

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ZAVAGLIA,

Applicant,

v.

BOSTON UNIVERSITY SCHOOL OF

MEDICINE,

Respondent.

*On Application to Stay or Recall the Mandate of the
U.S. Court of Appeals for the First Circuit*

**APPLICATION TO RECALL AND STAY THE MANDATE PENDING THE
FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI**

James Zavaglia
Pro Se Applicant,
25 High St.
Salem, MA. 01970
978-740-0280

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INTRODUCTION

To the HONORABLE STEPHEN G. BREYER, Associate Justice of the Supreme Court of the United States and Circuit Justice for the First Circuit:

Pro Se applicant James Zavaglia petitions Justice Breyer and the Supreme Court for an application to recall and stay the Mandate from the U.S. Court of Appeals for the First Circuit pending the filing and disposition of a petition for a Writ of Certiorari. Federal Rule of Appellate Procedure 41(d) authorizes a stay of this Court's mandate pending the filing of a petition for a writ of certiorari in the Supreme Court; a stay requires a substantial question to be presented in the petition and good cause for a stay. Upon notice to this Court that the petition is filed, the stay continues until the Supreme Court's final disposition of the case. Fed. R. App. P. 41(d)(2)(B). This motion demonstrates the requisite substantial question and good cause, and a stay should therefore be granted. This motion is filed because the appellants' petition for rehearing and rehearing en banc, was denied on

December 10, 2019 **SEE 18-1101 Document: 00117525630 (1st Cir Appeals 2019)** this current motion of which stays the mandate until disposition of the Supreme Court or a contrary order. Fed. R. App. P. 41(d). in this situation a pending Writ of Certiorari. The Court, therefore, should allow this stay motion. Plaintiff-Appellant has already communicated with the United States Supreme Court with procedural inquiries after reviewing that court's rules in preparation to filing a petition for a writ of certiorari. This motion should be granted, because the petition for a writ of certiorari will "present a substantial question," "there is good cause for a stay," and the motion is "not frivolous or filed merely for delay." Fed. R. App. P.41(d)(2)A);

OPINIONS BELOW

The Opinion and Order of the First Circuit Court of Appeals is included as Appendix A. The Appeals Court's Order Denying Defendants' Motion for Stay is included as Appendix B. The First Circuit's Order Denying Defendant's Motion for Stay is included as Appendix C. The First Circuit's Mandate is included as Appendix D

JURISDICTION

The First Circuit issued its opinion on October 31, 2019. Petitioner filed with the First Circuit a petition for rehearing en banc, which temporarily stayed issuance of the mandate. That petition was denied on December 10, 2019. On December 15, 2019, petitioners filed a request with the First Circuit to stay its mandate pending certiorari review by this Court, which again temporarily stayed issuance of the mandate. That request was denied on December 20, 2019. Absent a stay by this Court, the mandate was issued on December 20, 2019. This Court has jurisdiction to recall and enter a stay of the First Circuit's judgment pending review on a writ of certiorari. See 28 U.S.C. §§ 1254(1), 2101(f)

STATEMENT OF THE CASE

A. Factual Background and Procedural History

Below are excerpts of Pro Se Applicant's APPELLANTS' MOTION TO STAY THE MANDATE PENDING A PETITION FOR CERTIORARI SEE 18-1101

Document:00117527519 (1st Cir Appeals 2019) Pro Se Applicant worked for the Defendant for approximately 16 years before Defendant terminated his employment on October 7, 2014. Zavaglia obtained a bachelor's degree in general studies with a Concentration in Photography/Video

and Minors in Media Communications, English, and Political Science. Before coming to work for Defendant in 1998, Zavaglia was employed in various Media jobs. Zavaglia started working in his high school media center which led to a summer job with a local theater company as a Video Consultant, freelance photography and video jobs, working on an independent film as a production assistant, and for various college media centers as a work study student and a part time employee. Zavaglia also work for several political campaigns formally and informally as a Media Consultant, he also worked for a public library as an Audio-Visual Librarian/Senior Library Assistant. He also served on the cable advisory committee in his hometown, he also worked part time for a private audio-visual company going to different hotels and sites to set up audio visual equipment, and as a hobby he would be a media program participant speaking on media psychology and media demographics, media history relating to pop culture, television, and movies. animation, and literary panels of various authors at a local science fiction convention for twenty years and almost a hundred panels. a distinct advantage of attending the convention was that between the various other panel members and attendees, Zavaglia had the opportunity to meet many media, educational, computer hardware and software professionals from educational institutions and the private sector. He would gather information of the latest developments in the tech and educational sectors some

in the early concept or the early development stage. Zavaglia would research the information and go back to work and try to tell upper management what he found out to try to improve the Department with cutting edge information, he was ignored. Months and years later when upper management would inform the staff of new media concept or equipment, Zavaglia would remind them that he spoke to them about the very same thing at an earlier time. Zavaglia would always extend himself to help students, faculty, staff, and deans both formally or informally with any aspect of their curriculum needs, whether it was helping with a student presentation or a dry run of a conference presentation by faculty or dean, Zavaglia always made himself available even if it was after his shift. Additionally, Zavaglia's mother was a nurse for 40 years before she retired, even at a young age Zavaglia would read her continuing medical education information and ask her medical questions. Also, Zavaglia, while in college, took a semester long first responder class, the triage/critical nurse that taught the class went above basic first aid course and taught it as advanced class. When Zavaglia told various staff students and faculty of his medical knowledge they would comment he was the most qualified for his position.

Zavaglia filed a complaint with the EEOC in April 2013 claiming he was discriminated against on the basis of disability citing the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. Sec. 12101, et seq., for employment discrimination on the basis of a disability against a private

employer. Jurisdiction is specifically conferred on this Court by 42 U.S.C. Sec 2000e-5(f), 42 U.S.C. Sec. 12117 (a). Equitable and other relief is sought pursuant to 42 U.S.C. Sec. 2000e-5(g). Id. After corresponding with the EEOC, A letter from the EEOC, included a charge of age discrimination citing Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C Sec. 621, et. seq., for employment discrimination based upon age. Jurisdiction is alleged pursuant to 28 U.S.C. Sec. 1331, 1337, and/or 1343. Equitable and other relief is sought under 29 U.S.C. Sec. 626 (b) and (c) or Sec. 633a(b) and (c). and retaliation citing 42 U.S. Code § 12203 - Prohibition against retaliation and coercion. After an investigation by the EEOC. The investigation was closed in July 23, 2014 and a right to sue letter was issued by the EEOC. Zavaglia was terminated on October 7, 2014 while on intermittent Family Medical Leave Act trying to resolve back injuries sustained by an assault by a fourth-year medical student who is now a practicing doctor this assault was covered up by upper management. An action was filed on October 16, 2014 in Federal District Court as a Pro Se. SEE Zavaglia v BOSTON UNIVERSITY SCHOOL OF MEDICINE, 1:14-CV-13924(1stCir.2018) and moved to the Federal Appeals Court on February 2, 2018. SEE 18-1101(1st Cir Appeals 2019)

ARGUMENT

A stay of the mandate pending a petition for certiorari is warranted under Federal Rule of Appellate Procedure 41(d)(2) because this case presents a substantial question of federal law and the denial of a stay threatens irreparable harm. When the Supreme Court considers similar applications to stay a mandate pending disposition of a petition for certiorari, it considers those factors under a three-part rubric: (1) “a reasonable probability that four

members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari”; (2) “a significant possibility of reversal of the lower court’s decision”; and (3) “a likelihood that irreparable harm will result if **SEE Case: 18-1101 Document: 00117509910** Date Filed: 10/31/2019 that decision is not stayed.” *White v. Florida*, 458 U.S. 1301, 1301 (1982) (Powell, J., in chambers) (citation omitted).

This Court must consider whether there is a probability that the Supreme Court will accept certiorari and whether there is a “fair prospect” of reversal. In its analysis, this Court should consider “the issues that the applicant plans to raise in the certiorari petition ... the Supreme Court’s treatment of other cases presenting similar issues, and the considerations that guide the Supreme Court in determining whether to issue a writ of certiorari.” *Williams v. Chrans*, 50 F.3d 1358, 1361 (7th Cir. 1995) (per curiam). Reasons that support granting a petition for a writ of certiorari include: “[A] United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter ... [or] has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Sup. Ct. Rule 10(a), (c). All of these reasons are present in this case. The substantial question that is presented by previous evidence, cases, statutes and rules as part of the original civil show the Plaintiff Appellant suffered irreparable harm both civil and criminal, and physical at the hands of the Defendant Appellee and was unjustly punished for exercising their rights under state and federal law. This panel erred in its judgement by not allowing the Plaintiff-Appellant an opportunity to cross examine the

Defendant Appellee in front of a jury to see why they blatantly violated criminal and civil state and federal laws against the Plaintiff-Appellant. The Appeals Panel also erred by not giving an opinion of why the Appeal action was dismissed. Secondly two judges with ties to the Defendant-Appellee had to be recused from the rehearing and rehearing en banc proceedings possibly within the parameters of 28 U.S. Code § 455. The Appeals Court could have called upon guest judges so that the Plaintiff-Appellant could have had the benefit of an en banc panel in its entirety.

REASONS FOR GRANTING THE STAY

“To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). These standards are readily satisfied in this case.

I There Is a Reasonable Probability that this Court Will Grant Certiorari and Reverse the Judgment Below.

As stated above and with the accompanying Writ of Certiorari that the applicant's rights were violated, and criminal activity was evident through a cover up with full knowledge of upper management. also, as shown above and as part of the en banc denial two judges with ties to the respondent recused themselves as part of the proceedings. During the applicant's appeal process the panel of judges that were reviewing the case had to change three times because the two judges that recued themselves were on the review panel for

the applicant's case. the panel changed after the after the applicant called the appeals court to discuss the proceedings with their case manager. The applicant has suffered mental abuse, and physical assaults on the job both covered up, one from a supervisor and one later by a fourth year medical student, which has left the applicant with a permanent physical disability. The medical student is now a practicing doctor because of the coverup by the respondent. This situation will be reiterated in the Writ of Certiorari details from the civil and appellate action that was filed by the applicant.

CONCLUSION

Pro Se Applicant James Zavaglia thus respectfully request that this Court grant a stay of its mandate pending the filing and disposition of a petition for a writ of certiorari to the U.S. Supreme Court.

Respectfully submitted,
By the Pro Se Applicant
/s/ James Zavaglia
James Zavaglia (Pro Se)
25 High Street
Salem, MA 01970
(978) 740-0280
jimzsedem@yahoo.com

March 3, 2020

CERTIFICATE OF SERVICE

I certify that on this Third day of March, 2020, the foregoing is being sent via Federal Express for service on all persons registered in connection with this case including:

Lisa A. Tenerowicz (BBO #654188

latenero@bu.edu

Office of the General Counsel

Boston University

125 Bay State Road

Boston, MA 02215

(617) 353-2326

/s/ James Zavaglia

James Zavaglia (Pro Se)

APPENDIX

A. Opinion and Order of the First Circuit Court of Appeals.

B. Order Denying Petition for Rehearing En Banc

C. First Circuit's Order Denying Applicant's Motion to Stay the Mandate

D. The First Circuit's Mandate.

United States Court of Appeals For the First Circuit

No. 18-1101

JAMES ZAVAGLIA,

Plaintiff - Appellant,

v.

BOSTON UNIVERSITY SCHOOL OF MEDICINE,

Defendant - Appellee.

Before

Howard, Chief Judge,
Kayatta and Barron, Circuit Judges.

JUDGMENT

Entered: October 31, 2019

Plaintiff appeals from the dismissal of his claim under the Age Discrimination in Employment Act, and from the grant of summary judgment to defendant on his claims under the Americans with Disabilities Act. Applying de novo review, we affirm, essentially for the reasons stated in the district court's orders dated February 9, 2016 and January 8, 2018.

The judgment of the district court is affirmed. See 1st Cir. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

cc:
James Zavaglia
Lisa A. Tenerowicz

A P P A

United States Court of Appeals For the First Circuit

No. 18-1101

JAMES ZAVAGLIA,

Plaintiff - Appellant,

v.

BOSTON UNIVERSITY SCHOOL OF MEDICINE,

Defendant - Appellee.

Before

Howard, Chief Judge,
Torruella,* Lynch,** Thompson,
Kayatta and Barron, Circuit Judges.

ORDER OF COURT

Entered: December 10, 2019

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
James Zavaglia
Lisa A. Tenerowicz

*Judge Torruella is recused and did not participate in the consideration of this matter.

**Judge Lynch is recused and did not participate in the consideration of this matter.

APP. B

**United States Court of Appeals
For the First Circuit**

No. 18-1101

JAMES ZAVAGLIA,

Plaintiff - Appellant,

v.

BOSTON UNIVERSITY SCHOOL OF MEDICINE,

Defendant - Appellee.

ORDER OF COURT

Entered:

The motion to stay mandate is denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

James Zavaglia

Lisa A. Tenerowicz

APPC.

**United States Court of Appeals
For the First Circuit**

No. 18-1101

JAMES ZAVAGLIA

Plaintiff - Appellant

v.

BOSTON UNIVERSITY SCHOOL OF MEDICINE

Defendant - Appellee

MANDATE

Entered: December 20, 2019

In accordance with the judgment of October 31, 2019, and pursuant to Federal Rule of Appellate Procedure 41(a), this constitutes the formal mandate of this Court.

By the Court:

Maria R. Hamilton, Clerk

cc:

Lisa A. Tenerowicz

James Zavaglia

A P P D