No. 20-939

IN THE

Supreme Court of the United States

COLETTE MARIE WILCOX,

Petitioner,

v.

NATHAN H. LYONS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

ROSALIE PEMBERTON FESSIER
Counsel of Record
TIMBERLAKESMITH
25 North Central Avenue
P. O. Box 108
Staunton, Virginia 24402
(540) 885-1517
rfessier@timberlakesmith.com

Counsel for Respondents

304300

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Equal Protection Clause encompasses a pure retaliation claim that is not based on an unjustified classification but on an employee's report of discrimination.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Page

STATUTES AND OTHER AUTHORITIES:

STATEMENT OF THE CASE

This case arises out of petitioner's claim that she was fired in retaliation for reporting sex discrimination. She brought her claim solely under the Equal Protection Clause pursuant to 42 U.S.C. § 1983. She does not assert a retaliation claim under Title VII or the First Amendment.

Petitioner was a deputy Commonwealth's Attorney for Carroll County, Virginia employed by Respondent Nathan H. Lyons. Petitioner's Appendix (hereinafter "App.") 2a. Respondent Phillip C. Steele was her co-worker.[1] Petitioner alleges that she reported to Lyons that Steele discriminated against her. Some two and a half months later, Lyons terminated her for insubordination arising out of an argument over her misuse of leave after she challenged him about the applicability of the policy and requested to see the leave policy before she signed the written reprimand. App. 3a-4a. There are no facts alleged regarding any intervening conduct by Lyons during those two and a half months. Respondent Steele was not her supervisor, nor was he alleged to be the decisionmaker involved in her termination.

The district court dismissed the retaliation claim without deciding the constitutional question as petitioner failed to state a prima facie claim of retaliation under the framework of Title VII, even assuming it was applicable. App. 28a. The district court rejected petitioner's argument that temporal proximity of two and a half months alone

1. Steele was employed as a deputy Commonwealth's Attorney which was the same position as petitioner. Joint Appendix submitted to the court of appeals (hereinafter "J.A.") 136.

is enough to establish a causal connection between the protected activity and the adverse employment action. App. 25a. The district court noted that the only intervening conduct advanced by petitioner as supporting causation was that her co-workers ostracized her, which the court found not to be probative of retaliatory animus since they were not decisionmakers. App. 32a.

The court of appeals agreed that two and a half months was not sufficient temporal proximity, standing alone, to establish causation. App. 7a. However, it focused on a new argument advanced by petitioner that petitioner's termination for insubordination, which was characterized as an "overreaction," was sufficient to state a prima facie case of retaliation. App. 3a-4a. The court relied upon the premise that a disproportionate response to a minor infraction could be evidence of pretext and could bolster the causation element of a prima facie case. App. 3a-4a. In the absence of sufficient temporal proximity or intervening conduct evidencing retaliatory animus, the court of appeals found that petitioner had sufficiently alleged a prima facie case of retaliation based upon the characterization of the termination itself.

Because the court had resolved the non-constitutional issue in petitioner's favor, it addressed the constitutional question of whether a pure retaliation claim was cognizable under the Equal Protection Clause. The court joined the "vast majority of circuit courts to have considered the question" [2] to hold that the Equal Protection Clause

2. The court of appeals identified at least six other circuits, the Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh, who have considered the question and concluded that the Equal

cannot sustain a pure claim of retaliation. App. 16a. The court properly rejected the lone circuit outlier, the Second Circuit, which had concluded that retaliation is actionable under the Equal Protection Clause because an "equal protection claim parallels a Title VII claim" and because discrimination sometimes includes retaliation in other contexts. App. 22a. *See Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 82 (2d Cir. 2015). The court below declined "to break new constitutional ground based on the interpretation of statutes with different histories, different structures, and different text than the Fourteenth Amendment." App. 22a.

REASONS FOR DENYING THE PETITION

A. This case is a poor vehicle for resolving the lopsided circuit split as alternative case-specific grounds exist to affirm the decision of the lower court, making the determination of the constitutional question unnecessary.

Seven circuits, including the court below, have correctly concluded that the Equal Protection Clause does not encompass a pure retaliation claim.[3] App. 16a.

Protection Clause does not encompass a pure retaliation claim. (App. 16a-17a).

3. *See Thomas v. Indep. Twp.*, 463 F.3d 285, 298 n.6 (3d Cir. 2006); *Thompson v. Starkville*, 901 F.2d 456, 468 (5th Cir. 1990); *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 439-440 (6th Cir. 2005); *Boyd v. Ill. State Police*, 384 F.3d 888, 898 (7th Cir. 2004); *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 418 (7th Cir. 1988); *Maldonado v. City of Altus*, 433 F.3d 1294, 1308 (10th Cir. 2006)); *Teigen v. Renfrow*, 511 F.3d 1072, 1084-86 (10th Cir. 2007); *Watkins v. Bowden*, 105 F.3d 1344, 1354 (11th Cir. 1997);

Petitioner asks this court to align with the lone circuit on the solitary side of this seven to one split. However, as there exist case-specific alternative grounds to affirm the decision below, this case is a poor vehicle for resolving this lopsided split.

The court of appeals should have adopted the district court's conclusion that it did not need to decide the constitutional question of whether the Equal Protection Clause encompasses a pure retaliation claim as even if it did, there were insufficient facts alleged to state a prima facie case of retaliation under the Title VII framework. Application of the principles of judicial restraint and constitutional avoidance calls for review of these case-specific alternative grounds before reaching the constitutional question, making this case a poor vehicle for resolving the question presented.

1. The district court correctly held that the temporal proximity of two and a half months, in the absence of intervening conduct of retaliatory animus by the decisionmaker, was insufficient to satisfy the causation element of a prima facie case of retaliation.

The district court correctly held that petitioner's factual allegations did not state a prima facie case of retaliation under the Title VII framework and granted her leave to amend. Instead of amending the claim,

---

see also Burton v. Ark. Sec'y of State, 737 F.3d 1219, 1237 (8th Cir. 2013) (observing that other courts have rejected equal protection retaliation claims and concluding that "no clearly established right exists under the equal protection clause to be free from retaliation" (internal quotation marks omitted)).

petitioner moved for reconsideration, arguing that her allegations of temporal proximity of two and a half months alone was sufficient to state a prima facie case for retaliation. App. 28a-29a. The district court disagreed.[4] While acknowledging that there was no bright temporal line, the district court followed Fourth Circuit precedent suggesting that two-and-a-half months between the protected activity and the adverse action is "too long to establish causation by temporal proximity alone."[5] App. 29a. The district court distinguished the cases cited by petitioner and concluded that two and a half months alone was not sufficiently close to establish causation. App. 29a. "This case does not involve the kind of "very close" time span between protected activity and adverse action that gives rise to an inference of causation and establishes a prima facie case of retaliation." App. 32a.

The district court noted that in cases where temporal proximity is missing, courts may look to the intervening period for other evidence of retaliatory animus. App. 32a. The court nevertheless found that petitioner failed to allege such retaliatory animus during the intervening period, as the allegations that petitioner's coworkers

---

4. Temporal proximity between an employer's knowledge of protected activity and an adverse employment action must be "very close" before it will be sufficient evidence of causality to establish a prima facie case absent other evidence. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001).

5. *See King v. Rumsfeld*, 328 F.3d 145, 151 n.5 (4th Cir. 2003); *Horne v. Reznick Fedder & Silverman*, 154 Fed. App'x 361, 364 (4th Cir. 2005); *see also Perry v. Kappos*, 489 Fed. App'x 637, 643 (4th Cir. 2012); *Pascual v. Lowe's Horne Ctrs., Inc.*, 193 Fed. App'x 229, 233 (4th Cir. 2006); *cf. Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 247 (4th Cir. 2015).

distanced themselves from her was not probative of retaliatory animus since they were not decisionmakers. App. 32a. As the complaint failed to allege facts sufficient to state a prima facie case of retaliation, the district court denied petitioner's motion for reconsideration and dismissed the retaliation claim without having to decide the constitutional question.

2. The court of appeals incorrectly concluded that the characterization of the adverse employment action itself as an "overreaction" was sufficient to satisfy the causation element of a prima facie case of retaliation in the absence of sufficient temporal proximity or intervening conduct of retaliatory animus.

The court of appeals reached a different conclusion. While acknowledging that two and a half months between the protected activity and the adverse action was insufficient to establish causation in the absence of other evidence of retaliation, the court nevertheless found that causation was adequately plead based on the characterization of the adverse action itself as an "overreaction." App. 7a. The court focused on petitioner's termination for insubordination which it characterized as an "overreaction" resulting from an argument petitioner had with her employer about her misuse of the leave policy and her request to review the policy before signing the written reprimand. App. 3a-4a. The court relied upon the premise that a disproportionate response to a minor infraction could be evidence of pretext and could bolster the causation element of a prima facie case. App. 3a-4a. The court cited to its prior opinion in *Hernandez v. Fairfax Cnty.*, 719 Fed. App. 184, 189-190 (4th Cir. 2018) (per curiam) where it held that the relative severity of the

reprimand as well as its timing, and "the other evidence in the record leading up to Hernandez's protected activity" were sufficient to establish causation.

Here, unlike in *Hernandez*, there is no "other evidence" in the complaint to bolster the causal connection, only a subjective characterization of the termination itself as an "overreaction." The court pointed to no allegations of ongoing antagonism or retaliatory animus during the intervening period or inconsistent reasons for termination, which are the additional factors considered by the courts in determining whether a prima facie case of causation has been met in the absence of temporal proximity. *See Lettieri v. Equant, Inc.*, 478 F.3d 640, 650 (4th Cir. 2007); *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir. 2000).

This conclusion significantly undermines the causation element necessary to state a prima facie retaliation case. Gone is the need for temporal proximity or intervening conduct evidencing retaliatory animus. A plaintiff need do no more than paint the adverse action as an "overreaction" to establish the causal link no matter how remote the protected activity occurred in relation to the adverse action and no matter the absence of other intervening evidence suggesting retaliatory animus by the decisionmaker. The court improperly focused on the perception of the employee rather than the perception of the decisionmaker which should have been the relevant inquiry. *See Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 217 (4th Cir. 2007).

Proper consideration of the requirements for pleading a prima facie case of retaliation directs a finding that the complaint would not survive dismissal even if a claim of retaliation were cognizable under the Equal Protection Clause.

3. Application of the principles of judicial restraint and constitutional avoidance call for review of the case-specific alternative grounds before reaching the constitutional question, making this case a poor vehicle for resolving the question presented.

A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988); *Hagans v. Lavine*, 415 U.S. 528, 546 n.12 (1974) (noting the wisdom of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case). The district court correctly determined that the complaint failed to state a prima facie case of retaliation and thus avoided having to decide the constitutional question of whether the Equal Protection Clause encompasses a pure claim of retaliation. This was the correct decision.

Application of the principles of judicial restraint and constitutional avoidance call for review of the case-specific alternative grounds before reaching the constitutional question. Proper consideration of those alternative grounds will render a decision on the constitutional question unnecessary, thus making this case a poor vehicle for resolving the question presented.

B. The question presented lacks significant national importance as it impacts only a narrow subset of public employees and does not deprive them of "any" avenue of redress for claims of retaliation for reporting discrimination.[6]

Petitioner argues that this case is important because it is necessary to provide an avenue of redress for those public employees of small public employers who are not subject to the antiretaliation provisions of Title VII who suffer from retaliation for reporting discrimination. This impacts a narrow subset of public employees who indeed have an adequate alternative avenue of redress for retaliation through the First Amendment.

1. The question presented impacts only a narrow subset of public employees thus minimizing its national importance.

As petitioner acknowledges, in most cases an employee who has faced retaliation for complaints about discrimination in the workplace may pursue a claim under Title VII. *See* 42 U.S.C. § 2000e–3(a). However, petitioner belongs to that narrow subset of public employees who are employed by employers with fewer than 15 employees to which Title VII protection is not afforded. *See* 42 U.S.C. § 2000e(b). The impact on this narrow subset of public

6. Qualified immunity had not yet been asserted at the time the district court reached its decision. Even if this Court were to decide the question presented in petitioner's favor, qualified immunity will ultimately relieve respondents of liability in this case as, by petitioner's own argument, her right to be free from retaliation under the Equal Protection Clause was not clearly established at the time of her termination.

employees weighs against a finding of national importance and against review by this Court.

2. This subset of public employees has an avenue of redress for claims of retaliation for reporting discrimination through the First Amendment.

Contrary to petitioner's assertion, this case does not deprive this subset of public employees of "any" avenue of redress for claims of retaliation. While these individuals may lack an avenue of redress for retaliation under Title VII, they nevertheless have open to them an avenue of redress for retaliation under the First Amendment and so are not left without any remedy. As the court of appeals noted, retaliation for reporting alleged acts of sex discrimination imposes negative consequences on an employee because of the employee's report, not because of the employee's sex. App. 12a. Thus, such claims arise under the First Amendment. *Martin v. Duffy*, 858 F.3d 239, 252 (4th Cir. 2017); *Kirby v. Elizabeth City*, 388 F.3d 440, 447 (4th Cir. 2004); *Edwards v. City of Goldsboro*, 178 F.3d 231, 250 (4th Cir. 1999).[7]

Despite having this avenue of redress available, petitioner chose not to assert a retaliation claim under the First Amendment but rather stood on her purported claim under the Equal Protection Clause. To the extent the decision below effectively deprived petitioner of "any" avenue of redress for her claim of retaliation, such deprivation was

7. The court noted that to the extent a public employee links an alleged retaliatory action to her gender, that allegation would constitute part of an equal protection discrimination claim, not a freestanding retaliation claim, which the court noted had not been alleged here. App. 16a.

caused by petitioner's strategic decisions below, is limited to this case, and does not stand to limit the avenue of redress available to other similarly situated litigants.

C. The court of appeals correctly concluded that the Equal Protection Clause does not encompass a pure retaliation claim.

For the reasons set forth in the opinion of the court below, the conclusion that the Equal Protection Clause does not encompass a pure retaliation claim is correct. Petitioner's argument that because antidiscrimination statutes have been construed to include a claim for retaliation, then so too should the Equal Protection Clause is without merit.

CONCLUSION

For the reasons described herein, this Court should deny Petitioners' Petition for a Writ of Certiorari.

Respectfully Submitted,

Rosalie Pemberton Fessier
Counsel of Record
TimberlakeSmith
25 North Central Avenue
P. O. Box 108
Staunton, Virginia 24402
(540) 885-1517
rfessier@timberlakesmith.com

Counsel for Respondents