgment). Mr. Hester's single sentence simply stating that Ms. Espinosa was given a second chance to take and pass the Ortho ECI test, without any background regarding how he obtained that knowledge, does not satisfy the Court that his statement is based upon his personal knowledge. Due to Mr. Hester's failure to show that he has personal knowledge, and the complete lack of evidence regarding the most basic information surrounding Ms. Espinosa's alleged failure and subsequent re-take of the Ortho ECI test, such as the time frame in which the failure and retake occurred, the Court simply cannot conclude that this indicates any discriminatory purpose on the part of ISDH.[2]

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[2] Further, the Court also cannot conclude that the five females Mr. Hester identifies as sufficient comparators – Ms. Gentry, Ms. Espinosa, Lyndsey Hensler, Veronica Erwin Oss, and Katy Masterson – are, in fact, so. As discussed, Mr. Hester does not claim that Ms. Gentry, Ms. Hensler, Ms. Oss, or Ms. Masterson failed the Ortho ECI test, which is undisputedly the reason he was terminated. Accordingly, comparing ISDH's treatment of those women and its treatment of Mr. Hester makes no sense. As to Ms. Espinosa, Mr. Hester's statements in his Affidavit regarding her alleged failure of the Ortho ECI test and subsequent re-take of the test, without more, does not show that she is a sufficient comparator. *See McGowan v. Deere & Co.,* 581 F.3d 575, 580 (7th Cir.2009) (employee's statements in

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b. Indirect Method

Given the problems discussed above with the evidence Mr. Hester sets forth under the direct method of proof, the Court cannot conclude that the circumstances surrounding his termination were "dubious" enough to support his reverse gender discrimination claim. ISDH's treatment of the five females who allegedly performed the syphilis test outside of standard operating procedure is irrelevant to how it treated Mr. Hester in connection with his performance on the Ortho ECI test. This is particularly so given that Mr. Hester was treated the same as the female employees with respect to the syphilis test. And his evidence regarding Ms. Espinosa's Ortho ECI proficiency is tenuous at best. Further, as also noted above, Mr. Hester presents no evidence of an inclination on the part of ISDH to prefer females over males.

c. Pretext

Even assuming that Mr. Hester could satisfy his initial burden under the indirect method of proof for his gender discrimination claim (or race discrimination claim) related to his termination, Mr. Hester has not shown that ISDH's reasons for terminating him

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affidavit in opposition to summary judgment motion did not provide sufficient detail about proferred comparator to allow meaningful comparison). Significantly, Mr. Hester has not introduced that Ms. Espinosa was on a work improvement plan.

were pretext for discrimination. Mr. Hester claims that his alleged failure of the Ortho ECI proficiency test was pretext because: (1) he did not actually fail the test; (2) ISDH did not follow its procedural requirements for disciplinary action; and (3) ISDH would not produce certain documents requested by Mr. Hester, including the Excel spreadsheet that Mr. Hester completed during the Ortho ECI proficiency test. [Dkt. 43 at 10.] His assertion that ISDH acted incorrectly or even in a sinister manner, without any evidence that those actions were motivated by discrimination, are not enough to show pretext.

It is well settled that an employer can make a mistake, or even act unfairly, while still not acting in a discriminatory fashion. As the Seventh Circuit Court of Appeals has explained, "we 'do not sit as a kind of 'super-personnel department' weighing the prudence of employment decisions made by firms charged with employment discrimination. . . .' 'On the issue of pretext, our only concern is the honesty of the employer's explanation.' . . . And there is no indication in the record that [the employer] did not honestly believe [its actions were correct]." *O'Regan v. Arbitration Forums, Inc.,* 246 F.3d 975, 984 (7th Cir.2001). *See also Pitasi v. Gartner Group, Inc.,* 184 F.3d 709, 718 (7th Cir.1999) (in order to show pretext, it is insufficient for employee "to show that his employer fired him for incorrect or poorly considered reasons. He must establish that the employer did not honestly believe the reasons it gave for terminating him"); *Ptasznik v. St. Joseph Hosp.,* 464 F.3d 691, 697 (7th

Cir.2006) (finding insufficient evidence of pretext and stating "it is not our role to determine the competency of or interfere in employment decisions simply where we believe an employer has made a poor choice. Federal courts have authority to correct an adverse employment action only where the employer's decision is unlawful, and not merely when the adverse action is unwise or even unfair").

Much of Mr. Hester's brief in opposition to ISDH's summary judgment motion is spent discussing the Ortho ECI test, the reasons he believes he did not fail the test, and testimony from the SEAC proceeding relating to the test. [Dkt. 43 at 3-5, 7-10, 12.] Glaringly absent from Mr. Hester's brief is a discussion of any evidence showing ISDH's actions were motivated by discrimination. Mr. Hester's claims read more like wrongful termination claims, and Mr. Hester and ISDH are currently litigating the question of whether Mr. Hester's termination was proper in Mr. Hester's state court action challenging the SEAC's decision. Even if the state court were to determine that Mr. Hester in fact passed the test, and that he was wrongfully terminated, that still would not indicate that ISDH's reason for terminating him was a pretext for race or gender discrimination. *See Liner v. Dontron, Inc.,* 9 Fed. Appx. 523, 527 (7th Cir.2001) ("[the employee] believes that a state court's determination that the deductions from her earned commission violated the Illinois Wage Payment and Collection Act . . . somehow demonstrates a violation of Title VII. That the deductions were not valid under

state law, however, does not speak to the issue whether [the employer] honestly believed that it should deduct commissions to prevent future violations of company policy"); *O'Regan,* 246 F.3d at 984 (even if company's employment agreement was illegal, unenforceable, and a "bad business decision," company forcing employees to sign agreement did not establish pretext).[3]

In short, while Mr. Hester may be able to raise a genuine issue of fact that ISDH was wrong in terminating him, that claim is not pending here. The evidence he has presented does not demonstrate that illegal discrimination motivated ISDH's actions. Accordingly, the Court grants ISDH's summary judgment motion on Mr. Hester's reverse gender discrimination claims relating to his termination.[4]

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[3] Even if ISDH did not follow its procedural requirements for disciplinary action or failed to produce certain documents related to Mr. Hester's termination, the Court finds that these allegations – without more – still would not show that ISDH's reasons for terminating him were pretextual. *See Fortier v. Ameritech Mobile Communs.,* 161 F.3d 1106, 1114 (7th Cir.1998) (failure on the part of employer to follow own policies and procedures in connection with employee's termination was not evidence of pretext); *Doe v. First Nat'l Bank,* 865 F.2d 864, 871 (7th Cir.1989) (same principle). Both of those issues are currently before the Marion Superior Court, and any potential liability for those actions is more properly determined in connection with Mr. Hester's suit there.

[4] Mr. Hester moves to strike portions of ISDH's reply brief, [dkt. 52], which dispute his claim that Ms. Espinosa failed the Ortho ECI test and was permitted to re-take it, and which assert

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IV.

CONCLUSION

For the reasons explained herein, the Court **GRANTS** ISDH's Motion for Summary Judgment, [dkt. 40], on Mr. Hester's claims. Additionally, because the Court has not based its decision on any of the arguments Mr. Hester seeks to strike, his Motion To Strike, [dkt. 52], is **DENIED AS MOOT**. Judgment will enter accordingly.

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that he changed his testimony regarding ISDH's alleged failure to produce the Excel spreadsheet related to his Ortho ECI test. He also asks that the Court "enter judgment in Plaintiff's favor as to liability," [dkt. 53 at 5], because ISDH has not complied with the Court's May 15, 2012 Order, [dkt. 42], granting in part and denying in part Mr. Hester's Motion To Compel, [dkt. 37]. Because the Court has construed the evidence in the light most favorable to Mr. Hester and has not based its decision on any of ISDH's arguments which Mr. Hester addressed in his Motion To Strike, and since it appears that ISDH produced some discovery in response to the Court's May 15, 2012 Order after Mr. Hester filed his Motion To Strike (and Mr. Hester does not specify what aspects of the Order ISDH is not complying with), the Court denies Mr. Hester's Motion To Strike as moot.

[1] UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12-3207

PAUL HESTER,
Appellant,

v.

INDIANA STATE DEPARTMENT OF HEALTH,
Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
Cause No. 1:10-cv-1570-JMS-DML
Hon. Jane Magnus-Stinson, Judge

ORAL ARGUMENT OF
JUNE 6, 2013 AT 9:30 A.M.

JAMES D. MASUR II
Attorney for Appellant

Robert W. York & Associates
Attorneys at Law
7212 N. Shadeland Avenue, Suite 150
Indianapolis, Indiana 46250-2030
Telephone:(317) 842-8000

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[3] BY THE COURT (Judge Posner): – the Indiana State Department. Mr. Masur?

Go ahead.

BY MR. MASUR: May it please the Court. My name is J.D. Masur.

I am with the law firm of Robert W. York and Associates in Indianapolis, Indiana. I am pleased to be here on this D-Day Anniversary to represent Paul Hester in his quest for justice.

If we turn our first attention to the ADEA, that is the age discrimination claim, the judge below, it's our position, made an incorrect statement of the law as set forth in the U.S. Supreme Court case of *Kimel*.

BY THE COURT (Judge Wood): So, I have a question for you about that, Mr. Masur, which is this.

Nobody likes the topic of sovereign immunity more than I do. I am very interested in it.

But I, it, it's not a jurisdictional theory. It doesn't go to the subject matter jurisdiction of the Court.

And I have been asking myself the question, if we just jumped over this and agreed with you that somehow or another the Indiana State [4] Department of Health did not enjoy immunity from this suit pursuant to *Kimel,* etc., I don't see why the same reasoning that indicated that Mr. Hester couldn't prevail in his race discrimination claim and his sex

discrimination claim wouldn't equally sink the lawsuit on the age discrimination claim.

They are really all about the same thing. On the sex discrimination claim, it's Ms. Gentry.

And the Court looks at her performance in the lab, and looks at her people skills, and looks at things, decides that the department's response for her is not a pretextual one. She gets promoted for acceptable reasons.

So, I am, I am really having a strong feeling of much ado about nothing, when it comes to this giant sovereign immunity debate that's going on.

BY MR. MASUR: Well, Judge, I appreciate that analysis.

But the rule of law in this, as enunciated in this court is that if that, that argument wasn't made below, that there was not a claim that there was a substantive defense that would prevail on summary judgment on behalf of the [5] Defendant, then I have no obligation to respond.

There was no substantive argument made as to the (inaudible).

BY THE COURT (Judge Wood): But you're not, you're not quite answering my question, though.

Because I am saying suppose you won a hundred percent on sovereign immunity. Then, that doesn't mean you win the case.

BY MR. MASUR: Certainly not.

BY THE COURT (Judge Wood): It just means that Indiana State Department of Health has to engage the age discrimination claim on the merits. And that's where I fall off the train.

You know, I, I look at what happened, and it's, it's hard for me to see how the arguments in the final analysis are any different there.

So, I'm wondering whether you are asking us to jump into the middle of a very significant circuit split, a very complex theoretical issue about immunities from forums, and immunities from suits, and all of the rest of this stuff.

When, at the end of the day, I don't see how he could prevail on the age claim.

BY MR. MASUR: Judge, I, I'm, I'm at a loss, because the only argument that was made –

[6] BY THE COURT (Judge Posner): You have no evidence. That's the problem.

BY MR. MASUR: Judge, I do have evidence. I –

BY THE COURT (Judge Posner): Well, I don't see it.

BY THE COURT (Judge Wood): Well, maybe you should talk about it, then, so that we can see what you're, you think is your evidence.

BY THE COURT (Judge Rovner): But if you would just hold off for one second.

BY MR. MASUR: Certainly.

BY THE COURT (Judge Rovner): Because here is what I am wondering about.

With respect to the immunity question, did Mr. Hester seek injunctive and/or declaratory relief, apart from monetary relief?

BY MR. MASUR: We sought all of the relief available under the ADEA, as well as Title VII (inaudible).

BY THE COURT (Judge Wood): So, maybe reinstatement –

BY THE COURT (Judge Rovner): So –

BY THE COURT (Judge Wood): – is injunctive relief? I wonder about the same thing.

[7] BY THE COURT (Judge Rovner): See, that's, that's what I'm – yeah.

BY MR. MASUR: Correct.

BY THE COURT (Judge Wood): So, he, did, was it just a generic, and "I want everything I can get?" I mean, which is enough under the federal rules.

BY MR. MASUR: Right.

BY THE COURT (Judge Wood): There is nothing wrong in saying that. But –

BY MR. MASUR: When we, when we originally –

BY THE COURT (Judge Wood): So, possibly there is –

BY MR. MASUR: – filed in state court, that's what we asked for in the complaint (inaudible).

BY THE COURT (Judge Wood): So, there is some possibility of injunctive relief.

BY MR. MASUR: Right.

BY THE COURT (Judge Rovner): But if you look at that Indiana Supreme Court Decision in *Montgomery,* it would seem that sovereign immunity might not bar a private suit for declaratory or injunctive relief, but it would bar a private [8] suit for money damages.

BY MR. MASUR: Judge, if it, if it was properly asserted, I, I would agree.

But in this case, what we have is the State of Indiana removing and declaring outright this case is removed because it falls within the original jurisdiction of this Court, that is the Southern District of Indiana.

BY THE COURT (Judge Rovner): (inaudible).

BY THE COURT (Judge Posner): Well, what's your strongest evidence of discrimination?

BY MR. MASUR: Judge, our, our strongest evidence of discrimination is, as this Court said in *Wood,* that when –

BY THE COURT (Judge Posner): That's not evidence, what this Court said in *Wood.* Just what is the evidence?

BY MR. MASUR: I am sorry, *Good* was the case I, I was referring to.

The, the evidence is that the employer took action against a person in a protected class and, but not against another outside of that class.

BY THE COURT (Judge Wood): So, he promotes Gentry, they, I mean, they promote Gentry, and they don't promote Hester.

[9] That's your, your age, it's a significant age discrepancy. She is quite a bit younger. She is in her 20s.

But we have that whole situation evaluated under the label sex discrimination, too. And I know you are, you are challenging that.

But the District Court finds that, that, that there is simply no way he can show that the department's action, vis-à-vis sex discrimination, was, was illegal.

And I don't see why it's not the same analysis for age. I mean, she is a young woman.

BY MR. MASUR: If, if we get to trial, which, our position is we should, based on the error below, and on the age claim or the sex claim, the –

BY THE COURT (Judge Wood): What's your evidence that this was motivated by her age?

BY MR. MASUR: Well, the evidence that we have that would, that the motivation entails both age and sex –

BY THE COURT (Judge Wood): Which is what? Just, I mean, it's a demographic fact she is who she is. But why, why is it illegal to prefer her?

[10] BY MR. MASUR: Because, well, what we have in, in terms of the age discrimination and sex discrimination case, I would submit, is stronger in the termination context than in the, the failure to promote context.

But even that being said, what we have is –

BY THE COURT (Judge Wood): But you don't have evidence of, you know, a bunch of older people being terminated and lots of younger people coming into their – I mean, I –

BY MR. MASUR: I have never said that.

BY THE COURT (Judge Wood): – I don't see (sighs) the usual kind of age discrimination evidence here.

BY MR. MASUR: What, what we have, your Honor, is a, a, because these are reverse – the age discrimination isn't a reverse discrimination – but the sex, the Title VII discrimination is alleged as reverse discrimination.

And we have a plethora of evidence that there was all sorts of fishiness (inaudible).

BY THE COURT (Judge Posner): All right. What's your best piece of evidence?

BY MR. MASUR: The best piece of evidence is [11] that the person who was promoted, Jessica Gentry, was intent on providing evidence against Mr. Hester that was false, pure and simple.

The, the Excel spreadsheet that she relied on to terminate him, or the department relied on to terminate him, was untrue.

BY THE COURT (Judge Rovner): But wasn't there some type of error in the results Mr. Hester reported, if not in the test results itself, then in, in the sample number?

I mean, you know, why couldn't his employer think he was obligated to point out, or correct, the discrepancy in the sample number from the start?

BY MR. MASUR: That, that's exactly what did happen, Judge. He took the test on May 15th. He told Jessica Gentry that the first sample was quantity non-sufficient.

This machine, incidentally, was taken out of service, because it was so inaccurate.

But being that, setting that aside, the, the quantity non-sufficient sample he – she told him to get another one. He did.

He told her what he was using. He made a notation of that one. And that one turned out to [12] be quantity non-sufficient, as well.

So, he went back a third time to her, and she said, "Go find another sample." He used sample D-4.

Sample D-4 he marked positive, which, if you look at the Excel spreadsheet, was, what was the substituted sample, as well as, the original D-4 sample.

So, he wouldn't have missed one, as she said, falsely. He would have, he would have missed two; and he didn't. He missed none on that sample, that testing.

The testing, incidentally, is identical to the actual day-to-day function. The day-to-day function is, you take a sample, you test it, and then you go into, and then, the machine reports the results.

That Excel spreadsheet had nothing to do with his job at all.

BY THE COURT (Judge Rovner): You know, forgive me. But whatever the explanation, it really appears that there was an error on the spreadsheet.

And it's not, it's not entirely clear that Mr. Hester was without fault for the error, even [13] if the error had to do, you know, with the sample number, rather, rather than the test result.

And in, in any case, I, it doesn't seem that the dispute over the spreadsheet, by itself, is direct evidence of sex discrimination.

I am not sure why it's evidence of pretext, either.

I mean, even if Ms. Gentry, you know, was mistaken in her understanding of, of the discrepancy, this doesn't, without more, suggest that she was, you know, being dishonest about the reason for his discharge.

BY MR. MASUR: Judge, once again, we have a situation where there was no error on the part of Mr. Hester –

BY THE COURT (Judge Rovner): Well –

BY MR. MASUR: – in terms of the, in terms of what he was being tested for, which is –

BY THE COURT (Judge Posner): I don't understand. He says, "I marked positive for the D-5 result using D-4, but in error put C-1 instead of D-4 in parentheses."

BY MR. MASUR: That's, that was not his responsibility to identify the, the –

BY THE COURT (Judge Posner): Well, he –

[14] BY MR. MASUR: – and the fact that the department –

BY THE COURT (Judge Posner): – he says he made, he said he made, he says he made an error, right?

BY THE COURT (Judge Rovner): Right.

BY MR. MASUR: And the fact that the Department permitted him to continue to work for

twenty-five days after he took this test, and supposedly there was an error, I think augers well for Mr. Hester, in terms of the fact that he did not make an error as to what he was required to do, which was test samples and write down the results.

I have nothing further at this time.

BY THE COURT (Judge Posner): Now, in the, in Hester's deposition (clears throat), he was asked, "How do you know that she took both those tests over?"

And he said, "I just heard of conversations."

Is that, is that evidence?

BY MR. MASUR: Judge, I, I would acknowledge that Mr. Hester's evidence with regard to Erin Espinoza is probably the weakest component of his [15] case.

BY THE COURT (Judge Posner): And then, there is another one.

"You previously said or testified that some of the younger females working in the immunology, immunology lab were able to take their tests over."

"Correct."

"Which test was that?"

"For a fact, I knew that they did the Syphilis RPR test over. And I believe Brin, who is no longer there, took the ortho proficiency over, as well."

Again, is that, is that evidence? Wouldn't you have to depose Brin?

BY MR. MASUR: Judge, I believe when people are working in such close proximity as occurred within the Indiana State Department of Health Laboratory, that the actual observations that he had made, and, and that's what I asked him were, "Did you make actual observations?" Then, you can attest to that.

BY THE COURT (Judge Posner): Okay. Well, thank, thank you, Mister –

BY MR. MASUR: Thank you, your Honor.

[16] BY THE COURT (Judge Posner): – Masur.

Mr. Steiner?

BY MR. STEINER: May it please the Court.

Regarding the age discrimination claim, we did raise issues regarding sovereign immunity, and, and particularly regarding any damages claim, which we believe this case was primarily focused on attempting to obtain damages.

BY THE COURT (Judge Rovner): May I ask you, please?

In terms of liability immunity, are you saying that the State is immune from a private suit for all types of relief, or just a private suit for monetary relief?

BY MR. STEINER: I, I believe we only contended what, you know, is permitted under *Kimel,* and that, as I understand, is we're immune from a damages suit under the Eleventh Amendment.

BY THE COURT (Judge Rovner): Okay. So, monetary relief is what you're saying.

BY MR. STEINER: Monetary relief, yes.

BY THE COURT (Judge Wood): So, this case is here in all of its theories, in its age theory, its sex theory, if all of the theories were to go forward, your position is, on age, relief would [17] have to be limited to declaratory or injunctive relief, consistently with *Kimel* –

BY MR. STEINER: Right. And –

BY THE COURT (Judge Wood): – is your position.

BY MR. STEINER: – and I guess we didn't, we didn't really see them as seeking, really, they were focusing on seeking damages (inaudible).

BY THE COURT (Judge Wood): Well, he is talking about damages.

I suppose, as a matter of theory, one does see in discrimination cases requests for reinstatement, which surely prospective reinstatement is a form of injunctive relief.

So, (sighs), but, but it, it seems that this case really did jump into quite a long discussion about

sovereign immunity that you, you, you know, you have a fairly straightforward argument on the facts.

BY MR. STEINER: That's true, although –

BY THE COURT (Judge Wood): So, we might not need to say anything about sovereign immunity.

BY MR. STEINER: Well, I, I, I mean, often, I would think, that in this kind of situation, we [18] talk about maybe alternative arguments.

Certainly, when you are defending a case, you are concerned about –

BY THE COURT (Judge Wood): Yeah.

BY MR. STEINER: – raising, you know, any issue of liability that you could, that you could win on.

BY THE COURT (Judge Wood): No, I am not criticizing you for, from your point of view.

But from our point of view, a fact-specific decision one way or the other, well, let's – a, a fact-specific decision in your favor strikes me as the ultimate non-cert-worthy kind of decision.

I, I don't know. You know. We'll, we'll see.

But when it comes to these various kinds of immunities, this is an area in which there is quite a bit of ferment in the courts. And –

BY MR. STEINER: There, there is, although I think that the position that we take on the immunity issue is logical and makes some sense.

BY THE COURT (Judge Posner): Well, why, why did you remove the case? That seems puzzling.

BY MR. STEINER: Well, I, we, we said in our brief the reason, and I think that's essentially [19] the reason we, we removed it.

We knew, notwithstanding what we were going to have to deal with on the age discrimination aspect of the case, we were going to have to deal with the Title VII case.

Quite frankly, we find that, that, you know, the district judges that we deal with, dealing with Title VII, are generally pretty knowledgeable about those claims.

And, therefore, the Federal District Courts present a good forum from the perspective of the State, for bringing the claim and getting a, a, a solid, good decision, one that probably is less prone to be appealed, or having to be appealed, than maybe when you are dealing with State Court judges who do not deal with Title VII claims every, you know, day of the year. Maybe –

BY THE COURT (Judge Wood): That's because it's a self-fulfilling prophecy, if you remove all of them. (Laughs.) But, yes.

BY MR. STEINER: Well, I, I mean I think that it's a legitimate strategy, litigation strategy, to put your case in front of a judge that you believe will –

BY THE COURT (Judge Posner): It's extremely [20] odd (laughs) for a State to be removing a case into another sovereign's judiciary.

BY MR. STEINER: It, we deal with the Federal District Courts very frequently, of course, because many cases are filed in Federal District Court against State actors, State entities from time to time in a whole variety of contexts.

We know, we are very familiar with the Federal District judges. And the fact that we, you know, believe that we will –

BY THE COURT (Judge Posner): So, states take advantage of their sovereign immunity, set up special State judiciaries to channel all of these cases, you know, courts of claims and such?

It seems odd why they would want to be in Federal Court.

BY MR. STEINER: Well, (inaudible) –

BY THE COURT (Judge Rovner): (inaudible) so loved.

BY THE COURT (Judge Wood): And, and actually, it opens up –

BY THE COURT (Judge Rovner): Right. We love being loved.

BY THE COURT (Judge Wood): – (inaudible) [21] to be so loved.

BY MR. STEINER: (Laughs.)

BY THE COURT (Judge Wood): It, it, it draws you into some dangerous territory, actually, because the Supreme Court has held in a line of cases that the states are not entitled to discriminate against federal claims in their State Courts.

And the *Montgomery* case is a little worrisome, where you see the Indiana Supreme Court saying, "Yeah, we do have this Indiana law about age discrimination, but we're not going to entertain the federal age discrimination laws."

And I am hoping that we might not have to delve into all of that. But I am not sure that this is the unmitigated good that you might think that it is.

BY MR. STEINER: I understand what you are saying, Judge.

I mean, I have been listening both to the questions that were asked of, you know, the opposite side and to, to me. And I understand where you are coming from.

BY THE COURT (Judge Wood): You know, in the (inaudible) case a few years ago –

[22] BY MR. STEINER: But I do think it is (inaudible).

BY THE COURT (Judge Wood): – the Supreme Court said that. It was a 1983 case. New York had a law –

BY MR. STEINER: Yeah. I, I think, though, if you look at Indiana litigation, you will find that the Indiana Courts are frequently litigating all varieties of federal claims.

BY THE COURT (Judge Wood): We like the Indiana Courts.

BY MR. STEINER: So, as I said, under *Kimel,* whether we were in State or Federal Court, we should get the same treatment.

That's really our point, that we're not really getting any advantage by being in the, you know, (inaudible).

BY THE COURT (Judge Wood): But if the State Court would entertain – we said this in *Erickson* – if the State Court would entertain an analogous claim under State law, there is a line of cases that says it can't carve out federal law for uniquely disadvantageous treatment.

Then, there are other cases that seem to look in the other direction. But it, it's a, [23] it's a difficult area that raises supremacy clause issues, that raises equality of treatment for federal claims.

And so, if the reason you think you are immune from the Federal ADEA in State Court is because the Indiana Supreme Court has carved out federal claims, that ruling, in itself, may be a problematic ruling.

BY MR. STEINER: Well, I, I think, and when, when you look at that *Lombardo* case from the Third Circuit, they, you know, they talk about a waiver of this kind of Eleventh Amendment immunity needing to be something expressly done by the State.

BY THE COURT (Judge Wood): Right. I wish we could stop –

BY MR. STEINER: There is no statute –

BY THE COURT (Judge Wood): – talking about the Eleventh Amendment, by the way, because, you know, when you have the Supreme Court saying, "Actually, this immunity has nothing to do with the Eleventh Amendment. The Eleventh Amendment is reflective of the State." (Laughs.)

BY MR. STEINER: Well, it's sovereign immunity.

[24] BY THE COURT (Judge Wood): I mean, yeah, let's just call it sovereign immunity. That's fine.

BY MR. STEINER: I mean, it pre-exists prior to the Eleventh Amendment.

BY THE COURT (Judge Wood): Right.

BY MR. STEINER: And it continues to exist after the Eleventh Amendment.

BY THE COURT (Judge Wood): True.

BY MR. STEINER: I think our real point here is that, generally, removal, we recognize, ought to have consequences regarding whether the Court can decide issues and what, you know, issues might be placed before the Court, such as in this Court's, you know, decision in the *University of Wisconsin* case where you said that, okay, you removed, you filed this case –

BY THE COURT (Judge Wood): Yeah, Wisconsin was the Plaintiff there.

BY MR. STEINER: – in Federal Court. So, if there are legitimate federal compulsory counterclaims, you have got to deal with them.

BY THE COURT (Judge Wood): Right.

BY MR. STEINER: We fully recognize that. We know that's what's going to happen when we [25] remove a case.

BY THE COURT (Judge Posner): If this was just an ADEA claim, would you think it proper to remove?

BY MR. STEINER: If it was just an ADEA case – well, I'm not, I, I don't know.

We, because it probably would be a case that could easily be disposed of, particularly if it was one

that was clearly directed for damages at the State Court level. And, therefore, we may not have removed it.

You know, that's speculation, really, at this point, because we –

BY THE COURT (Judge Posner): It's some kind of forum shopping. (Laughs.)

BY THE COURT (Judge Wood): (Laughs.

BY THE COURT (Judge Posner): I mean, suppose you thought the Federal Court was friendlier to sovereign immunity arguments than the State Court.

BY MR. STEINER: I really would say we thought that the Federal Court judges know more about them, because they deal with them more frequently. They, they deal more frequently with these kinds of issues.

[26] And so, you know, seeking a judge that knows more or, you know, initially about something, helps you in terms of communicating what you need to communicate about the particular legal points that you want to make.

So, I think that's really the reason.

Now, regarding the Title VII case, I, you know, I think there has, there has already been some discussion.

But our real point is that there is really no evidence presented at all of any sorts of discrimination in this case.

BY THE COURT (Judge Wood): And you would extend that, I assume, had you needed to, to age.

BY MR. STEINER: That's correct. Because there really isn't any differentiation between these claims being made regarding age, gender, and race.

Because the real problem is, there isn't any evidence that any of those factors, you know, came into play here.

We have a gentleman, Mr. Hester, who, apparently, he had not been qualified on some tests that he needed to be qualified on for quite some time.

[27] As a result, he was placed on a work improvement plan, specifically, to require him to a hundred percent complete tests for two different testing, two additional testing programs.

BY THE COURT (Judge Wood): So, this Ortho ECI test is for hepatitis?

BY MR. STEINER: Hepatitis, apparently, yes.

BY THE COURT (Judge Wood): Of some type, yeah.

BY MR. STEINER: So, he completed the rabies test that he needed to complete within the thirty days.

But there was a mistake on the form that he submitted on the hepatitis test. As a result, he had not successfully completed the work improvement plan.

And the fact that he wasn't immediately fired is not really of any consequence. It's some, it takes some time to figure things out. And it wasn't a very long period of time before they did it.

And they, they determined that he had failed to complete the work improvement plan, that there were other reasons, as well – you know, that he [28] hadn't gotten along well with people, that he had drug his feet on being qualified.

You know, all of those things came into play, and they decided to let him go.

And regarding the promotion, there was, you know, clearly ample evidence that the young lady that got the job actually was quite qualified, was better at working with people, was very proficient in getting her work done.

All of those things are very legitimate. There was no showing here of any pretext in what was done.

And we would urge that that decision on the Title VII claim be affirmed, as well as the claims relating to age discrimination.

BY THE COURT (Judge Posner): Okay. Thank you, Mr. Steiner.

BY MR. STEINER: Thank you.

BY THE COURT (Judge Posner): Mr. Masur, do you have anything further?

BY MR. MASUR: Judge, just one brief statement in response to why, perhaps, this case was removed from the State Court.

When we were below, because there is a companion SEAC Hearing, State Employees Appeals [29] Commission Hearing, which we have appealed, as well.

We also obtained, we actually obtained a judgment in Mr. Hester's favor in the, in the State Court. And you will see this in the record.

And what then happened, unexpectedly, the other side didn't find that particularly to their liking. So, they sought to have that overturned.

BY THE COURT (Judge Wood): Yeah. And I was surprised that this winds up with what looks to me like claim splitting. But I, I don't want to go too far into that.

BY MR. MASUR: Well, there is a whole line of things I had to do to preserve his rights.

But the, the long story, long story short is that they did obtain that, an order from that Court setting aside Mr. Hester's favorable judgment.

We had no notice of the motion at all prior to that order being entered.

And that's another factor that I believe really entered into why it's preferable to have these cases litigated in Federal Court.

Because as, in addition to the obtaining an [30] order without providing us any notice whatsoever, the, the Attorney General's Office also suggested that I had taken the hearing transcript, which was on tape, which, of course, didn't occur.

So, we have a whole lot of lawyer conduct that isn't tolerated in the Federal Court level that apparently gets excused at the State Court level.

But be that as it may, we appreciate your time.

BY THE COURT (Judge Posner): Okay. Well, thank you very, thank you very much Mr. Masur.

(End of Oral Argument.)

BY THE COURT (Judge Posner): So, our next case for argument, United States –

(End of Recording.)

[Notary Public Certificate Omitted]