

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ وَصَلَّى اللَّهُ عَلَى النَّبِيِّ الْكَرِيمِ

No. 19-8287

ORIGINAL

Supreme Court, U.S.
FILED

APR 10 2020

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

MUHAMMAD TOUM — PETITIONER
(Your Name)

vs.

CDCR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MUHAMMAD TOUM
(Your Name)

P.O. BOX 373438
(Address)

DECATUR, GA 30037
(City, State, Zip Code)

(323) 877-6847
(Phone Number)

QUESTION(S) PRESENTED

- (1) AGAINST FED. R. CIV. P. 12(b)(1) AND 12(b)(6), WHAT IS THE SCOPE OF A COURT'S DISCRETION IN UPHOLDING A PLEADING THAT STATES A CLAIM FOR RELIEF IN LIGHT OF BELL ATLANTIC CORP. V. TWOMBLY (2007) AND ERICKSON V. PARSONS (2007)?
- (2) DOES FED. R. CIV. P. 15(e)(2)(B) PROVIDE REMEDY FOR A DEFECT IN A PLEADING?
- (3) CAN A COURT DISMISS DEFENDANTS WITHOUT ISSUING A NOTICE FOR SERVICE?
- (4) DOES FILING A COMPLAINT OR GRIEVANCE BY AN EMPLOYEE, THROUGH THE EMPLOYER'S ESTABLISHED GRIEVANCE PROCESS, CONSTITUTE PROTECTED ACTIVITY UNDER 42 USC § 2000-3(a), WHEN THE COMPLAINANT OR GRIEVANT BELIEVES THEY ARE OPPOSING HARASSMENT AND DISCRIMINATION?
- (5) IS SUMMARY JUDGMENT VALID IF A COURT'S ABUSE OF DISCRETION CAN BE SHOWN?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

5:16-CV-01983-RGK-SHK
MUHAMMAD TOUKE V. CA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION

JUDGMENT ENTERED
JUNE 14, 2018

MUHAMMAD TOUKE V. CALIFORNIA DEPARTMENT
OF CORRECTIONS AND REHABILITATION

NO. 18-55961

U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
JUDGMENT ENTERED
JULY 18, 2019

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TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

BELL ATLANTIC V. TWOMBLY
550 U.S. 544 (2007)

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ESTELLE, 429 U.S. AT
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LANG V. ILLINOIS DEPT
OF CHILDREN + FAMILY

SERV.S. 761 F.3d 416 (7TH CIR 2004)

13

EEOC V. DINUBA MED. CLINIC,
222 F.3d 580, 586 (9TH CIR 2000)

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STATUTES AND RULES

TITLE 42, U.S.C. § 1981

7

FED. R. CIV. P 4(m)

11

CIVIL RIGHTS Act of 1964

§ 7, 42 U.S.C. § 2000 et seq (1964)

12

OTHER

CORP. V. CATRETH, 477 U.S.
317, 326 (1986)

13

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**: NA

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was July 18, 2019.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Nov. 12, 2019, and a copy of the order denying rehearing appears at Appendix _____.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including April 10, 2020 (date) on Feb. 5, 2020 (date) in Application No. 19A 873.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts: NA

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(E) CIVIL RIGHTS ACT of 1964
§ 7, 42 U.S.C. § 2000 et seq (1964)

(F) U.S. CONST. AMEND. XIV, § 1.

(G) 42 U.S.C. § 1981

(H) 42 U.S.C. § 1983

STATEMENT OF THE CASE

THIS PETITIONER, MUHAMMAD TOUMÉ, FILED AN INITIAL SUIT AGAINST HIS EMPLOYER AT THE TIME, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION (CDCR) ON SEPTEMBER 16, 2016 IN THE U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA. (Doc. # 1). THE PETITIONER WAS EMPLOYED BY THE DEFENDANT AS A MUSLIM CHAPLAIN, ASSIGNED TO 2 INSTITUTIONS FROM JUNE 2007 UNTIL HIS RECENT TERMINATION ON SEPTEMBER 19, 2019. PRIOR TO FILING THE SUIT, THE PETITIONER HAD MADE NUMEROUS COMPLAINTS THROUGH THE DEFENDANT'S INTERNAL PROCESS, WHICH HE BELIEVED WAS HARASSMENT BASED UPON HIS RACE AND RELIGION. THIS HARASSMENT CULMINATED ON JULY 30, 2015, WHEN THE PETITIONER WAS SERVED A NOTICE OF ADVERSE ACTION (NOAA) OF A 48 DAY SUSPENSION. THIS NOAA WAS BASED UPON ALLEGATIONS THAT WERE MORE THAN A YEAR OLD AND IN ADDITION TO THAT, THERE WAS NO COLLECTIVE ACTION TAKEN BEFORE THE SUSPENSION WAS ISSUED. SOME MONTHS PRIOR TO THE SUSPENSION, THE PETITIONER BECAME A UNION STEWARD AND DISCOVERED THE CONTRACT / AGREEMENT BETWEEN HIS UNION AND EMPLOYER, HE WAS ENTITLED TO ADDITIONAL COMPENSATION AS A SUPERVISOR OF INMATES.

1 AFTER FORMALLY NOTIFYING THE DEFENDANT
2 OF THIS STIPULATION AND REQUESTING IT BE
3 IMPLEMENTED, IT WAS DENIED. THE PETITIONER
4 SUBSEQUENTLY FILED A FORMAL GRIEVANCE,
5 BELIEVING THE DEFENDANT TO HAVE NO GROUNDS
6 FOR DENIAL, SINCE IT WAS BEING GIVEN TO
7 OTHER CHAPLAINS AND EMPLOYEES AND CONSIDERED
8 THIS A CONTINUATION OF THE HARASSMENT HE
9 CONTINUED TO ENDURE. WHILE STILL IN THE
10 GRIEVANCE PROCESS, AND AFTER FILING WITH
11 AN ELEVATED DEPARTMENT, ON JUNE 12, 2015,
12 THE PETITIONER RECEIVED THE NOA ON JULY 30,
13 2015 FOR 48 DAYS WITHOUT PAY - WHILE OUT ON
14 SUSPENSION, THE DEFENDANT CONTACTED THE
15 PETITIONER AND TOLD HIM TO REPORT TO WORK
16 BECAUSE THE SUSPENSION HAD BEEN REVOKED.
17 UPON RETURNING TO WORK, THE PETITIONER INQUIRED
18 AS TO WHY THE SUSPENSION WAS REVOKED AND
19 WAS TOLD PROCEDURAL ERRORS HAD BEEN MADE.
20 ON JANUARY 4, 2016, THE PETITIONER WAS
21 RE-SERVED THE SAME NOA, THIS TIME WITH
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MEMOS AND DOCUMENTS THAT WERE NOT IN THE FIRST (NOAA). AFTER FILING WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FOR TITLE VII RELIEF, INCLUDING ONGOING HARASSMENT AND RETALIATION, THE PETITIONER WAS GIVEN THE RIGHT TO SUE ON JUNE OF 2016. THE PETITIONER ALSO FILED AN APPEAL WITH THE STATE PERSONNEL BOARD (SPB) WHICH WAS EVENTUALLY RULED IN FAVOR OF THE DEFENDANT. PRIOR TO PROCEEDING WITH THE SPB HEARING, THE DEFENDANT OFFERED A SETTLEMENT FOR \$5900.00 WHICH THE PETITIONER DECLINED. IN ADDITION TO THIS, BEFORE THE HEARING STARTED, THE DEFENDANT SCRAMBLED OFF ONE OF THE KEY ALLEGATIONS AGAINST THE PETITIONER. THE PETITIONER THEN PROCEEDED TO FILE SUIT IN THE FEDERAL COURT. THE CASE WITH THE INITIAL COMPLAINT WAS CLOSED AFTER THE INFILMA PAUPERIS WAS DENIED. (DOC. #6). THE PETITIONER SUBSEQUENTLY FILED MOTION TO RECONSIDER AND REINSTATE, CLARIFYING HIS REQUEST TO PROCEED INFILMA PAUPERIS AND THE PREVIOUS ORDER WAS VACATED. (DOC. #9)

1 THE PETITIONER THEN FILED A FIRST AMENDED
2 COMPLAINT (FAC) UNDER SAME JURISDICTION NOW
3 ADDING TITLE 42, USC § 1981, ON JULY 14,
4 2017. (DOC. # 18). THE BASIS OF THE COMPLAINT
5 WAS ONGOING HARASSMENT WHICH HAD CULMINATED
6 IN THE PETITIONER BEING SUSPENDED FOR 48 DAYS
7 WITHOUT PAY. THE DEFENDANT RESPONDED WITH A
8 MOTION TO DISMISS UNDER FED. R. CIV. P 12(b)(4)
9 AND 12(b)(6), WITH THE COURT GRANTING IN PART
10 AND DENYING IN PART. (DOC. # 27). THIS
11 WAS THE KEY RULING IN THE CASE BECAUSE
12 THE COURT'S RULING CHANGED THE WHOLE
13 COMPLEXION OF THE CASE. THE COURT DISMISSED
14 ALL OF THE 14TH AMENDMENT CLAIMS, VIOLATING
15 THE DEFENDANTS PROTECTION UNDER SOVEREIGN
16 IMMUNITY. THE COURT ALSO DISMISSED
17 ALL OF THE CLAIMS UNDER TITLE VII WITH
18 THE EXCEPTION OF RETALIATION, RULING THAT
19 THE PETITIONER DID NOT ALLEGE ENOUGH FACTS
20 IN THE COMPLAINT. THE PETITIONER THEN
21 NOTIFIED THE COURT THAT HE INTENDED TO
22 AMEND THE COMPLAINT AGAIN TO BRING
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1 SUIT AGAINST DEFENDANTS IN THEIR
2 INDIVIDUAL CAPACITY. (DOC #29). ON
3 JAN. 3, 2018, THE PETITIONER FILED REQUEST
4 FOR LEAVE TO AMEND. (DOC. #37). THE
5 COURT DENIED THE MOTION FOR LEAVE TO
6 AMEND (DOC. #43), STATING THE INDIVIDUAL
7 DEFENDANTS HAD BEEN DISMISSED AT THE
8 SCHEDULING CONFERENCE ON NOV. 13, 2017 (DOC.
9 ~~#43~~³²). THE PETITIONER WAS PRESENT AT THE
10 CONFERENCE AND HEARD THE JUDGE SAY
11 THE UNSERVED DEFENDANTS WERE DISMISSED,
12 NOT KNOWING WHAT THAT MEANT AT THE
13 TIME, BECAUSE HE WAS WAITING ON AN
14 ORDER OR NOTICE TO HAVE INDIVIDUAL
15 DEFENDANTS SERVED. IN ADDITION TO
16 THAT, THE REPORT FROM THE CONFERENCE
17 STATED LAST DAY TO ADD PARTIES WAS
18 JAN. 3, 2018, ADDING TO THE CONFUSION,
19 CAUSING THE PLAINTIFF TO BELIEVE
20 AMENDING THE COMPLAINT WAS ACCEPTABLE.
21 THE PETITIONER THEN FILED MOTION
22 TO RECONSIDER AND REINSTATE (DOC. #44),
23 WHICH THE COURT ALSO DENIED.
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1 On 5/7/18 THE DEFENDANT FILED
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3 For Summary Judgment, ASSERTING
4 THAT THE RETALIATION CLAIM, WHICH
5 WAS NOW THE ONLY CLAIM LEFT, COULD
6 NOT BE PROVEN BECAUSE FILING A
7 CONTRACT GRIEVANCE DID NOT CONSTITUTE
8 PROTECTED ACTIVITY, THE COURT AGREED.
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10 THE PETITIONER THEN APPEALS TO THE
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12 NINTH CIRCUIT COURT OF APPEALS WHO
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14 UPHOLD THE DISTRICT COURT'S DECISION,
15 (APP. DOC. # 17), AND NOW PETITIONS THIS
16 COURT IN HOPE OF THIS CASE BEING
17 FULLY HEARD AND DECIDED ON THE
18 BASIS OF ITS MERITS AS JUSTICE DEMANDS.
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REASONS FOR GRANTING THE PETITION

This Petition should be granted because this is the highest court in the land, and this is the last possibility of habe, that constitutional rights can be ensured for all, and that the objective of judicial discretion be the Application of Justice and Fairness. My Informant advocates rights and my experience in the legal process, should not bar me from having my case fully heard on its legal merits. I believe this is a case of public concern because of the parties involved and the fact that the public's tax contributions fund the Defendant's operations. Also, the nature of this case and the causative factors which the directly related to the constitutional culture that has existed for so long, and created the current crisis of over crowding of inmate population and the continued high volume of suits filed by staff and inmates alike. Prisoners rights is also a key element

1 OF THIS CASE BECAUSE OF MY CLASSIFICATION
2 AS THE TIME AS A MUSLIM CHAPLAIN AND
3 THE MANY ISSUES CONTRASTING RELIGION
4 IN CORRECTIONAL SETTINGS ARE VERY
5 MUCH RELATED TO THIS CASE. THE
6 FACT OF THE MATTER IS THIS, MY CASE
7 SHOULD HAVE BEEN HANDLED MUCH DIFFERENT
8 BY THE DISTRICT COURT. THE COURT SHOULD
9 NOT HAVE DISMISSED MY CLAIMS ON
10 THE BASIS OF NOT STATING ENOUGH
11 FACTS. THE COURT WAS OBLIGATED TO
12 ACCEPT MY CLAIMS AS THEY WERE,
13 *BEL ATLANTIC. V. TWOMBLY* 550 U.S.
14 844 (2007), ESPECIALLY AS A PRO SE
15 PLAINTIFF, *ESTELLE*, 429 U.S. AT 106,
16 97 S. CT. 285. THE COURT SHOULD HAVE
17 ALSO GIVEN ME NOTICE THE DEFENDANTS
18 NEEDED TO BE SERVED, *FED. R. CIV. P. 4(c)*,
19 BEFORE DISMISSING THE CLAIM. I WAS
20 WAITING ON DIRECTION TO SERVE THE
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1 DEFENDANTS, HAD I KNOWN THEY WOULD
2 BE DISMISSED THE WAY THEY WERE I
3 WOULD HAVE SURELY HAD THEM SERVED. I
4 SHOULD HAVE BEEN ALLOWED TO CURE
5 THE DEFECTS OF MY COMPLAINT BY
6 AMENDING THEM AGAIN. SUMMARY
7
8 TWO GRANTS SHOULD NOT HAVE BEEN GRANTED,
9 MY CLAIMS SHOULD HAVE BEEN ACCEPTED
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11 AS THEY WERE, DELL ATLANTIC CORP....

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14 FILING A CONTRACT GRIEVANCE FALLS
15 WITHIN A TITLE VII CLAIM IF THEY BELIEVE
16 THEY WERE OPPOSING UNLAWFUL CONDUCT
17
18 CIVIL RIGHTS ACT OF 1964 § 7, 42 U.S.C.
19 § 2000e et seq (1964). WHEN I FILED MY
20 GRIEVANCE, I BELIEVED THAT I WAS
21 BEING DENIED SOMETHING ON THE BASIS
22
23 OF HARASSMENT AND DISCRIMINATION BECAUSE
24 OF MY RELIGION AND RACE, THEY WERE
25 OTHER CAPTAINS AND EMPLOYEES OF
26 OTHER CLASSIFICATIONS WHO WERE GETTING
27 WHAT I WAS DENIED.
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1 THE DECISIONS IN BOTH THE
2 DISTRICT COURT AND THE APPEALS
3 COURT, WAS A CLEAR CASE OF
4 ABUSE OF DISCRETION. LANG V.
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6 ILLINOIS DEPT OF CHILDREN + FAMILY
7 SERVS. 361 F.3d 416 (7TH CIR 2004),
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9 EEOC V. DINUBA MED. CLINIC, 222
10 F.3d 580, 586 (7TH CIR 2000), CELOTEX
11 CORP V. CATRETT, 477 U.S. 317, 326 (1986).
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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MUHAMMAD TOSKE

Date: APRIL 10, 2020