No. 18-8035

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

LORETTA C. ADIGUN, PETITIONER

Vs.

EXPRESS SCRIPTS, INC., RESPONDENT

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

PETITION FOR REHEARING

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CIVIL CASE

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, Loretta C. Adigun respectfully petitions for hearing of the court decision issued on April 22, 2019. Adigun v. Express Scripts, Inc. No. 18-8035. Ms. Adigun moves this court to grant this petition for rehearing and consider her case with merits briefing and argument. This petition for rehearing is filed within 25 days of this court's decision in the case, and is being filed within 15 days of this court's letter to resubmit.

REASONS FOR GRANTING THE PETITION

The Supreme Court dating back to the 1790s, since the passage of the Americans with Disabilities Act (ADA), and up until the issuance of its opinion in this case; has never issued an opinion without briefing and/or argument. For example, *Cleveland v. Policy Management Systems Corp.* (97-1008) 526 U.S. 795 (1999) 120 F .3d 513.

I. The Supreme Court has never issued an opinion without briefing and/or argument granting a lower appellate court's opinion where the court's opinion was a decision based on an issue that was not proposed or briefed by any party. But, this is precisely what happened here:

A. The United States Court of Appeals for the Eleventh Circuit, No. 17-15225, filed on 8/7/2018 the following opinion:

> "Adigun does not satisfy the third prong of the prima facie case because there is no evidence showing that she ever requested a reasonable accommodation from Express Scripts." (writ of certiorari - appendix A)

ESI is responsible for any third party company that they hire to interact with their employees by law and by admission as stated in document 12 - Answer and Defenses to Amended Complaint, filed on 11/7/2016, page 2, section 4:

> "Defendant admits only that it used a third-party vendor, Aon Hewitt to assist in the administration of its leave of absence program."

The evidence in the letter dated November 12, 2014 (writ of certiorari - appendix E) shows that Adigun requested a medical leave as a reasonable accommodation:

> "During my stay at Shands Hospital from August 23, 2014 until being discharged on August 25, 2014, I was informed that I was scheduled for follow-up with the cardiology clinic and that I required cardiac rehabilitation and that this rehabilitation is very vital in improving my heart function and my physical ability to function."
>
> "Dr. Percy prescribed 13 weeks of cardiac rehabilitation to start as soon as possible. Dr. Percy explained that he would be overseeing my rehabilitation and that I would not be required back into his office until after the completion of rehabilitation, for which, he would reevaluate my condition to function at that time. It was understood, that I would be expected back into his office upon complet[ion] of rehabilitation for reevaluation of my ability to return to work."

ESI acknowledged the request when they replied back to her in a letter dated January 20, 2015 (writ of certiorari - appendix F) upholding their decision to deny her a reasonable accommodation and stating:

> "Our correspondence dated November 17, 2014 confirmed receipt of your appeal and outlined the review process."
>
> "In conclusion, there were no findings to indicate that you had any impairment that would prevent you from performing a light amount of physical exertion, lifting up to 20 pounds for the time period of November 6, 2014 through February 25, 2015. The determination to deny your request for an extension of benefits has been upheld, and your claim for benefits will remain closed."

The letter dated January 20, 2015 pointed out the time period of November 6, 2014 through February 25, 2015, leading one to believe, because ESI had Adigun in their absent management system, they had already planned on/or before January 20, 2015 to discharge her from employment on February 25, 2015.

> Document 12, filed on 11/7/2016 by the defendant (ESI) - Answer and Defenses to Amended Complaint, page 3, section 6: "Defendant admits that plaintiff's last day of work was August 20, 2014 and that she claimed a disability date of August 23, 2014. Upon information and belief, defendant further admits plaintiff was hospitalized from August 23-25, 2014 and was prescribed thirteen weeks of cardiac rehabilitation."

ESI admits and points out in writing with the statements in the above paragraph, that Adigun did three days in the hospital, underwent a recovery period from surgery, was prescribed

and underwent thirteen weeks of cardiac rehabilitation: all collectively, but fail to explain how all of this medical treatment fits into a twelve week FMLA entitlement without the need of the additional medical leave covered under the Americans with Disabilities Act (ADA).

B. The Court Of Appeal's decision continues as to Adigun's FMLA form that was filled out by her cardiologist:

> "On September 8, 2014, Adigun's cardiologist submitted a Family and Medical Leave Act ("FMLA") Certification of Health Care Provider form to Aon Hewitt, the third-party administrator of Express Script's short term disability plan. In that form, Adigun's cardiologist stated that Adigun's condition would last indefinitely and that she would need cardiac rehabilitation for 13 weeks." (writ of certiorari - appendix A).
>
> "Adigun was referred to a health care provider for cardiac rehabilitation, but that reference does not serve as a reasonable accommodation request because there is no indication that Adigun's need for cardiac rehabilitation---for which she needed and received FMLA leave---would conflict with the demands of her position once she returned to work." (writ of certiorari - appendix A).

See appendix C of Adigun's writ of certiorari the actual FMLA certification form:

> "Part B: Amount of Leave Needed, question 5. Will the employee be **[incapacitated]** for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ___No X_ Yes."

As noted above Adigun's cardiologist answered **Yes**. The evidence shows that Adigun was **incapacitated** during her medical treatment making her medical leave, **be in conflict with the demands of her position** because she was not to return to work until the completion of treatment and until she has been reevaluated by her cardiologist. This is the primary purpose of asking for a medical leave as a reasonable accommodation.

II. The Supreme Court has never issued an opinion without briefing and/or argument where there is the induction of new law and/or where clarification of the law at issue might be of significant benefit to the country. <u>But, this is precisely what happened here:</u>

A. The Equal Employment Opportunity Commission's (EEOC's) Right-To-Sue Letter in this Americans with Disabilities Act (ADA) Civil Lawsuit; gave Adigun the right to sue in the Federal District Court.

The United States Court of Appeals for the Eleventh Circuit, No. 17-15225, states:

> "Adigun began working for Express Scripts, Inc. In September 2012 as a patient care advocate."

Adigun hired by Express Scripts, Inc. (ESI) on September 7, 2012 as a patient care advocate and later promoted to Coventry patient care advocate, worked at the location from hire date until being discharged on February 25, 2015. Adigun's letter of hire was placed into evidence in the case: Under the orientation section the letter states,"You are scheduled for orientation on Friday, September 7, 2012, 8 am at our site located at 2603 Osborne Road, St. Marys, GA. We will meet in the front lobby where you will receive your **ESI badge** (Express Scripts, Inc. badge).

'A company overview, benefits package and payroll information will be reviewed during orientation." Under the benefits section: "Assuming you enroll on time, your coverage becomes effective on the first day of the month following thirty-two (32) days of employment. Since your start date is Friday, September 7, 2012, your enrolled benefits will become effective November 1, 2012. If you enroll your dependents in **ESI benefits** (Express Scripts, Inc. benefits) , you will need to provide verification of eligibility to our HR Solution Center by November 1, 2012."

ESI claims that Express Scripts Services Company located in Bloomington, Minnesota is plaintiff's employer of record because it is listed on her IRS W-2, paychecks and earning statements. Plaintiff never had any inaccuracies or discrepancies with these forms, therefore she has never had any interaction with this subsidiary.

ESI a pharmaceutical benefit management company, was under contract with Coventry, a health insurance company that used Adigun (a patient care advocate) to service their members in the way of advice about their health insurance, right down to filling a prescription.

The Petitioner points to the right-to-sue letter in her Writ of Certiorari and asks that the Supreme Court of the United States will clarify this confusion in the law. The Plaintiff in an ADA case can not sue **anyone** until they stop by the EEOC and get the right to do so. When the plaintiff receives the right to sue letter, they are to follow the instructions on the letter. The EEOC says you can sue the respondent that participated in the legal investigation. In order for a Plaintiff to sue someone other than those listed on the letter, the Plaintiff must be given jurisdiction over the letter and/or return to the EEOC for that right. The same shall hold true for the Defendant in this case; they must also return to the EEOC if they find issue with the letter. And what would stop the plaintiff from giving themself the right to sue if they had been denied that right or the defendant from changing the respondent if they did not want to be sued.

1. Should the right-to-sue letter issued by the EEOC granting the claimant permission to sue the respondent under the ADA be trialed in the district court for wrong entity.? In the case Adigun vs. ESI, ESI claimed that the plaintiff has sued the wrong defendant. The District Court granted the defendant motion for summary judgment and stood with them on irrefutable evidence. The plaintiff followed the instruction on the right-to-sue letter, noting that the EEOC had conducted a federal investigation and if the wrong entity had participated in this federal investigation they played a part in the outcome and/or may have obstructed justice.

2. The EEOC gave the plaintiff the right to sue her employer that hired her and that participated in their federal investigation not the subsidiary listed on the W-2, paystubs, and earning statements.

3. Should the claimant's employer respond to the federal EEOC investigation by giving their "position statement" that is contributed to the final decision made by the EEOC investigator and for purposes of the district court case, claim they they are the wrong entity in the case?

4. Should the right-to-sue letter be on trial in the district court, or should issues with the right-to-sue letter be handled during the investigation and should the party or parties with issue returned to the EEOC for resolution.

5. Should the plaintiff have to fight for the right-to-sue, do to alleged discrepancies claimed by the defendant on the right-to-sue letter, while at the same time for which they are fighting the lawsuit for which the right-to-sue letter gives them the right to partake in?

6. Should the District Court give the Plaintiff a limited time for which they are responsible to correct allegations that the defendant claim they have with the right-to-sue letter, even if the plaintiff does not have any issues, and if so , what is this time frame and what is the corrective action process?

7. Will this legal procedure with the EEOC become reductant or eliminated and the right-to -sue letter no longer be valid, needed or used?

8. Are issues with the right-to-sue letter grounds for the dismissal of the civil lawsuit?

9. Can all issues with the right-to-sue letter be handled in the district court, such as issues with wrong entity, not being given the right to sue, etc.

For the purposes of a lawsuit filed under ADA, is the employee's employer the entity that hired them,for which they work at their facility, interface with their clients under contract, honor their policies, procedures, mission and given the chain of command as in the case with *Adigun vs. Express Scripts, Inc.*, where Adigun was informed that George Paz was her CEO/chairman or is it the subsidiary listed on the IRS W-2s, paycheck stubs, and earning statements for which they never interface? As a matter of law:

1. Can a party who claims to be the wrong entity participate in the lawsuit?
2. Can this wrong entity reserve the right to come back into the district court and dismiss the case at a much latter date?
3. Can this employer be the right entity to participate in the EEOC investigation and the wrong entity in the district court?

B. Discovery After Discharge In An American with Disabilities Act (ADA) Civil Lawsuit.

1. In an ADA case where discovery such as the SSDI application is not relevant to the case because it happen after discharge from employment; can this discovery be used "as a matter of law" to:

- 0 grant the defendant's motion for summary judgment
- 0 used to disqualify the plaintiff as a qualified individual under the ADA
- 0 used to imply that the plaintiff could not perform the essential functions of the job because they answered "No" for "Now able to Work" on the SSDI
- 0 used to accuse the plaintiff of defrauding the Social Security Administration (SSA)

III. Opinion Did Not Consider The Most Important And Actual Proposed Briefings And Arguments Of The Case.

A. Adigun"s Appellant Brief (writ of certiorari - appendix H)

Adigun's appellant brief, No. 17-15225, filed in the United States Court of Appeals for the Eleventh Circuit on appeal from the United States District Court for the Southern District of Georgia Brunswick Division civil action No. 2:16-cv-00039 was a brief of the final judgment from order No. 80 (writ of certiorari - appendix B) denying plaintiff's document No. 71- motion for reconsideration of summary judgment, and granting defendant's document No. 73 - motion for summary judgment and for reversal. (writ of certiorari - appendix H).

Adigun "did not" file a brief to the court of appeals for the eleventh circuit addressing the request for a reasonable accommodation. Evidence was furnished early in the case showing Adigun had requested an accommodation and was denied. Her FMLA certification form stated she would be incapacitated during treatment, thus her treatment would interfere with the

demands of her job. This is the reason why she requested a medical leave as a reasonable accommodation.

Adigun's appellant brief, No. 17-15225, addressed the following issues: Did the district court err as a matter of law by:

(a) assessing whether Adigun was qualified under the ADA based on whether she could perform the essential functions while she was out on leave rather then when she completed medical disposition and was returned to the workforce.

(b) holding that a leave request made in advance, of limited duration, and likely to enable the individual to perform her job nonetheless was not a reasonable accommodation.

(c) did the employer fail to satisfy its summary judgment burden to show that a reasonable jury could only find it had established undue hardship.

(d) granting summary judgment to ESI based on the claim that Adigun is not a qualified individual.

(e) in granting summary judgment based on the the claim that ESI is not Adigun's employer.

(f) in granting summary judgment based on the claim that Adigun did not request a reasonable accommodation.

(g) not determining if Adigun was a qualified individual at the time of discharge from employment, but rather, than as much as two years later at the 2017 court deposition.

(h) arguing the allegation of "wrong entity" on behalf of the defendant.

The fact that Adigun received Social Security Disability Insurance (SSDI) is proof that she is a qualified individual under the Americans with Disabilities Act (ADA). The ADA offers Adigun a reasonable accommodation and the Social Security Administration Act (SSA) does not. The SSA's award of disability benefits is consistent with Adigun's ADA claim that she could work with accommodation. Adigun met her burden to prove she was a qualified individual under the ADA.

IV. This Court Should Not Resolve The Substantial and Important Factual Issues In this Case Without Full Briefing and Argument.

A. Adigun's Motion For Summary Judgment

Adigun filed her complaint against Express Scripts, Inc. (ESI) on March 21, 2016 and her amended complaint on June 13, 2016. ESI answered and filed counterclaim on November 7, 2016. Adigun answered ESI's counterclaims on November 14, 2016 and filed motion for summary judgment on December 19, 2016.

Adigun's motion for summary judgment presented evidentiary factual material (1) the FMLA certification form dated September 8, 2014 (writ of certiorari - appendix C), filled out by her cardiologist stressing the importance of her attendance in cardiac rehabilitation for a minimum of thirteen weeks and stating that she would be incapacitated during this treatment (2) a letter dated November 6, 2014 (writ of certiorari - appendix D) denied Adigun a medical leave, denied her the monetary benefit that is enjoyed by other employees on short term disability leave, placed her in the absence management system creating the possibility for her to lose her job if she did not return to work (3) a letter dated November 12, 2014 (writ of certiorari - appendix E), Adigun's plea and explanation of her need for accommodation, keeping in mind that without treatment her heart and physical abilities were at some risk, (4) a letter dated January 20, 2015 (writ of certiorari - appendix F), upholding the decision to deny her an accommodation, while also insulting her by implying she could lift 20 pounds, (5) after being held in the absence management system on unapproved medical leave dating back to November 6, 2014, she was discharged from employment on February 25, 2015 for excessive absences.

Because Adigun's medical leave was not approved, she was denied monetary benefits offered to employees on short term disability leave. Adigun filed for Social Security Disability Insurance (SSDI) on line, later that day after discharge. Realizing that something was wrong and that she had been discriminated against because of her disability, she filed a complaint with the Equal Employment Opportunity Commission (EEOC). She also filed a claim for unemployment insurance, where she was fought by ESI, for which the claim led to a formal hearing and where ESI decided not to participate further. The Georgia Department of Labor, an entity that covers separation from employment, decide she was eligible for unemployment insurance and that her separation date was February 25, 2015.

ESI's opposition that the motion was premature failed to raise a triable issue of fact. Plaintiff in this civil case was under no obligation to permit the defendant to have a full course of discovery before serving the motion for summary judgment. Courts stress that a party contending that a motion for summary judgment is premature are required to demonstrate that additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are solely within the hands and control of the movant. **The mere dream or speculation that evidence sufficient to oppose a motion for summary judgment may be uncovered during the discovery process is not enough to deny the motion.** Especially, when the burden had shifted to ESI in the form of their undue hardship. A burden that exist at the time that it is claimed and not sought later through the discovery process. There must be some evidentiary basis to suggest that discovery may lead to relevant evidence.

As a result of the Schedule Conference held on January 12, 2017, Adigun was given an order/ultimatum to make a decision to proceed or to withdraw her motion for summary judgment.

The Plaintiff faced with a deadline for which to make a decision to continue with her motion for summary judgment, reviewed the circumstances in the case, keeping in mind that a motion for summary judgment is filed to save time and money on an unnecessary discovery process and unnecessary lengthy trial. She also reviewed the question of premature motion for summary judgment as it applied to the law and to her case. As it stood, the issue of premature motion was without any triable issue of fact.

Looking at the issue that ESI had introduced into the case: "Wrong Entity" and "Wrong Discharge Date". She saw this more as an obstruction of justice instead of a discovery problem.

However, Adigun worked for ESI, had direct contact with ESI's health insurance clients, interaction with the third party vendor (Aon Hewitt) that assisted with its leave of absence program, and does not recall knowledge of or any interaction with Express Scripts Services Company; therefore she decided to proceed with her motion for summary judgment. Noting that there must be some evidentiary basis to suggest that discovery may lead to relevant evidence and taking into account that ESI had already answered the motion for summary judgment. ESI never presented the circumstances for which they alleged was a hindrance in their opposition to the motion.

The wrong discharge date alleged by ESI was that it was not February 25, 2015, but April 1, 2015. The motion for summary judgement stated the evidentiary factual material as Adigun being discharged from employment before she could be reevaluated by her doctor and returned back to work. Adigun was returned to work on April 7, 2015 (Docket No. 52). There was no reason to believe that an even later discharge date of April 1, 2015 that was still **prior** to Adigun being returned to work would have an impact as discovery on the motion for summary judgment. Rather than automatically waiting until the close of discovery, (the scheduling continued to be revised throughout the case), Adigun considered the salutary effect of foreclosing on discovery, and decided that in the end, this would not have had an impact on the outcome of the case. She filed Docket No. 34 - Notice of Intent to Pursue 21 Motion for Summary Judgment.

July 3, 2017 - Dkt. No. 71 - Motion for Reconsideration of 2nd Motion for Summary Judgment

Plaintiff motion that the court rule on Motion for Summary Judgment at the conclusion of discovery [which was April 17, 2017- approximately 2 motions prior to motion] or as soon as the law would allow.

(1). Plaintiff's Second Motion for Summary Judgment (Dkt. No. 59) was filed on May 22, 2017

(2). ESI's Response Motion for Summary Judgment (Dkt. No. 65) was filed on June 12, 2017)

(3). Plaintiff Presented her SSDI Application into Evidence (Dkt. No. 66) on June 13, 2017 - Shows that Plaintiff Applied for SSDI after Discharge from Employment.

(4). Court Denies Plaintiff Second Motion for Summary Judgment (Dkt. No. 69) on June 27, 2017 - Stating "the Court Cannot Rule on a Motion for Summary Judgment Until Discovery is Completed."

(5). Plaintiff's Reconsideration Of Second Motion for Summary Judgment (Dkt. No. 71) was filed on July 3, 2017

Before the Court on June 27, 2017 was ESI's request for the Plaintiff's SSDI records and files from the United States Department of Justice. On June 13, 2017 Plaintiff entered into

evidence her SSDI application showing that she filed for SSDI benefits after she was discharged from employment. This means that plaintiff's SSDI records were not relevant in the case because it happen after discharge.

ESI went on a fishing expedition to find at best an alleged **undue hardship.** An undue hardship is "a hardship that exist at the time that it is claim." **Again, the mere dream or speculation that evidence sufficient to oppose a motion for summary judgment may be uncovered during the discovery process is not enough to deny the motion.**

November 21, 2017 - Dkt. No. 80 Order Denying Plaintiff 71 Motion for Reconsideration and Granting Defendant 73 Motion for Summary Judgment

B. Adigun"s Social Security Disability Insurance (SSDI) Application

The United States District Court for the Southern district of Georgia, civil action No. 2:16-cv-00039 filed on 11/21/2017, gave an opinion that:

> "While the parties dispute the date of plaintiff's termination, they agree that she was employed at least until February 25, 2015 Dkt. No. 73-2, 75:18-20. That same month, Adigun applied for Social Security Disability Insurance ("SSDI") benefits based on her heart attack. Dkt. No. 66-1 p.11. In that application, plaintiff supplied, **"No" next to "Now able to work". Id., p.5.** The Social Security Administration ("SSA") determined that plaintiff was disabled and granted her monthly SSDI benefits, which she continues to receive **(at least until the time of her deposition in this case). Dkt. No. 73-2 229: 9-11, 234: 12-14."**

The Social Security Administration's (SSA) award of disability benefits is consistent with Adigun's ADA claim that she could work with accommodation. She met her burden to prove she was a qualified individual under the ADA.

Because it is crucial to establish and maintain relevance in an ADA case, Adigun furnished her SSDI application into evidence on June 13, 2017. Adigun's SSDI application started online on February 25, 2015 at 2:00:41 pm and was completed and submitted to

SSA on that same day at 4:51:57 pm. Because Adigun was discharged from ESI on the morning of February 25, 2015, evidence shows that she applied for SSDI after discharge from employment.

The United States Department of Justice filed Dkt. No. 61 on may 31, 2017. Statement of Interest: Social Security Administration (SSA) is not a party in the case *Adigun vs. Express Scripts, Inc.* The plaintiff adds at this time nor has the SSA filed any formal complaints against her.

Disappointed at the results of the dream that evidence sufficient to oppose the motion for summary judgment would turn up in a discovery process, the Court slandered the Plaintiff's name by accusing her of defrauding the Social Security Administration. This is evident in Dkt. 80 (writ of certiorari - appendix B). Keeping in mind that the Plaintiff's SSDI records should not be relevant in the case.

While the Court lashes out at Adigun and accuses her of defrauding the SSA, the argue an allegation on behalf of ESI: "The undisputed evidence in this case shows that Express Scripts, Inc. has never employed Plaintiff."

CONCLUSION

The United States Supreme Court affirmed the opinion of the United States Court of Appeal for the Eleventh Circuit. The court of appeals gave a decision that was not proposed or briefed by any party in the lawsuit: *Adigun vs. Express Scripts, Inc.,* and a decision that was in opposition with all the other appellate courts The decision stated that the FMLA certification form filled out by Adigun's cardiologist said nothing and did not even constitute a reasonable accommodation request. Regardless of the form stating that Adigun would need thirteen weeks of cardiac rehabilitation and that she would be incapacitated during her medical treatment. This decision also stated that this incapacitation should not be a reason that should cause her to be in conflict with the demands of her job.

Does this affirmation mean that there is no such thing as a medical leave as a reasonable accommodation. To be explained as there is no longer a law that allows this leave. How does this affect all qualified individuals under the ADA?

The United States Court of Appeal for the Eleventh Circuit affirmed the order of the District Court for the Southern District of Georgia, Brunswick Division. The district court argues the allegation with irrefutable evidence that Express Scripts, Inc. was not Adigun's employer and granted them their motion of summary judgment based on this premise. This leaves an unanswered question, as a matter of law, how do you participate in a lawsuit and be awarded motion for summary judgment if you are the wrong entity.

What does it mean and how does it impact the ADA law and our country, when the right-to-sue letter is on trial in the district court. It makes the claimants trip to the EEOC a waste of time and the letter that they leave with worthless.

Ms. Adigun respectfully requests that this Court grant petition for rehearing and full briefing and argument on the merits of this case.

Respectfully submitted,

Loretta C. Adigun 5/14/2019

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for deay.

Loretta C. Adigun 5/14/2019

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