No. 18-251

In The
Supreme Court of the United States

SHELDON SCHWARTZ, M.D.,

Petitioner,

v.

UNIVERSAL HEALTH SERVICES, INC.; UNIVERSAL HEALTH SERVICES FOUNDATION, INC.; HRI HOSPITAL, INC.; UHS OF DELAWARE, INC.; PATRICK MOALLEMIAN; and KRISHNASWAMY GAJARAJ,

Respondents.

On Petition For Writ Of Certiorari To The Massachusetts Appeals Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petitioner has presented a compelling reason to grant the Petition as to the Massachusetts Appeals Court's affirming the judgment of dismissal by the Superior Court, where it does not implicate any important federal question not settled by this Court, and the Petitioner failed to raise any federal question in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rule 29, the Respondents make the following disclosures:

Universal Health Services, Inc. is a publicly-held corporation incorporated under the laws of Delaware and is the parent corporation owning more than 10 percent of HRI Hospital, Inc. and UHS of Delaware, Inc.

Universal Health Services Foundation, Inc. is a non-profit corporation incorporated under the laws of Pennsylvania and does not have any parent corporation.

HRI Hospital, Inc. is a corporation incorporated under the laws of Massachusetts and is a subsidiary of Universal Health Services, Inc.

UHS of Delaware, Inc. is a corporation incorporated under the laws of Delaware and is a subsidiary of Universal Health Services, Inc.

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INTRODUCTION

Pursuant to United States Supreme Court Rule 15, the Respondents HRI Hospital, Inc. d/b/a Arbour-HRI Hospital, Universal Health Services Foundation, Inc., Universal Health Services, Inc., UHS of Delaware, Inc., Patrick Moallemian, and Krishnaswamy Gajaraj ("Respondents") submit this Brief in Opposition to the Petition for Writ of Certiorari of Petitioner Sheldon Schwartz, M.D. ("Dr. Schwartz"). The Petition presents no "compelling reasons" for review on a writ of certiorari, and therefore it should be denied.

To the contrary, Dr. Schwartz seeks to further litigate a case that has been found to be without legal support by three tribunals, each of which capably addressed the issues before them. The Superior Court ruled that Dr. Schwartz's Complaint failed to satisfy Mass. R. Civ. P. 12(b)(6) pleading standards. The Appeals Court affirmed, concluding "the claims were either barred on procedural grounds that the factual allegations of the complaint failed to plausibly suggest an entitlement to relief." The Supreme Judicial Court denied Dr. Schwartz's Application for Further Appellate Review.

In his Petition, Dr. Schwartz misstates the rulings of the lower courts, incorrectly arguing the lower court decisions violated his rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution because they "strip physicians of constitutional protections for their speech and their liberty rights" and state law treats physicians differently from other

persons. Petition at 41-48. The Appeals Court held the Complaint was properly dismissed because Dr. Schwartz failed to satisfy the basic pleading requirements of Mass. R. Civ. P. 12. None of the lower courts made any ruling that physicians have no constitutional protections for their speech and liberty rights or are unprotected by whistleblower laws. Nor did Dr. Schwartz raise any First, Fifth, or Fourteenth Amendment issues in the lower courts.

Thus, the Petition should be denied based on the standards for certiorari set forth in United States Supreme Court Rule 10. Dr. Schwartz has failed to set forth any reason, let alone a compelling reason, why certiorari should be granted.

STATEMENT OF THE CASE

A. Statement of Facts

The following is a brief summary of the relevant allegations which reasonably can be gleaned from the Complaint.

Petitioner, a medical doctor by training, had medical privileges at Arbour-HRI Hospital in Brookline, Massachusetts, from approximately 2006 until May 31, 2013. During Petitioner's many years of examining and caring for patients at Arbour-HRI Hospital, Petitioner was the subject of numerous internal investigations concerning his inappropriate behavior with staff and management, including in 2008, 2010, 2011 and

2013. (Complaint, ¶¶ 25, 28, 31, 44, 54 and 55). Petitioner claims generally that he was mistreated by the management, staff and others during his involvement with Arbour-HRI Hospital which resulted in the suspension of his medical privileges; eventually, he resigned from the hospital. (Complaint, ¶¶ 54-55). Petitioner also alleges that in connection with Massachusetts Board of Registration in Medicine's active investigation and public hearing into his allegedly inappropriate behavior, as reported to the Licensing Board by the hospital in 2013, the Respondents continue to interfere with certain purported rights set forth in his Complaint. (Complaint, ¶¶ 63-74). The Complaint is void as to specific allegations against certain Respondents. Instead, Petitioner lumps all Respondents together for purposes of all four allegations set forth in the Complaint. (Complaint, ¶¶ 75-110).

B. Procedural History

On May 27, 2016, Dr. Schwartz filed a Complaint against the Respondents in Massachusetts Superior Court alleging wrongful suspension, retaliation, violation of Title VII of the Civil Rights Act of 1964, and violation of M.G.L. c. 151B, § 4, arising from his employment at Arbour-HRI Hospital, a psychiatric hospital in Brookline.

The Respondents responded to the Complaint by filing Motions to Dismiss pursuant to Mass. R. Civ. P. 12(b)(6), on the basis that (1) the Complaint fails to state factual allegations which, if true, would raise a

right to relief above the speculative level; (2) the Complaint is barred by the applicable statute of limitations; and (3) the Petitioner's claims are precluded by his failure to file the required prior administrative proceeding.

On November 29, 2016, the Superior Court held a hearing on the Motions to Dismiss filed by Respondents Universal Health Services, Inc. and Patrick Moallemian and Respondents Krishnaswamy Gajaraj and UHS of Delaware, Inc. On December 27, 2016, the Court issued a Memorandum of Decision and Order allowing those Respondents' Motions and dismissing the claims against Universal Health Services, Inc., Patrick Moallemian, Krishnaswamy Gajaraj, and UHS of Delaware, Inc.

On January 31, 2017, the Superior Court held a hearing on the Motions to Dismiss filed by Respondents HRI Hospital, Inc. d/b/a Arbour-HRI Hospital and Universal Health Services Foundation, Inc. On February 6, 2017, the Court issued an Order dismissing the claims against HRI Hospital, Inc. d/b/a Arbour-HRI Hospital and Universal Health Services Foundation, Inc., on the basis that they suffer from the same deficiencies as the claims against the other Respondents.

Judgment in favor of all Respondents and against Dr. Schwartz was entered on February 7, 2017. Dr. Schwartz filed an appeal, arguing the Complaint was improperly dismissed.

The Massachusetts Appeals Court issued a decision affirming the judgment of the Superior Court on

December 29, 2017. Dr. Schwartz filed a petition for rehearing, which was denied by the Appeals Court on January 18, 2018. Judgment after rescript entered in the Superior Court on February 6, 2018. On February 9, 2018, Dr. Schwartz filed an Application for Further Appellate Review with the Massachusetts Supreme Judicial Court. The Supreme Judicial Court denied the Application on March 29, 2018.

REASONS TO DENY THE PETITION

A. The Petition Raises No Grounds for Review by this Court

The Petition should be denied based on the standards for certiorari set forth in United States Supreme Court Rule 10. Dr. Schwartz has failed to set forth any compelling reason why certiorari should be granted. Further, the Court should deny certiorari because Dr. Schwartz has failed to "present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration." Sup. Ct. R. 14.4. Instead, Dr. Schwartz has submitted a rambling narrative rehashing his grievances with his former colleagues and falsely impugning the integrity of the Respondents' counsel.

The principal purpose of certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344 (1991). A writ of certiorari is not a matter of right, but of judicial discretion, and is granted only where there

are "compelling reasons" for it. Sup. Ct. R. 10. Such reasons include a conflict among United States courts of appeals regarding an important question of federal law; a conflict among state courts of last resort as to an important question of federal law; and a decision by a state court or United States court of appeals conflicting with the decisions of the United States Supreme Court concerning an important question of federal law. *See id*.; *see also*, *e.g*., *Bingler v. Johnson*, 394 U.S. 741 (1969); *Egan v. City of Aurora, Ill*., 365 U.S. 514 (1961). None of these reasons is present in the Petition.

Further, pursuant to Rule 10, a writ is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. At the heart of the Petitioner's case is an argument that the lower courts misapplied the pleadings standard under Mass. R. Civ. P. 12. That issue was properly addressed by the Massachusetts courts and does not require or warrant review by this Court.

The Petitioner incorrectly argues the Appeals Court ruled that "Massachusetts physicians who blow the whistle and get retaliated against may not recover for post-employment retaliation because no law protects them once they are no longer employed by that hospital" and "that protection from post-employment retaliation does not even exist as far as physicians are concerned." Petition at 40. The Petitioner contends the lower court decisions violated his rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution because they "strip

physicians of constitutional protections for their speech and their liberty rights" and state law treats physicians differently from other persons. Petition at 41-48. Yet, the decisions of the lower courts do no such thing. The Appeals Court held Count I for "wrongful suspension under G.L. c. 260, Section 2A" was properly dismissed because the cited statute does not provide a right of action. *See* Petition, App. 3. Count II, alleging violation of the Massachusetts medical provider whistleblower statute, M.G.L. c. 149, § 187, was properly dismissed because the acts complained of fell outside the applicable statute of limitations, and the later conduct allegedly occurred three years after Dr. Schwartz resigned, so it could not have affected the "terms and conditions of [Schwartz's] employment," and it could not form the basis for a whistleblower claim under the statute. *See* Petition, App. 4. The Appeals Court held Counts III and IV, purporting to allege violations of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*., and M.G.L. c. 151B, were properly dismissed because "[t]he fatal flaw in Schwartz's complaint is the absence of any allegation that he engaged in any activity, or exercised any right, protected by these statutes." *See* Petition, App. 4.

Thus, the Appeals Court held the Complaint was properly dismissed because Dr. Schwartz failed to satisfy the basic pleading requirements of Mass. R. Civ. P. 12. A civil plaintiff's compliance with pleading requirements in a state court action is a matter of state law, not federal law. None of the lower courts in addressing Dr. Schwartz's defective pleadings made any ruling that physicians have no constitutional protections for

their speech and liberty rights or are unprotected by whistleblower laws. There is no federal question to be decided in this case. Therefore, the Petition should be denied. *See Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996).

B. The Petitioner Presents Issues Not Raised Below

Dr. Schwartz argues in his Petition that the lower court decisions violated his rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution because they "strip physicians of constitutional protections for their speech and their liberty rights" and state law treats physicians differently from other persons. Petition at 41-48. Dr. Schwartz fails to articulate how any of the rulings by the lower courts violates any constitutional protections, but even if he had done so, the Petition should be denied because none of the supposed constitutional issues presented in the Petition was raised below. Issues raised for the first time on appeal are not considered by the reviewing court. *Wood v. Milyard*, 566 U.S. 463, 473 (2012); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-169 (2004). Having waived his arguments concerning supposed constitutional violations, Dr. Schwartz cannot raise them now. For these additional reasons, the Petition should be denied.

MISSTATEMENTS OF LAW AND FACT

There are many misstatements of fact in the Petition, but they mostly match the wildly inaccurate

allegations in the Complaint and Dr. Schwartz's opposition to the Respondents' motions to dismiss. Of greater concern are the misstatements of law. Dr. Schwartz mischaracterizes the current state of governing law and the rulings of the lower courts. Dr. Schwartz claims incorrectly that the Superior Court and the Appeals Court both ruled that only physicians – as opposed to other medical professionals – can never recover damages for post-employment retaliation. He also claims the lower courts' rulings are contrary to controlling law. Those statements in the Petition are inaccurate. The lower courts ruled that the retaliation statute cited by Dr. Schwartz in the Complaint applies only to adverse action affecting "conditions of employment," and because the alleged action occurred years after Dr. Schwartz resigned, it could not have affected the conditions of his employment. The Superior Court and Appeals Court decisions do not distinguish physicians from other medical professionals as Dr. Schwartz contends. The lower courts further noted that post-employment retaliation may be actionable under state and federal law – but that Dr. Schwartz failed to plead any protected activity under the applicable statutes, Title VII and M.G.L. c. 151B.

Thus, Dr. Schwartz has misstated the issues before the Court. There is no basis to argue that the courts incorrectly applied controlling law, much less that Dr. Schwartz as a physician was denied equal protection under the laws (even if Dr. Schwartz had raised that issue below). Accordingly, the Petition should be denied.

CONCLUSION

The Petition presents no "compelling reasons" for granting a writ of certiorari. The dismissal of the Petitioner's Complaint for failure to plead a proper claim under Mass. R. Civ. P. 12 is a state law issue, which was capably decided by the Superior Court, the Appeals Court, and Supreme Judicial Court. The Petitioner fails to articulate any coherent argument regarding purported violations of the First, Fifth, or Fourteenth Amendments to the United States Constitution, and no such issues were raised in any court below. As such, those purported issues are waived. Numerous misstatements of fact and law further warrant denial of the Petition. For these foregoing reasons, the Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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