

Supreme Court, U.S.
FILED

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No. 19-1170

In the
Supreme Court of the United States

RICKY W. CAMPBELL,

Petitioner,

v.

CHAD WOLF,
ACTING SECRETARY OF HOMELAND SECURITY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If Fed. R. Civ. P. Rule 12(b)(1), grants 21 days for a party to respond after being served, why would the Fourth Circuit Court uphold an allegation by the Respondent that the Petitioner did not file a timely response, which was filed on the 15th day after it was received?
2. 42 U.S.C. § 2000e-5(e)(1), states that a plaintiff “shall” file an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days after an “alleged unlawful employment practice occurred.”; why would the Fourth Circuit Court uphold an argument that a claim not filed within 45 days and less than 180 days was not timely filed?
3. Would the Fourth Circuit Court be considered to have ignored Federal Rules of Civil Procedures when it stated in its Order that the (II. Legal Standard)(A.) Motion to Dismiss Under Fed. Civ. P. 12(b)(1), Plaintiff failed to exhaust the requirement of antidiscrimination functions as a jurisdictional bar, when in fact the Plaintiff clearly demonstrated that he exhausted all requirements and there were no other avenues to be explored?
4. Did the Fourth Circuit Court ignore the U.S. Supreme Court ruling when it failed to consider the U.S. Supreme Court’s affirmation in *Staub v. Proctor Hospital*, 131 S.Ct. 1186, 1194 (2011), when stating in its order that Plaintiff’s claim cannot prove a causal connection between his prior EEO activity and his non-selection for a STSO position? The Supreme Court ruling states that an employer is liable when a supervisor acting with a discriminatory motive uses

a delegated authority to cause an adverse employment action.

5. Did the Fourth Circuit ignore the U.S. Supreme Court ruling when it ignored the fact that Plaintiff met all the requirements of a causal connection concerning the Respondent's Assistant Federal Security Director (AFSD Stanton), his prior EEO activity and his non-selection for an STSO position?

LIST OF PROCEEDINGS

United States Court of Appeals, Fourth Circuit
No. 19-1427

Ricky W. Campbell, Plaintiff-Appellant v.
Kevin McAleenan, Acting Secretary, Department of
Homeland Security, Defendant-Appellee

Date of Final Opinion: August 26, 2019

Date of Rehearing Denial: November 5, 2019

United States District Court of the Western District
of North Carolina

3:17-cv-707-RJC-DCK

Ricky W. Campbell, Plaintiff v. *Kirsten M. Nielsen*,
Secretary of Homeland Security, Defendant

Date of Final Order: March 15, 2019

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OPINIONS BELOW

Memorandum Opinion of the United States Court of Appeals for the Fourth Circuit is affirmed and is reported at App.1a and is published on August 26, 2019. Order of Rehearing Denial is stated on November 5, 2019 and reported at App.23a. Order of the United States District Court of the Western District of North Carolina stated on March 15, 2019 is reported at App.3a.



JURISDICTION

This Court has jurisdiction of this petition to review the judgment of United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254(1). The Fourth Circuit's memorandum opinion was filed on October 2, 2019 and Petitioners' Petition for Rehearing and Rehearing En Banc was denied on November 5, 2019 and received by the Petitioner on November 8, 2019.



STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-5(e)(1)

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Fed. R. Civ. P. 12(1)(b)

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;

N.C. Gen. Stat. 1A-1, Rule 56(c)—Summary Judgment

(c) Motion and proceedings thereon.—The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits at least two days before the hearing. If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the affidavit within the required time.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of

damages. Summary judgment, when appropriate, may be rendered against the moving party.



STATEMENT OF THE CASE

On December 14, 2012, Plaintiff filed an EEO complaint wherein he claimed that the Agency discriminated against him in reprisal for his prior protected EEO activity under Title VII and subjected him to a hostile work environment when:

- (1) On or about February 4, 2012, Complainant was not selected for the Supervisory Transportation Security Officer (STSO) position advertised via Vacancy Announcement (VA) CLT-12-444666.
- (2) On or about April 5, 2012, Complainant was not selected for the Supervisory Transportation Security Officer (STSO) position advertised via Vacancy Announcement (VA) CLT-12-469756.
- (3) On or about August 4, 2012, Complainant was not selected for the Supervisory Transportation Security Officer (STSO) position advertised via Vacancy Announcement (VA) CLT-12-516492.
- (4) Between August 21 and 23, 2012, Complainant was denied the opportunity to work overtime hours.
- (5) On February 22, 2013 a Transportation Security Manager stated that the scheduled overtime shift Complainant had worked the

previous day was "illegal", and Complainant was not paid for the hours he had worked.

The Defendant has alleged:

- A. That Plaintiff's claims 1, and 2 lack subject matter jurisdiction because Plaintiff did not properly and timely exhaust his administrative remedies.
- B. That Plaintiff's claim 3 cannot prove a causal connection between his prior EEO activity and his non-selection for a STSO position.
- C. That Plaintiff's claim 4 cannot prove a causal connection between his prior EEO activity and denial of the opportunity to work overtime.
- D. That Plaintiff's claim 5 cannot prove a causal connection between his prior EEO activity and the refusal to pay him overtime wages for hours worked during his regularly scheduled shift.

CLAIM A

Fed. R. Civ. P. Rule 12(b)(1), grants 21 days for a party to respond after being served. The Plaintiff received Defendant's Motion on March 8, 2018. Plaintiff's response was filed on March 23, 2018. Plaintiff's response was filed 15 days after it was received. Plaintiff's response was timely.

Prior to filing this action in District Court: Plaintiff filed an EEO complaint and litigated all claims of retaliation in administrative proceedings before the EEOC. On October 5, 2012, Plaintiff initiated the

administrative complaint process by contacting an EEO counselor.

Plaintiff filed a formal administrative complaint with TSA on December 4, 2012. After an independent EEO investigator investigated Plaintiff's claims, the investigator issued a report of investigation (ROI).

Plaintiff requested a hearing before an EEOC Administrative Judge. After the parties had the opportunity to conduct full discovery, the Administrative Judge granted TSA's motion for summary judgment on all six of Plaintiff's claims.

Plaintiff appealed the Administrative Judge's order to the EEOC Office of Federal Operations ("OFO"). On October 27, 2017, OFO denied the appeal and affirmed the Administrative Judge's order.

On December 6, 2017 Plaintiff timely filed this action with the District Court.

Plaintiff has clearly and timely exhausted all possible administrative remedies.

Under Title VII of the Civil Rights Act of 1964, a plaintiff "shall" file an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days after an "alleged unlawful employment practice occurred.

42 U.S.C. § 2000e-5(e)(1).

The United States Court of Appeals for the Ninth Circuit held that a Plaintiff may sue on claims that would ordinarily be time barred so long as they either are "sufficiently related" to incidents that fall

within the statutory period or are part of a systematic policy or practice of discrimination that took place, at least in part within the limitations period.

The Defendant does not disagree that claim number 3 was filed within the 45 day qualifying time period. Claims 1 and 2 each fall within 180 days of the last incident.

Furthermore, EEOC's Ongoing Harassment / Hostile Work Environment Clause state that you must file your charge within 180 or 300 days of the last incident of harassment, they will look at all incidents of harassment when investigating the charge, even if the earlier incidents happened more than 180/300 days earlier.

CLAIM B

The Supreme Court affirmed in *Staub v. Proctor Hospital*, 131 S.Ct. 1186, 1194 (2011) that anyone who played a role in this action had a unlawful motive that satisfies 4311(C)(I) and the burden shifts to the employer to show it would have done the same thing anyway.

Further, an employer is liable citing *Staub v. Proctor Hospital*, when a supervisor acting with a discriminatory motive uses a delegated authority to cause an adverse employment action.

The Supreme Court further states that the actions of the Supervisor committing the adverse act could be acting with or without knowledge that his actions are in violation of Title VII.

In order to establish a prima facie case Plaintiff must allege (1) that he engaged in protected conduct, (2) that he suffered and adverse action, and (3) that

“there was a causal connection between the protected activity and the asserted adverse action.”

Plaintiff has established that Defendant’s DFSD Jordan (Selecting Official) met all the criteria for the establishment of a *prima facie* case.

Claims number 1, 2, 3, 4 and 6 each become a part of the established *prima facie*.

In addition, Defendant’s AFSD Stanton (Recommending Official), denied the Plaintiff the opportunity to interview for the posted position of Supervisor (STSO).

The Plaintiff filed a claim of discrimination against Defendant’s AFSD Stanton (Recommending Official). Plaintiff accused AFSD Stanton of being a Racist under Title VII and that Claim was being investigated by Defendant’s DFSD Kurt Jordan (Selecting Official) while the Plaintiff was interviewing for a promotion referenced in Claims number 2, and 3, with AFSD Stanton as the Recommending Official.

Plaintiff was not recommended by AFSD Stanton.

The Plaintiff had filed an EEOC charge and Civil Suit against DFSD Jordan, who was the Selecting Official in Plaintiff’s Claims 1, 2, and 3. DFSD Jordan was investigating AFSD Stanton, Recommending Official, on Title VII Discrimination charges against Plaintiff while AFSD Stanton was the Recommending Official on Plaintiff’s Claims number 2 and 3.

Clearly meeting all the criteria for the establishment of a *prima facie* case.

CLAIM C

The law is clear that summary judgment is only appropriate if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that any party is entitled to a judgment as a matter of law. N.C. Gen. Stat. 1A-1, Rule 56(c) (2011).

There exists a genuine issue of material fact that only the examination of all pleadings, depositions, answers to interrogatories and admissions of file can satisfy.

Further stating, anytime there is dispute of material fact, then summary judgment is inappropriate.

CLAIM D

Regarding Plaintiff's claims 5, Defendant has not offered any supporting documentation that would support its actions.

Plaintiff has offered Agency documentation that would support that an employee should have been paid for at least 2 hours of overtime even if he reported to work and was sent home without working one minute.

Plaintiff's claims 4 and 5 falls under the jurisdiction of *Staub v. Proctor Hospital*, 131 S.Ct. 1186, 1194 (2011). An employer is liable citing *Staub v. Proctor Hospital*, when a supervisor acting with a discriminatory motive uses a delegated authority to cause an adverse employment action.

The Supreme Court further states that the actions of the Supervisor committing the adverse act could

be acting with or without knowledge that his actions are in violation of Title VII.



REASONS FOR GRANTING THE PETITION

This Court should grant this petition and review the judgment of the court of appeals because its decision is in conflict with Fed. R. Civ. P. Rule 12(b)(1), granting 21 days for a party to respond after being served.

The court of appeals affirmation of Defendant's allegation that Plaintiff failed to exhaust the requirement of antidiscrimination functions as a jurisdictional bar, conflicts with Title VII of the Civil Rights Act of 1964; a plaintiff "shall" file an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days after an "alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1)",

The Defendant does not disagree that claim number 3 was filed within the 45 day qualifying time period. Claims 1 and 2 each fall within 180 days of the last incident.

EEOC's Ongoing Harassment/Hostile Work Environment Clause states; that you must file your charge within 180 or 300 days of the last incident of harassment, and the Fourth Circuit ruling conflicts with this court's ruling in *Staub v. Proctor Hospital*, 131 S.Ct. 1186, 1194 (2011). An employer is liable citing *Staub v. Proctor Hospital*, when a supervisor acting with an adverse employment action.

Further stating, anytime there is dispute of material fact, then summary judgment is inappropriate.



CONCLUSION

For the above and foregoing reasons, Petitioner request the issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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