

19-8010

No. 19-

ORIGINAL

In The
Supreme Court of the United States

JOSEPH CHHIM,

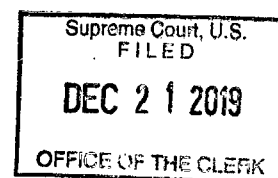
Plaintiff-Appellant,

v.

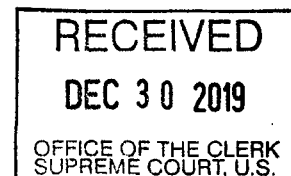
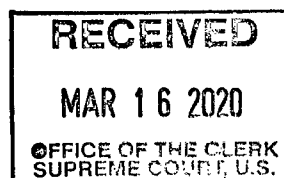
City of Houston; Luna Nelson, In the Official Capacity,

Defendants - Appellees

PETITION FOR WRIT OF CERTIORARI



Joseph Chhim, Pro Se
5634 Windsor Forest Drive
Houston, Texas 77088
Telephone: (832) 855-6743
Email: chhimjoseph100@gmail.com



QUESTIONS PRESENTED

1. Whether Appellant was discriminated against in the initial pre-qualification process when he was qualified for the position of custodian and building maintenance mechanic, but Luna Nelson, General Service Department ("GSD") failed to refer Chhim's applications to the recruiter manager based on her conclusory allegation, without any evidence, that Chhim was terminated in 1995 due to performance? Contrary to the City's allegations, Chhim's yearly performance reviews, found at Appendix G, demonstrate that Appellant Chhim had good performance. Was this a pretext for discrimination?
2. Whether Appellant exhausted his Age and Retaliation claims with the EEOC, whether it was error for the U.S. District Court and the U.S. Court of Appeals for the Fifth Circuit to fail to consider whether Appellant was discriminated against based on "Age" discrimination, and whether he was retaliated against for filing EEOC complaints against The City of Houston?
3. Whether the lower Court erred in not recognizing that Appellant Chhim was entitled, by way of the Settlement Agreement" with the City of Houston dated October 20, 1994, to apply for, be interviewed for and be hired for any job with the City of Houston General Service Department, as long as it was not with the City of Houston Aviation Department, and did the City of Houston violate and breach the Settlement Agreement, thereby entitling Appellant to be considered and hired for the positions for which he applied and for which he was found to be qualified? Exhibit A, of Appendix F, is the Settlement Agreement, between Appellant Chhim and the City of Houston. Pursuant to Paragraph 2, it states "I understand and agree that the City and the Department of Aviation do not admit any fault in any matter and that this settlement is only to make peace and to allow me to start fresh in my new position." Exhibit A of Appendix F.

PARTIES TO THE PROCEEDING

Plaintiff – Appellant is:

Joseph Chhim, Pro Se
5634 Windsor Forest Drive
Houston, Texas 77088
Telephone: (832) 855-6743
Email: chhimjoseph100@gmail.com

Defendant-Appellee is:

The City of Houston

Represented by:

Robert W. Higgason,
Senior Assistant City Attorney
City of Houston Legal Department
900 Bagby, 3rd. Floor
Houston, Texas 77002
Telephone: (832) 393-6481
Facsimile: (832) 393-6259
Email: robert.higgason@houstontx.gov

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JURISDICTIONAL STATEMENT

The Judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on September 26, 2019. The Court of Appeals denied the Petition for Leave to File a Petition for Rehearing Out of Time on November 15, 2019. [App. C]. The Petition for Writ of Certiorari was filed on December 21, 2019. The jurisdiction of the U. S. Supreme Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. Sec. 1254 (1): Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record be sent up for decision of the entire matter in controversy.
2. 42 U.S.C. Sec. 2000e5(b): Power of EEOC Commission to prevent unlawful employment practices. The Commission is empowered to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.
3. Civil Rights Act of 1964: The Civil Rights Act of 1964, ended segregation in public places and banned employment discrimination on the basis of race, color, religion, sex or national origin, and is considered one of the crowning legislative achievements of the civil rights movement. This law protects employees of a company as well as job applicants. Before the Civil Rights Act of 1964 was passed an employer could reject a job applicant because of their race, religion, sex or national origin. An employer could turn down an employee for a promotion, decide not to give them a particular assignment, or in some other way discriminate against that person because of their race, color, religion, sex or national origin and it would be legal.

STATEMENT OF THE CASE

In 1995, after filing a discrimination case against The City of Houston in Civil Action No. H-93-1634, filed with the Texas Workforce Commission, Appellant Chhim and The City of Houston settled the case. The Settlement Agreement allowed Appellant to apply for any job with the City of Houston except for any jobs with the Aviation Department. The jobs that he applied for were not with the aviation department and he was qualified for the positions for which he applied. The City of Houston violated the Settlement Agreement based on discriminatory factors of Race, National Origin, Age and Retaliation. The Settlement Agreement in 1994 did not require that his background be checked before he would be hired under the terms of the Settlement Agreement.

The evidence in Chhims case is to be considered in the light most favorable to him, since this was a Motion for Summary Judgment, and not a trial. Chhim requests that this case be returned to the lower court for further proceedings.

Appellant Joseph Chhim is a United States Citizen of Cambodian descent. On June 2, 2017, Chhim filed a pro se employment discrimination suit against the City of Houston, in Houston, Texas. [Doc. 1;ROA 6-29]. Chhim had applied for the position of custodial lead, custodian and building maintenance supervisor, Maintenance Mechanic III. And other positions related to Appellant Chhims experience, education (including 80 semester hours of building maintenance technology from San Jacinto College, two years (320 clock hours) with Houston Community College in Executive Housekeeping and Supervisory Management, and other related on the job experience which he obtained from working from 1981 thru 1992 in building maintenance and physical plant maintenance with the City of Houston in Houston, Texas.

Chhim was 69 years old at the time of his EEOC Complaint on May 3, 2013. The City of Houston Public Works Department interviewed Chhim for the Custodial lead position and said that he was qualified for the position, but hired someone else. Luna Nelson with the City of Houston General Service Department , on the otherhand, never sent Chhim to be interviewed for any of his other job applications after he had been found qualified for a Custodial lead position. She said that Chhim had been fired from the City of Houston in 1995, but said nothing about the "Settlement Agreement". Chhim had received \$5,000.00 and the

agreement that he could apply for any job with the City of Houston as long as it was not at Bush Intercontinental Airport. The jobs that Chhim applied for were not with the aviation department. Chhim was not interviewed, even though Luna Nelson, with the City of Houston, knew that Chhim was qualified for the job(s). Chhim argues that he was discriminated against based on Age (69), Retaliation against filing EEO Complaints against The City of Houston, Race and National Origin.

Before filing a charge of employment discrimination against the City of Houston, the EEOC amended to include the additional allegations of age and retaliation for filing EEO charges against The City of Houston. Initially Age discrimination and Retaliation were inadvertently left out of the EEOC charge, however, the EEOC amended charge number H46-2013-30998 to include additional allegations of Age and Retaliation on March 7, 2014. The lower court erred when it did not consider age and retaliation discrimination in this case as it was part of the underlying EEOC Complaint investigated and was in the charge. The amendment was attached to the Original Complaint as Exhibit A. [Doc. 1; ROA 6-29; Exh. A – EEOC Charge of Discrimination], as well as age and retaliation discrimination were discussed in the deposition of Appellant by the City of Houston. Exhibit A (EEOC Charge of Discrimination) indicates that the basis of the Complaint is Race, Sex, National Origin, Retaliation and Age. It should be no surprise that age and retaliation were two of the basis of discrimination against Appellant.

INTRODUCTION

Title VII of the Civil Rights Act of 1964 requires individuals complaining of employment discrimination to file a charge with the Equal requirement ensures that the EEOC has an Employment Opportunity Commission (EEOC) before proceeding to federal court. 42 U.S.C. 2000e-5(b), (f). This exhaustion

opportunity to investigate and resolve credible claims of discrimination before those claims give rise to litigation. Further, it guarantees employers fair notice of the charges against them, and a chance to remediate the discriminatory practices being complained of. Appendix D sets out the Charges and Amended Charges that Joseph Chhim exhausted before the EEOC and Appendix I is the deposition of Joseph Chhim taken by The City of Houston Attorney wherein it is discussed on P. 31 of the deposition, lines 1-25 and P. 32 of the deposition, lines 1-25, that Age discrimination and retaliation were exhausted as part of the basis of his discrimination claim.

The Judgment in this case was not based on a trial, or other evidentiary hearing, but on the Report and Recommendation of the Magistrate Judge which ignored the Age and Retaliation discrimination claims all together. Even The City of Houston said that Plaintiff's arguments were "irrelevant", when the basis for Age and retaliation discrimination had been exhausted with the EEOC in his complaint. Tameka Hardison's Declaration which is the basis of The City of Houston's argument and proof and the basis upon which its Motion for Summary Judgment was granted, was conclusory, and did not set out any basis for Joseph Chhim not being interviewed for the many positions for which he had applied and for which he was qualified.

Appendix G, The City of Houston's Job Performance Review and Attendance Statements attached hereto in the Appendix section, show that Chhim's performance was satisfactory and acceptable. It does not indicate that Chhim had unsatisfactory job performance, and certainly did not indicate any specific performance problems that would result in a termination of employment, therefore it indicates that The City of Houston retaliated against Chhim for his filing of the EEOC complaints against The City of Houston. Also Mr. Chhim's performance indicated that he was rehired as Custodial Leader at the City of Houston Convention Center based on his satisfactory performance as indicated in Appendix G. He was hired over 27 candidates.

Appellant believes that the evidence shows that he was discriminated against in the initial pre-qualification process although he was more than qualified for consideration for the jobs for which he was applying. Appellant believes that the reason for not considering him for the job, or for any job with The City of Houston, was a pretext for discrimination. The evidence will show that The City of Houston admitted that Chhim was qualified for the job of Custodial Lead, Building Maintenance Supervisor and Building Maintenance Mechanic II, as well as others, but that he was not interviewed for the rest of the eleven applications for lower level jobs due to discriminatory reasons.

Appellant, since he had been found to be qualified for the Custodial Lead Position, the highest position, by Luna Nelson, he should have been sent for an interview for the rest of his applications. When he was not sent for an interview, when he was found to be qualified for the Custodial Lead Position, the City of Houston discriminated against Chhim based on age, retaliation, race and national origin.

Chhim has shown for retaliation purposes that he (1) engaged in an activity protected by Title VII, namely filing EEOC Complaints against the City of Houston; (2) he was subjected to an adverse employment action when he was not interviewed, or even considered for, or hired for at least one of the positions for which he applied for which it had already been determined that he was qualified; and (3) that a causal link exists between the protected activity and the adverse employment action. *David v. Dallas Area Rapid Transit*, 383 F.3d 319 (5th Cir. 2004).

3. Did the lower Court err in not recognizing that Appellant Chhim was entitled, by way of a "Settlement Agreement" with the City of Houston, to apply for and be interviewed for any job with the City of Houston General Service Department as long as it was not with the City of Houston Aviation Department? Did City of Houston give pretextual reasons for not interviewing Appellant Chhim for the positions for which he applied which reasons appear to be based on Chhim's Age, Race and National Origin and Retaliation?

Judge Nancy Johnson addressed the Settlement Agreement in her Memorandum and Recommendations on which Judge Miller's final order was based. City of Houston had a large file on Appellant for his many years of working for them, and concerning his many EEOC discrimination cases that he had filed against the City for discriminating against him. The City of Houston already knew about his qualifications and that the City of Houston had entered into Negotiations and a Settlement Agreement that said that Appellant was entitled to make application for any job with the City of Houston as long as it was not at with the City of Houston Aviation Department. An applicant, if qualified for the job, would naturally include an interview for which Appellant did not have an interview for his other applications. If he was determined to be qualified for the top job of "Lead", then Chhim should have been qualified for the lower level jobs, and he was not interviewed for any of them. The evidence before this Court indicates that Plaintiff was retaliated against by Defendant City of Houston.

4. Did the lower Court err in not considering the issues of age discrimination and retaliation in this case? Should the case be sent back to the lower Court for further proceedings to consider Age discrimination and Retaliation?

REASON FOR GRANTING THE PETITION

As will be seen hereafter, the decision of the U.S. Court of Appeals for the Fifth Circuit is wrong, and the evidence before the lower courts was not viewed in the light most favorable to Appellant Joseph Chhim when the City of Houston's Motion for Summary Judgment was considered by the Court,

The first example of this is that even though the discrimination bases of Age and Retaliation had been exhausted at the EEOC, both the U. S. District Court and the U. S. Court of Appeals totally ignored the issues of Age and Retaliation discrimination and did not consider them.

The evidence that was considered was not considered in the light most favorable to Appellant Joseph Chhim. Facts that were relevant were not considered. Statements in conclusory affidavits were impermissibly taken as true facts.

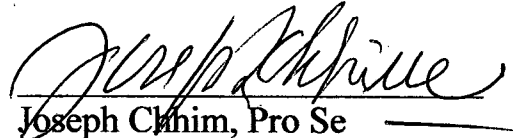
There were many applications made by Appellant, Joseph Chhim. It was only on one application that he inadvertently clicked twice to become the incorrect answer that he did not have a driver's license. It is pre-textual and unbelievable to think that The City of Houston, after eleven years of employment by Joseph Chhim with the City of Houston, and the number of possessions that he had applied for, did not know that he possessed a driver's license. The types of positions he applied for required a driver's license. He applied for the position of custodian on July 25, 2012, parking enforcement officer on October 27, 2012, custodian leader on November 27, 2012, building maintenance supervisor on November 28, 2012, messenger grant funded position on December 29, 2012, custodian on February 26, 2013, building maintenance supervisor on March 6, 2013, and park maintenance aid on March 19, 2013. The City of Houston had his driver's license number in his file, and further, he entered it on the numerous applications.

Respectfully, many Courts have found that it is unjust and discriminatory to treat elderly workers in a prejudicial manner in the matter of hiring, especially since it creates poverty when elderly workers cannot find employment for many years.

CONCLUSION

The evidence before this Court indicates that obvious evidence in the case was ignored by the lower Courts and that an unjust result occurred when Appellant Joseph Chhim was discriminated against when he was not interviewed or hired for any of the positions for which he applied even though he was qualified for the positions. After a review of the record, Appellant requests that this Honorable Court reconsider his case, and return it the lower Court for further proceedings.

Respectfully submitted,


A handwritten signature in cursive script, appearing to read "Joseph Chhim", is written over a horizontal line.

Joseph Chhim, Pro Se
5634 Windsor Forest Drive
Houston, Texas 77088
Tel: (832) 855-6743
Email: chhimjoseph100@gmail

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all persons on this list by U.S. Mail, postage repaid, on this the 28th. day of February, 2020:

Robert William Higgason
City of Houston Legal Department
900 Bagby Street
Houston, Texas 77002



Joseph Chhim, Pro Se

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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(s)


Appellant Joseph Chhim

Dated: December 21, 2019

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