

No. 18-6101

In the
Supreme Court of the United States

JEAN GESPERE PIERRE,

Petitioner,

vs.

FJC SECURITY SERVICES INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Whether the Petition meets the standards for Supreme Court review.

Whether the lower courts properly granted Summary Judgment in favor of Respondent, and subsequently affirmed the dismissal of Petitioner's Title VII discrimination and retaliation claims.

Whether the lower courts properly denied and upheld the denial of Petitioner's motions for sanctions against Respondent and for removal of a Magistrate Judge.

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Introduction and Opinions Below

Petitioner seeks review of the Second Circuit's affirmance of a United States District Court's grant of summary judgment in favor of Respondent dismissing Petitioner's Title VII action, and its denial of sanctions and for removal of a Magistrate Judge. *Pierre v. FJC Security Services, Inc.*, 2017 US Dist Lexis 152081 (E.D.N.Y. 2017); aff'd, 2018 US App Dist Lexis 13655 (2d Cir. May 24, 2018).

Jurisdiction

The Summary Order of the Second Circuit Court of Appeals appears at 2018 US App Dist Lexis 13655 (2d Cir. May 24, 2018). A Petition for Rehearing was denied on July 24, 2018. The Petition was filed on August 28, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257 (a).

The Petition should be denied in its entirety. It does not present compelling or even appropriate questions for this Court's review pursuant to Rule 10 of the Rules of this Court. This matter involves neither a decision that is in conflict with another federal or state court, nor an important question of federal law. Even if these considerations did not preclude Supreme Court review, the lower courts' decisions were based on well settled law that were properly applied to Petitioner's claims, and appropriately resulted in the dismissal of same. The Petition should be denied.

A. Statement of the Case

The facts of this matter are accurately stated in the U.S. District Court's Memorandum and Order dated September 19, 2017 (Hon. Margo K. Brodie, U.S.D.J.) which is included in its entirety in Petitioner's appendix. [ECF Document 73, pp. 1-18]¹ Briefly, however, Petitioner was formerly employed as a security guard with Respondent, and was terminated on or about November 8, 2014 for insubordinate and abusive conduct towards a supervisor. [ECF Document 73 pp. 1, 6-8] Prior to Petitioner's termination, he had had workplace disagreements with a female co-worker, also a security guard, (concerning his and the co-worker's respective lunch breaks) and had complained to supervisors about what he regarded as the female co-worker's violation of company procedures. [ECF Document 73, pp.2, 4-5] Some three months prior to Petitioner's termination he had been transferred to work in a separate area from the co-worker and had not had contact with her for that period of time. [ECF Document 73, p. 6] Following his termination, Petitioner filed a Title VII action against Respondent alleging gender discrimination and retaliation. [ECF Document 73, p. 1] Petitioner alleged that he was treated unfavorably in comparison to the co-worker, and further alleged that he was retaliated against by Respondent's supervisors after making complaints about the female co-worker. Petitioner alleged that this was purportedly because the supervisors were engaged in a romantic relationship with the female co-worker, or wished to have such a relationship with her. [ECF Document 73, pp. 8,11,15]

¹ Pro Se Petitioner did not consecutively paginate his Appendix. References to the record are to the ECF pagination contained on the top of the pages of the Appendix.

Petitioner also has alleged, in support of a motion for sanctions against Respondent that it purportedly interfered with a deposition of a non-party witness that Petitioner wished to conduct during discovery, and in support of a motion for removal of a Magistrate Judge, that the Judge had improper ex parte contacts with Respondent. [ECF Document 89, p. 2]

B. Reasons to Deny the Petition

Even if this matter presented proper questions for review, which it does not, the Petition should be denied because it is clear, even from the Petition itself, that Petitioner's Title VII claims were and are based on a legally unsustainable "paramour preference" theory, and not upon a cognizable claim of discrimination or retaliation based upon gender. [Petition, p. 2, Petition, Statement of the Case p. 8] To the extent that the Petition seeks review because of the denial of Petitioner's motions for sanctions and for removal of a Magistrate Judge, it should be denied because, as the lower courts found, these claims are based solely upon Respondent's request for a ruling as to the order of depositions, and are not supported by any evidence of wrongdoing. [ECF Document 89. P.2]

C. Argument

I. The Lower Courts Properly Dismissed and Upheld the Dismissal of Petitioner's Title VII Claims.

As is abundantly clear from the Petition, Petitioner has, and continues to steadfastly allege that his Title VII gender discrimination/retaliation claims are based on Respondent's supervisors' alleged romantic relationship with the female co-worker in question, or their wanting to have such a relationship. [Petition, p. 2] It is well established in the Second Circuit, without any contrary authority having been presented by Petitioner, that discrimination and retaliation claims cannot be based on a theory of "paramour preference." This theory makes discrimination and retaliation claims dependent upon alleged disparate treatment not because of a claimant's gender, but because of a romantic relationship between an employer and a person preferentially treated. *DeCintio v. Westchester Cty. Med. Ctr.*, 807 F.2d 304, 306 (2d Cir. 1986); *Fattoruso v Hilton Grand Vacations Co., LLC*, 525 F. Appx 26, 28 (2d Cir. 2013); *Kelly v. Howard I. Shapiro & Assocs. Consulting*, 716 F.3d 10, 14 (2d Cir. 2013).

Furthermore, Title VII cases are analyzed under a three part burden shifting framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 US 792, 93 S. Ct. 1917, 36 L.Ed. 2d 668 (1973). A prima facie case of discrimination requires a showing that: (i) a plaintiff belonged to a protected class, (ii) plaintiff was qualified for the position, (iii) plaintiff suffered an adverse employment action, and (iv) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. Similarly, a prima facie case of retaliation requires a

showing that (i) plaintiff participated in protected activity, (ii) defendant knew of the protected activity, (iii) an adverse employment action occurred, and (iv) a causal connection existed between the protected activity and the adverse action. *Shultz v. Congregation Shearith Israel of the City of New York*, 867 F.3d 298, 309 (2d Cir. 2017). If a Plaintiff successfully presents a prima facie case, the defendant must rebut the presumption by offering legitimate and non-discriminatory reasons for the adverse employment action demonstrated in Plaintiff's prima facie case. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted and drops from the case, and the burden then shifts back to the Plaintiff to prove intentional discrimination by a preponderance of the evidence. *Holcomb v. Iona College*, 521 F.3d 130, 138 (2d Cir. 2008). The Plaintiff may do this either by proving that a discriminatory/retaliatory motive more likely than not motivated the defendant or by proving both that the reasons given by the defendants are not true and that discrimination is the real reason for the action. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1180-81 (2d Cir. 1997).

Here, the Second Circuit upheld the lower court's rulings that Petitioner had not set forth evidence to support a Title VII claim, and that he was not subjected to legally cognizable adverse actions by Respondent. [ECF Document 89, pp. 1-2] The Petitioner's termination was supported by Respondent's explanation that this occurred after Petitioner was (by his own admission) insubordinate and abusive towards a supervisor. [ECF Document 73, p. 15-16, fn. 7] Petitioner, for his part, was unable to rebut this explanation or demonstrate that it was pretextual. [ECF

Document 73, p. 17, fn. 8] A plaintiff bringing workplace discrimination/retaliation claims must make more than conclusory allegations in order to defeat a motion for summary judgment. *Campbell v. Cellco Partnership*, 860 F. Supp.2d 284, 293-4 (SDNY 2012).

A summary judgment decision is reviewed by the Court of Appeals de novo. *Goenaga v. March of Dimes Birth Defects Foundation*, 51 F. 3d 14, 18 (2d Cir. 1995). Here, the Petitioner's claims were reviewed by the District Court in the light most favorable to him and in a manner so as to make the strongest arguments they presented. [ECF Document 73, p. 11 fn. 5, 6] The Second Circuit properly upheld the District Court's grant of summary judgment in favor of Respondent and this ruling should not be disturbed.

Moreover, any rulings that have been made in this matter are based on circumstances individual to Petitioner and/or well settled law in the Second Circuit. Petitioner has offered no important legal questions for this Court's review, and accordingly, the Petition should be denied.

II. The Lower Courts Properly Denied Petitioner's Motions for Sanctions Against Respondent and his Motion to Remove a Magistrate Judge.

As set forth in the Second Circuit's Summary Order, the District Court correctly denied Petitioner's applications for sanctions against Respondent, and his request to remove a Magistrate Judge from his case, because Petitioner offered no evidence of wrongdoing by either. [ECF Document 89, p. 1-2] As noted by the Second Circuit, Respondent merely alerted the Magistrate Judge to the fact that Petitioner's deposition, and a non-party witness deposition the Petitioner wanted to take, had been scheduled on the same day. [Id. at p.2] The Magistrate made a discovery ruling as to the order of depositions with which Petitioner disagreed, resulting in repeated (unsuccessful) motions by Petitioner containing unsupported and scurrilous accusations similar to the type contained in the Petition. [Id. at p. 2] Even if the Petition presented issues properly before this Court for consideration, which it does not, the Petition offers no facts or evidence that would form a basis for a decision contrary to that of the lower courts. The District Court's denial of sanctions was properly reviewed for an abuse of discretion. See *Chin v. Port Authority of New York and New Jersey*, 685 F.3d 135, 162 (2d Cir. 2012). Petitioner is not entitled to Supreme Court review of a routine discovery ruling as was made in this matter.

D. Conclusion

As set forth in the rules of the Supreme Court, Rule 10, a Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Respectfully, even if the instant Petition offered support for such asserted errors, which it does not, Supreme Court review of the District Court's ruling, which applied the Petitioner's stated version of events to well settled law, would not set forth issues that are appropriate for review.

Respectfully submitted,

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