No. 18-9007

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

NICHOLAS WEIR - PETITIONER

vs.

MONTEFIORE MEDICAL CENTER, ALBERT EINSTEIN COLLEGE OF MEDICINE, and YESHIVA UNIVERSITY - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

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from UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a district court judge's misunderstanding of the initial timeline that establishes a retaliation claim (under 42 U.S.C. § 2000e) not considered a harmless error under FRCP rule 61 and thus presents an arguable basis in law and in fact in contrast the generic ruling occasionally used as an alternative for keenly combing through all the facts?

Can or should a district court rule on a timely FRCP rule 60(b) motion that includes a harmful error affecting substantial rights that is pending in appeal court without a conjunctive FRCP 62.1 motion?

LIST OF PARTIES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and appears to be unpublished.

The opinion of United States district court appears at Appendix B to the petition and appears to be unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was January 24, 2019. No petition for rehearing was timely filed in my case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- Fourteenth Amendment of the US Constitution § 1:

All person 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.

- Title VII of the Civil Rights Act of 1964, as codified, 42 U .S.C. § § 2000e to 2000e-17 (race, color, gender, religion, national origin):

Too lengthy to quote.

STATEMENT OF CASE

The case is about the granting of a motion to dismiss request by the respondents for Title VII claims (discrimination, retaliation, hostile work environment, and equal pay violation) on February 22, 2018. The district court erred with an initial timeline that established the retaliation claim (under 42 U.S.C. § 2000e). The petitioner filed a notice of appeal on March 23, 2018. While the appeal was pending the petitioner filed a FRCP 60(b)(1),(3), and (4) motion along with other motions on August 28, 2018. The district court dismissed one of the motions, motion to sanction, noting that it does not have jurisdiction to rule on it and deferred making ruling on the other motions. The United States Court of Appeal for the Second Circuit, represented by Judge Amalya L. Kearse, Dennis Jacobs, and Robert D. Sack, dismissed the case by simply noting that it "lacks an arguable basis either in law or in fact" on January 24, 2019. The Mandate was issued on February 15, 2019 to the district court. The district court granted the petitioner's motion for electronic case filing (ECF) on February 15, 2019. The petitioner mailed the district court a letter because the ECF did not work for several days despise repeated effort to get it fix with the ECF office at the court. The court endorsed the petitioner's letter on February 28, 2019 noting that the court had granted ECF on February 15, 2019 and will resolve the other pending motions in due course. The respondents wrote a letter to the district court erroneously noting that the petitioner's Rule 60(b) motion was untimely quoting a local rule which had exceptions. On March 26, 2019, the district court surprisingly agreed that it was moot and untimely despite the

motion being filed about six months in the one year timeline for the invoked FRCP Rule 60(b) motion.

REASONS FOR GRANTING THE WRIT

Federal Rules of Civil Procedure (FRCP) 61: Harmless error

Does a district court judge's misunderstanding of the initial timeline that establishes a retaliation claim (under 42 U.S.C. § 2000e) not considered a harmless error under FRCP rule 61 and thus presents an arguable basis in law and in fact in contrast the generic ruling occasionally used as an alternative for keenly combing through all the facts?

In the judgement, the district court noted in footnote that the "Plaintiff alleges he did not file his suit against New York State and CUNY until April 7, 2016, after his termination from AECOM. (P1. Opp. 9)." The district court erred by not being more meticulous in its fact-finding effort and missed the following statement: "Notice of Intention to File a Claim in New York Court of Claims on December 16, 2015. I was required to also mail a copy to CUNY which I did concurrently." (P1. Opp. 3). It is surely possible that the district court at the time was unaware of the fact that the Notice of Intention to file a claim can be used as the claim under certain circumstances and should be viewed as the "claim or unofficial claim." It essentially secure the timeliness (within 90 days) for filing a claim in New York Court of Claims. The point here being that the respondents retaliatory actions took place after the Notice of Intention to file a claim was submitted to the Court of Claims, The Attorney General of New York office, and CUNY. The first retaliation took place when my contract was abruptly changed days after I began working officially. I was given an ultimatum to take it or leave it.

This was about two weeks after filing a Notice of Intention to file a claim to the Court of Claims, The Attorney General of New York office, and CUNY. The petitioner also observed government agents who have been maliciously targeting and stalking within the institution during this time period. Other employees of a different race were not coerce to sign a new contract. The petitioner appeal the judgment in the Second Circuit. While the appeal was pending, the petitioner filed a FRCP 60(b)(1)(3)(4) motion on August 28, 2018 which was about six months from the date the district court entered judgment on February 22, 2018. FRCP 62.1 allows the district court to either (1) defer considering the motion, (2) deny the motion, or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue. The district court denied one of the motion and deferred the petitioner's rule 60(b) motion despite there being substantial rights affected by the district court's harmful error. The appeal court did not acknowledge any of the discrepancies including the retaliation timeline that the petitioner pointed out in the district court's judgment. The appeal court simply noted that the case "lacks an arguable basis either in law or in fact."

A second circuit ruling shows a narrow view of the Fed.R.Civ.P. 61. According to Matusick v. Erie County Water Authority (2d Cir. 2014), "[u]nder Federal Rule of Civil Procedure 61, courts are instructed to "disregard all errors and defects that do not affect any party's substantial rights." Fed.R.Civ.P. 61. But "[e]rror cannot be regarded as harmless merely because the trial judge or the appellate court thinks

that the result that has been reached is correct." Federal Practice & Procedure § 2883. Instead, the "probable effect of the error" must be "determined in light of all evidence." Id. The "substantial rights" language of the Federal Rules has therefore been interpreted to require an examination into the likely outcome of the proceedings. An error is not harmless if "one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." Kotteakos v. United States, 328 U.S. 750, 765 (1946); see also United States v. David, 131 F.3d 55, 61 (2d Cir.1997) (describing Kotteakos as "construing the 'substantial rights' language of 28 U.S.C. § 391 (from which Rule 61 is derived), as requiring an assessment of 'whether the error itself had substantial influence' on the outcome of the case.")."

On the other hand, a ninth circuit ruling shows a broad view of the Fed.R.Civ.P. 61. According Rand v. Rowland (9th Cir.1997), a dissenting judge noted that "[t]he majority opinion reverses, despite the harmless error rule, because (1) the notice was not in plain enough English, and included citations that might confuse a layman; □(2) it did not tell Rand that his case would be over if he lost on summary judgment. The majority's first reason is stylistic and highly subjective, a suggestion that our Appendix A is better in writing style than the California Attorney General's statement....The reason why Congress commanded us to disregard harmless error is that it has been engaged in a century-long campaign to move courts away from their nineteenth century tendency to reverse for technicalities without substantive significance. "Congress enacted (or approved)

harmless error rules to reverse" the approach that in the nineteenth century had made appellate courts "□'impregnable citadels of technicality.'□" United States v. Widgery, 778 F.2d 325, 329 (7th Cir.1985) (quoting Roger Trayner, The Riddle of Harmless Error 14 (1970)). What matters about an error is whether it caused substantial injustice to a party, not whether the appellate court feels strongly about the desirability of adherence to the rule. When we reverse because of a mere technicality, we cause injustice to the party that had finally obtained an end to the litigation. Where an error does not affect substantial rights, the party that obtained an end to the lawsuit is entitled to an appellate stake through the lawsuit's heart."

Here, the petitioner had a statutory right affected by the district court, but yet the Second Circuit was unable to acknowledging the temporal error establishing the retaliation claim. The petitioner's affected substantial right rose above the technical error approved by the Ninth Circuit but yet the Second Circuit did not find the petitioner's statutory right to be a substantial right.

Federal Rules of Civil Procedure (FRCP) 62.1: Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal.

Can or should a district court rule on a timely FRCP 60(b) motion that includes a harmful error affecting substantial rights that is pending in appeal court without a conjunctive FRCP 62.1 motion?

- Should the district court only choose to hear or make an indicative ruling on a FRCP 60(b) motion if it includes an affected substantial right instead of deferring it until the court receive the mandate?

A ninth circuit ruling indicates that the three options under FRCP 62.1(a) are completely at the discretion of the court even if a substantial right was affected by a harmful error. "In considering these options, the district court is free to consider new evidence at its discretion." NewGen, LLC v. Safe Cig, LLC (9th Cir. 2016). The FRCP 62.1 was adopted in 2009 and it does not indicate the circumstances under which a district court can defer a FRCP 60(b) motion, including motions containing affected substantial right.

On the other hand, a second circuit ruling suggests that a district court should exercise due discretion in protecting a substantial right. According to Rousset v. Atmel Corp (2d Cir.2017), the court "review the denial of motions under Fed. R. Civ. P. 60(b) for abuse of discretion, see Gomez v. City of New York, 805 F.3d 419, 423 (2d Cir. 2015), which [the court] identify when "(1) [the court's] decision rests on an error of law (such as application of the wrong legal principle) or clearly erroneous factual finding, or (2) [the court's] decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions," McDaniel v. Cty. of Schenectady, 595 F.3d 411, 416 (2d Cir. 2010) (internal quotation marks omitted). We apply the same standards to the denial of indicative relief pursuant to Fed. R. Civ. P. 62.1."

- Is a FRCP 62.1 motion required for the district court to act on a FRCP 60(b) that includes an affected substantial right?

A ninth circuit ruling shows that a FRCP 62.1 motion is not needed to initiate a limited remand to the district court for an indicative ruling. "Unlike our sister circuits, we have never addressed whether a limited remand is permissible without first moving in the district court under FRCP 62.1 for a targeted "indicative ruling." We hold that it is permissible, and in this case, a limited remand is appropriate so the government can move for dismissal of the remaining claims....Although this is an issue of first impression for us, other circuits have not treated a FRCP 62.1 motion as a prerequisite for ordering a limited remand. Instead, courts have been willing to construe district court actions as indicative rulings even when no FRCP 62.1 motion (or, in the criminal context, a resentencing motion under 18 U.S.C. § 3582(c)) was filed." Mendia v. U.S. Department of Homeland Security (9th Cir. 2017).

- Does a circuit court's mandate of dismissal makes a timely FRCP 60(b) motion in district court that included a harmful error affecting substantial rights moot?

A second circuit ruling shows that its mandate of dismissal makes a timely FRCP rule 60(b) motion moot even though the court went on to demonstrate that the rule 60(b) motion would have failed if it was evaluated. The "return of the mandate to the district court rendered the Rule 62.1 motion moot because it was no longer necessary for the district court's jurisdiction to consider the concomitant Fed.

R. Civ. P. 60(b) motion." Rousset v. Atmel Corp. (2d Cir. 2017). On the other hand, a ninth circuit ruling shows that a litigant is not restricted from filing a motion presuming that it is not untimely according to established rules. "Nothing in the Local Rules prevents litigants from raising issues in a Rule 60(b) motion that were previously raised in a Rule 62.1 motion. See Local Rules – Central District of California, L.R. 7-18 (only disallowing motions for reconsideration that repeat arguments made in "the original motion" (emphasis added)). Appellants are therefore free to move in district court for reconsideration under Rule 60(b) on the basis of the two hearing transcripts they received after the district court's denial of their original motion to dismiss." Holloway v. Bartman Horn City of Pasadena (9th Cir. 2017).

Here, the petitioner filed a timely FRCP 60(b) motion that included at least one harmful error affecting substantial rights while the case was pending in appeal court. The FRCP 60(b) motion did not included an explicit FRCP 62.1 motion. The district court deferred hearing the motion until it received the mandate. Upon receipt of the mandate, the district grant motion for ECF but subsequently noted FRCP 60(b) motion was moot and untimely. There are conflicting perspectives held by at least two United States Court of Appeals, the Second Circuit and the Ninth Circuit, on FRCP 60(b), FRCP 61, FRCP 62.1 (or FRAP 12.1). The resolution of these conflicting perspectives will be beneficial to the appeal courts and others with similar inconsistent rulings across different jurisdictions.

CONCLUSION

The petition for writ of certiorari should be granted given the conflicting rulings and point of views between Circuit Courts and the relevance of my case to others similarly situated. Thank you!

Respectfully submitted,

N. Weir

Date: 04/23/2019

CERTIFICATE OF COMPLIANCE

I, Nicholas Weir, certify that this petition for writ of certiorari contains 9,000 words or less.