No. 20-7599

In The
Supreme Court of the United States

KEVIN L. TUCKER,
Petitioner,

v.

DAVID SHULKIN, SECRETARY OF DEPT. OF VETERANS AFFAIRS.,
Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

Kevin L. Tucker
3794 1st St SE
Washington DC 20032
(864) 506-1925
philosopherking2017@gmail.com

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

QUESTION(S) PRESENTED

> Whether the United States Court of Appeals for the Third Circuit has entered a decision in conflict with the United States Court of Appeals for Veteran Claims and the United States Court of Appeals for the Eleventh Circuit on the same important matter, in direct conflict with the United States of Court Appeals for the Eleventh Circuit and the United States Court of appeals for Veterans Claims?

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Mr. Kevin L. Tucker, whose contact information is Kevin L. Tucker, 3794 1st St., SE Washington DC 20032; (864) 506-1925; philosopherking2017@gmail.com.

The Respondent in this case is Mr. David Shulkin, in his official capacity as Secretary of the United States Department of Veteran Affair, who is represented by an attorney, to-wit: Judith A. Amorosa, Esq., Assistant United States Attorney, 615 Chestnut Street, Philadelphia, PA 19106: Phone: 215-861-8869; Email: judith.amorosa@usdoj.gov.

OPINIONS BELOW

The Court of Appeals for the Third Circuit entered judgment on Friday, July 24, 2020 (App. 1). The Petitioner did timely file a Petition for Rehearing *en banc*, which was denied on Tuesday, December 22, 2020 (App. 3).

JURISDICTON

The Court of Appeals for the Third Circuit entered judgment on Tuesday, December 22, 2020 (App. 3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Section One of the 14th Amendment.*

INTRODUCTION

In a nutshell, this Court committed a clear error of law by holding the unrefuted evidence demonstrates that Tucker has been collecting 100% permanent and total disability from the VA for a time that started before his constructive discharge and continues to the present.

Because Tucker is, and has been, completely disabled he is not entitled to back pay, front pay, or reinstatement. Tucker does not argue that he is entitled to any other type of equitable remedy. Tucker has not shown that his alleged injury is redressable. Therefore, Tucker has failed to meet his burden of establishing standing. The Court lacks subject matter jurisdiction because Tucker does not have standing to bring his RA retaliation claim. However, this Court has been led to believe that 100% Permanent and Total (P &T) disability for the VA purposes is the same as permanent and total disability for Social Security and Department of Labor purposes.

The Plaintiff has continuously argued that the Defendant knowingly made P & T interchangeable with Total Disability with Individual Unemployability (TDIU).

The Plaintiff has stated numerous times that the Cases: *Ingram v Nicholson*; *Stefl v Nicholson*; and *Nieves-Rodriguez v Peake* from the US Veterans Court of Appeals, were still being addressed by the Defendant.

The Defendant has been aware of these issues being addressed and have manipulated the Court for their cause. The Defendant stated in their Summary Judgement that "Mr. Tucker cannot now establish..." knowing that the VA had made erroneous errors in their adjudication of Mr. Tucker's benefits. Once a Veteran becomes 100% P & T they are protected from VA ratings being reduced.

STATEMENT OF THE CASE

In a nutshell, the United States Court of Appeals for the Third Circuit rendered a decision that is in direct conflict with the United States Court of Appeals for Veterans Claims opinion in Cantrell v. Shulkin, No. 15-3439 (Decided April 18, 2017) and the United States Court of Appeals for the Eleventh Circuit's opinion in Proctor v. Fluor Enterprises, Inc., 494 F.3d 1337, 1349 (11thCir. 2007), by holding:

> The unrefuted evidence demonstrates that Tucker has been collecting 100% permanent and total disability from the VA for a time period that started before his constructive discharge and continues to the present. Because Tucker is, and has been, completely disabled he is not entitled to back pay, front pay, or reinstatement. Tucker does not argue that he is entitled to any other type of equitable remedy. Tucker has not shown that his alleged injury is redressable. Therefore, Tucker has failed to meet his burden of establishing standing. The Court lacks subject matter jurisdiction because Tucker does not have standing to bring his RA retaliation claim. (Doc. No. 63 at p 6-7).

REASONS FOR GRANTING THE PETITION

The courts have developed several justiciability doctrines to enforce the case-or-controversy requirement, and "perhaps the most important of these doctrines" is the requirement that "a litigant have standing' to invoke the power of a federal court. *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984).

The standing question is whether the Plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the Court's remedial powers on his behalf. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

The Plaintiff bears the burden of meeting the "irreducible constitutional minimum" of Article III standing by establishing three elements: First, the plaintiff must have suffered an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the

conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The Third Circuit has recognized that of the three required elements of constitutional standing, "the injury-in-fact element is often determinative." *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 138 (3d Cir.2009). To satisfy this requirement, the alleged injury must be "particularized," in that it "must affect the Plaintiff in a personal and individual way." (*Lujan*, 504 U.S. at 560 n. 1, 112 S.Ct. 2130).

"The `injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be they among the injured." *Lujan.* at 563, 112 S.Ct. 2130 (*Sierra Club v. Morton,* 405 U.S. 727, 734-35, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)). The injury must also be "an invasion of a legally protected interest." Id. at 560, 112 S.Ct. 2130. Since "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n. 6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996), a Plaintiff who raises multiple causes of action "must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). Furthermore, "the standing inquiry requires careful judicial examination of complainant's allegations to ascertain whether the particular Plaintiff is entitled to an adjudication of the particular claims asserted." (*Allen*, 468 U.S. at 752, 104 S.Ct. 3315).

The Plaintiff has argued that the VA Vocational Rehabilitation Department assisted Mr. Tucker in gaining employment with the VA. If the Court accepts the Defendant's argument that Mr. Tucker should not move forward, because of his unemployable status, it would be a contradiction of the Cantrell v Shulkin decision by the Court of Appeals for Veterans Claims. Mr. Tucker has claimed that his position with VA was protected.

Cantrell v. Shulkin was a case successfully argued before the Court of Appeals for Veterans Claims. The issue at hand here was that Mr. Cantrell was working while seeking Total Disability based on Individual Unemployability, a benefit equivalent to a 100 percent VA rating reserved for veterans who are left unable to secure or maintain substantially gainful employment due to a service-connected disability; however, the work he was doing was protected. A *protected work environment* is one in which an employer makes special accommodations for the veteran that enables him or her to work there. These accommodations would be considered unreasonable for most jobs. According to VA's regulations, a job is not substantially gainful if it is in a protected work environment.

While the court did not provide a definition for what a protected work environment is, it conceded that VA must consider the degree of accommodation the veteran is receiving from his or her employer and look at the combined impact of all of the veteran's service-connected disabilities in determining whether referral for extra schedular consideration is warranted.

The Plaintiff is making this request because the Plaintiff believes and has often stated that the Courts have not received full disclosure from the Defendant on issues surrounding his Department of Veterans Affairs (VA) benefits. Hence, the Court, in the Plaintiff's thinking, has been manipulated by the Defendants to receive judgements in their favor.

The Defendant stated in their Motion for Summary Judgement that Mr. Tucker cannot now establish that he was qualified to perform the essential functions of the job. The Defendant knew and understood that the Plaintiff found errors in his benefits, and that he was working to have the errors corrected. The Defendant attempted to manipulate and get this case dismissed before the VA corrected its own errors. The Plaintiff noted on numerous occasions that he was under the impression that his permanent and total (P&T) rating was tied to his disabilities.

The Defendant acknowledges that Mr. Tucker contacted the VA about his P&T; yet, they failed to inform the Court that they knew Mr. Tucker had placed a Notice of Disagreement with the VA, which was received 3 October 2011. So, when Mr. Tucker was inquiring about his rating based on disabilities and not unemployable. Exhibit 1: Letter dated 2 October 20, which states, "...certifies that Kevin Tucker is receiving service-connected disability compensation as follows:

Effective Date of August 18, 2010
Percent (%) Disability 100
Assigned: Basic Eligibility under 38 USC from August 18, 2010
Chapter 35 – Permanent and Total

The Defendant recklessly equates P&T with P&T Unemployable—Total Disability based on Individual Unemployability (TDIU). The Defendant stated numerous times in their Motion for Summary Judgement that Mr. Tucker was unemployable; yet, they knew that Mr. Tucker with many Veterans misunderstand the differences between the varying 100 percentages.

The Defendant has members that were demoted or reassigned in part because they misapplied the Fast Letter (law) of the TDIU. Ms. Lucy Filipov stated in her deposition that this was the case in her reassignment.

Mr. Tucker provided an exhibit showing that he was 100% and not TDIU. Exhibit 2: Letter dated 7 October 20, which states, "This total disability is considered permanent. You are not scheduled for future examinations."

The Defendant would have the Court believe that permanent and total of the VA are parallel with the Department of Social Security and Department of Labor. There is a difference in the former compared to the latter two. Within the VA a Veteran with service connection can have percentages for numerous ailments that would equal to 100%. If the ailments will last for the life of the Veteran, then the Veteran is not required to have future examination for those issues. For instance, if a Veteran has a temporary 100% for prostate cancer the VA will schedule them future examinations; hence, they may not keep the 100% for life.

Mr. Tucker believes that he has addressed the Third Circuit established two-part test based on Cleveland v Policy Management Systems Corporation. Mr. Tucker has held in both Motions for Summary Judgement and Dismissal that his testimony was and is based on the truth that he is P&T. Mr. Tucker submitted the argument that the VA had made an error in his benefits summary and he presented the fact that the VA was working to correct the error. The Defendant knew that Mr. Tucker was correct and the Defendant withheld that evidence or information from the Court. That is why the Defendant stated, "...that Tucker cannot now establish..." The Defendant knew what was coming down the pike on the issue of Mr. Tucker's benefits rating, and that that decision would not fit their narrative. The forms that were sent to the Plaintiff should never have gone to Mr. Tucker; however, Mr. Tucker was truly under the impression of being P&T.

Next, Mr. Tucker was very capable of doing the essential job duties as he never had a negative job performance. As well, Mr. Tucker was doing the work of GS-11 and 12 levels while he served at the GS-7 level.

Mr. Tucker did contact Ms. Vernell Washington, EEO Specialist Manager on Wednesday, 17 September 2014, asking her to look over the letter that he was going to send to the VA Secretary. Mr. Tucker, also, asked her to offer any suggestion and that he would send the letter out on the next day to the Secretary. This letter talked about the issues going on at the VA and the request that the Secretary get involved. This is exhibit 3. As well, I refer to Complainant v Robert McDonald.

Mr. Tucker argues that the Defendant denied him reasonable accommodations for faulty reasoning, and that the Defendant did not follow its own procedures in making the decision. The irony is that the Defendant sent Mr. Tucker home to work then came back saying without an assessment that Mr. Tucker would suffer from the same medical emergencies at home.

Ms. Lina Giampa, Chief of Human Resources, stated in her deposition—page 86, sentences 18-23—So, we had thought that relocating him for his duty assignment to his home where one would assume he's pretty much protected from whatever it is that's bothering him, that that would have been a reasonable and appropriate accommodation for the scent issue."

The testimonies of the various upper managers constantly contradicted each other. They acknowledged that they did not reference the VA Policy Handbook on Disabilities. Ms. Giampa with her important position that should ensure that all employees understand and follow the guidelines set forth by the agency failed to read or have knowledge of the protocol for accommodating disabled employees versus regular employees that want to work from home.

She goes in great length to categorize in her deposition the role that reasonable accommodations had taken on in an environment that was meant to care for those who suffered for their Country and the Agency that is to ensure their success and support. Her statement on page 87, sentences 1-10:

I wasn't involved in RA as far as managing and helping. I was consulted for these difficult and helping. I was consulted for these difficult to say that it was new.

We were always dealing with RA's. But it was a line of business that was getting more and more inquiries and requests. And I don't know if that had to do with our hiring of primarily disabled veterans or - but business was booming, so to speak, in reasonable accommodation.

While the Defendant was denying Mr. Tucker the ability to telework as a reasonable accommodation the Defendant was permitting two Caucasian males to telework as a reasonable accommodation.

Ms. Lucy Filipov, Assistant Direct of the Philadelphia Regional Office (RO) stated in an email dated 12 February 2014, "Are we putting his health in jeopardy by having him in the work effort?...I feel as though we may have liability here if we continue with the pattern?"

Ms. Filipov said in another email I do not know why Kevin would go to Ameen's office to speak with him knowing that Ameen's oils and smell bothers him. Yet, on the 12th of February where she acknowledges liability she sends me in a room to meet with Ameen so that he can give me my letter to work from home.

This is an example of direct liability to my condition and placing me in a position that I had to do what was told to me or receives punishment. Please see the *US Aviation Underwritiers, Inc. v Olympia Wings, Inc.* (liabilities). Ms. Filipov even testified that she wanted the RO to bring me back from termination because she found the reasons lacking. She wanted to find stronger or better reasons to terminate Mr. Tucker.

The Defendant sought to retaliate against the Plaintiff from the moment he sent the first letter to the Secretary and Under-Secretary of the VA on issues that was going on at the RO. The day after contacting the two the Plaintiff was being targeted for termination. Email dated 8 July 13, "This HR Office had HRC expedite his previous civilian service to determine that he was a probationary employee. I think this might need a discussion."

The Defendant has used numerous actions to ensure that there was adverse treatment towards Mr. Tucker and now they want to get assistance from the Court to

dismiss the Plaintiff with a technicality that they knew was created from their own inaction to Mr. Tucker's benefits issues.

Under Rule 59(e) 2: the availability of new evidence; or 3: the need to correct clear error of law or prevent manifest injustice. Mr. Tucker believes that with exhibit 1 and 2 the Court will see the new evidence and find that there was an error of law and help to prevent manifest injustice.

The Defendant knows that once a Veteran is 100% P&T that the Veteran does not receive a VA Form 21-4041; therefore, the two questionable forms should be deemed inadmissible. Mr. Tucker has argued that it is most interesting that letters that should go out to Veterans each year that are unemployable was only sent to Mr. Tucker twice, which correlated with Court and EEO issues to help the Defendant with their manipulation to win with a technicality.

The Third Circuit Court of Appeals has held that when an EEO process is within a year and an adverse action occurs that the Plaintiff does not have to restart the EEO process. The two will be considered together. This goes that when the Plaintiff was terminated in October 14, it was recommended by Ms. Jeanne Paul, Service Center Manager and Mr. Tucker's third line supervisor, around the time that she was being interviewed by the EEO Investigator. As well, the EEO Investigation ended in June and September the Director Ms. Diane Rubens was putting the termination together without an investigation or speaking with Mr. Tucker. These actions were premeditated. Please see the *Carvalho-Grevious v Delaware State University* case.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

/s/ Kevin L. Tucker

Kevin L. Tucker
3794 1st St SE
Washington DC 20032
(864) 506-1925
philosopherking2017@gmail.com

CERTIFCATE OF COMPLICANCE

I, Mr. Kevin L. Tucker, Petitioner, proceeding pro se, hereby certifies that the foregoing Petition for Writ of Certiorari complied with the Rules of the Supreme Court of the United States, whereas the same is submitted on 81/2 by 11-inch paper, is in Century Font, 12-point-type with 2-point leading between lines, and contains a total a total of 3240 words per Microsoft Word 2016.

/s/ Kevin L. Tucker

Kevin L. Tucker
3794 1st St SE
Washington DC 20032
(864) 506-1925
philosopherking2017@gmail.com