No. 19-690

In The
Supreme Court of the United States

TINA NEVILLE,

Petitioner,

v.

JANET DHILLON, CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*

Respondents.

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

REPLY IN SUPPORT OF PETITION

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Introduction

This Reply Brief responds to arguments in Respondents' Opposition Brief not adequately anticipated and argued against in Petitioner's initial November 27, 2019, *Writ of Certiorari* ("Petition"). Petitioner, through counsel, reaffirms, adopts, and incorporates her Petition. The failure to explicitly restate in this Reply any arguments in the Petition or address any argument in the Opposition Brief does not constitute a concession to those arguments.

Argument

1. Petitioner Has the Right to Utilize EEOC Administrative Process and Petitioner may Bring a Title VII Suit in Federal Court.

Under 32 U.S.C. §709(f)(5), Duel Status Technicians ("DSTs") are permitted to appeal Title VII complaints to the Equal Employment Opportunity Commission ("EEOC") when such complaints do not "concern[] activity occurring while the member is in a military pay status, or concern[] fitness for duty in the reserve components…" 32 U.S.C. §709(f)(4-5). This right to EEOC access is an existing right derived from 42 U.S.C. §2000e-16(a) and from DSTs' status as federal civilian employees under 32 U.S.C. §709(e). As conceded by Respondents, "Congress' [2017 National Defense Authorization Act ("NDAA")] amendment was meant to *clarify* access to an administrative appeal…" that has already existed. Government Opposition Brief (Gov Opp) at 20 (emphasis added). The 2017 amendment was not meant to *create* access to an administrative appeal because a right to such access has already existed.

Respondents have conceded that Petitioner had an existing right to access EEOC Title VII process. *See* Gov Opp at 14; *Id*. at 18-20. Thus, it must also be true that EEOC could process Petitioner's claim. By conceding that Petitioner, as clarified by Congress, had a right under 32 U.S.C. §709(f)(5) to appeal her complaint to EEOC, Respondent has also by logical necessity conceded that EEOC held proper jurisdiction over Petitioner's complaint since her complaint did not "concern[] activity occurring while the member is in a military pay status, or concern[] fitness for duty in the reserve components…" 32 U.S.C. §709(f)(4); *See* Pet. at ("[N]othing in the record that . . . indicate[d] any of the discrimination occurred during [Petitioner's] weekend work in her military capacity."). This concession as to jurisdiction holds two consequences for Respondents.

First, having jurisdiction over Petitioner's compliant under §709(f)(5) requires that EEOC be authorized to investigate Petitioner's complaint, as EEOC has done, and be able to issue corrective orders when necessary to alleviate unlawful discrimination, as EEOC has also done. Under 42 U.S.C. §2000e-5, Part 1 of 6, 42 U.S.C. §2000e-16, and 29 C.F.R. §1614.502, EEOC orders are binding upon federal agencies. The agency has a legal obligation to comply with the order. The non-compliant agency has, essentially, three options upon receipt of an EEOC order. The agency can take corrective measures to become compliant with EEOC order, usually in reinstating the wrongfully terminated petitioner and/or issuing backpay. The agency can, under 29 C.F.R. §1614.502(b), request that EEOC reconsider the matter. If the agency requests reconsideration, they must still provide temporary relief. Finally, a

non-compliant agency can elect to simply ignore EEOC, as the Federal Defendants have done here. *See* Pet. at 22; Gov Opp at 9.

When an agency refuses to comply with an EEOC order the complainant may petition EEOC for enforcement under 29 C.F.R. §1614.503(a). A petition for enforcement may escalate to the Office of Federal Operations, on to the Commission, and ultimately up to the Office of Special Counsel ("OSC") which may initiate a civil suit. 29 C.F.R. §1614.503(a-f). And when EEOC has determined that an agency is refusing to comply with an order, EEOC must notify the petitioner of that agency's continued refusal and must notify the petitioner of their right to file a civil action in district court to seek judicial review of the agency's refusal to implement EEOC orders. 29 C.F.R. §1614.503(g). By either avenue, through OSC or through a petitioner filing a civil action, non-compliance with an EEOC order ultimately demands judicial review.

Second, by conceding that Petitioner has access to EEOC process under 32 U.S.C. §709(f)(5), Respondent has by logical necessity also conceded that Petitioner had a cause of action to bring her compliant before a federal district court, because this method of judicial review is inseparable from EEOC process. Judicial review is a key component of the organic statutes establishing EEOC. 42 U.S.C. §2000e-5, Part 1 of 6 (f)(1). Judicial review is further guaranteed by EEOC regulations 29 C.F.R. §§1614.310, §1614.407, and §1614.408. 29 C.F.R. §1614.503, which deals with ultimate enforcement of EEOC final orders, further provides that non-compliant agencies may be compelled to follow EEOC

orders through either a civil action filed by OSC or through a civil action filed by the petitioner. 29 C.F.R. §1614.503(g) specifically states that the petitioner may file a civil action for:

> [E]nforcement of the [EEOC] decision pursuant to Title VII … and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act [("APA")], 5 U.S.C. §701 et seq., and the mandamus statute, 28 U.S.C. §1361, or to commence de novo proceedings pursuant to the appropriate statutes.

29 C.F.R. §1614.503(g). Judicial review provisions such as these are vital to the overall functioning of Title VII and of EEOC.

As part of the 2017 NDAA, Congress clarified that DSTs have always had access to EEOC administrative process. 32 U.S.C. §709(f)(5)(**"**[w]ith respect to an appeal…, the provisions of sections 7511, 7512, and 7513 of title 5, and section 717 of the Civil Rights Act of 1991 shall apply…"). Without further language clarifying or limiting exactly which provisions of these laws apply, the Court must assume the plain meaning of the text, that Congress intended the listed laws to apply in their entirety. *See Morton v. Mancari*, 417 U.S. 535, 549, 94 S. Ct. 2474, 2482 (1974) ("[R]epeals by implication are not favored…"). If Congress has intended to amputate any chance for Judicial review from EEOC process, thus making it an entirely unenforceable and moot facsimile of due process, then Congress would have needed to state such an intention expressly.

Respondent has conceded that Petitioner had a right to access EEOC administrative process for her Title VII complaint. Gov Opp at 20 ("Congress' amendment was meant to clarify access to an administrative appeal…"). As discussed above, this logically necessitates EEOC having jurisdiction over Title VII claims from DSTs (as plainly stated by 32 U.S.C. §709(f)(5)). Thus, EEOC having proper jurisdiction, the Federal Defendants are unlawfully refusing compliance with valid mandatory orders from EEOC. The result of this non-compliance, pursuant to EEOC process to which Respondents concede Petition has a right to access, is that Petitioner is authorized to "seek judicial review of the agency's refusal to implement the ordered relief pursuant to the [APA], 5 U.S.C. §701 *et seq.*, and the mandamus statute, 28 U.S.C. §1361, or to commence *de novo* proceedings pursuant to the appropriate statutes." 29 C.F.R. §1614.503(g). Petitioner has an express right to bring her Title VII suit in federal court.

2. The *Feres* Doctrine does not Bar Judicial Review of Petitioner's Title VII Suit.

Respondents argue this suit is barred by *Feres*. Gov Opp at 13. This is incorrect. Respondents correctly state that absent an "express congressional command," members of the military generally may not sue the government for injuries that "arise out of or are in activity incident to [military] service." Gov Opp at 13 (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)). In the present case, said express command exists. A textual analysis of 32 U.S.C. §709(f) shows that §717 of the Civil Rights Act of 1991 ("CRA") applies to DSTs when their appeal does not

concern "activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components…" 32 U.S.C. §709(f)(4-5). The relevant provisions of §717 of the CRA, codified as 42 U.S.C. §2000e-16, include both a prohibition on gender and sex discrimination by federal agencies and a cause of action before federal courts for any employee suffering from such prohibited discrimination. 42 U.S.C. §2000e-16; *see also Id.* at (c) ("[A]n employee…, if aggrieved by the final disposition of [her] complaint, or by the failure to take final action on [her] complaint, may file a civil action as provided in section 706…"). Thus, the statutory text of 32 U.S.C. §709 directs DSTs to another statutory provision that gives them a clear cause of action.

Respondent's contention that the 2017 clarifying language, adding in provisions directing DSTs to appeal under Title VII, reaffirms only the right to an administrative appeal without authorizing a cause of action in federal court is not supported by the text. Gov Opp at 18-20. 32 U.S.C. §709(f)(5) simply directs DSTs to 42 U.S.C. §2000e-16. The text does not abrogate, limit, or otherwise impair the application of 42 U.S.C. §2000e-16. As discussed above, it would be improper for this Court to assume Congress intended to limit the application of 42 U.S.C. §2000e-16 in this way when such a limitation has no basis in the clear intent of Congress as expressed in the statutory text. As written, 32 U.S.C. §709(f)(5) and 42 U.S.C. §2000e-16(c) expressly waive sovereign immunity for DSTs filing Title VII suits not otherwise barred by 32 U.S.C. §709(f)(4). 32 U.S.C. §709(f)(4) ("[A] right of appeal which may exist… shall not extend beyond the adjutant general of the

jurisdiction concerned when the appeal *concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components…*") (emphasis added); *see also Jentoft v. United States*, 450 F.3d 1342, 1345 (Fed. Cir. 2006) (Holding that DST's were barred from pursuing claims "that relate to enlistment, transfer, promotion, suspension and discharge or that otherwise involve the military 'hierarchy.'"). *Feres*, a judicial doctrine, cannot stand against this express Congressional command. This Court has a solemn duty to interpret what the law is, not to create it whole cloth. *See generally Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (Quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) ("It is emphatically the province and duty of the judicial department to say what the law is.").

3. There is a Circuit Split on the Applicability of Feres to DSTs.

Respondent contends that the federal Courts of Appeals are in conformity on their application of *Feres*. Gov Opp at 14-15. This is false. While Respondent is correct insofar as every Circuit agrees that DSTs may not bring Title VII suits against the military based on service-related activity, the yardstick for determining whether the underlying activity is service-related differs between circuits. Some Courts of Appeals, e.g., Sixth Circuit, have maintained a *per se* bar to DSTs filing Title VII suits. They hold that because a DST's job is "irreducibly military," such technicians' claims will always be subject to *Feres*. *Bowers v. Wynne*, 615 F.3d 455, 459 (6th Cir. 2010); *Wright v. Park*, 5 F.3d 586, 588 (1st Cir. 1993). Other courts of appeals, including the

Fifth Circuit, have applied an "incident to service" test on a case by case basis. Pet. 19. Yet other circuits have applied a more lenient "integral to military structure" test. *Overton v. New York State Div. of Military & Naval Affairs*, 373 F.3d 83, 95 (2d Cir. 2004). The Federal Circuit has created a useful list of claims that DSTs may not seek relief for with EEOC. This list is enlightening more for the expansive number of hypothetical claims a DST could raise than for those expressly barred by the Federal Circuit. *Jentoft v. United States*, 450 F.3d 1342, 1345 (Fed. Cir. 2006) (Holding that DST's were barred from pursuing claims "that relate to enlistment, transfer, promotion, suspension and discharge or that otherwise involve the military 'hierarchy.'").

Respondent contends these differences are trivial and that no DST has ever successfully perused a discrimination claim under any interpretation of *Feres*. *See* Gov Opp at 14-15. But this contention is again incorrect. Relegated to a mere footnote in Respondent's opposition brief, a DST in the Virgin Islands successfully maintained a discrimination case in the face of that Court's "integral to military structure" test. *Laurent v. Geren*, No. 2004-0024, 2008 U.S. Dist. LEXIS 81292 at 8-9 (D.V.I. Oct. 10, 2008); *see* Gov Opp at 16.

In *Laurent*, the discriminatory environment created that resulted in Laurent's injuries was not furthering the military mission—the constant sexism, harassment, and mistreatment did not further the mission any more than it did in Petitioner's case. Thus, this case is not subject to *Feres*. Respondents have not attempted to distinguish *Laurent* from the present case. *See* Gov Opp at 16 (Failing to discuss the

facts or merits *Laurent* or how said facts may be distinguished.). Therefore, should be deemed conceded by Repondents. *Hopkins v. Women's Div.*, *General Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003).

While Petitioner's action was unjustly barred by the Fifth Circuit, it could very well have succeeded before the *Laurent* or *Overton* courts. Based on these variances in applying *Feres*, Petitioner would be subject to differences in the circuits sufficient to affect her substantive rights. This Circuit sp lit in applying *Feres* to DSTs will necessitate the involvement of this Court.

4. The Filing of this Action did not Strip EEOC of a Duty to Continue Processing Petitioner's Complaint.

Respondent states EEOC's duty to process Petitioner's claim is merely discretionary and that EEOC has no legal obligation to continue attempts to enforce their final orders. Gov Opp at 20. Respondent states second that EEOC regulation 29 C.F.R. §1614.409 also works to relieve EEOC of all obligations towards Petitioner. Gov Opp at 21. Respondents are incorrect on both counts.

First, EEOC does have a non-discretionary duty to continue processing Petitioner's complaints. The statutory text of EEOC's organic statute clearly states that "[i]n the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission cannot secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and *shall* refer the case to the Attorney

General." 42 U.S.C. §2000e-5, Part 1 of 6(f)(1)(emphasis added). The text "*shall*" denotes a non-discretionary duty which requires EEOC to refer the matter to the AG if EEOC is unable to secure compliance from a government agency. As the record is void of Petitioner's complaint being referred to the AG for investigation and void of prosecution against the non-compliant agencies, EEOC still has at least one non-discretionary duty it owes to Petitioner. Respondent's attempt to read 29 C.F.R. §1614.503(f) as relieving EEOC of this duty is an impermissible reading. It would position the regulation in direct contravention of EEOC's statutory mandate.

Second, 29 C.F.R.§1614.409 is inapplicable to this case. Through strategic bracketing, Respondents have presented the regulation as "EEOC 'shall terminate Commission processing of [any] appeal'". Gov Opp at 21 (quoting 29 C.F.R. §1614.409). The word *any* does not appear in the regulatory text and, combined with the omission of the critical first half of the sentence, leads to a misrepresentation of the entire provision. The quoted sentence actually states: "Filing a civil action under §1614.407 or §1614.408 shall terminate Commission processing of the appeal." 29 C.F.R.§1614.409. Thus, a plain reading of the regulation does not support Respondent's contention that *any* civil action of *any* appeal will force EEOC to terminate proceedings. Petitioner's action was not filed under §1614.407 or §1614.408. Petitioner's civil action is a mandamus claim filed under 29 C.F.R. §1614.503(g), APA and Mandamus statute. *See* 29 C.F.R. §1614.503(g); 5 U.S.C. §701; *and* 28 U.S.C. §1361. Thus, the primary regulation cited by Respondents to justify dismissal of Petitioner's complaint is not relevant.

5. Respondent's Counsel May Still be Subject to Discipline for Continuing Representation Despite Impermissible Conflicts of Interest.

When operating in federal court, lawyers retain the duty to follow state professional rules of conduct. *See Resolution Trust Corp. v. Bright*, 6 F.3d 336, 341 (5th Cir. 1993) ("The Texas Disciplinary Rules of Professional Conduct [("TDRP")] do not expressly apply to sanctions in federal courts, but a federal court may nevertheless hold attorneys accountable to the state code of professional conduct.") (internal citation omitted). The Fifth Circuit specifically recognizes that state bar rules on attorney conduct apply to attorney conduct in federal courts.

Petitioner's present court matter basically began in federal district court in Texas; therefore, the Texas rules of professional conduct apply to the government attorneys in this matter. Under Rule 1.06 of TDRP, an attorney cannot represent opposing parties to the same litigation and cannot represent two parties whose interests are materially and directly adverse to each other in the same litigation. Tex. R. Prof Conduct 1.06(a). The comment to Rule 1.06 elaborates that an impermissible conflict develops where parties' positions are incompatible regarding an opposing party. *Tex. R. Prof Conduct 1.06* (comment 3).

In the present case, the position of EEOC, as the agency initially attempting to enforce Petitioner's rights under Title VII, are incompatible with the other Federal Defendants who have consistently argued that EEOC orders do not apply to them.

Respondents do not address this conflict of interest in their Opposition Brief, thus the fact that such a conflict exists ought to be conceded. *See* Gov Opp at 22-23; *see also Hopkins* at 25.

Instead of discussing the underlying conflict, Respondents simply state that the AG has sole authority to appoint representation for Respondents. Gov Opp at 22. But this does not absolve Respondent's counsel of their obligations under TDRP. Rule 5.02 states that, "A lawyer is bound by these rules notwithstanding that the lawyer acted under the supervision of another person…". Tex. R. Prof Conduct 5.02. Counsel for Respondents may be working on the orders of an AG supervisor, but they are still subject to TDRP discipline as this Court deems appropriate for continuing representation in the face of an impermissible conflict of interest.

Respectfully submitted,

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