No. _____

In The

Supreme Court of the United States

TODD A. ENGLISH,

Petitioner,

v.

SONNY PERDUE, Secretary, USDA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Court(s) err in its discretion in applying the standard for "plausible cause for relief," as it relates to dismissing a claim during pretrial motions when applied to Title VII and ADEA complaint(s)?

II. First, Fifth and Sixth Amendments, should the Court consider "violations of the law(s)," specifically "due process," when determining "plausible cause for relief" when applied to Title VII and ADEA claims?

III. Did the Court err in its discretion when it allowed English's Attorney of Record to withdraw after only providing a "conclusory statement"?

IV. Did the Court err in its discretion when it failed to consider "temporal proximity," as it relates to Ker's conclusory statement, when it allowed him to withdraw from this case?

V. Sixth Amendment, was the USDA "investigation" of part of Attorney *Ker's* representational responsibilities as it relates to English's third EEO complaint?

VI. Did the investigation the USDA conducted against English violate my constitutional rights under the First, Fifth and Sixth Amendments?

VII. Is evidence submitted into the docket part of the same case, and not just items submitted in the "original complaint"?

VIII. First, Fifth and Sixth Amendments, is it legal for the Department of Justice to represent an agency, who's managers have violated the Civil Rights of a Federal Employee who has Constitutional guarantees of Due Process of the law(s)?

LIST OF ALL PARTIES TO THE PROCEEDINGS

The following is a list of all parties to the proceedings in the Court below, as required by Rule 14.1(b)(i), (iii).

Documents under Rule 29.1, 2, 3, 4(a) have been timely filed, properly served with 3 copies and the appropriate federal agency has been notified.

1. Todd A. English, *Plaintiff-Appellant*
2. Sonny Purdue, Secretary, USDA, *Defendant-Appellee*

RELATED CASES

Todd A. English v. Thomas J. Vilsack, Secretary, U.S. Dept. of Agriculture United States District Court, for the Western District of Texas, No. 6:16-CV-306, Complaint filed July 29, 2016.

Todd A. English v. Sonny Perdue, Secretary, U.S. Dept. of Agriculture United States District Court, for the Western District of Texas, No. 6:16-CV-306, Amended Complaint filed July 13, 2017.

Todd A. English v. Sonny Perdue, Secretary, U.S. Dept. of Agriculture United States District Court, for the Western District of Texas, No. 6:16-CV-306, Complaint filed July 29, 2016.

RELATED CASES – Continued

Todd A. English v. Sonny Perdue, Secretary, U.S. Dept. of Agriculture United States District Court, for the Western District of Texas, No. 6:16-CV-306, Report and Recommendations entered March 2, 2018.

Todd A. English v. Sonny Perdue, Secretary, U.S. Dept. of Agriculture United States District Court, for the Western District of Texas, No. 6:16-CV-306, Order Denying Motion to Withdraw entered March 29, 2018.

Todd A. English v. Sonny Perdue, Secretary, U.S. Dept. of Agriculture United States District Court, for the Western District of Texas, No. 6:16-CV-306, Order Granting Motion to Withdraw entered May 14, 2018.

Todd A. English v. Sonny Perdue, Secretary, U.S. Dept. of Agriculture United States District Court, for the Western District of Texas, No. 6:16-CV-306, Order Adopting in Part and Rejecting in Part entered May 23, 2018.

Todd A. English v. Sonny Perdue, Secretary, U.S. Dept. of Agriculture United States District Court, for the Western District of Texas, No. 18-50530 Appeal filed entered July 3, 2018.

Todd A. English v. Sonny Perdue, Secretary, U.S. Dept. of Agriculture United States District Court, for the Western District of Texas, No. 18-50530 Judgement entered June 19, 2019.

RELATED CASES – Continued

Todd A. English v. Sonny Perdue, Secretary, U.S. Dept. of Agriculture United States District Court, for the Western District of Texas, No. 18-50530 Order, Rehearing Denied entered September 6, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Todd A. English (I, me), having first-hand knowledge of the events in this case, respectfully Petitions the United States Supreme Court for a Writ of Certiorari to review the pre-trial, pre-discovery, judgment of the United States Fifth Circuit Court of Appeals (5th Circuit) and for the United States District Court for the Western District of Waco Texas (District Court) in this case.

The legal citations and arguments used are those of a layperson without any formal or informal legal training. Therefore, I respectfully request this Court's indulgence.

This Petition is lengthy, but there are eight questions regarding more than sixty violations of the 1st, 5th and 6th Amendments and various other law(s), policies and regulations. I kept it as brief as possible.

OPINIONS BELOW

The unpublished Order of the United States Court of Appeals for the Fifth Circuit, Rehearing En Banc, signed September 6, 2019, App. 68.

The unpublished Judgment of the United States Court of Appeals for the Fifth Circuit, Appeal, signed June 19, 2019, App. 1.

The unpublished Order of the U.S. District Court, rendering "Moot," the Motion to Reconsider Allowing Attorney to Withdraw, signed June 4, 2018 is App. 14.

The unpublished Order of the U.S. District Court, Adopting in Part and Rejecting in Part, dated May 23, 2018 is App. 18.

The unpublished Order of the Magistrate in the U.S. District Court, granting the Attorney of Record to Withdraw, dated May 14, 2018 is App. 50.

The unpublished Report and Recommendations of the U.S. District Court, signed by the District Magistrate, dated March 2, 2018. App. 52.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2019. English filed a timely Petition for Rehearing En Banc and it was denied on September 6, 2019.

The District Court granted Defendant's Motion to Dismiss, the Order was signed on May 23, 2018.

The District Court Granted my attorney's Motion to Withdraw as Counsel of Record, the Order was signed on May 14, 2018.

A timely filed Motion to Reconsider Allowing Attorney of Record to Withdraw, was rendered Moot, the Judgment was signed on June 4, 2018.

The jurisdiction of this Court is invoked under *28 U.S.C. § 1254.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., First Amendment (Freedom of Speech) provides:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;* ***or abridging the freedom of speech****, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

U.S. Const., Fifth Amendment (Due Process) provides:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself,* ***nor be deprived of life, liberty, or property, without due process of law****; nor shall private property be taken for public use without just compensation.*

U.S. Const., Sixth Amendment (Nature of Accusation, Witnesses) provides:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,* ***and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.***

28 U.S.C. § 1331 provides;

> *The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.*

Federal Rules of Civil Procedure 8 provides:

> Claim for relief. A pleading that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e and 1978) provides:

[I]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he had made a charge.

(a) sex

(b) wrongful termination; retaliation/termination for engaging in protected activity (Title VII, 42 U.S.C. 2000e)

(c) it shall be an unlawful labor practice for a labor organization,

(2) to limit, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or employment opportunity.

STATEMENT OF THE CASE

I am a federal employee working for the United States Department of Agriculture (USDA) since August of 2009. In September 2014, I was rated as "Does Not Meet" on his annual Performance Appraisal. This rating violated due process of federal law, *5 U.S.C. § 432.104*, because I was never placed on an Opportunity to Improve (OTI) nor was I provided a Personal Improvement Plan (PIP). Not only did those actions not take place, but both the Program Director (Jordison) and the State Director (Valentin), were told that they could not rate me "Does Not Meet" by Human Resources (HR – Edwards), the Regional Program Administrator (RPA – Connelly), the Administrative Program Director (APD – Maedgen) and Employee Relations (ER – Keim), because there is no grounds for the rating. Both managers refused to change my rating because promotions were coming up in December 2015 and they wanted to prevent me from being eligible to apply. When federal employees are rated "Does Not Meet" it has tangible effects on their job, they can't apply for a job within their agency, nor can they apply anywhere else within the federal government, they don't get their step increase in pay and these actions put them behind for future promotions, which has an overall effect on retirement income, so I filed a complaint with the EEO.

The EEO conducted an investigation and concluded that my rights were violated by the rating but determined that I failed to "state a claim upon which relief could be sought" and granted permission to seek

remedy through the courts. The USDA even went so far as to permanently remove Jordison and send her to another state and temporarily replaced the State Director, but they refused to compensate me for the adverse action(s) taken against me.

I hired an attorney, Jon R. Ker, and paid $15,000 in retainers for representation. I continued to be harassed daily at work and filed 2 more EEO complaints at the urging of Ker. The 3rd EEO complaint was due to an "unlawful investigation" conducted by the USDA against me regarding an email that I sent out to Union members.

Ker assisted with the wording of the 3rd EEO complaint, and referenced it during Discovery, yet his 3rd Motion to Withdraw stating a "fundamental disagreement over the scope of representation" was due to his claim that he was not hired to represent me for the "investigation."

Ker pressed that the best course of action was to file under *Title VII* and *ADEA* and filed the Complaint to that effect. After several delays over 2 years, and 2 opportunities to file a proper complaint, Ker requested another $10,000 retainer and advised that another $10,000 was on the horizon. I advised him that I would pay the remainder of what I owe upon conclusion of the trial. Ker didn't like this response and filed a Motion to Withdraw for Breach of Contract, which was denied. Ker immediately filed a second motion, adding more to the Breach of Contract argument, which was also denied, but the magistrate added that if Ker found

substitute counsel, he would consider allowing his withdrawal. Ker filed a 3rd Motion to Withdraw, changing tactics, and provided a 'conclusory statement' of a "fundamental disagreement over the scope of representation," with no specific information, nor any "temporal proximity," nor did he attempt to find substitute counsel, yet the motion was granted.

The case was then dismissed for "failure to state a claim upon which relief could be sought."

I filed an Appeal with the Fifth Circuit, which was denied.

I filed a Motion for Rehearing En Banc, which was also denied.

The Fifth Circuit Court of Appeals refused to address some of my questions, stating that they were "extensive detail not in my original complaint," and that "we cannot and do not consider English's many allegations advanced for the first time on Appeal." However, these 'many' and 'extensive' details were addressed, and evidence submitted into the docket, during the 3 Motions to Withdraw. Since this was all part of the same case, this evidence should have been considered and addressed. Especially since Ker's 'conclusory' claim is directly attributable to the 'unlawful investigation' conducted by the USDA against me.

English now seeks the collective wisdom of the Supreme Court of the United States with a ruling on these issues.

REASONS FOR GRANTING THE PETITION

I. Dismissing the Case for Failure to State a Claim

The Court "must consider both direct and circumstantial evidence but may not make 'credibility assessments,' which are the exclusive province of the trier of fact." That is, "a judge's function at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial,'" *Tyanne Davenport v. Edward Jones & Company, L.P.*, No. 17-30388 (5th Cir. May 22, 2018).

Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957), states that "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

I clearly proved the elements of Disparate Treatment under *Title VII* and *ADEA* in that:

1) I am a member of a protected class in that;

- I filed the OIG complaint against the State Director that was investigated in 2014, protected class.
- I filed 3 EEO complaints in 2014 and 2015, protected class.
- I testified for the Union as the Steward against the unlawful practices of USDA management, protected class.

2) I proved that the discriminator(s) knew that I was in a protected class, based upon the complaints above against the discriminators.

3) I proved that acts of harm occurred that had an impact on my employment, denied pay increases and promotions.

4) I proved that management showed favorable treatment towards others who are similarly employed.

I further proved that Discriminatory Harassment occurred in that:

1) I am a member of a protected class.

2) The harassers are aware of my protected class.

3) I was subjected to unwanted harassment.

4) The harassment was based upon my protected class.

I also have protections under the *Whistle blower* protections of *5 U.S.C. §§ 2302 and 2302(b)* for the complaint that I filed against the State Director, which was investigated in 2014, as well as the three EEO complaints. I also have a military background affiliation, which is now an identified protected class, against profiling and discrimination under *Title 38, U.S.C. § 4311* and *MSPB Rule 9.* I am retired from the U.S. Navy, 24 years, with 14 years at the SEAL Teams.

Failure to promote and posting jobs under authorities that favors a person over other candidates, such

as females and under the age of 40, or meant to exclude a particular candidate, are violations under *Title VII of the Civil Rights Act of 1964/78*, which have been applied to *ADEA*. As stated previously, the unlawful rating caused me to not be promotable. When I did become eligible for promotion, they started posting jobs under authorities that favored females who were under the age of 40.

When applying violations of the law with *Title VII* and *ADEA*, once a "plausible" standard has been established, the Court(s) should shift the burden to proof back to the Defendant to show, "but for" age and/or "gender," what are the reason(s) for management's unlawful actions, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). There are far more specific instances of harassment, but Ker failed to mention them in the complaint, however, these could have been brought up during Discovery. It's not necessary to include every piece of evidence during the pretrial stage and I still contend that sufficient evidence was submitted within the complaint to withstand the plausibility factor.

The bottom line is that I met all of the requirements under *Title VII* and *ADEA* and proved there was more than enough "plausible cause for relief" to have all of the evidence presented to a jury.

When the defendant argued that I "failed to state a claim for which relief could be sought," this was a conclusory statement and the case was dismissed based on that statement. The defendant should have been required to state which elements were not met

and we could have provided more specific information regarding that, but the Court(s) did not require that.

II. Should the Court Consider Violations of the Law(s), Specifically Due Process, When Determining Plausible Cause for Relief When Applied to Title VII and ADEA Cases?

The lower Courts don't consider violations of the law(s) when applying the standards of "plausible claim for relief" when applied to *Title VII* and *ADEA* complaints. The standard(s) used for decades are outlined in *Bell Atlantic v. Twombly; Burlington Industries, Inc., v. Ellerth*; the *Federal Rules of Civil Procedure 8(a)(2)* and *Title VII, Civil Service Reform Act of 1964/78*, but these standards appear to have been raised to more of a Prima Facie desire. However, to the extent that Constitutional rights are involved, due process of the law imparts a judicial review of the actions of administrative and executive officers. Therefore, violations of the law(s), particularly denial of due process, should be taken into consideration in these types of cases. It's one thing to file civil rights complaints in federal court that show violations were committed, but they don't delve into the "why" these actions occurred, and the intent of the managers adverse actions, in the way that *Title VII* and *ADEA* does.

When you couple the law with the other relevant factors behind the violations, the "intent" becomes relevant and obvious. "When the actions of managers are egregious, intentional, unlawful and show malice, a

judgment for punitive damages can be awarded" in Title VII and *ADEA* cases, *Kolstad v. American Dental Association*, 527 U.S. 526, 535-34, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999).

In the absence of prima facie evidence, there are other proven means available for establishing a "plausible cause for relief." When it is not immediately evident as to the reason(s) for adverse actions of managers against employees, then the totality of the circumstances must be considered. In my case, there was never an overt mention of my age nor of my gender, but when you look at the fact(s):

- my 5th Amendment rights of due process were violated by this adverse rating on my performance appraisal. This action also violated *Title 5, Part 752.203b*, *29 CFR 1614.108*, the *Labor/Management Agreement 5.1(b)* and *5 U.S.C. § 432.104.*
- this rating had a significant impact on my career, being denied promotions (3 to date), no pay raise, not able to apply for other federal agencies and the financial impact on my retirement.
- that Jordison (female), told me on two occasions that I need to find another job. This action violates *5 U.S.C. § 2301* and the *Merit Systems Protection Board (MSPB) Rule 2* under fair and equitable treatment.
- Jordison instructed other, non-supervisory, females under the age of 40, to monitor

my daily activities, a direct violation of *USDA Department Regs, 4070-735-001, Sec. 11, Sec. 18, Sec 20(b)*, and *5 U.S.C. Part III, Subpart F, 7116(c) & Sec. 19.*

- that only females were hired after my rating and all are under the age of 40, *Title VII* and *ADEA*
- that only females were promoted after my rating and all are under the age of 40, *Title VII* and *ADEA*
- false accusations were levied against me for breaking and entering a federal office and stealing documents, which of course never happened and are in direct violation of *USDA Departmental Regulations 4070-735-001, Sec. 11, Sec. 18, Sec. 20, USDA Employee Responsibilities and Conduct.*
- When they conducted the investigation of me, which is not related to the allegations listed above, they refused to tell me who the complainants were, *6th Amendment* violation of due process.
- they refused to tell me what crimes or policies I supposedly committed/violated, *6th Amendment* violation.
- they refused my right to counsel or to have a Union representative available, *6th Amendment* violation.
- all of the female complainants met in the State Office with the State Director and

worked together on the wording of their complaints, which constitutes "*Conspiracy to Terminate*" me.

- they placed severe restriction on my movements throughout the building, and then took punitive action against me for allegedly violating those restrictions, which I never did.
- the state Director, Valentin, refused to cooperate with investigation of my third EEO complaint. This is a direct violation of *USDA Departmental Regulations 4070-735-001, Sec. 20(b)* and *29 CFR 1614.108.*
- they never officially concluded the investigation, because they never found anything that I did wrong, even though they went back 7 years into my past. So, they never sent me a "Final Agency Decision" nor did they provide me with an official copy of the "Report of Investigation" (ROI), I went online and found it on the HR web site. These are direct violations of *29 CFR 1614.108(f) thru 1614.110.*

Each of the issues listed above are direct violations of the law(s), policy, procedure, specifically, the *Civil Service Reform Act of 1978* under the "fair and equitable treatment" provision, the *Labor Management Agreement, 5.1(b)*, and the *USDA Employee Responsibilities and Conduct.* Therefore, I have done far more than simply state that "the law was broken," I proved it and stated each infraction of the law or statute, *Ashcroft v. Iqbal*, 556 U.S. 662, 6787 (2009). If

Ashcroft requires that a complaint states more than stating that "the law was broke," then it would stand to reason that each violation of the law would be considered in connection to *Title VII* and *ADEA* complaints, but the Court(s) did not do that.

When you factor in all of these violations, it becomes blatantly obvious that management was intent on terminating me, however, their intent remains in question because the Court never asked, and opposing counsel never offered, any reason(s) for management's actions. The Court(s) simply took the position that the complaint my attorney filed was void of plausible relief. This is a travesty of justice!

The Supreme Court defined a tangible employment action as "a significant change in employment status such as hiring, firing, **failing to promote, reassignment with significantly different responsibilities**, or **a decision causing a significant change in benefits**," based on this definition, three of these have occurred to me, demonstrating that there is clear evidence to state a plausible claim for relief.

Burlington Industries, Inc., v. Ellerth, 524 U.S. 742 (1998), highlighted some of the deficiencies within *Title VII*, when the "Court of Appeals En Banc produced eight separate opinions and no consensus for a controlling rationale" when determining "vicarious liability." Given this, and the numerous other interpretations of *Title VII* and *ADEA*, as well as the discretions applied by the various courts, it is more paramount than ever that the Federal Courts, more specifically the Supreme

Court, establish more defined parameters for the lower courts in these matters. Especially since the Merit Systems Protection Board (MSPB) and the Federal Labor Relations Board (FLRB) are in a constant state of flux, causing lengthy periods of time before cases get heard. Couple that with the fact that EEO personnel wash their hands of complaints as quickly as possible, and you get a recipe which forces employees to seek redress in State and District Courts, where the discretions of judges are just as varied. Judges discretions are formed in the same manner as everyone else's, they are driven by past experiences, education, practicing the law and in some instances, politically motivated. When discretion is so varied, it is paramount to establish more defined parameters that would encourage judges to err on the side of the one who has already been oppressed in some manner.

The EEO admitted that the USDA did not follow the law(s) when it rated me "Does Not Meet" on my performance appraisal, but they failed to take into consideration the magnitude of such a rating, neither did the Court(s). Federal employment, once given is considered property and can't be denied without due process. *The Civil Service Reform Act of 1978*, as codified in *Title 5 of the U.S. Code*, requires the federal government to follow certain procedures before depriving individuals of their inalienable rights, which means following due process under the *Fifth Amendment of the Constitution. Title 5, part 752.203, 29 CFR 1614.108* and the *Labor Management Agreement, 5.1(b).*

III. Did the Court Err in its Discretion When it Allowed English's Attorney of Record to Withdraw After Only Providing a Conclusory Statement?

The Court has established a dangerous precedent by allowing an Attorney of Record to withdraw based on a mere 'conclusory statement' of a "fundamental disagreement over the scope of representation," especially when the attorney has already been paid $15,000. Ker neither provided what exactly that "fundamental disagreement" was, nor does this statement meet the "good cause" standard to allow an attorney to withdraw. "Good Cause" is typically reserved for issues such as a client trying to get the attorney to do something illegal or immoral, or for no communication between the attorney and client for a long period of time, or in some rare occurrences, for not being paid anything at all for services rendered. None of these apply in this case.

Ker's first two motions to withdraw stated that he was withdrawing because I breached the payment terms of the contract. He referenced *Augustson v. LAN Chile, S.A.*, 76 F.3d 658, 663 (5th Cir. 1996), but I proved in my Response that this case has absolutely no bearing on my case. In his second motion, he didn't cite any case law, because there is none that has ever allowed an attorney to withdraw under these circumstances. In fact, the *Texas State Bar Rules of Ethics* state 'a dispute over fees are not good cause to withdraw, especially one who has been paid $15,000. The Magistrate did state that he would consider allowing Ker to

withdraw if he found substitute counsel, which Ker never even attempted.

So, in his third motion to withdraw, Ker changed tactics and submitted his motion "under seal" and provided the conclusory statement of a "fundamental disagreement over the scope of representation." The Court should have required Ker to explain exactly what this "fundamental disagreement" was about. Only then can the court make an informed decision as to whether or not there is "just cause" to allow his withdrawal.

However, I contend that there was no "fundamental disagreement over the scope of representation" as Ker claimed. This was an intentional act by Ker to mislead the Court, and the motion to file under seal was just another guised tactic. The motion filed under seal made no specific claims about anything that would have jeopardized my case, it merely made the same conclusory statement and was therefore unnecessary. It wasn't until Ker asked for more money that he tried to claim that he was not representing me for the investigation the USDA conducted against me. However, Ker's claim is false because he was the one who hand wrote corrections on my third EEO complaint before I submitted it. He also asked opposing counsel about it during Discovery, which was never completed due to the case being dismissed. But both of these actions by Ker, make it clear that he was representing me on this issue, yet he refused to get the evidence from the USDA managers that I requested in this case. Proof of all of this are part of the District Court docket.

Ker has been negligent in his representational responsibilities of this case from the very beginning. It is immediately evident by the fact that his first complaint was so deficient that the Court granted him leave to submit a second complaint, over a year later. The second complaint was also devoid of numerous facts that would have clearly raised this case beyond the speculative level for plausible cause for relief, and Ker possessed all of the necessary evidence because I had been sending it to him from day one, yet he failed again to include them.

The second complaint Ker filed was "moot" anyway, because the District Judge denied my case based upon the Magistrate's Report and Recommendations of the initial complaint. Which begs the question, if the District Judge dismissed this case based upon the first Motion to Dismiss the "first" complaint, and then ruled my Motion to Reconsider Ker's Withdrawal and "moot," wouldn't the magistrate's Order Granting the withdrawal also be "moot"? At the very least, if the Magistrate is going to allow my attorney to withdraw, then my Motion to Reconsider should have been considered and ruled upon by the District Judge as well, and not ruled as "moot"!

The issues above, along with my Appeal Brief, clearly established Ker's negligence, but instead of seeing the evidence that 'I' submitted as negligence on Ker's part, the 5th Circuit used it to infer that the evidence I provided was proof of Ker's claim. This is ridiculous, I never mentioned any of it until Ker filed his Motion to Withdraw. So, it was not an issue between

Ker and I, and it's also why Ker never argued any of this in any of his motions. The temporal proximity of the evidence that 'I' submitted into the docket will support my claim.

The 5th Circuit used *Matter of Wynn*, 889 F.2d 644, 646 (5th Cir. 1998), to support her position to Uphold the finding of the lower court stating, "the depth of the disagreement is evident from the lengthy portion of English's brief addressing the issue," and then quotes from *Wynn,* "an attorney may withdraw from representation only upon leave of the court, and a showing of good cause and a reasonable notice to the client." However, she failed to take several other facts of *Wynn* into consideration;

- The issues in *Wynn* are in no way relevant to my case because *Wynn* is a law school graduate and should know about the legal process, but instead, he used stall tactics to delay, and in some instances he never responded. Whereas I have no formal or informal legal training and I employed no such tactics. So, relieving me of my attorney put me in a very precarious position.
- *Wynn* Accused his attorney, and the magistrate from bankruptcy court, of illegal activity. I have never made any such claims.
- There is no proof that *Wynn* ever paid his attorney anything, especially since *Wynn* was forced into bankruptcy court for not

paying creditors. Whereas I have paid Ker $15,000 in retainers.

- The 5th Circuit also failed to include *Streetman v. Lynaugh*, 674 F. Supp. 229 (E.D. Tex. 1987), into her *Wynn* argument. *Streetman* states that "When an attorney agrees to undertake the representation of a client, he is expected to see the work through to completion. *Tex. Code Prof. Resp. EC2-31* (Vernon 1973); *United States v. Ramey*, 559 F. Supp. 60, 62 (E.D. Tenn. 1981), see also *Rule 3(a), Local Court Rules*, U.S. *District Court for the Eastern District of Texas. Streetman* goes on to say, "when the expressed reason for wanting to withdraw is the existence of a conflict of interest between attorney and client, the record 'must' show an actual conflict before granting the motion is appropriate." *Mekdeci v. Merrill National Laboratories*, 711 F.2d 1510-21 (11th Cir. 1983). *Mekdeci* further states, "Unsubstantiated claims of a conflict are insufficient, especially when the client has expressed no dissatisfaction with the attorney's representation and has not asked counsel to withdraw." I clearly stated that I had faith in Ker's ability to do his job, I was just concerned because he had not put in the effort in my case that he has with other cases that he was working at the same time, but I clearly fought to keep him on my case.

The fact that neither Ker, nor the Court, could produce case law to support allowing Ker to withdraw under these circumstances, other than an ambiguous comment about discretion, is very telling.

Allowing Ker to withdraw, especially since dismissing the case was already being considered, was a gross miscarriage of justice and abuse of discretion and caused further harm to me.

IV. Did the Court Err in its Discretion When it Failed to Consider Temporal Proximity, as it Relates to Ker's Conclusory Statement When it Allowed Him to Withdraw From this Case?

In addition to the issues above, the Court should require the same standard for allowing an Attorney of Record to Withdraw from a case, that it does when it requires a plaintiff to show "temporal proximity" when it's considering dismissing a case. If temporal proximity is as relevant to the evidence related to cases, then it should be just as applicable to the evidence submitted by counsel when filing a motion to dismiss. The Court(s) did not consider this when they permitted the Ker to withdraw. If the Court had required Ker to specifically state the reason behind his claim of a "fundamental dispute," which was the investigation for which he claims he was not hired, and then asked him when this became an issue, the Court would have seen that temporal proximity would have excluded his claim on this issue alone.

The investigation was initiated in April 11, 2016 and I started him every piece of evidence related to it from that day. In fact, Ker had already made corrections to my 3rd EEO complaint prior to my submission in February 2016, and then he asked defendant about the investigation in his Discovery Questions in April 2018. Both instances occurred 24 months before, and 2 months after his initial Motion to Withdraw, which was on February 2018. This motion also coincided with his asking for another $10,000 retainer and stating that another $10,000 was on the horizon. All of this, coupled with the fact that Ker's first two Motions to withdraw centered around fees and a contract dispute, would have made it abundantly clear of his intent.

This indisputable proof that it was clearly over a fee dispute and is supported by the evidence is filed in the District Court docket.

V. Was the USDA Investigation of English Part of Ker's Representational Responsibilities as it Relates to my Third EEO Complaint?

The Court refused to rule on the investigation conducted against me, and whether or not it was part of Ker's representational responsibilities, stating that it was "new" and "lengthy," however, all of this was presented during pre-trial Motions to Withdraw, and should be considered part of the same case.

As stated previously, Ker tried to claim that this was not what he was hired to represent me for. However, the docket reflects that I submitted evidence

where Ker made hand written corrections to my 3rd EEO complaint prior to my submission, and he asked opposing counsel about it during Discovery. He made the hand-written corrections the same night that he told me that I would have to pay him the additional $10,000 retainer, which brought what I paid him to $15,000.

The evidence clearly shows that Ker himself viewed the investigation as part of his responsibilities. It wasn't until after he was selected as Chairman of the McClennan County Republican Party that he made this claim.

VI. Did the Investigation the USDA Conducted Against English Violate His Constitutional Rights Under the First, Fifth and Sixth Amendments?

My Constitutional rights were further violated under the *First, Fifth* and *Sixth Amendments* by managers of the USDA when they conducted an "unlawful investigation" against me. This investigation, along with about sixty violations of federal laws, policies and procedures, are specifically enumerated in my Appeal Brief. I also filed complaints with the USDA and DOJ, but neither agency would investigate my claims, which is another *5th Amendment* violation of "due process."

This investigation stemmed from an email that I sent out to Union members, as the Union Steward, while I was on leave. The content upset the females who are friends of management, and when I advised

the members that those females were working with management against the Union, those females got upset. All of those females met with management and they worked together on the wording of their complaints to HR – Edwards, ER – Keim, the EEO and the Union, National Vice President – Eliano. This gathering and the assisted wording of complaints constituted "conspiracy to terminate" me. Each of them is entitled to file complaints against me but it must be done separately and in their own words.

Each of the entities, HR, ER, the EEO and the Union to them that there is nothing wrong with the email that I sent out and that they would not be taking any action against me.

After they received this response, they all met again and concocted a scheme to conduct an investigation themselves. They called it "recent workplace conduct" and got 26 levels of management and attorneys involved, from Temple, Texas to Washington D.C. and had an investigator assigned from D.C.

When the investigator questioned the females and I, all of the questions were only about the email that I sent out. There was nothing about "recent workplace conduct," proving that it was only about the email that HR, ER, the EEO and the Union already refused to take action against. The investigator also went back and spoke with people with whom I had not worked in seven years, which is another violation of due process. Since this investigation centered around the email, and since the email was proven to be valid

communication, this violated my *First Amendment* right of Freedom of Speech.

When I was brought in for questioning, and to be placed on the restrictions, they refused to:

- Allow me to have my attorney or a Union representative during questioning, *6th Amendment* violation.
- They refused to advise me of the nature of my crime(s) or policy violations, *6th Amendment* violation.
- They refused to tell me who the complainants were, *6th Amendment* violation.
- They placed me on the severe restricted movements and reassigned my job duties without cause or justification, *5th Amendment* violation of due process.
- I was then placed on 10 weeks paid administrative leave, *5th Amendment* violation, due process.
- I was not permitted the USDA funded employee appreciation function in San Antonio, *5th Amendment* violation, due process.
- I was denied promotions while under investigation, *Title VII* and *5th Amendment* violation, due process.
- I was reassigned to menial job functions, *Title VII* violation and *5th Amendment* violation, due process

- The investigation started April 12, 2016 and the ROI was sent to USDA around September 29, 2016. However, I was never sent my formal copy, nor was I ever sent the Final Agency decision. *5th Amendment* violation, due process, and also violates, *29 CFR 1614.108(f)* states that agencies have 180 days to complete an investigation, they have grossly exceeded that timeline.
- February 8, 2017, restrictions lifted, but told that investigation is still ongoing.
- Given a 3-Day non-paid suspension for allegedly violating restrictions, *5th Amendment* violation, due process.

All of this can be substantiated based on the ROI, which was submitted into the District Court docket, document #55.

However, the 5th Circuit refused to rule on this stating that it is "new," and "brought up for the first time on Appeal," and that "only items that are extraordinary in nature can be reviewed for the first time on Appeal." If the 60 or more violations of the law, policy and procedure, and the negligent manner in which my attorney, Ker, handled this case are not extraordinary circumstances, then no such case exists!

VII. Is Evidence Submitted into the Docket Part of the Same Case and Not Just the Facts Alleged in the Complaint?

The 5th Circuit refused to consider evidence that was entered into the District Court docket when other Motions were argued. They claim that it was not part of the original complaint and is therefore not part of this case. All evidence entered into the docket of a case has been presented to the Court as part of that case, and therefore should be considered as part of the case. At the very least, the 5th Circuit should have submitted Certified Questions, under *Rule 19, Supreme Court Rules* to the Supreme Court for a ruling as opposed to simply dismissing them.

"In determining whether a complaint states a claim, the Court may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which may take judicial notice," *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

VIII. Is it Legal for the Department of Justice to Represent an Agency, Who's Managers Have Violated the Civil Rights of a Federal Employee Who has Constitutional Guarantees of Due Process of the law(s)?

The DOJ is representing the managers of an agency who violated over sixty federal laws, rules, regulations and procedure, including Civil Rights violations against a federal employee who has Constitutional Rights. For the DOJ to take this position, they are violating their

Oath of Office to "Seek Justice above all else" and to "Support and Defend the Constitution." It would seem that this further violates my 5th Amendment rights of Due Process.

There is no case law supporting this action, which makes this the perfect case for the Supreme Court to rule upon.

CONCLUSION

It is paramount that this Petition for Writ of Certiorari be granted in order to rescue justice from the misguided discretions of the lower Court(s). There are some disturbing trends taking place within the lower Court(s) that are changing the interpretations of precedented case law and cases are being dismissed without due consideration. This misguided practice has caused plaintiffs to either not seek justice, or to Petition the Supreme Court, where there are far too many cases to be heard. Which means the justice is falling through the cracks due to this ill-gotten practice.

Appellant's Petition for a Writ of Certiorari should be granted in order to preserve justice.

Respectfully submitted,

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