No. ---------

In The
Supreme Court of the United States

STEPHEN J. SIMONI,
Petitioner,
v.

JERSEY SHORE UNIVERSITY MEDICAL CENTER
and
HACKENSACK MERIDIAN HEALTH,
Respondents.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

United States Supreme Court precedent requires that union members be awarded attorneys' fees where the employer wrongfully blocked access to quick and inexpensive mandated arbitration and thereby forced the union members to seek a remedy in the judiciary. But are arbitrators in federal labor cases free to disregard this United States Supreme Court precedent simply because the subject Circuit Court of Appeals has not yet itself addressed the issue?

PARTIES TO THE PROCEEDING

Stephen J. Simoni, Petitioner.

Jersey Shore University Medical Center and Hackensack Meridian Health, Respondents.

STATEMENT OF RELATED PROCEEDINGS

Roe v. Diamond, 519 Fed. Appx. 752 (3d Cir. 2013);

Roe v. Diamond, 2011 U.S. Dist. LEXIS 115596 (D.N.J. Oct. 5, 2011), rev'd in relevant part, 519 Fed. Appx. 752 (3d Cir. 2013);

Roe v. Luciani, No. MON-L-4020-12 (N.J. Super.), Mar. 13, 2013;

Simoni v. Diamond, Civ. No. 10-6798 (FLW), 2015 U.S. Dist. LEXIS 108640 (D.N.J. Aug. 18, 2015);

Simoni v. Diamond, Civ. No. 10-06798-PGS (D.N.J. Apr. 12, 2017);

Simoni v. Diamond, No. 10-cv-6798, 2017 U.S. Dist. LEXIS 2746 (D.N.J. Jan. 9, 2017);

Simoni v. JSUMC, Civ. No. 18-17714-FLW, 2019 U.S. Dist. LEXIS 223616 (D.N.J. Dec. 30, 2019).

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Petitioner, Stephen Simoni, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the Third Circuit can be found at 2020 U.S. App. LEXIS 35026. Both the Opinion and the Order of the Third Circuit denying the petition for rehearing and rehearing en banc of the Opinion are reproduced in the appendix hereto ("App.") at App. 1 and App. 56, respectively. The Opinion of the District Court for the District of New Jersey can be found at 2019 U.S. Dist. LEXIS 223616 and is reproduced at App. 9. The Opinion and Award of the American Arbitration Association are reproduced in the appendix hereto at App. 26 and App. 54, respectively.

JURISDICTION

The judgment of the Third Circuit denying the petition for rehearing and rehearing en banc of the Opinion was entered on December 8, 2020. App. 56. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act and Labor Management Relations Act enforce a federal labor policy that keeps union worker disputes out of the judiciary by awarding attorneys fees as ***compensatory damages*** against ***both*** the union and the employer where each entity wrongfully blocked the worker's access to a Collective

Bargaining Agreement's ("**CBA**") quick and inexpensive grievance process that mandates binding arbitration.

STATEMENT OF THE CASE

Petitioner Stephen Simoni ("**Nurse**" or "**Union Member**"), a member of Health Professionals & Allied Employees, Local 5058, AFT/AFL-CIO ("**Union**"), was terminated by Respondent Jersey Shore University Medical Center ("**Hospital**") on October 18, 2010. Nurse submitted a timely grievance with the Union, which the Union in turn filed with the Hospital in accordance with the subject collective bargaining agreement's ("**CBA**") grievance process.

But Hospital flatly refused to process the Union's grievance and instead subjected Nurse to ten years of costly, extensive, and time-consuming litigation that necessitated the involvement of three judges of the U.S. District Court for New Jersey, the Presiding Judge of the N.J. Superior Court's Civil Division in Freehold, and two Third Circuit Panels of the U.S. Court of Appeals from 2011 through 2013 and again in 2020.

Although Nurse finally received $81,338.00 in mitigated backpay eight years after Nurse's termination when the District Court ordered the Hospital to arbitrate, the Arbitrator simply ignored United States Supreme Court precedent that established Nurse's right to attorneys' fees as a union member who was forced to pursue a remedy through the judicial system ***solely because the employer had wrongfully and unilaterally repudiated the CBA's grievance and mandated arbitration process***.

In Nurse's case, that wrongful repudiation resulted in nearly 10 years of litigation, rather than use of the CBA's grievance and mandated arbitration process that was designed by federal labor law statutes to quickly, inexpensively, and ***exclusively*** resolve such disputes and thereby avoid burdening the judiciary.

Nurse explains herein that United States Supreme Court precedent requires an award of attorneys' fees to simultaneously (i) make terminated union members whole; (ii) ensure that union members who are wrongfully blocked from arbitration will find attorneys willing to take their cases; and (iii) serve to deter employers from needlessly burdening the federal and state judiciaries with filings, motions, and appeals of labor disputes that were intended exclusively for mandated arbitration.

REASONS FOR GRANTING THE PETITION

I. Decades-old Supreme Court Authority Awards Attorneys' Fees to Union Members Who Were Wrongfully Denied Their Right to Quick and Inexpensive Mandated Arbitration.

The United States Supreme Court has repeatedly recognized that an essential objective of federal labor law is to preserve the ***non-judicial*** grievance system as the ***exclusive*** mechanism for resolving CBA disputes of union members and instructs that damages must therefore be apportioned against ***both*** employers and unions to ensure that they ***both*** "comply with the grievance procedure" in order to keep these disputes out of the courts:

> [**T]he grievance procedure [] provide[s] the "uniform and exclusive method** for [the] orderly settlement of employee grievances," **which the Court has recognized is essential to the national labor policy**. See Clayton v.

> Automobile Workers, 451 U.S. 679, 686-87 (1981). . . . In the absence of damages apportionment where the default of ***both*** [the union and the employer] contributes to the employee's injury, **incentives to comply with the grievance procedure will be diminished**.

Bowen v. USPS, 459 U.S. 212, 226-27 (1983) (emphases added). The High Court, moreover, explicitly authorizes union workers to obtain extra-contractual remedies where the employer "repudiat[ed] [the subject] contractual procedures:"

> **An obvious situation** in which the employee should not be limited to the exclusive remedial procedures established by the [CBA] occurs when **the conduct of the employer amounts to a repudiation of those contractual procedures**. Cf. Drake Bakeries v. Bakery Workers, 370 U.S. 254, 260-63. See generally 6A Corbin, Contracts 1443 (1962).

Id. at 185 (emphases added).

This Supreme Court precedent mandates that Hospital must pay Nurse's attorneys' fees here: By wrongfully repudiating the CBA's grievance process and its mandatory referral to binding arbitration, Hospital unilaterally unleashed a decade of litigation that needlessly burdened the judiciary and imposed financial damages on Nurse—and the Hospital thereby knowingly exposed itself to an attorneys' fee award. Absolving Hospital of the well-established liability for attorneys' fees in such circumstances will not only conflict with controlling United States Supreme Court precedent, but it will also serve to embolden other employers who seek to end-run CBA-mandated grievance procedures, effectively evade grievances where the union member cannot afford counsel, force labor disputes into the judiciary, and require judges to adjudicate CBA disputes that were intended

exclusively for the quick and inexpensive non-judicial grievance and arbitration process—all while the employer relies on employment practices liability insurance policies to fund its defense.

By requiring employers to pay the union member's litigation expenses, arbitrators reinforce the "***system of private ordering that is of the highest importance*** to the well-being of employer and worker alike" by deterring employers from thwarting mandated arbitration provisions in clear contravention of the "national labor policy that encourages private rather than judicial resolution of disputes arising over the application and interpretation of collective-bargaining agreements." Clayton v. Automobile Workers, 451 U.S. 679, 686-87 (1981) (*citing* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567, 570-71 (1976)).

This United States Supreme Court precedent was detailed at length during the arbitration and all court proceedings below.

II. The Third Circuit, the District of New Jersey, the American Arbitration Association, and the Union All Stated that Hospital Had Wrongfully Blocked Nurse's Access to Quick and Inexpensive Mandated Arbitration, Which Spawned 10 Years of Continuing Burdens on the Federal and State Judiciaries.

The Third Circuit, the District of New Jersey, the American Arbitration Association, and the Union all stated that Hospital had wrongfully blocked Nurse's access to quick and inexpensive mandated arbitration, which then spawned 10 years of continuing burdens on the federal and state judiciaries. And Hospital only permitted Nurse to belatedly access mandated arbitration because Hospital was ordered to do so by the judiciary.

1. The Union

The Union agreed that Nurse:

> should have been provided a pre-termination hearing to determine whether or not [Hospital] had just cause to terminate Nurse's employment, and that any holding adverse to Nurse **would have been eligible for grievance and arbitration under the CBA at Nurse's option**.

Letter from Union to Nurse, dated Jan. 28, 2014 (emphasis added).

2. The American Arbitration Association

The arbitrator recognized that Hospital's wrongful conduct had "required [Nurse] to litigate the issue for approximately eight years prior to these arbitration proceedings" and awarded $81,338.00 in mitigated back pay and interest for the fourteen-month post-termination loss of employment. Arbitral Decision, at 26-27 (App. 51-52).

3. District of New Jersey

The District of New Jersey ruled:

> **There is no dispute . . . that [Hospital] precluded [Nurse] from engaging in the grievance process** . . . . Based on that action alone, [Nurse] has proven as a matter of law that [Hospital] breached Article 13 of the CBA . . . .

Simoni v. Diamond, Civ. No. 10-6798 (FLW), 2015 U.S. Dist. LEXIS 108640, at *21 (D.N.J. Aug. 18, 2015) (emphasis added).

4. Third Circuit

The Third Circuit ruled that the refusal to afford Nurse access to the CBA's grievance process and mandated arbitration was "based on a strained and

logically flawed interpretation of the CBA." Roe v. Diamond, 519 Fed. Appx. 752, 758 n.2 (3d Cir. 2013).

By unilaterally repudiating the CBA and thereby subjecting Nurse to many years of costly and time consuming litigation, ***Hospital knowingly exposed itself to liability for an attorneys' fee award*** to reimburse Nurse for the ensuing litigation expenses that have included assistance of counsel, extensive document discovery, multiple days of depositions, motion practice, and appeals that now continue into the tenth year. And it was only ***after*** the District Court ordered Hospital to do so that Hospital finally permitted Nurse to access the CBA-mandated grievance process rather than conduct a full-blown trial in the District Court.

III. Following U.S. Supreme Court Precedent, Countless Circuits Have Awarded Attorneys' Fees to Union Members Who Were Wrongfully Denied Their Right to Quick and Inexpensive Mandated Arbitration.

Significantly, and as also detailed at length in the appeal below, other United States Circuit Courts of Appeal have adhered to United States Supreme Court precedent and thereby recognize attorneys' fees as ***compensatory damages*** to union members who have been blocked from pursuing their claim in the quick and inexpensive forum of binding arbitration as provided for in the subject Collective Bargaining Agreement's mandated grievance process. The decisions of these numerous Circuits include those below.

1. First Circuit

The First Circuit explained that

> the cost of **attorney's fees is an injury to the employee directly attributable to and**

> **necessitated by the failure of the union and/or employer to utilize the contractual grievance procedures** designed to remedy breach of contract claims **without resort to the courts**. . . . [and an attorneys' fee award protects the worker who] should retain a substantial portion of the . . . 'lost earnings' award for himself.

De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 293 n.17 (1st Cir. 1970), cert. denied, 400 U.S. 953 (1970)) (emphasis added).

2. Second Circuit

The Second Circuit affirmed the District Court's (i) vacating of an arbitral decision and (ii) awarding attorneys' fees as compensatory damages to a terminated union member against the employer in Holodnak v. Avco Corp., 514 F.2d 285, 286 (2d Cir. 1975), aff'g in relevant parts 381 F. Supp. 191 (D. Conn. 1974), cert. denied, 423 U.S. 892 (1975). Ruling that the terminated worker should not be required to utilize the backpay award to cover legal expenses, the Court relied on, *inter alia*, De Arroyo v. Sindicato de Trabajadores Packinghouse:

> The alleged wrong inflicted on the employee, the loss of employment in violation of contractual rights; the anticipated recovery, perhaps too insubstantial to sustain competent counsel's best efforts, and **the ultimate purpose of making the employee whole, all suggest that the employee should retain his lost earnings for himself**. Vaca v. Sipes, 386 U.S. at 210 (Mr. Justice Black dissenting); De Arroyo v. Sindicato de Trabajadores Packinghouse, *supra*.

Holodnak v. Avco Corp., 381 F. Supp. 191, 206 (D. Conn. 1974) (emphasis added), aff'd in relevant parts, 514 F.2d 285, 287 (2d Cir. 1975) ("We are in agreement with

the [District Court] decision to set aside the arbitration award . . . and to ***award [the union member] back pay and counsel fees***, and accordingly we affirm as to these issues on the basis of [the District Court's] thorough decision." (emphasis added)), cert. denied, 423 U.S. 892 (1975).

3. Fourth Circuit

In 1980, the Fourth Circuit reversed the District Court and held that the union members

> should be awarded a judgment in a reasonable amount to **cover their expenses**, including **attorneys' fees and costs, incurred in seeking a fair resolution of their claim against the employer**.

Self v. Drivers, Chauffeurs, 620 F.2d 439, 444 (4th Cir. 1980) (emphases added).

4. Fifth Circuit

The Sixth Circuit affirmed a $39,368.75 award of attorneys' fees to the union member to compensate him for the expense of pursuing his remedy in the judicial system rather than the CBA-mandated process. Seymour v. Olin Corp., 666 F.2d 202, 215 (5th Cir. 1982).

5. Sixth Circuit

In 1989, the Sixth Circuit held the employer liable for the union member's attorneys' fees because the employer had played a part in depriving the union member of the proper CBA-mandated grievance and arbitration. Allied v. Plant Maintenance Co., 881 F.2d 291, 297 (6th Cir. 1989).

6. Seventh Circuit

The Seventh Circuit ruled in 1992 that "[t]o avoid conflict with the American rule, courts generally limit fees awarded as [compensatory] damages in [federal labor law cases] to the ***expenses incurred in pursuing the claim against the employer***." Bennett v. Local Union No. 66, Glass, Molders, Pottery, Plastics and Allied Workers Union, 958 F.2d 1429, 1440 (7th Cir. 1992) (emphasis added)).

7. Ninth Circuit

The Ninth Circuit rejected the argument that awarding a terminated union member attorneys' fees in a federal labor law case violates the American rule. Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1276 (9th Cir. 1983) (the award "represent[s] damages, not attorney's fees per se, and does not violate the American rule"). The Ninth Circuit explained that awarding attorneys' fees in a federal labor law action does not violate the American rule because the union member had incurred attorneys' fees ***solely because the grievance had to be processed in the courts rather than in CBA-mandated arbitration*** and therefore the union member's attorneys' fees are not merely "a result of the harm," but rather are "***the harm itself***," id. at 1275 (emphasis added), and would have been entirely avoided if the CBA-mandated grievance process had been permitted to proceed, as designed by federal labor statutes, for exclusive non-judicial resolution of the union member's claim. Cf. UFCW, Locals 197 & 373 v. Alpha Beta Co., 736 F.2d 1371, 1383 (9th Cir. 1984) ("[T]he award of fees is appropriate when a party frivolously or in bad faith refuses to submit a dispute to arbitration. . . . ").

IV. It is Respectfully Submitted That The Third Circuit Erred By Failing to Follow U.S. Supreme Court Precedent.

It is respectfully submitted that the Third Circuit erred when it declined to modify the arbitration award to add an award for attorneys' fees. The Third Circuit did not acknowledge the decades-old United States Supreme Court precedent that calls for an award of attorneys' fees to union members who were denied the right to quick and inexpensive mandated arbitration. Instead, the Third Circuit based its ruling solely on its statement that "our circuit has left open whether an employee could recover attorneys' fees in those circumstances[, which] means our circuit has no clear law that the arbitrator could have manifestly disregarded." App. 6.

Arbitrators who apply federal labor law, however, must of course apply *national* labor law as enunciated by the United States Supreme Court and cannot blindly follow a specified Circuit's law that may not have yet addressed an issue that the United States Supreme Court already has resolved.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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