No.

==========

In The

SUPREME COURT OF THE UNITED STATES

KAREN H. SCOTT PETITIONER

v.

DISTRICT HOSPITAL PARTNERS, L.P. & UHS OF DELAWARE, INC. RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Laurence A. Elgin
Counsel of Record
601 Pennsylvania Ave. NW
Suite 900 South Building
Washington D.C. 20004
lawnet.lae@gmail.com

==========

QUESTIONS PRESENTED FOR REVIEW

1) Did the court of appeals decide that a severe physical condition, one that can prevent breathing and be life-threatening is not a disability under the law in conflict with the 10th, 7th and 4th circuits so as to require clarification with regard to an impairment from which many suffer?

2) Did the court of appeals decide that judges and administrators may decide about such a medical matter without medical knowledge or input as if they were doctors in conflict with the 7th circuit so as to require clarification about such a practice?

3) Did the court of appeals decide upon the doctrine of relation back before the EEOC in conflict with important controlling precedent from this Court?

4) Did the court of appeals sanctify reliance upon precedent from this Court which Congress specifically repealed so as to create conflicts with required circuit precedents so as to create an issue which this Court should clarify?

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Relevant Statutes Involved	2
Statement of the Case	2
Basis For Jurisdiction in the District Court	7
Argument	8

TABLE OF AUTHORITIES

CASES	PAGE(S)
Amax Coal Co. v. Sevier, 1994 WL 102145 (7th Cir. 1994)	8
Battaglia v. Peabody Coal Co., 690 F. 2d 106 (7th Cir. 1983)	8
Blakes ex rel. Wolfe v. Barnhart 331 F.3d 565, 570 (7th Cir. 2003)	8
Buck v. *Hampton Tp. School Dist.*, 452 F.3d 256 (3rd Cir. 2006)	9
Darling v. Savers Life Insurance Co., 131 F. 3d 133 (4th Cir. 1999)	8
Edelman v. Lynchburg College, 535 U. S. 106, (2002)	9
Federal Express Corporation v. Holowecki, 552 U.S. 389 (2008)	9
Goins v. Colvin, 2014 WL 4073108 (7th Cir. 2014)	8
Haynes v. Williams, 392 F.3d 478, 483 (D.C. Cir. 2004)	6
Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S.Ct. 2139 144, L.Ed.2d 450 (1999)	5

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 122 S.Ct. 681 151 L.Ed.2d 615 (2002) 5

Wiles v. Apfel, 1999 WL 102145 (10th Cir. 1999) 8

STATUTES

Americans with Disabilities Act Amendments Act, codified at 42 U.S.C. ch. 126, Sec. 12101 et. seq. 2, 5, 6, 10

United States Code, Title 28, Section 1254 (1) 2

RULES

Fed.R.Civ.P. 60(b) 6

OPINIONS BELOW

Order of the District of Columbia Circuit denying petition for rehearing en banc filed May 1, 2018. #1728856 in #17-7061 Appx. 56

Order of the District of Columbia Circuit denying panel rehearing filed May 1, 2018. #1728855 Appx. 55

Judgment per curiam of the panel of the District of Columbia Circuit filed March 6, 2018. #1720735 Appx. 1-3

Minute Order of the district court denying plaintiff's Rule 60 (b) 3/21/2017 in No. 1:13-cv-00600-CRC Appx. 4

Order of the district court, ECF No 70, denying plaintiff/petitioner's Motion to Alter/Amend 03/07/17 Appx. 4-5

Order of the district court granting summary judgment to respondents on race discrimination and HWE. Filed 12/29/2017. ECF No. 65 Appx. 5-6

Memorandum Opinion of the United States District Court for the District of Columbia filed 12/29/2016 granting summary judgment to respondent on race discrimination and HWE ECF No. 64 Appx. 6-29

Minute Order denying plaintiff's 2nd Motion to Vacate disability discrimination opinion 04/20/2015 Appx. 29-30

Order denying plaintiff's Motion to Alter 9/23/2014 ECF 23 Appx. 30-34

Order dismissing disability and age discrimination counts 07/28/2014 ECF No. 15. Appx. 34-36

Opinion re: ECF No. 15, ECF No. 14 07/28/2014 Appx. 36-52

Order of EEOC investigator 01/28/2013, found in district court case at ECF 8-1. EEOC Charge No.: 570-2011-00475 Appx. 53-54

EEOC DISMISSAL AND NOTICE OF RIGHTS, 02/06/2013

JURISDICTION

The judgment sought to be reviewed was filed in the United States Court of Appeals for the District of Columbia Circuit on March 6, 2018. Panel Rehearing and En Banc consideration were denied on May 1, 2018. The statutory provision believed to confer on this Court jurisdiction on a writ of certiorari is United States Code, Title 28, Section 1254 (1)

RELEVANT STATUTES INVOLVED

Americans with Disabilities Act Amendments Act, codified at 42 U.S.C. ch. 126, Sec. 12101 et. seq.

STATEMENT OF THE CASE

Petitioner, the holder of a Licensed Practical Nurse (LPN) certificate for the District of Columbia, was sent by a temp agency to work at the George Washington University Hospital (GWUH) at its Case Management Unit (CMU). GWUH is owned by the respondent LP and managed by the managing company respondent, which is a subsidiary of the company that owns 80% of the LP. After a period she was hired on a permanent basis by the supervisor of the unit with favorable recommendations and at first received good reviews and rewards.

That changed in two ways. First, petitioner was compelled to work in closed room with little air

circulation. In that environment she found that her nose became swollen, her eyes swelled shut, her cheeks puffed up and soon she was literally unable to breathe. She consulted with doctors. First, one doctor told her she had S/B or shortness of breath. Then another doctor, a pulmonary specialist at Georgetown Medstar, diagnosed her also as having S/B and gave the number code for that condition as recognized in international and U.S. coding, where is also designated as dyspnea. She was issued orders to cease working in the environment for days. Petitioner sought to accommodate her condition by opening a door and placing it slightly ajar but was told she could not do that. When she tried to explain her problem she was yelled at by the supervisor and began to find herself shunned and not told of when staff meetings were to occur. She went to the supervisor and HR but found the there was no interest in listening to her complaint.

Secondly, petitioner noticed that one-by-one the supervisor was firing black (and in one case a dark-skinned Filipina) employees, including a secretary and nurses, and replacing them with white employees. Petitioner, who is black, observed other marks of discrimination against black employees by the supervisor.

Eventually, petitioner was discharged on the basis that the department was being reorganized so as to require nurses to have an RN degree. Eventually petitioner was able to expose this as a pretext by such things as GWUH advertising on the web for LPNs to fill the positions.

Petitioner filed pro se at the EEOC, formally charging on the check off boxes, race, religious and age discrimination. Then she hired counsel and amended to eliminate religious discrimination and added Hostile Work Environment.

At intake petitioner submitted her medical documents showing she had the dyspnea condition and on her questionnaire mentioned the disability discrimination and discussed it with intake officer, who acknowledged its being mentioned.

Later, invoking relation back, petitioner, this time with a difference counsel, filed to relate back to her documents and questionnaire answers at intake to add disability discrimination and retaliation.

The EEOC investigator declined to relate back, deciding that dyspnea did not appear to present a disability under the law.

The EEOC dismissed the case and gave notice of time to sue in district court. Plaintiff filed in district court claiming race, disability discrimination, HWE, retaliation, and wrongful discharge under D. C. law. l

Respondents moved to dismiss petitioner's disability, HWE, **ret**aliation and wrongful discharge counts.

The district court dismissed all the said counts, leaving only the race discrimination count and HWE based on it, the court opining that dyspnea was not a disability under the act, relying, in doing so, upon cases in this Court decided prior to the enactment of the ADAAA which Congress repudiated in enacting the A and "playing doctor" by neglecting to inform itself as any medical input from medical experts or documents from them, ignoring splits in the circuits in doing so and also circuit splits on dyspnea..

Petitioner moved to alter judgment on 8 25 2014. ECF 20. In the support memo she specifically notes the ADAAA and how it broadened the definition of disability from what it had been under the ADA, saying: "The ADAAA was enacted because of Congress' dissatisfaction with the way that courts

were interpreting the ADA far too narrowly with regard to the claims of those alleging that they were disabled. So great was this concern in Congress that, among other things it specifically overturned Supreme Court decisions which it felt embodied this too narrow approach. The most significant cases that the Congress specifically overturned in the ADAAA were the two opinions *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681 151 L.Ed.2d 615 (2002) and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139 144, L.Ed.2d 450 (1999).

On 9-23-2014 the district court denied the Motion to Alter in a 4 page written Order. ECF 23. In it the court acknowledged the ADAAA's narrowing but insisted that the D. C. Circuit opinion it relied on *Haynes v. Williams,* 392 F.3d 478, 483 (D.C. Cir. 2004), which in turn relied on the cases in this Court cited above, though decided before the ADAAA was in effect, was still binding on it because it was "narrower."

Petitioner moved for reconsideration per 60 (b) on 3-30-2015. Again petitioner pointed out cases in other circuits addressing courts in other circuits recognizing the condition of dyspnea as disabling under the law and cases in other circuits pointing out the error of judicial officers giving medical conclusions without getting informed medical opinion.

Lower court denies motion in a minute order, 4-20-2015.

Respondents move for summary judgment on race discrimination count and race-based HWE. 3-14-2016.

District court grants summary judgment based on two comparators rather than wholesale, one-by-one firing

of members of unit and unit-wide discrimination. 12-29-2016.

Petitioner moves to alter 1-26-2017, emphasizing not two comparators whose race not known to decision maker but wholesale unit discrimination.

Court denies motion to alter in Order without separate opinion. 3-7-2017.

Petitioner moves for reconsideration under 60(b). 3-13-2017.

Court issues Minute Order denying Rule 60. 3-21-2017.

Court grants petitioner in forma pauperis status. 4-4-2017.

Petitioner files notice of appeal. 4-5-2017.

USCA case number 17-7061 filed 4-18-2017

Petitioner files appellant's opening brief 12-17-2017, pointing out splits with other circuits on dyspnea as disabling, judicial officers "playing doctor," this Court being ignored on relation back before the EEOC.

USCA issues 2 page judgment affirming district court, ignoring precedent of this Court on relation back, splitting with other circuits on dyspnea as a disability under the law, finding "minor legal error" insufficient to prevent affirmance. 3-6-2018.

USCA denies petition for panel reconsideration and for full panel consideration in 2 one page orders without reasons or analysis.

BASIS FOR JURISDICTION IN THE DISTRICT COURT

Jurisdiction in the district court was based on federal questions.

ARGUMENT

From the investigator at the EEOC up through the court of appeals, the decisions here on dyspnea as not being a disability condition were contrary to decisions in other circuits, in particular the 10th, 7th and 4th. *Wiles v. Apfel,* 1999 WL 102145 (10th Cir. 1999); *Amax Coal Co. v. Sevier*, 1994 WL 102145 (7th Cir. 1994); *Battaglia v. Peabody Coal Co.*, 690 F. 2d 106 (7th Cir. 1983); *Darling v. Savers Life Insurance Co.*, 131 F. 3d 133 (4th Cir. 1999). And these were cases cited before the enactment of the ADAAA in which Congress broadened the coverage of the ADA and in fact specifically rescinded cases from this Court which interpreted the ADA more narrowly. These actions were sanctioned by the USCA, putting it in conflict with the other circuits on the question of dyspnea as a disabling condition.

A further conflict between the USCA in this case and the 7th Circuit occurred with regard to the fact that here all decision makers, from the EEOC investigator up through the USCA panel, engaged in giving uninformed medical opinion or sanctioning it as if they were doctors. This creates a split with the 7th Circuit and other circuits that have echoed it on engaging in what the 7th Circuit has characterized as "playing doctor." *Goins v. Colvin*, 2014 WL 4073108 (7th Cir. 2014), citing *Blakes ex rel. Wolfe v. Barnhart* 331 F.3d 565, 570 (7th Cir. 2003),; *Rohan v. Chater*, 98 F.3d 966, 970 (7th Cir. 1996). Here, from the EEOC investigator up through the sanctioning at the USCA we see the uninformed decision makers "playing doctor." Here the judges and the EEOC investigator did not only arrive at medical conclusions

unsupported in the record, *a fortiori*, they engaged in medical conclusions contradicted in the record.

It is also the case that we see here a refusal to heed the precedent set by this Court regarding relation back before the EEOC when documents submitted at intake, written answers on questionnaires, statements made at intake and other such matters are at issue. *Edelman v. Lynchburg College*, 535 U. S. 106, (2002), (relation back before the EEOC, documents to be considered as well as formal charge); in *Federal Express Corporation v. Holowecki*, 552 U.S. 389 (2008) (relation back before the EEOC similar language.) Thus the USCA has sanctioned a departure from the decisions of this Court and put itself at odds with other circuits, including the Fourth, where the *Edelman* case arose. See, for example, *Buck* v. *Hampton Tp. School Dist.*, 452 F.3d 256 (3rd Cir. 2006)

Since, when plaintiff sought to relate back her disability claim to her original charges because of documents submitted and statements made at intake the EEOC investigator refused to relate back based on his medical opinion without having any qualifications to render such an opinion, the defendants were never required to respond to the charge. Thus though plaintiff verified her disability charge the time for verifying it never ran. Plaintiff made this filing based on relation back before she received the formal notice of discharge and right to sue. See Appx. 61-75.

Here also, the lower court opined and the court of appeals sanctioned reliance on cases from this Court that Congress specifically repealed when it enacted the Americans with Disabilities Act Amendments Act of 2008 that applied here. There are no reports of any other circuits doing this, making this circuit the odd man out on this point.

It is important that confusion created between the USCA in this case and these other circuits be resolved. Dyspnea or Shortness of Breath can be deadly if one is unable to breathe long enough. An inability to breathe is clearly a disability under the law and that should be clarified.so that any judges or administrative officials who are inclined in the future to act as if they were doctors and opine that this impairment is not one that interferes with a major life activity are deterred from doing so.

Thus there are questions here that are unsettled between circuits and they should be settled by this Court.

Respectfully submitted,

_/s/_____
Laurence A. Elgin
601 Pennsylvania Avenue NW
South Building, Suite 900
Washington, D.C. 20004-2601
(202) 628-1114 lawnet.lae@gmail.com