No. _____

In The

Supreme Court of the United States

CONEISHA L. SHERROD,

Petitioner,

v.

UNITED WAY WORLDWIDE,

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

(1) Whether the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981") prohibits a non-contracting party from interfering with person's contract, specifically, a person's employment, based on race.

(2) Whether alleging that a party either participated in race discrimination directly or had knowledge of discrimination, the authority to prevent discrimination, and refused to prevent the discrimination, is sufficient to state a cause of action under Section 1981.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Coneisha Sherrod petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit is unreported but available at 821 Fed. Appx. 311 and reproduced in the Appendix ("App.") at 1-9. The underlying district court decision is unreported but available at 2018 WL 10435225 and reproduced at App. 29-41.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2020. This Petition is timely filed under Supreme Court Rule 13 and this Court's order dated March 19, 2020, which extended the deadline for filing any petition for writ of certiorari due after the date of the order. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULES INVOLVED

The relevant statute is Section 1981 which provides:

> **(a) STATEMENT OF EQUAL RIGHTS**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> **(b) "MAKE AND ENFORCE CONTRACTS" DEFINED**
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> **(c) PROTECTION AGAINST IMPAIRMENT**
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

The relevant rules are Federal Rules of Civil Procedure 8 and 12.

Rule 8(a)

> 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.

FED. R. CIV. P. 8.

Rule 12(b)(6)

Rule 12(b)(6) provides that a party may assert a defense by motion of "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

STATEMENT OF THE CASE

United Way Worldwide oversees the operations of its member organizations, such as United Way of Tarrant County, Texas. Coneisha Sherrod was the Vice President of Human Resources of United Way of

Tarrant County. She alleged retaliation against her by United Way Worldwide.

United Way Worldwide knew about a previous discrimination claim by an Executive Vice President of United Way of Tarrant County, and that Ms. Sherrod reported retaliation for being a witness, opposing discrimination against the Executive Vice President and herself, and for correcting ERISA violations as a plan administrator. United Way Worldwide communicated with Ms. Sherrod multiple times about her claims. United Way Worldwide member organizations are subject to United Way Worldwide who has the power to force its member organizations to comply with the law and has done so in the past. United Way of Tarrant County terminated Ms. Sherrod within days of her reporting violations to United Way Worldwide.

United Way Worldwide told Ms. Sherrod after her termination that it was reviewing the matter but then tells her that it has contacted legal counsel and will not be taking any further action. Coneisha Sherrod sued United Way Worldwide and its member organization, United Way of Tarrant County, for retaliating against her for opposing violations under Section 1981 and the Employee Retirement Income Security Act ("ERISA"). Ms. Sherrod alleged that United Way Worldwide retaliated against her in violation of Section 1981 and ERISA by either participating in her termination of employment or refusing to prevent the discrimination and retaliation.

The Trial Court dismissed Ms. Sherrod's claims against United Way Worldwide upon a motion under Rule 12(b)(6). A jury found that United Way of Tarrant County retaliated against Ms. Sherrod for reporting and opposing a violation of Section 1981, the ERISA claim to be tried later to the judge. United Way of Tarrant County then settled with Ms. Sherrod and Ms. Sherrod appealed the dismissal of United Way Worldwide. The Fifth Circuit Court of Appeals affirmed the Trial Court.

REASONS FOR GRANTING THE PETITION

The application of Section 1981 and ERISA to prevent interference in employment by non-employers needs clarification. The Courts of Appeal are not uniform in the application of these statutes.

1. Section 1981 was meant to prevent interference in contracts.

The significance of Section 1981 as American landmark legislation is hard to overstate. Section 1981 is both a Thirteenth and a Fourteenth Amendment statute. *See Jett v. Dallas Indep. Sch. Dist*., 491 U.S. 701, 722 (1989) (citations omitted). The Act is "plainly meant to secure that right against interference from any source whatever, whether governmental or private." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 424 (1968).

The broad language is not "a mere slip of the legislative pen." *Id*. at 427. "We think that history leaves no doubt that, if we are to give (the law) the scope that its origins dictate, we must accord it a sweep as broad as its language." *United States v. Price*, 383 U.S. 787, 801 (1966) (construing Section 1982). The Civil Rights Acts of 1866 and 1871 were each aimed primarily at the Ku Klux Klan. *Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 665 n.11 (1978); *Jett*, 491 U.S. at 722. Preventing interference with equal rights is foundational to Section 1981.

The Supreme Court previously recognized a Section 1981 claim not only against an employer, but against the union as a third party participating in the violation, as well. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668–69 (1987) (superseded on other grounds by statute).

Most circuits have found Section 1981 to prohibit third-party interference with contracts based on race. *See Deets v. Massman Const. Co*., 811 F.3d 978, 984 (7th Cir. 2016) ("a third party can be liable under § 1981 for interfering with the plaintiff's relationship with his employer"); *Moore v. Grady Mem'l Hosp. Corp.*, 834 F.3d 1168, 1173 (11th Cir. 2016); *Harris v. Allstate Ins. Co.*, 300 F.3d 1183, 1197 (10th Cir.2002); *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 351 (4th Cir. 2013); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1313 (9th Cir. 1992) abrogated on other grounds recognized *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1055 (9th Cir. 2008); *Griffin v. Pinkerton's, Inc.*, 173 F.3d 661, 664 (8th Cir. 1999); *Al-Khazraji v. Saint*

Francis Coll., 784 F.2d 505, 518 (3d Cir. 1986), aff'd, 481 U.S. 604, 107 S. Ct. 2022, 95 L. Ed. 2d 582 (1987).

The issue is whether a third party must have managerial control over the plaintiff to be liable or can a non-related party be liable for interference. *See McIntyre v. Roly's Trucking, Inc.*, No. 4:14-cv-193, 2014 WL 1692782, at *2 (N.D. Tex. Apr. 29, 2014) ("[T]he court has found no Fifth Circuit case expanding race discrimination and retaliation claims under § 1981 in the employment context to third parties who are not in some form of employment relationship with the plaintiff as employer, coworker, or supervisor."). *See also Miller v. Wachovia Bank, N.A.*, 541 F. Supp. 2d 858, 863 (N.D. Tex. 2008) (for 1981 liability to attach, the non-employer defendant must have had control or managerial authority over the plaintiff, restricting the reach of § 1981 non-employer liability). The claim should be based on substantial influence not managerial control. *See Daniels v. Pipefitters' Ass'n Local Union* No. 597, 945 F.2d 906, 1914 (7th Cir. 1991) (action against a union who had substantial influence on employment contracts).

Section 1981's language itself is not restricted to prohibitions against those in privity of contract. The act affirmatively gives persons the right to enter into and enforce contracts in the same manner as white citizens. Restricting Section 1981 beyond its plain language to allow those not in privity with a contract to prevent the contract is not within the purpose of the statute. For example, the Ku Klux Klan should be prohibited under Section 1981 from interfering with other

persons' contracts on the basis of race. *See Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993, 1012 (S.D. Tex. 1981) (enjoining the KKK from interfering with contractual rights). A fair reading and interpretation of Section 1981 would protect employees from third parties who interfere with employment contracts on the basis of race, regardless of managerial authority.

2. *Iqbal* and *Twombly* were not meant to bar pleading relying on indirect evidence.

Clarification is needed between the standard in *Swierkiewicz*, which does not require particularity beyond the elements of the claim and *Iqbal* and *Twombly* which require pleading a plausible case.

Ms. Sherrod alleged that:

> United Way Worldwide monitors and oversees the operations of member organizations, including United Way of Tarrant County.
>
> United Way's brand is interdependent and connected with United Way Worldwide and its member organizations across the country.
>
> United Way donors do not generally differentiate between United Way Worldwide and its member United Way organizations.
>
> A president of a United Way organization stated that if a member organization violates the law, it is "going to hurt everyone if it isn't

brought under control – and quickly . . . The United Way is the United Way is the United Way."

United Way Worldwide can remove the head of the organization, remove the membership of the organization, and terminate the license of the brand.

United Way Worldwide communicates regularly with its member organizations.

United Way Worldwide knew about the discrimination claim of an Executive Vice President of United Way of Tarrant County, who also expressed concerns about discrimination against Ms. Sherrod by United Way of Tarrant County, as African-Americans.

United Way Worldwide received a report from Ms. Sherrod that she is being retaliated against for reporting and correcting ERISA violations, for opposing race discrimination, for being a witness to race discrimination, and because of her own race.

United Way Worldwide tells Sherrod that it needs to think how to best handle the situation and will get back with her.

United Way Worldwide hears more details from Sherrod during few days.

United Way of Tarrant County terminates Ms. Sherrod about a week later.

United Way of Tarrant County sends Ms. Sherrod a severance agreement conditioned upon releasing United Way Worldwide, not

just United Way of Tarrant County, from any discrimination or retaliation claims.

United Way Worldwide hears Ms. Sherrod's story again a few months later, says it is shocked, that it needs to investigate further, and will get back with her.

United Way Worldwide tells Ms. Sherrod the next day that the discrimination and retaliation was wrong, that it is continuing its investigation, and will speak to its legal counsel.

United Way Worldwide tells Ms. Sherrod a few days later that it contacted legal counsel and now will not be taking any action to help her, that she should sign the severance agreement releasing any claims it.

United Way Worldwide either participated in the termination of Sherrod, intentionally interfering with her employment at United Way of Tarrant County and knowingly participated in the discrimination and retaliation; or knew, or should have known, of United Way of Tarrant County's discrimination and retaliation and intentionally refused to prevent the discrimination and retaliation.[1]

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[1] The Fifth Circuit did not prohibit the ERISA retaliation claim based on an unsolicited report but recognized a circuit split on the matter in its footnote: "We recognize that the circuits are split over what constitutes statutorily protected activity within the meaning of Section 510. Currently, the Fifth, Seventh, and Ninth Circuits consider unsolicited, informal complaints to be protected activity, and the Second, Third, Fourth and Sixth

Previous to *Iqbal* and *Twombly*, this Court has never indicated that the requirements for establishing a prima facie case rejected the argument that a discrimination complaint requires greater "particularity," because this would "too narrowly constric[t] the role of the pleadings." *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 511 (2002) (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A plaintiff must set forth "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). While factual allegations are accepted as true, legal conclusions are not. *Id.* at 679. The standard applied in *Iqbal* and *Twombly* does not run counter to the standard in *Swierkiewicz* that direct evidence is not required and the prima facie case is not rigid. *Twombly*, at 570.

Ms. Sherrod has alleged the elements of a prima facie case accepted by some courts: 1) a protected

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Circuits have reached contrary conclusions. *Compare Anderson v. Elec. Data Sys. Corp*., 11 F.3d 1311, 1314 (5th Cir. 1994), *George v. Junior Achievement of Cent. Ind., Inc*., 694 F.3d 812, 816–17 (7th Cir. 2012), *and Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993), *with Nicolaou v. Horizon Media, Inc*., 402 F.3d 325, 329 (2d Cir. 2005), *Edwards v. A.H. Cornell & Son, Inc*., 610 F.3d 217 (3d Cir. 2010), *King v. Marriott Int'l, Inc*., 337 F.3d 421, 426–28 (4th Cir. 2003), *and Sexton v. Panel Processing, Inc.*, 754 F.3d 332–42 (6th Cir. 2014). Admittedly, however, *Anderson* does not provide analysis on the topic and is not very clear."

activity; 2) an adverse action; and 3) a short proximity in time between the protected activity and the adverse action. *See Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997); *see also Cruz v. Mattis*, 3:15-CV-0590-D, 2017 WL 6381741, at *8 (N.D. Tex. Dec. 14, 2017) (citing *McCoy v. City of Shreveport*, 492 F.3d 551, 562 (5th Cir. 2007).

Ms. Sherrod alleges all three. She reported discrimination and retaliation, United Way Worldwide treated her adversely by either participating in the termination or refusing to prevent the termination, and the timing was short. Ms. Sherrod alleges actual participation by United Way Worldwide, or alternatively that it failed to take corrective measures within its control. Courts have recognized the duty to take action in the joint-employer relationship. Ms. Sherrod should be allowed to proceed under at least the participation allegation which should not be lessened by the alternative allegation. *See Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 229 (5th Cir. 2015) (staffing agency is liable for the conduct of its client if it participates in the discrimination, or if it knows or should have known of the client's discrimination but fails to take corrective measures within its control.). The same standard should apply to a parent company who controls the lesser organization.

The Fifth Circuit raises the bar and finds that Ms. Sherrod's allegations do not show that United Way Worldwide's actions are based upon discriminatory intent. The prima facie case is designed to infer intent. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530

U.S. 133, 146 (2000). Requiring direct evidence of intent would create the "incongruous" result of requiring a plaintiff "to plead more facts than [s]he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered." *Id.* at 511-12. Furthermore, before discovery, "it may be difficult to define the precise formulation of the required prima facie case in a particular case." *Id.* at 512; *see also Twombly*, 550 U.S. at 569–70 (explaining that *Swierkiewicz* is consistent with *Twombly*'s facial plausibility standard). Ms. Sherrod's allegations state a sufficient cause of action under Section 1981.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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