No. 20-7399

IN THE

Supreme Court of the United States

JENITA CLANCY

Petitioner,

v.

Lloyd James Austin III
Secretary, Department of Defense
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

AMENDED PETITION FOR REHEARING

JENITA CLANCY
Pro se
573-855-5878

Pursuant to Rule 44 of this Court, petitioner Clancy, hereby respectfully petition for rehearing of this case. This case involves disability discrimination and harassment, retaliation and post-employment retaliation.

Petition alleged that her immediate supervisor Tina Groves at DeCA Fort Riley Kansas discriminated against her in violation of the Rehabilitation Act of 1973, Section 501 and 505 as amended, by insisted Clancy to sign resignation form (SF-52) rashly, and discharging her employment immediately after she opposed to return to a belligerent and provocative confrontation meeting about the (management did not modify News Release 62-16) for the allegedly pretextual reason of performing poorly. Clancy further claimed that the discharged was in retaliation based on opposition for the harassment and retaliation repeatedly on a series of baseless counselling two to three times a week from July 2016 to November 3, 2016, in violation of Title VII Civil Rights Act of 1964

The Kansas District Court did not give petitioner Clancy any opportunity to file evidence on her opposition for summary judgement. Granted defendant/respondent Summary Judgement without evidence from petitioner on the ground that petitioner Clancy did not have expert witness and no reference on the record. The Court ordered that Clancy must pay cost to defendant. The Tenth Circuit Court of Appeal affirmed all judgement of Kansas District Court.

CLAIM UNDER SECTION 505 & 501 OF THE REHABILITTION ACT 1973 AS AMENDED

Discrimination based on disability

Petitioner Clancy suffered to a demeaning comment from her immediate supervisor Tina Groves about Clancy "position as a secretary was not good for mental health" on a numerous closed-door counselling about the fabricated performance issue after Clancy was continuously opposing her supervisor harassment and retaliation. Groves made it clear in writing, she wanted Clancy vacated her secretary position. (ECF No. 8, pp. 325, third para.)

Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. 794, was one of the first federal civil rights statute that protect an employee with disability from discrimination. *Baker v. Board of Regents*, 991 F.2d 628, 631 (10th Cir. 1993), When Congress enacted the Americans with Disabilities Act of 1990 (ADA), it used Section 505 as a benchmark, directing that nothing in the ADA "be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973," 42 U.S.C. 12201(a), and preserving the existing rights and remedies of Section 505, see 42 U.S.C. 12201 (b).

It is undisputed that prior to 1992, Section 505 prohibited employment discrimination against persons with disabilities by any entity that received federal

financial assistance. Congress intended that Section 505 govern the employment practices of any program or activity that received federal financial assistance. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 632 (1984); cf. Roberts v. Progressive Independence, Inc., 183 F.3d 1215, 1217 (10th Cir. 1999).

The language of Section 505 admits of no exceptions. It provides that otherwise qualified individual with a disability in the United States shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. " 29 U.S.C. 794(a)

Section 505(d) provides that the standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act." 29 U.S.C. 794(d) The word "standard" means a measure or rule applicable in legal cases such as the standard of care in tort actions. Black's Law Dictionary 1404 (6th ed. 1990). It refers to the rules regarding what constitutes a "violation. " By its plain meaning, the provision does not incorporate the coverage provisions of Title I or anything other than standards of liability. This Court has already recognized that, even after the 1992 amendments, Section 505 cannot be read to incorporate Title I's "good faith efforts" defense to compensatory damages.

See Roberts, 183 F.3d at 1223 (declining to engage in "creative statutory construction").

The legislative history of the Rehabilitation Act Amendments makes clear that Section 505 and its companion provisions were simply intended to "ensure uniformity and consistency of interpretations," S. Rep. No. 357, 102d Cong., 2d Sess. 71 (1992), so that entities subject to both Section 505 and Title I would be assured of a uniform set of rules. Given that the various statutes and implementing regulations had been enacted using different language over the course of two decades, it was not surprising that differences had developed. Under Sections 501 and 505, a reasonable accommodation for an employee with a disability did not include reassignment to a vacant position; Title I expressly include reassignment as a potential required accommodation. *Woodman v. Runyon*, 132 F.3d 1330, 1339 & n.9 (10th Cir. 1997). By incorporating the "standards" of Title I into Section 505, Congress made sure that all employers governed by federal disability anti-discrimination law were subjected to the same requirements.

Senator Harkin thus explained during consideration of the Rehabilitation Act Amendments, after outlining the various components of the duty not to discriminate in Title I of the ADA, that "[n]ow those who are covered by title V of the Rehabilitation Act will know that these are the definitions of reasonable accommodation and discrimination that apply. They will also know that the

standards governing preemployment inquiries and examinations, and inquiries of current employees apply. Incorporating the ADA standards into the Rehabilitation Act will assure that there will be consistent, equitable treatment for both individuals with disabilities and businesses under the two laws." 138 Cong. Rec. 31522 (1992); *Freed v. Consolidated Rail corp.*, 201 F.3d 188, 194 (3d Cir. 2000) (The aim of these provisions is to achieve substantive conformity and to avoid duplication of effort).

Section 505 applies to all programs or activities "conducted" by federal agencies such as Defense Commissary Agency (DeCA). The tenth Circuit has held that Congress intended Section 501 to be the exclusive avenue for federal employees to claim employment discrimination on the basis of disability, *Johnson v. United States Postal Service*, 861 F.2d 1475, 1478 (10th Circuit 1988), and the Supreme Court has held that, unlike Section 501, Section 505 does not waive federal sovereign immunity for damage claims, *Lane v. Pena*, 518 United States 187 (1996).

CLAIM UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Harassment based on disability

Petitioner Clancy was subjected to intimidation. Her direct supervisor Tina Groves threatened her on a series of closed-door counselling about the fabricated

performance issue, verbally and in writing such as: Failing to follow my instruction will result in progressive action; *(ECF No. 8, pp. 469, last para.),* Future issue could result in the initiation of other adminstrative actions; (*ECF No. 8, pp 325, 2nd para., last line*), and Insubordination.

Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors. The Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles:

1) an employer is responsible for the acts of its supervisors;
2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment.

In order to accommodate these principles above, the Supreme Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior.

b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The Supreme Court, reasoned that vicarious liability for supervisor harassment is appropriate because supervisors are aided in such misconduct by the authority that the employers delegated to them. Therefore, that authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment. *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton,* 118 S. Ct. 2275 (1998).

Retaliation based on opposition & filing charged

On January 6, 2016, Petitioner Clancy has filed another EEOC complaint against DeCA Fort Leonard Wood Missouri location. The defendant on this EEOC complaint was Tina Groves former director at Fort Riley Kansas. Immediate supervisor Groves violated DeCA policy for did not pay Clancy Sunday Premium Pay on March 20, 2016, and did not pay Clancy earned overtime on May 31, 2016. These were an abuse of authority, in violation of 5 U.S. Code § 2302 - Prohibited Personnel Practice (PPP), and in violation of Title VII.

It shall be an unlawful employment practice for an employer to retaliate against any of his employee because she has opposed any practice made an

unlawful employment practice or because she has made a charged. Title VII also prohibits employers from retaliating against employees based on an employee's opposition to employment discrimination or complaint of discrimination. *See* 42 U.S.C. § 2000e-3(a).

Post-Employment-Retaliation

Petitioner supervisor Tina Groves not only protested Clancy unemployment claim, submitted falsified information about Clancy discharged but also denied that the unemployment insurance never contacted them.

Unemployment Insurance Employer Handbook information, posted to the Kansas Department of Labor website stated, that "when an individual file a claim for unemployment, that individual's last employer (DeCA Fort Riley) is mailed an Employee Notice form K-BEN 44/45." "If the employer protested the claim, employer will select one of the four elements".

The element DeCA chose was *"Left work voluntarily without good cause attributable to the work or the employer."* The element DeCA chose above was mentioned two times on Clancy denial of unemployment letter. Line 7- 8, and 10-11 below the word "DECISION." *(EFC No.8, pp.78-79, 100, 109, 176-178, 510-511.)* Employer Protest to the Benefit Charge, third element on (page 23) of Kansas Unemployment Insurance Employer Handbook, (Pltf. Ex. G-2).

United States Supreme Court, in a unanimous decision, has held that former employees may sue under Title VII of the Civil Rights Act of 1964 to challenge alleged retaliation by their past employers. *Robinson v. Shell Oil* Co. (95-1376), 519 U.S. 337 (1997).

For the foregoing reasons, the petition for rehearing should be granted. This case is matter to Clancy. She was working for her retirement, she lost almost everything after she was discharged immediately by her immediate supervisor on November 3, 2016, including her health insurance. She lost peace of mind. She lost her ability to earn an income that support herself and her defendant family.

Respectfully Submitted April 28, 2021

Jenita Clancy
Pro se

Enclosure

CERTIFICATE

Petitioner Clancy hereby certify that this petition for rehearing is presented in good faith and not for delay.

Jenita Clancy
Pro se

April 28, 2021

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CERTIFICATE OF SERVICE

I **Jenita Clancy**, do swear or declare that on this date, **April 28, 2021**, as required by Supreme Court Rule 29, I have served the enclosed PETITION FOR REHEARING on party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by electronic to defendant counsel on April 27, 2021.

The names and addresses of those served are as follows:

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Jenita Clancy