

IN THE
Supreme Court of the United States

EDINA HARSAY,
Petitioner,

v.

UNIVERSITY OF KANSAS,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of the State of Kansas

PETITION FOR REHEARING
OF ORDER DENYING
PETITION FOR A WRIT OF CERTIORARI

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**PETITION FOR REHEARING
OF ORDER DENYING
PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Edina Harsay, respectfully submits this Petition for Rehearing of an order denying her petition for a writ of certiorari, pursuant to Rule 44.2 of the Rules of the Supreme Court of the United States. The order denying the petition for writ of certiorari was filed on October 7, 2019.

INTRODUCTION

In the Question Presented in my Petition for Writ of Certiorari, I stated claims under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Only the rationale for my claim under the Equal Protection Clause is apparent in the Question, because I could present only this rationale succinctly, as required by this Court's Rules. But my claim under the Due Process Clause is also fundamental to this case and it is the stronger of my two claims, so I wish to ascertain that the Court is aware that I presented this as a separate claim that has more grounds than what is apparent in the Question Presented. I do not make new claims under the Due Process Clause in this Petition for Rehearing, but I add clarifications to my claim based on a United States Court of Appeals opinion that became available after I filed my Petition for Writ of Certiorari.

The concepts in the recent case are not novel, but the legal analysis was more applicable to my situation than the case law that I had found earlier.

The second rationale for my Petition for Rehearing is that this Court decided not to grant my Petition for Writ of Certiorari without first requesting a Response from the opposing party in this case, the University of Kansas. I realize that it is very common not to request a Response when this would almost certainly needlessly burden the opposing party. But in my particular situation, I believe that a Response is critical for determining whether or not my case is worthy of consideration. This is because I claim that the Kansas Supreme Court knowingly misrepresented both the legal and factual aspects of my case in order to conceal that it was not following Kansas law. Thus, it is not possible to fairly judge my claims based primarily on the Opinion of the Kansas Supreme Court.

On its own, a denial of my right to adjudication under current Kansas law is probably not a violation of my rights under federal law. But the misrepresentations that conceal the denial of my rights under Kansas law are a serious violation of my due process rights under the Fourteenth Amendment, especially because of the severe damage they cause to my reputation and future employment prospects. Furthermore, it is not possible for this Court to ascertain whether or not adequate state grounds exist for the Kansas Supreme Court's judgment without considering whether or not my case was properly presented in that court's Opinion. This surely is an unusual

and serious situation, and for that reason, especially as a *pro se* litigant, I likely have little if any perceived credibility without indication from the University that my claims of misrepresentation are correct.

The issue at hand is not a disagreement on facts or disagreement on interpretation of the law. I believe that the Kansas Supreme Court realized that my legal arguments were correct, and for that reason, failed to acknowledge their existence in its Opinion, much less address them. The University likewise did not refute my key legal arguments (it mostly ignored them), nor did it deny that my presentation of the facts were correct. Thus, I believe that a Response from the University would support my claims, at the very least by not refuting them.

THIS CASE SATISFIES THE REQUIREMENTS
FOR "STIGMA-PLUS"

My case started as an employment case in Kansas state courts, but my claims before this Court concern violations of my federal constitutional rights not by an employer but by the Kansas Supreme Court. Most of the relevant case law concerning the deprivation of liberty interest of the sort I claimed in my Petition for Certiorari (Pet. Cert. at 25) involve violation of rights by an employer, and I did not cite this case law because the analyses did not readily translate to my case. However, a June 2019 opinion from the United States Court of Appeals For the Seventh Circuit, *Doe v. Purdue Univ.*, No. 17-3565 (7th Cir. Jun.

28, 2019) likewise involved a liberty interest similar to the sort I claim, and that case did not involve an employer. It thus provides an example of a more broadly relevant analysis that now helps me to more clearly present my claim. The case involved harm to a student's reputation that resulted in expulsion from a Navy ROTC program and loss of a scholarship; the student failed in his claim for deprivation of property interest, but he prevailed in his claim for loss of "occupational liberty." A thorough explanation of his situation was sufficient to establish the deprivation of a liberty interest (that is, he did not need to provide evidence of failed attempts to pursue his chosen occupation).

I claim a deprivation of a liberty interest because the misrepresentation of the University's tenure review by the Kansas Supreme Court severely harms my professional reputation and severely restricts my "occupational liberty," the ability to pursue occupations in my chosen field, or even occupations in other fields that require a similar level of ability and education. Occupational liberty is protected by the Constitution; see, e.g., *Greene v. McElroy*, 360 U.S. 474, 492 (1959). The effects of a violation of this sort by an appellate court is especially severe in modern times because courts post opinions on the World Wide Web, and thus the opinions are readily available to anyone on Planet Earth with an internet connection, even when this information is not intentionally sought. The days are long gone when court opinions had to be accessed in law libraries and thus were largely restricted to legal professionals. Be-

cause of the potential for great harm, it has become crucial for courts to present the facts of a case with great care and honesty, and also to provide a post-deprivation remedy when errors or misrepresentations occur.

In order for me to establish a claim on liberty interests, this Court's precedent requires that I satisfy a "stigma-plus" test, which requires that I "show that the state inflicted reputational damage accompanied by an alteration in legal status" that deprived me of a right that I previously held. See *Doe v. Purdue Univ.*, No. 17-3565, at *11 (7th Cir. Jun. 28, 2019); *Paul v. Davis*, 424 U.S. 693, 708-09 (1976). The "plus" component of the "stigma-plus" test is most often the loss of employment status, but as in *Doe*, it is more broadly defined. In my case, prior to the Kansas Supreme Court's Opinion, I had prevailed at the Court of Appeals, which ordered the University to perform an entirely new year-long tenure review process for me (Pet. Cert., App. 22b). Because of the extraordinary length of time it took for the District Court to render an opinion in my case (Pet. Cert. at 3), and the necessity for me to wait for a resolution (see Aplt. Motion for Rehear. Modif, Court of Appeals), the remedy provided by the Court of Appeals was the sole remaining route to regaining access to my research lab (equipment, strains and reagents) and recover my academic research career. The Kansas Supreme Court deprived me of this remedy (a change in my legal status), and thus its judgment and opinion satisfy the requirements of "stigma-plus."

INFRINGEMENT OF MY LIBERTY INTERESTS VIOLATED
BOTH SUBSTANTIVE AND PROCEDURAL DUE PROCESS

In my Petition, I claimed that the deprivation of my liberty interests was a violation of both substantive and procedural due process rights (Pet. Cert. at 25), but I did not provide much argument or authorities to support my claim. The claim of violation of substantive due process is appropriate because much of the harm caused by the Kansas Supreme Court's handling of my case cannot ever be procedurally remedied, most of all the severe distress over a very extended period of time, but also the loss of productivity, income, and irreparable harm to my reputation and academic career. Yet, it was possible to remedy and prevent some of the future harm with a rehearing and/or modification of the court's Opinion, and I requested this remedy (Pet. Cert. at 10). By denying my request without any comment (Pet. Cert. App. 1c), the Kansas Supreme Court violated my procedural due process rights by refusing to provide a post-deprivation remedy. “[D]eprivation of procedural due process ‘is not complete unless and until the State refuses to provide due process. *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). In other words, a plaintiff does not suffer a violation of his procedural due process rights unless and until the state refuses to make available a means to remedy the deprivation.” *McKinney v. Pate*, 20 F.3d 1550, 1563 (11th Cir. 1994).

LACK OF CANDOR AND MISLEADING STATEMENTS IN A
COURT OPINION VIOLATE BOTH SUBSTANTIVE AND
PROCEDURAL DUE PROCESS

In my Petition for Certiorari, the primary reason that I gave for my claim of a violation of my substantive due process rights was that the Kansas Supreme Court's refusal to apply current law, and refusal to acknowledge the existence of my legal arguments, was a violation of our "system of ordered liberty" (Pet. Cert. at 24-25). The court's treatment of my case was an unexpected "arbitrary action" and an abuse of power. This is not how the public expects our courts to behave. The Fourteenth Amendment was originally intended to prevent and help fight such abuse of governmental power. It was particularly grievous to deny the right to a law (while concealing that denial) when that law had the intent to empower the People to challenge state agency decisions; that is, to provide a mechanism to challenge the abuse of power. Yet, while "substantive due process" is a well-established concept and I believe that it applies here, I recognize that it is controversial concept, so it is beneficial to argue that procedural due process also applies here. See, e.g., *Timbs v. Indiana*, 139 S. Ct. 682, 692 (2019) ("[T]he oxymoronic "substantive" "due process" doctrine has no basis in the Constitution....") (Justice Thomas, concurring in the judgment.)

Professor David Shapiro has argued that judicial candor, that is, honesty in explaining the reasons

behind a court's decision in its published opinion, is an absolute obligation:

In many ways, I believe, candor is to the judicial process what notice is to fair procedure. All procedural rights to be heard and to have counsel depend on the adequacy of notice, and thus a good case can be made that notice should be a nonwaivable right. Similarly, the fidelity of judges to law can be fairly measured only if they believe what they say in their opinions and orders, and thus a good case can be made that the obligation to candor is absolute.

David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731, 750 (1987).

I believe that it would be fair and beneficial to assert that judicial honesty is an essential component of procedural due process.

CONCLUSION

The issue of perceived credibility when advocating as a *pro se* litigant is a disadvantage even for an attorney. A further disadvantage for me (besides the obvious lack of extensive expertise) is that, even if this Court finds the issues that I present worthy of its consideration, it may wish for a case of this nature to be in more capable, expert hands before granting a petition. It is true that the case is more challenging for me than it would be for an attorney, and I might make some mistakes. Yet, my status as

pro se is an integral part of this case. Had I been represented by an attorney, it is very unlikely that the Kansas Supreme Court would have violated my due process rights in the manner that it did. Academic deference was not likely the sole reason for why I was not treated with the same level of respect and professionalism as is more typical of that court. A *pro se* status on its own should not preclude me from equal protection of the laws, and equal consideration even before this Court. Lastly, the area of law in my case should be understandable even by people who are not legal experts. We should all understand our rights under the Constitution, and we should all be willing, and allowed, to defend those rights.

I respectfully request that this Court assist me in defending my rights by reconsidering my case, and deciding whether or not to grant my Petition for Writ of Certiorari only after first considering a Response from the University of Kansas.

Dated: November 1, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

EDINA HARSAY
Petitioner

v.

UNIVERSITY OF KANSAS
Respondent

As required by Supreme Court Rule 44.2, I certify that this petition for rehearing of an order denying a petition for a writ of certiorari is restricted to the grounds specified by Rule 44.2. The petition for rehearing is presented in good faith and not for delay, and it is restricted to substantial grounds not previously presented.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 1, 2019.



Edina Harsay