3/4/19

No. 18-1391

In The
Supreme Court of the United States

Dr. N'Dama Bamba,

Petitioner,

vs.

Kimberly Fenton and Stony Brook University,

Respondents,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

N'Dama Bamba, MD
Pro se
3600 Rosedale Road
Baltimore, MD 21215

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit erred when it held that the Plaintiff's complaint of discrimination to the New York State Physicians Board (NYSPB) was not a protected activity?
2. Whether the United States Court of Appeals for the Second Circuit erred when it held that Stony Brook University Hospital (SBUH) is immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court, disregarding the fact that SBUH is a recipient of Federal financial assistance, and has violated a Federal statute prohibiting discrimination?

LIST OF ALL PARTIES

Petitioner:

1. N'Dama Bamba, MD *Pro se*

Respondents:

2. Stony Brook University Hospital
3. Kimberly Fenton, MD
4. Barbara D. Underwood, Acting Attorney General for the State of New York
5. Andrew W. Amend, Senior Assistance Solicitor General for the State of New York
6. David Lawrence III, Assistance Solicitor General of Counsel for the State of New York

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PETITION FOR WRIT OF CERTIORI

Dr. N'Dama Bamba, a former Internal Medicine and Pediatrics Resident at Stony Brook University Hospital was discriminated against and wrongfully terminated by the Respondents when she opposed the Respondents' unlawful employment actions under Title VII, thereby engaging in a constitutionally protected activity. The Petitioner respectfully petitions this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision by the United States District Court for the Eastern District of New York granting the Respondents' motion for summary judgment is

attached in the Appendix at 11a. The decision by the United States Court of Appeals for the Second Circuit affirming the United States District Court for the Eastern District of New York's decision is attached in the Appendix at 1a.

JURISDICTION

The Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C §1254 (1), having timely filed this Petition for a Writ of Certiorari within ninety days of the United States Court of Appeals for the Second Circuit's final judgment on December 4th 2018.

CONSTITUTION STATUTES INVOLVED

42 U.S.C §2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of

his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S. Code § 2000d–7(a) (1):

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S. Code § 1981 (a):

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory t o make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains,
> penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

The Petitioner is an African-American female physician that arrived at Stony Brook University Hospital, in July 2011, on a trajectory of

having a promising academic career. However, the Petitioner's career was suspended upon her employment termination on August 31st 2013. The Petitioner was wrongfully terminated by the Respondents for providing objective constructive criticism about her residency training program and making charges of discrimination and retaliation against the Respondents. The Respondents' discriminatory and retaliatory conduct continues to obstruct the Petitioner's medical career advancement and tarnish the Petitioner's reputation in the medical community.

In April 2013, the Petitioner completed a required annual Accreditation Council of Graduate Medical Education (ACGME) survey, wherein she provided constructive criticism about her residency program. The ACGME is responsible for

accrediting residency programs across the United States. On April 15th 2013, the Petitioner was awarded a resident physician grant from the American Academy for Pediatrics (AAP). The Respondents congratulated the Petitioner on her grant award and vowed that SBUH would provide the Petitioner support and assistance in materializing the grant project.

In May 2013, the Respondents informed the Petitioner and other resident physicians that the ACGME Survey results suggested that approximately twenty-five percent (25%) of the Internal Medicine/Pediatrics program trainees raised concerns in areas such as resident mistreatment. On May 2nd 2013, the Petitioner was informed by the Respondents that she would be placed on probation for concerns of

professionalism, medical knowledge communication and interpersonal skills, patient-based learning and patient care.

When the Petitioner sought clarification, Respondent, Dr. Kimberly Fenton (Fenton) insisted that the concerns surrounding placement on probation was not a matter for debate or discussion. Respondent Fenton also informed the Petitioner that the AAP resident grant that she was awarded would be returned to the awarding organization out of concern that the Petitioner acquired the grant unprofessionally. On or about May 5th 2013, the Petitioner contacted the New York State Department of Health, Office of Professional Misconduct (also known as the New York State Physician Board (NYSPB) and the EEOC, out of concern that

she was being mistreated, discriminated, and retaliated against by the Respondents. On June 1st 2013, the Respondents renewed the Petitioner's employment contract.

On June 13th 2013, the EEOC informed the Respondents of the Petitioner's EEOC charge. Also on or about June 13th 2013, the NYSPB completed their investigation of the Respondents. On June 20th 2013, the Petitioner received notice of termination from the Respondents. On or about June 25th 2013, the Petitioner appealed her termination. On or about July 1st 2013, the Respondents submitted a negative end of the year performance evaluation about the Petitioner. On August 31st 2013, the Petitioner was effectively terminated from the Respondents.

In October 2013, the Respondents purposely failed to provide the Petitioner a letter of reference to accompany the Petitioner's residency application, which the Respondents knew and admitted is common practice. In March 2014, after the Petitioner's incessant inquires, the EEOC provided the Petitioner her right to sue letter via email. Subsequently, the EEOC and the United States District Court for the Southern New York informed the Petitioner that the ninety (90) day period for her to sue the Respondents had lapsed, and she could no longer purse an action against the Respondents.

On or about April 21st 2014, the Respondents recommended to the American Board of Pediatrics (ABP), the agency that certifies physicians and physicians in-training in pediatrics across the United

States that the Petitioner should not receive credit for the work completed during the July 2012 to June 2013 period. In October 2014, the Respondents submitted a negative letter of recommendation to State of Maryland's medical licensing agency.

On March 14th 2015, the Plaintiff commenced this legal action against Respondents, Kimberly Fenton and Stony Brook University Hospital, for which the Petitioner claimed retaliation pursuant to 42 U.S.C. §1981 and 42 U.S.C. §1983 Title VII. On August 10th 2017, the United States District Court for the Eastern District of New York granted the Respondents' motion for summary judgment. On or about December 28th 2017, the Petitioned appealed her case to the United States Court of Appeals for the Second Circuit.

On December 4th 2018, the United States Court of Appeals for the Second Circuit affirmed the U.S. District Court for the Eastern District of New York's decision. Now, on March 4th 2019, the Petitioner files this Writ for Certiorari challenging the United States Court of Appeals for the Second Circuit's decision.

This case presents the questions of whether: (1) the United States Court of Appeals for the Second Circuit erred when it held that the Plaintiff's complaint of discrimination to the New York State Pediatrics Board (NYSPB) was not a protected activity; and (2) the United States Court of Appeals for the Second Circuit erred when it held that Stony Brook University is immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court, because it

disregarded the fact that SBUH is a recipient of Federal financial assistance, and has violated a Federal statute prohibiting discrimination.

SUMMARY OF THE ARGUMENT

The United States Code of Law 42 U.S.C §2000e-3(a) makes it conspicuously clear that it is unlawful to discriminate and retaliate against an individual for opposing any unlawful employment practice under Title VII. Here, the United States Court of Appeals for the Second Circuit erred when it found that the Petitioner's NYSPB complaint was not a protected activity, reasoning that the Petitioner made conclusory allegations for which Respondent Fenton could not have reasonably known that the Petitioner was alleging racial discrimination to constitute a

protected activity under 42 U.S.C §2000e-3(a) (Title VII).

The Petitioner reasonably believed that the Respondents were discriminating against her because of her race and as evidence of what she perceived to be discrimination, she complained to the NYSPB, because the Respondents returned the grant the she was awarded, placed her on probation, and demoted her. The Petitioner perceived the Respondents actions to be unlawful employment practices under Title VII, and as a result expressly alleged that the Respondents' actions were "discrimination and overt sabotage." The U.S. Code and this Courts case law have clearly established that discrimination is prohibited under Title VII. The Petitioner opposed the Respondents employment practices of discrimination toward

her, when she filed her complaint with the NYSPB, constituting a protected activity under 42 U.S.C §2000e-3(a) (Title VII).

The Respondents knew or should have known that discrimination is an unlawful practice under Title VII. Insofar that when the Petitioner complained of discrimination, they should have known it was in regards to employment acts that the Petitioner perceived to be prohibited under Title VII. The Petitioner's complaint to the NYSPB alleged discrimination unambiguously enough to put the Respondents on notice that the Petitioner opposed what she perceived to be their discriminatory employment practices.

Once this Court agrees that the Petitioner's complaint to the NYSPB was a protected activity, then it should

respectfully follow that the Petitioner has satisfied her §1981 retaliation claim against Respondent, Fenton, has presented a claim triable for a jury, and thus is worthy of overcoming summary judgment. The Petitioner respectfully requests that Certiorari be granted and that this case be reversed and remanded to the U.S. District Court for the Eastern of New York.

Lastly, the Petitioner contends that Respondent, SBUH has waived state immunity, because it is a recipient of Federal financial assistance and has violated a federal provision (42 USC §1981), prohibiting discrimination.

ARGUMENT

a. The United States Court of Appeals for the Second Circuit erred when it held that the

Plaintiff's complaint of discrimination to the New York State Physicians Board (NYSPB) did not constitute a protected activity under Title VII.

The United States Court of Appeals for the Second Circuit erred when it held that the Plaintiff's complaint of discrimination did not constitute a protected activity under Title VII.

> "Title VII of the Civil Rights Act of 1964 forbids employment discrimination against "any individual" based on that individual's "race, color, religion, sex, or national origin." Pub. L. 88-352, § 704, 78 Stat. 257, as amended, 42 U. S. C. § 2000e-2(a). A separate section of the Act—its antiretaliation provision—prohibits an employer from

> "discriminat[ing] against" an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. § 2000e-3(a)." Burlington Northern & Santa Fe Railway Co. v. White, 548 U. S. 53, 126 S Ct 2405, 165 L Ed 2d 345 (2006).

In Burlington Northern & Santa Fe Railway Co. v. White, this Court stated "a reassignment of duties can constitute retaliatory discrimination where both the former and present duties fall within the same job description. Burlington N. & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405, 165 L.Ed.2d 345, 548 U.S. 53, 74 USLW 4423 (2006). Here, the Petitioner complained to the NYSPB about being

demoted, placed on probation, and having the grant she was awarded returned. The Petitioner perceived the reassignment of her duties and her demotion to be retaliatory discrimination. The Petitioner complained to the NYSPB, because she is an African American female that was being treated adversely and differently from her white colleagues for providing constructive feedback on ACGME surveys.

The Petitioner is a member of a protect class (African American Female) that opposed what she believed to be retaliatory discrimination. The United States District for the Eastern District of New York acknowledged that the Respondents had general corporal knowledge of the Petitioner's complaint. The United States Court of Appeals for the Second Circuit said the Plaintiff's

conclusory allegations to the NYSPB could not have constituted a protect activity, although the Respondents were aware of the Petitioner's complaint. Neither 42 U.S.C § 2000e-3 (a) nor any other case decided in this Court provides guidance to how a complainant should articulate their complaint of discrimination to constitute a protected activity. The Petitioner's contention here is that she is a member of a protected class that opposed what she perceived to be unlawful employment practices under Title VII (retaliatory discrimination). The Respondents were aware of the Petitioner's complaint concerning their employment practices, and subsequently terminated her employment, shortly after renewing her employment contract.

The Petitioner believed that the Respondent's employment practices were unlawful, and it is follows that a reasonable jury could also find that the Respondent's employment practices were unlawful. If this Court accepts the Petitioner's argument that her NYSPB complaint was a protect activity, then the Petitioner requests that after granting Certiorari, this case be remanded and the District Courts decision for summary judgment be reversed.

b. Stony Brook University Hospital is not immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court because it is a recipient of Federal financial assistance and has

violated a Federal statute prohibiting discrimination.

Stony Brook University is not immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court because it is a recipient of Federal Financial Assistance that has violated a Federal statute prohibiting discrimination. Under 42 U.S. Codes § 2000d–7(a) (1):

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of

> 1975 [42 U.S.C. 6101et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S. Code § 1981 (a) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory t o make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white

> citizens, and shall be subject to like punishment, pains,
> penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 prohibits race discrimination in the making and enforcing of contracts. It prohibits racial discrimination against whites as well as nonwhites. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295 (1976) (Section 1981 was intended to "proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race"). In Runyon v. McCrary, 427 U.S. 160 (1976), the Supreme Court held that Section 1981 regulated private conduct as well as governmental action. In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Supreme Court restricted the

application of Section 1981 to claims arising out of the formation of the contract. But the Civil Rights Act of 1991 legislatively overruled the Supreme Court's decision in Patterson, providing that the clause "to make and enforce contracts" in Section 1981 includes "the making."

A claim against a government actor for a violation of Section 1981 can in appropriate circumstances be brought under 42 U.S.C. § 1983. The protections afforded by Section 1981 may in many cases overlap with those of Title VII. But the standards and protections of the two provisions are not identical. For example, a Section 1981 plaintiff does not have to fulfill various prerequisites, including the completion of the EEOC administrative process, before

bringing a court action. Also, Title VII applies only to employers with fifteen (15) or more employees, whereas Section 1981 imposes no such limitation. Employees cannot be sued under Title VII, but they can be sued under Section 1981. On the other hand, Title VII protects against discrimination on the basis of sex, creed or color as well as race, while Section 1981 prohibits racial discrimination only.

Here, Section 1981 prohibits only racial discrimination. The Respondents have discriminated against the Petitioner on the basis of her race. Since the Respondents have discriminated against the Petitioner on the basis of her race, they are in violation of 42 USC Section 1981, which is a Federal statute that prohibits recipients of Federal Financial assistance from violating any

Federal statute that prohibits discrimination. Respondent, SBUH is a recipient of numerous federal grant awards. The facts here fall perfectly under the plain language meaning of 42 U.S. Code § 2000d–7(a) (1).
"A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for
a violation of..... [ ] any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." See 42 U.S. Code § 2000d–7(a) (1).

Respondent SBUH, which in this case is the state of New York, should be not immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court, because it is a recipient of Federal finance assistance, and has violated 42 USC Section

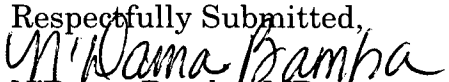
1981, a federal statute that prohibits discrimination.

CONCLUSION

For the above-mentioned reasons, the Petitioner respectfully requests that this Court issues a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

DATED this 4th day of March, 2019

Respectfully Submitted,



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