No. _____

In the Supreme Court of the United States

LYMAN S. HOPKINS

PETITIONER

V.

LANGUAGE TESTING INTERNATIONAL, INC. AND

DIANE ARCHER

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

PETITION FOR A WRIT OF CERTIORARI

LYMAN S. HOPKINS
PRO SE LITIGANT
20 FRANKLIN DRIVE UNIT A
MAPLE SHADE, NEW JERSEY 08052
LSHY2K@juno.com
(646) 670-0186
Pro se Petitioner

QUESTIONS PRESENTED

Is language certification testing agency Language Testing International, Inc. (LTI) immune from discrimination and retaliation charges despite it's twin affiliation with it's parent and certification organization American Council on Teaching Foreign Languages (ACTFL) maintaining the full-service teacher employment website jobcentral.actfl.org?

Is the court screening and dismissing the 28 U.S.C. § 1915 matter three days before Plaintiff timely submission, overlooking, void of fact-finding, relevant new admissible evidence and ripeness affirmation legally justifiable by the U. S. Constitution First Amendment right to petition and the Fourteenth Amendment Section 1. Equal Protections?

Is the practice of U. S. District Court District of Southern District of New York denying opportunity for Plaintiff to amend the complaint aligned with the usual course of U. S. District Court proceedings?

Is it proper to herein litigate 42 U.S.C. § 1983 where jobcentral.actfl.org invites school personnel to post teacher employment positions and prospective teachers to seek employment-related services?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

The petitioner is a nongovernmental corporation. The petitioners does not have a parent corporation or shares held by a publicly traded company.

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APPENDICES

PETITION FOR A WRIT OF CERTIORARI

Lyman S. Hopkins, Pro se Litigant, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of New York Circuit in this matter.

OPINIONS BELOW

The decision of the Court of Appeals, is unpublished and is inserted in the Appendix (App.) at 1. The District Court's opinions, unpublished, are inserted at App. 2 to 15. The decision of the Court of Appeals on the timely filed and timely refiled by motion to attach, granted, petition for rehearing, is unpublished and is inserted in the App. 16.

JURISDICTION

The Court of Appeals entered its judgment of Plaintiff appeal from New York District Court for the Southern District of New York on March 16, 2018, and denied a petition for rehearing on May 15, 2018. App. 1 and App. 16. This Court has jurisdiction under 28 U.S.C.

§ 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Article III

Cited at Appendix (App.) 1

First Amendment Right to Petition

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment Section 1. Equal Protection Clause

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes and Rules

28 U.S. Code § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1)

By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1915

Cited at App. 19

42 U.S. Code § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S. Code § 2000e-2(b)

(b)Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

42 U.S. Code § 12203

Cited in App. 18

Age Discrimination in Employment Act of 1967 § 623

Cited at App. 20

Americans with Disabilities Act Title I

Cited at App. 21

Civil Rights Act 1964 Title VII

Cited at above 42 U.S. Code § 2000e-2(b)

Federal Rules of Evidence 103

Cited at App. 22

Federal Rules of Evidence 402

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Federal Rules of Evidence 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

INTRODUCTION

LTI, the administers foreign language competency tests and certifies foreign language competency testers. Foreign language competency certificates through testing are used by many states' departments of education as well as for university foreign language placement and credit and a special teachers' National Board certification administration. The tests generally measure skills for foreign language writing and speaking.

Plaintiff Hopkins holds a state Spanish teaching certificate in Connecticut and seeks an endorsement in Italian to become a more competitive teacher prospect. Hopkins is aware of LTI foreign language testing procedures and background having sat the written and oral proficiency interview (OPI) for Spanish July 2002.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance is the court below has jurisdiction of this action under 42 U.S.C. § 2000e-5(f), 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. §§ 12117, and 12188, 28 U.S.C. §§ 1331, 1345 and, for appropriate venue 1391.

1. Factual Background

Plaintiff Hopkins sits his first session of Italian written and oral proficiency interview (OPI) on August 2014 satisfies the State of CT required 'intermediate high' rating for the written portion and 'intermediate mid' for the telephone-administered OPI. Candidates have a two year window to satisfy testing requirements. Plaintiff diligently studies a variety of Italian media to satisfy the OPI and May 2015 sits a retest of the same administered OPI where there is no role play, consists of two questions with no OPI-structure warm-up, level checks, probes, and wind-down and the telephone interviewer has the identical voice as the prior interviewer.

June 7, 2015 Plaintiff sends an email grievance citing the unconventional May 2015 Italian OPI test and the tester sounds like the same individual. Services Coordinator Diane Archer replies June 10, 2017 with an off-topic response regarding a waiver to the 90-day retest policy.

Making several LTI inquiries between April and June 2016 to schedule a retake of the Italian OPI and exploring the option to sit a face-to-face OPI Hopkins makes several mainly email inquiries to LTI regarding how to schedule.

Many of Hopkins' LTI inquiries are replied to with off-topic responses by LTI personnel and the face-to-face OPI is not addressed.

On June 9, 2016 Diane Archer, Test Aministration Supervisor responds, "Dear Ms. Hopkins, The OPI (Oral Proficiency Interview is administered over the phone..."

June 9, 2016 Hopkins emails a second grievance to LTI with the same concerns as the June 2015 grievance.

Around June 11, 2016 Plaintiff finds information regarding the Italian OPI computer-based (OPIc) test and schedules to sit it at the LTI White Plains office and has difficulty selecting the scheduled due to the LTI online requirement to choose two dates and receives a payment confirmation.

June 15, 2016 Hopkins sends email to LTI verifies OPIc is scheduled and June 20, 2016 email to LTI to inqure about updating the OPIc appointment. A June 21, 2016 email from LTI OPIc application is being processed. Plaintiff July 3, 2016 makes inquiry to the status of OPIc and July 8, 2016 LTI emails the OPIc Test Confirmation which does not indicate a proctor fee for any oral test administration.

July 16, 2016 when Hopkins approaches the waiting area desk to register he is confronted with having to pay a proctor fee, has to wait while the LTI personnel checks the computer to verify the test confirmation information, is asked how much money he has on him and is the allowed into the test area with no word on the fee resolution.

The same LTI reception desk personnel brings Hopkins to the computer station and explains testing procedure. During the test the computer avatar voice is very accelated beyond comprehensible natural speech. The test result returns intermediate-low and Hopkins sends July 30, 2016 email to LTI for concerns with the Italian OPIc which goes unanswered for several weeks.

2. Proceedings Below

For several weeks before District Court () Judge McMahon is assigned sua sponte to this LDC matter the case is in a default unassigned status. Plaintiff files a F.R.C.P. 15 (a)(2) amendment June 13, 2017 to correct an omission of F.R.C.P. 8(a)(2) and makes weekly inquiries to the Court regarding the status of the case.

August 11, 2017 Defendant counsel argues in his motion to dismiss LTI is not liable for the Plaintiff ADA, Title VII, Sec. 1983, and ADEA LDC properly asserted claims due to LTI not being an employer or employment agency.

Concurrently overcoming several third-party obstacles to (24 hour

utility disruption and several days wifi internet shutoff during the two weeks prior (and few days prior, a faulty new inkjet cartridge) to answering the August 11, 2017 motion) completing this litigation documents August 25, 2017 Plaintiff enroute to White Plains, NY U.S. courthouse may not arrive timely so phones the Court clerk. The clerk advises case is closed recently and Plaintiff apprises clerk of submission of memorandum and exhibits then mails them the same day.

Hopkins obtains the August 22, 2017 order to dismiss and files a motion for reconsideration August 31, 2017. Due to deadlines and no ruling on the Plaintiff August 31, 2017 motion, September 18, 2017 Hopkins files a Rule 60(b) motion. October 4, 2017 court below Juge McMahon issues an order denying both the Plaintiff August 31 and September 18, 2017 motions.

REASONS FOR GRANTING THE WRIT

LTI discriminatory testing issues are a matter of U. S. public concern due to many public schools, higher education institutions and government bodies utilizing LTI to obtain foreign language test results

required by their employment and education-based candidates.

Lebron v. National Railroad Passenger Corporation __ 513 U.S. 374 (1995) permits Hopkins to argue anew in this matter.

LTI is the alter-ego of ACTFL

Akzona Inc. v. EI Du Pont De Nemours & Co., 607 F. Supp. 227 (D. Del. 1984) cites, "Whether a subsidiary is the agent of the parent involves a determination that the separate corporate identities of the subsidiary and parent are a fiction".

Gallagher v. Mazda Motor of America, Inc., United States District Court, E.D. Pennsylvania Jan 6, 1992 781 F. Supp. 1079 (E.D. Pa. 1992) cites three lines of cases dealing with when imputing jurisdictional contacts is proper.

This court addresses minimal contacts and personal jurisdiction at *International Shoe v. State of Washington,* 326 U.S. 310 (1945), *World-Wide Volkwagen Corp. v. Woodson,* 444 U.S. 286 (1980) and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984)

According to contact information on their respective website contact information pages ACTFL and LTI are one-in-the-same entity

with both identifying the same address as the other. Further, the language test certificate holds the ACTFL seal, is endorsed several times with the ACTFL name and is signed by the director at, "LTI-The ACTFL Testing Office"

No evidence finding precedes 28 U.S.C. § 1915 dismissal below

Borough of Duryea v. Guarnieri __ 564 U.S. 379 (2011) cites 'Among other rights essential to freedom, the First Amendment protects "the right of the people ... to petition the Government for a redress of grievances." U. S. Const., Amdt. 1.'

Two other matteres heard at this Court, *Regents of the University of California v. Bakke*, 438 U.S. 265 and *Brown v. Board of Education of Topeka*, 347 U.S. 483 explore the Fourteenth Amendment privilege of equal protections in the realm of public education where *Regents* cites, "The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. at 22."

In *Blum v. Yaretsky* __ 457 U.S. 991 (1982) this Court holds, "It is axiomatic that the judicial power conferred by Art. III may not be

exercised unless the plaintiff shows "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant."

The court below dismissal of the matter citing 28 U.S.C. § 1915 affects the Hopkins' substantial First Amendment right to petition and Fourteenth Amendment equal protections.

Below order at App. 7 Cites, "Nor does Plaintiff allege facts suggesting that LTI is a labor union, an employment agency, or that a connection exists between LTI and Plaintiff's employer sufficient to constitute an integrated enterprise or a joint employment relationship." Ruling Below Deprives Plaintiff the Opportunity to Amend

Mihailovich v. Laatsch, 359 F.3d 892, 906 (7th Cir.2004) cites, "Fed.R.Evid. 403. Rule 403 thus calls upon the district court to weigh the need for and probative value of the evidence against potential harm that its admission might cause. Id., Advisory Committee Note (1972)".

Ruling Below Deprives Plaintiff the Opportunity to Amend

Leave to amend the complaint appears to be treated differently by the court below in light of Third Circuit more liberal leave to amend the

complaint citing *Mullin v. Balicki*, No. 16-2896 (3d Cir. 2017) and *Phillips v. County of Allegheny*, 515 F.3d 224 (3rd Cir. 2008).

Mullin cites, "They refer to a line of cases in which we explained that "[w]hen a party seeks leave to amend a complaint after judgment has been entered, it must also move to set aside the judgment pursuant to Federal Rule of CivilProcedure 59(e) or 60(b), because the complaint cannot be amended while the judgment stands." Jang v. Boston Sci. Scimed, Inc., 729 F.3d 357, 367–68 (3d Cir. 2013); see also Ahmed v. Dragovich, 297 F.3d 201, 207–08 (3d Cir. 2002)."

Hopkins alludes to the need to amend complaint in his August and September 2017 memoranda to the court below. Realizing a need to submit an offer of proof, he submits a proposed amended complaint at the Second Circuit motion for reconsideration the filing of which is granted April 30, 2018 by the court. Plaintiff is cognizant of the need, having objected to the rulings below, to vacated those rulings in order to proceed with the amended complaint.

Hopkins, a disabled black male, also seeks to preserve his claims below with regard to the Americans with Disabilities Act, Title VII, and

the Age Discrimination in Employment Act and 42 U.S. Code § 12203 he litigates below citing this Court at *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___ (2013).

LTI is a 'state actor' under 42 U.S. Code § 1983

This Court citing *Lugar v. Edmondson Oil Co.*, Inc., 457 U.S. 922 (1982) affirms, "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents".

LTI and Diane Archer are a 'state actor' under 42 U.S. Code § 1983 by the operation of the employment website jobcentral.actfl.org where individuals can post teacher employment opportunities and candidates may explore those opportunities as well as Featured Employers, Career Coaching, Resume Writing, Reference Checking, Learning Center etc.

CONCLUSION

The petition for a writ of certiorari should be granted

Dated: August 13, 2018

Respectfully submitted,

Lyman S. Hopkins
Pro se Litigant
20 Franklin Drive Unit A
Maple Shade, NJ 08052
(646) 670-0186
LSHY2K@juno.com