19-916

No. 19-____

In the Supreme Court of the United States

VERNON WENDELL RISBY,

Petitioner,

v.

TIMOTHY MOYNIHAN; STACY M. SMITH; JAMES HARRIS; KEVIN MCALEENAN, Acting Secretary, United States Department of Homeland Security,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

VERNON W. RISBY
PETITIONER PRO SE
28409 ALAVA
MISSION VIEJO, CA 92692
(469) 337-7762

JANUARY 17, 2020

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Is *Collateral Estoppel* applicable where the prior Mandamus case dealt only with the issue of whether the Agency was obligated under LEOSA to provide a LEOSA card that indicated LEOSA status and the subsequent Title VII case is based on a new issue of retaliation?

2. Can the court make inferences based on the totality of the circumstances to determine that the alleged lack of good standing was a pretense and allow the issue of retaliation to be decided by a jury?

3. Did the Agency violate due process by indicating Mr. Risby was in good standing and then waiting until long after he retired to inform him that management had determined he was not in good standing when he retired, thereby denying him an opportunity to be heard?

PARTIES TO THE PROCEEDINGS

Petitioner

- Vernon W. Risby

Respondents

- Kevin McAleenan
- Acting Secretary United States Department of Homeland Security
- Timothy Moynihan
- Stacy M. Smith
- James Harris

LIST OF PROCEEDINGS

United States Court Of Appeals for the Ninth Circuit

No. 17-56946

Vernon Wendell Risby v. Kirstjen Nielsen, Secretary of Homeland Security; Timothy Moynihan; Stacy M. Smith; and James Harris

Date of Opinion: April 10, 2019

Date of Rehearing Denial: June 18, 2019

United States District Court Central District of California Southern Division–Santa Ana

SACV 16-02275 AG (JCGx)

Vernon Risby v. Jeh Johnson Et Al.

Date of Judgment: November 27, 2017

Date of Order: November 21, 2017

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

CASES

STATUTES

PETITION FOR WRIT OF CERTIORARI

Petitioner Vernon W. Risby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit is included herein as at App.1a. The Order of the United States District Court for the Central District of California Granting a Motion for Summary Judgment, dated November 21, 2017, is included at App.8a. The district court entry of judgment, dated November 27, 2017, is included at App.7a.

JURISDICTION

This Court has jurisdiction of this petition to review the judgment of United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1). The Ninth Circuit's memorandum opinion was filed on April 10, 2019 and Petitioners Petition for Rehearing *En Banc* was denied on June 18, 2019.

The district court had subject matter jurisdiction pursuant to section 28 U.S.C. § 1334 and pursuant to 28 U.S.C. § 1331 because the complaint alleged federal

constitutional torts and the case is against a federal agency.

STATEMENT OF THE CASE

Respondent Department of Homeland Security the Department which controls Immigration and Customs Enforcement, an agency of the United States government. (hereinafter the Agency). Petitioner Vernon W. Risby, a disability retired special agent brought suit in the District Court against Respondent DHS for retaliation against his exercise of his right to initiate a complaint under Title VII of the Civil Rights Act, and Rehabilitation Act. Petitioner also filed a separate count under 42 U.S.C. § 1983 or a *Bivens* action to exercise his rights to a LEOSA ID Card due to the ruling of *Duberry v. United states.*

Prior to this current Title VII action Petitioner filed a previous Title VII action and a settlement of all claims was agreed to and placed on the record. The settlement agreement provided that Petitioner would retire on a disability, DHS indicated that Petitioner was in good standing when he retired but subsequently denied him a retirement card indicating his status as a LEOSA qualified law enforcement officer under the criteria provided by 18 U.S.C. § 926(c) in order to carry a concealed firearm in all 50 states pursuant to the Law Enforcement Officers Safety Act of 2004 and subsequent amendments.

DHS refused to issue the above referenced LEOSA card even though the Agency issued the card

indicating LEOSA status to other similarly situated retired ICE officers. The Agency eventually claimed that Petitioner did not retire in good standing but did not give him notice or an opportunity to be heard regarding the matter of good standing until long after the adverse employment action was made and his retirement was final. He was never afforded an opportunity to even know that he had allegedly not retired in good standing and there is still nothing in the record determining when or how the decision was made that he was not in good standing.

The Petitioner filed a Writ of Mandamus in order to compel DHS to issue the retirement card. The District Court denied the Writ because LEOSA does not require that government agencies issue retirement cards indicating LEOSA status. By the time he filed the Writ, Mr. Risby was in the EEOC investigative phase of a new Title VII claim which included non-LEOSA issues. He was exhausting his administrative remedies via the investigative process. Subsequently, he filed a new action under Title VII, alleging that the Agency's refusal to issue a LEOSA retirement card was based on retaliation for his prior discrimination claims. Mr. Risby has been awarded three previous decisions from EEOC Administrative Law Judges against the agency proving a pattern and practice of discrimination and retaliation.

Petitioner also filed under a separate count, after the D.C. Circuit Court ruling in *Duberry v. District of Columbia*, which gave law enforcement officers of the District of Columbia the right to sue for their LEOSA cards under 42 U.S.C. § 1983, under 28 U.S.C. §§ 1331 and 1346.

The District Court judge dismissed all claims, including non LEOSA Title VII claims based on issue preclusion or *collateral estoppel; i.e.,* the *estoppel* effect from the dismissal on a defense MOTION FOR SUMMARY JUDGMENT in the previous Writ of Mandamus case. Petitioner appealed to the Ninth Circuit.

Petitioner argued that there was no *collateral estoppel* effect because the issues in the Mandamus case were different than the issues before the court in the Title VII action, and there were other Title VII issues other than LEOSA. Petitioner argued that there were issues of material fact regarding whether the issues raised by the Agency were a pretense. The court found in favor of the self-serving allegations made by various Agency employees. The premise of the court's holding seems to be that the Petitioner failed to shift the burden regarding pretense. This despite the fact that the defense assertions contained evidence on their face that the Agency's own witness testimony raised issues of deception and arbitrary exercise of discretion in order to justify its decision to retaliate by withholding the retirement card.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition and review the judgment of the court-of appeals because its decision is in conflict with the decision in *Duberry v. District of Columbia*, 18-7102 (D.C. Cir. 2019) on an important point of federal law. *Duberry* held that LEOSA creates a private right to enforce a cause of action in order to obtain the credentials required under the LEOSA Act.

Further, the Court should exercise its power to supervise the lower federal courts and grant review because many federal, state and local agencies have been issuing retirement cards indicating LEOSA status. Despite the fact that there is no requirement to do so under LEOSA, legislative silence regarding a duty to issue such identification should not be an opportunity for an Agency to exercise unfettered discretion that results in opportunities to punish employees for exercising statutory and Constitutional rights. Such discretion threatens freedom of speech, discrimination laws and equal protection under the law.

The *Duberry* case states as follows:

> It is well established that an agreement is binding on the party particularly where the terms are memorialized on the record." "An agreement announced on the record becomes binding even if a party has a change of heart after (she) agreed to its terms but before the terms are reduced to writing
>
> In *Duberry I*, we found that "LEOSA' plain text, purpose, and context show-that Congress intended to create a concrete, individual right to benefit individuals like [Appellees] and that is-within the competence of the judiciary to enforce.

Duberry, 18-7102 (D.C. Cir. 2019)

The Government's *collateral estoppel* argument in the present case is a red herring because the government presupposes that the same causes of action are before the court in both cases. *See Montana, below* at 154. The Court stated that in order to determine

whether *collateral estoppel* applies courts must determine whether:

> . . . the issues presented by this litigation are, in substance, the same as those resolved against the United States in *Kiewit I* second, whether controlling facts or legal principles have changed significantly since the state court judgment; and finally, whether other special circumstances warrant an exception to the normal rules of preclusion.

Montana, *supra* at 156

The *Little John v. U.S.*, case holds that res judicata is inapplicable when a cause of action or defense is not available in subsequent legal proceeding. Petitioner filed the Writ of Mandamus (upon which the Agency predicated its *issue preclusion* and/or *res judicata arguments*) while Mr. Risby was still perfecting his claim by completing the EEOC process. Furthermore the decisions below improperly apply the burden-shifting analysis from *McDonnell Douglas Corp. v. Green* (*McDonnell* provides that bias may be imputed to Defendant under a *Poland v. Chertoff* "cat's paw" theory). Mr. Risby's specific and substantial evidence established that within 7 days of executing a settlement agreement resolving a claim of retaliation, the Agency inexplicably and falsely connected Mr. Risby's Social Security number to a database entry for criminal misconduct, *i.e.* child pornography, Therefore an inference exists that invidious racial prejudice was the motivation to retaliate and an Agency employee therefore intended to justify the Agency's adverse action. Thus, the discriminatory intent more than likely

motivated the employer because the employer's proffered explanation was unworthy of credence. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 802 (1973);

In the *Nigro v. Sear Roebuck* case, a federal appellate panel repudiated the lower court's concern that the employee's evidence was "self-serving, holding that it was not important that some of the plaintiffs evidence was self-serving. Such evidence must be assessed by a trier-of-fact and *not determined at the summary judgment stage. Anthony V. Nigro v. Sears Roebuck & Company*, No.12-57262 (9th Cir. 2015). The Petitioner is asking Court to consider the circumstances herein that *scream,* for cross-examination. The discrimination and issues of retaliation in this case entail great emotional harm to the Petitioner. Petitioner had previously prevailed against the agency in EEOC proceedings on three separate occasions.

In the *Figueroa v. Pompeo*, No. 18-5064, 2019 WL 2063562 (May 10, 2019), the court stated:

> We frustrate the Supreme Court's design if we allow employers to satisfy their burden of production without a "clear and reasonably specific" explanation as to how the employers applied their standards to the employee's particular circumstances. . . .

Plaintiffs lack the resources (and the clairvoyance) to guess at how their respective decision[-] makers interpreted the criteria and to explain away each standard at trial. According to the DC Circuit, an employer's explanation for its challenged job actions must pass a four-factor analysis:"

- First, the employer must produce admissible evidence for the district court to evaluate.
- Second, the court must reasonably be able to conclude, based on the evidence, that the employer did what it did for lawful reasons.
- Third, the employer's explanation must be facially credible in light of the proffered evidence.
- Fourth, when the employer's rationale involves subjective criteria, as it did in *Figueroa,* the evidence must point to clear and specific reasons for the employer's assessment, such as seniority, length of service in the same position, personal characteristics, general education, technical training, experience in comparable work, or any combination of such criteria.

CONCLUSION

For all the reasons above, Petitioner request the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The denial of due process is apparent in the fact that the Agency did not give Mr. Risby opportunity to investigate how he came to be deemed as not having retired in good standing after the Agency had already indicated in writing at the time of his retirement that he was in good standing. The opportunity for government employers to take advantage of their discretion when it comes to issuing such cards leaves a wide opening for abuse and retaliatory discrimination.

The issue of why the court could not, in the alternative, convert the 42 U.S.C. § 1983 claim into a *Bivens* action was riot addressed at any level. Apparently the Ninth Circuit conflated the *Bivens* action as a cause of action connected with the Title VII claims. Nevertheless, the Section 1983 civil rights claims were in the alternative against individually named Defendants who were employees of the Agency. The court should provide for all these issues of fact discussed above to be decided by a jury with cross-examination as the best way to expose the deceptions that are apparent in the witness testimony.

Respectfully submitted,

VERNON W. RISBY
PETITIONER PRO SE
28409 ALAVA
MISSION VIEJO, CA 92692
(469) 337-7762

JANUARY 17, 2020