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

PETITION FOR REHEARING

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REQUEST FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI

Petitioner, Tina Neville, humbly asks this Court for a rehearing on her Petition for *Writ of Certiorari* (Petition) on two grounds: First, the following issue has not been heard by any Court to have thus far reviewed this matter: The Equal Employment Opportunity Commission (EEOC) failed to carry out this mandatory duty to refer Petitioner's claim of sex discrimination to the Attorney General (AG) of the United States.

Second, the ruling on this matter from the Fifth Circuit Court of Appeal condones consistent and widespread violations of federal law by the United States government. This Court is the only remaining venue with the power to rectify this longstanding violative pattern. Without a ruling from this Court, the express will of Congress will continue to go ignored.

Procedural Background

This Court denied Petitioner's Petition on April 6, 2020. Petitioner now files for a Rehearing of that Petition.

Legal Standard

While "[t]he right to [rehearing] is not to be deemed an empty formality as though such petitions will as a matter of course be denied," Petitioner respects it does place a heavy burden of persuasion on her. *Robinson v. United States*, 416 F.3d 645, 650 (7th Cir. 2005). Requests for rehearing on a Petition for *Writ of Certiorari* are governed by Supreme Court

Rule 44.2. It states that, "… grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented." Sup. Ct. R. 44.2.

The first stated ground for rehearing, intervening circumstances, has been interpreted by this Court to require 1) an opposite ruling from another Court of Appeals regarding an identically situated litigant appealing from the same incident; 2) a lower court having, previously ruled on the matter with which the petition is concerned, expressing doubt about the rightness of its ruling in a later similar case; and/or 3) a subsequent decision from this Court expressing views favorable to the petitioner. *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965); *see also* U.S.C.S. Supreme Ct R 44, note 2.

The second stated ground for rehearing, other substantial grounds not previously presented, does not have as clear a standard. Instead, "[t]he question under such circumstances must be whether there is any reasonable likelihood of the Court's changing its position and granting certiorari." *Richmond v. Arizona*, 434 U.S. 1323, 1326, 98 S. Ct. 8, 10 (1977); *see also Boumediene v. Bush*, 550 U.S. 1301, 1302, 127 S. Ct. 1725, 1727 (2007) ("Such grounds can hardly provide a basis for believing this Court would reverse course and grant certiorari."). Thus, tautologically, the standard for whether the Court ought to change their mind on a denial of *cert* is whether the grounds argued are compelling enough to change the Court's mind.

Argument

Petitioner through Counsel proffers these grounds are compelling enough to change the Court's mind in denying *Cert*:

1. By the Respondents later acknowledging the EEOC had jurisdiction in this case, the EEOC has a Non-Discretionary Duty to Refer Petitioner's Claims to the AG.

The EEOC has a non-discretionary duty to continue processing Petitioner's complaints. The statutory text of the 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 the EEOC to refer the matter to the AG if the EEOC cannot secure compliance from a government agency. This legal obligation attaches to the EEOC when the agency substantiates the petitioner's claim and is unable to secure voluntary compliance from the suspect government entity. *Hiller v. Okla. ex rel. Used Motor Vehicle & Parts Comm'n*, 327 F.3d 1247, 1252 (10th Cir. Okla. May 6, 2003) ("It is clear, of course, that § 2000e-5(f)(1) requires the Attorney General to be involved in Title VII administrative actions against a [government entity] where there is any indication the discrimination complaint is viable."). This obligation is reiterated in the EEOC's promulgated regulations:

> If the Commission is unable to obtain voluntary compliance in a charge involving a government, governmental agency or political subdivision, it shall inform the Attorney General of the appropriate facts in the case with recommendations for the institution of a civil action by *him or her against such respondent or for intervention by him or her in a civil action previously instituted by the person claiming to be aggrieved.*

29 C.F.R. § 1601.29 (Emphasis added).

The EEOC fully investigated Petitioner's claims and ultimately found for Petitioner, issuing a final order in 2013 from the Office of Federal Operations ordering the federal Defendants to reinstate Petitioner in her former position and to pay Petitioner compensation. Appendix at 5a. This is irrefutable proof that the EEOC substantiated Petitioner's claims. Furthermore, the Government has conceded that the EEOC's orders were not followed, i.e., that the suspect government entities are non-compliant. Government Opposition Brief 7-12. Thus, the EEOC is bound by statute, and by their own regulations, to refer this matter to the AG.

As the record is void of Petitioner's complaint ever being referred to the AG for investigation and potential prosecution against the non-compliant agencies, the 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 the EEOC of this duty is an impermissible reading of the regulation. 29 C.F.R. § 1601.29 expressly

contemplates the matter being referred to the AG *after* the petitioner has initiated a civil action, stating that the EEOC *shall* recommend that the AG initiate a civil action against the non-compliant agency or *intervene* in "a civil action previously instituted by the person claiming to be aggrieved." 29 C.F.R. § 1601.29. Respondents' current argument that the EEOC has no obligations towards Petitioner contravenes the EEOC's organic statutes and to the EEOC's own regulations.

The EEOC has abdicated, in its entirety, its non-discretionary duty to refer this matter to the AG. The EEOC's refusal to carry out this legal obligation is a reviewable offense and an offense that demands redress. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) ("But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."). However, none of the lower courts having reviewed this case have sanctioned, nor even discussed, the EEOC's refusal to carry out its lawful mandate to refer this matter to the AG.

Similarly, in both *Reed v. Lipnic*, 1:2019cv00794 (W.D. Mich., October 1, 2019) and *Smock v. Lipnic*, 1:2019cv00795 (W.D. Mich., October 1, 2019) the National Guard (NG) refuses to obey the EEOC's Orders. The EEOC failed or refuses to refer the matter to the AG for enforcement despite its mandate. As Neville has attempted to enforce similar EEOC Orders on her own, the parties in Reed and Smock are left to stand in where the EEOC failed or refuses to do its mandatory duty to refer their

respective matters to the AG. Thus, as no court has touched upon this issue for Petitioner Neville, the EEOC's misconduct constitutes a "substantial ground[] not previously presented." Sup. Ct. R. 44.2.

Further, remand is appropriate on this matter as the Government litigants have substantially altered their position, i.e., the Government has conceded that the EEOC properly exercised jurisdiction over Petitioner's compliant. Government Opposition Brief at 20[1]; *see generally Lawrence v. Chater*, 516 U.S. 163, 169-73 (1996) (Holding that a remand may be appropriate where a litigant has altered their position or confessed to error.). A concession that the EEOC properly held jurisdiction provides a basis for a Rehearing.

Since the Respondents' have conceded EEOC had jurisdiction, the NG had to comply with the EEOC's Orders. Since the EEOC has as conceded by Respondents have jurisdiction, it has the statutory duty to refer this matter to the AG: Both based on the NG's failure to obey EEOC orders and Neville's

[1] The Government, in a single sentence, made statements in their brief before the 5th Circuit Court of Appeals alluding to the possibility that DSTs' may have a proper right to access the EEOC process, but they did not expressly concede that point until their Opposition Brief before this Court. Docket, October 17, 2018, Brief of Federal Respondents (USCA5th) ("Thus, the "appeal" to which the 2017 amendment refers is an administrative appeal"); Government Opposition Brief at 20. The 5th Circuit Court of Appeals never discussed this possible distinction and the quotation marks in the Government's brief suggest a mere argument in the alternative. Thus, the Government's concession in their brief before this Court that DSTs do have a right to the EEOC process has not been discussed, nor truly presented, before any lower court.

initiation in federal court. See 29 C.F.R. § 1601.29. The EEOC has a statutory duty to act; its failure to act changed the outcome of Neville's case as it's referral to the AG would have allowed the AG to enforce the EEOC's Orders per the EEO laws, *Feres,* and the NDAA.

If parties like Petitioner Neville do not have their rights enforced by the Government as required by its laws, then those who are discriminated against have nowhere to turn for redress.

2. The Ruling of the Lower Courts on this Matter Continues a Lasting Trend of Federal Courts Condoning Violations of Federal Law by the Government.

Petitioner's case is merely a single thread in a larger tapestry of government abuse. While the precise standards used vary by circuit, the United States Courts of Appeals have predominantly fallen on the side of depriving Duel-Status Technicians (DSTs) of their civilian federal employee employment rights guaranteed under 32 U.S.C. § 709(f)(5). *See, e.g., Bowers v. Wynne*, 615 F.3d 455, 460-61 (6th Cir. 2010) (Holding that all Title VII claims filed by DSTs are non-justiciable.); *Leistiko v. Stone*, 134 F.3d 817, 820-21 (6th Cir. 1998) (Finding DSTs to be "irreducibly military in nature" and thus not protected by the Civil Rights Act); *Fisher v. Peters*, 249 F.3d 433, 443 (6th Cir. 2001) (Affirming *Leistiko* and holding that claims from DSTs are barred regardless of the underlying facts of the claim.); *Willis v. Roche*, 256 Fed. Appx. 534 (3d Cir. 2007) (Dismissing the DSTs claim as non-justiciable.); *Overton v. New York State Div. of Military & Naval*

Affairs, 373 F.3d 83 (2d Cir. 2004) (Dismissing the DSTs claim as non-justiciable.).

As Petitioner elaborated in her Petition for *Writ of Certiorari* and in her Reply to the Government's Opposition Brief, DSTs when acting in their civilian capacity are granted a statutory right to Title VII protection by 32 U.S.C. § 709(f)(5). Respondents' prior briefs provide a *carte blanch* dismissal that Congress can never supplant *Feres.* But this is both in contradiction of *Feres*[2] (which states that the Government cannot be sued **unless** supplanted by Congress) and the Equal Employment Opportunity Act of 1972.

Such a right to Title VII protections has always existed due to the DST's status as a federal civilian employee. 42 U.S.C.S. § 2000e-16(a). The 1968 NGTA expressly states that DSTs are federal employees. The 1997 NDAA further clarified that DSTs are Federal *civilian* employee. NATIONAL DEFENSE AUTHORIZATION ACT FOR FY98, 1997 Enacted H.R. 1119, 105 Enacted H.R. 1119, 111 Stat. 1629, 1734. In conjunction with the Equal Employment Opportunity Act of 1972, which states that federal civilian employees of military departments may utilize the EEOC process to sue under Title VII, DSTs have had a clear statutory right since 1972 at the very latest, far predating the events of this case. Equal Employment Opportunity Act of 1972., 86 Stat. 103.

The Government's ability to discriminate against DSTs in their civilian capacity is capable of repetition yet evading review. The continued misapplication of this judicial doctrine is allowing the

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[2] *Feres v. United States*, 340 U.S. 135 (1950).

NG to discriminate against DSTs in their civilian capacity. Recently in *Reed v. Lipnic*, 1:2019cv00794 (W.D. Mich., October 1, 2019) and in *Smock v. Lipnic*, 1:2019cv00795 (W.D. Mich., October 1, 2019), the EEOC found that the parties' respective matters were in the scope of the DSTs' civilian employment. Thus, they were remanded by the EEOC for further processing per EEOC regulations. The NG, as with Petitioner Neville, refused to act on the Orders; all-the-while, the EEOC refused to send the matter to the AG for enforcement. This renders their legal entitlement to EEO rights and the EEOC process per Title VII and 32 U.S.C. § 709(f)(5) meaningless.

In both cases, again similarly to Petitioner Neville, the NG stated that the actions were military in nature since they were in the reserves and working on things that are "military". However, there is no evidence that the various parties were acting in a military capacity at any relevant time. They were all working during their normal civilian hours, they were not on reserve duty, they were not on active duty and it was Reed and Smocks' removal from their civilian employment (not from the NG[3]) that gave rise to their respective EEO complaints!

Without firm guidance by this Court, DSTs will not be free of work-place discrimination as promised by the laws of the United States.

This Court has in the past granted petitions for rehearing on the grounds that failure to do so may aggravate trends that infringe on the proper application of justice. *Florida v. Rodriguez*, 469 U.S.

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[3] At the times relevant, neither party was "removed" from the NG.

1, 11 (U.S. November 13, 1984) (Marshall, J. dissenting) ("The principal ground advanced by Florida in its petition for rehearing was that a succession of clearly erroneous *per curiam* decisions of the State District Court of Appeal was having a devastating effect on its prosecutions."). This is just such a case. The Government is flagrantly violating federal law, i.e., *Feres* and the EEO Act, as passed into law through Congress. These violations directly infringe on the rights of DSTs and will subject them to the devastating effects of work-place discrimination.

Respondents' disregard of DSTs rights are being condoned by the Courts of Appeals. In addition to the basic principle that the government ought to follow validly enacted laws, this trend of violative behavior has deprived DSTs of their EEO rights guaranteed by Congress. This deprivation extends, not only to the individual DSTs brave enough to fight for their rights in court, but to every DST in this nation who will be too intimidated to advocate for their own Constitutional rights as federal employees. These violations are ongoing. In addition to Reed and Smock, the Merit Systems Protection Board has within the past few months ordered the reinstatement of a DST wrongfully terminated from civilian employment in Virginia. *Cruz v. DOD*, 2020 MSPB LEXIS 483 (M.S.P.B. January 31, 2020). Their NG employer will no doubt ignore this mandatory order on the same justification that Respondents have argued in this case.

Congress has spoken.[4] The laws have been passed.[5] The EEOC is failing to refer the NG's blatant failure to comply with the Orders to the AG and the lower courts are not properly enforcing *Feres* and the Equal Employment Opportunity Act of 1972. This Court is the only remaining venue with the power to right these wrongs and to finally make the Government held accountable for these clear violations of federal law.

Conclusion

Because the EEOC has refused to carry out a mandatory duty, and that a refusal by this Court to rule on this case leaves DSTs across this country deprived of their statutory civilian employment protections, Petitioner humbly requests this Court grant a rehearing on her Petition for *Writ of Certiorari* or for a remand back to the lower court for further development on the issues in this Request for Reconsideration.

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[4] Equal Employment Opportunity Act of 1972; NATIONAL DEFENSE AUTHORIZATION ACT FOR FY98, 1997 Enacted H.R. 1119, 105 Enacted H.R. 1119, 111 Stat. 1629, 1734.; NDAA of 2017, 114 P.L. 328, 130 Stat. 2000, 2016 Enacted S. 2943, 114 Enacted S. 2943 at § 512.

[5] See footnote 4, *supra.*

Respectfully Submitted,

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